

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

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

**I. Procedural history**

On January 30, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Michael Gawenka, Helen Miller, Joanne and David Forbes and John and Jennifer Didio (**Petitioners** or **Miller**). The matter was assigned Case No. 02-3-0003, and is hereafter referred to as *Miller v. City of Bremerton*. Petitioners challenge the City of Bremerton’s (**Respondent** or **Bremerton**) adoption of Ordinance Nos. 4771, 4783 and 4784, amending Bremerton’s GMA Plan and development regulations. The basis for the challenge is noncompliance with numerous provisions of the Growth Management Act (**GMA or Act**), Shoreline Management Act (**SMA**) and State Environmental Policy Act (**SEPA**).

On February 4, 2002, the Board issued a “Notice of Hearing” setting March 7, 2002, as the date for a prehearing conference (**PHC**). The Board issued its “Prehearing Order” (**PHO**) on March 7, 2002, establishing the final schedule for the case and setting forth the Legal Issues to be resolved by the Board.

On April 8, 2002, the Board received “Respondent’s Motion for Partial Dismissal” (**Bremerton Motion**). Bremerton moved that the Board dismiss Legal Issues 2, 4, 5 and 6<sup>[1]</sup> as they relate to Ordinance No. 4771. Copies of two exhibits were attached to the Motion.

On April 17, 2002, the Board received “Response to Motion for Partial Dismissal” (**Miller**

**Response).**

The Board did not receive a reply from the City; the Board did not hold a hearing on the motions.

## **II. Discussion of dispositive motion**

The basis for Bremerton's motion is that Petitioners' appeal, related to the challenge to Ordinance No. 4771, was not timely filed. The City attached copies of Ordinance No. 4771 indicating it was enacted and signed by the City in August 2001 and published on August 13, 2001. Also attached was an Affidavit of Publication indicating that Ordinance No. 4771 was published in the Bremerton Sun on August 13, 2001. Bremerton Motion, at 1 and attachments 1 and 2. <sup>[2]</sup>

Petitioners did not respond to the timeliness issue raised in the City's motion. <sup>[3]</sup>

### **Applicable Law**

RCW 36.70A.290(2) provides:

All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter [chapter 36.70A RCW - GMA] or chapter 90.58 [SMA] or 43.21C RCW [SEPA] *must be filed within sixty days after publication* by the legislative bodies of the county or city.

RCW 36.70A.290(2), (emphasis supplied), *see also*: WAC 242-02-220(1).

### **Discussion**

The Board now applies these explicit provisions of the GMA. It is undisputed that Ordinance No. 4771 was published on August 13, 2001. PFR, at 1, Bremerton Motion, at 1 and attachments. The appropriate timeframe for appealing the provisions of Ordinance No. 4771 was within sixty days from this publication date, or October 12, 2001. It is also undisputed that Petitioners filed their PFR challenging Ordinance Nos. 4771, 4783 and 4784 <sup>[4]</sup> on January 30, 2002. PFR, at 8 and Procedural History, *supra*. The Board finds that the PFR challenging Ordinance No. 4771 was filed 109 days after the deadline for filing appeals challenging the contents and provisions of Ordinance No. 4771 for compliance with the GMA. The Board concludes that Petitioners challenge of the City's adoption of Ordinance No. 4771 is untimely, and the City's motion is **granted**.

Legal Issues 2 and 3, as stated in the PHO, only challenge Ordinance No. 4771's compliance with

the GMA, SMA and SEPA. Legal Issues 2 and 3 are **dismissed in their entirety**. Legal Issue 5 and 6 question whether Ordinance Nos. 4771 *and* 4783 comply with the GMA. References to Ordinance No. 4771 in Legal Issues 4 and 5 are hereby **struck** and **dismissed**. Only Ordinance No. 4783 remains at issue in Legal Issues 5 and 6. The Legal Issues, or portions thereof, that remain before the Board are restated in Appendix A.

While the GMA precludes the Board from reviewing the contents and provisions of Ordinance No. 4771 since the challenge was untimely, the Board is not barred from reviewing and considering Ordinance No. 4771 in the context of GMA compliance with regard to Legal Issue 1.

### Conclusion

Petitioners' PFR challenging Ordinance No. 4771's compliance with the goals and requirements of the GMA, SMA and SEPA is untimely. It was filed well past the sixty day period for filing appeals with the Board, set forth in RCW 36.70A.290(2). The City's Motion for Partial Dismissal is **granted**.

### III. ORDER

Based upon review of the Petition for Review, the briefs and materials submitted by the parties, the Act, Washington case law, and prior decisions of this Board and other Growth Management Hearings Boards, the Board enters the following Order:

Petitioners' PFR challenging the City of Bremerton's adoption of Ordinance No. 4771 was not timely filed, and **did not comply** with the GMA appeal filing deadlines as set forth in RCW 36.70A.290(2).

The City of Bremerton's Motion for Partial Dismissal is **granted**.

Legal Issues 2 and 3 are **dismissed in their entirety**. References to Ordinance No. 4771 in Legal Issues 4 and 5 are hereby **struck** and **dismissed**.<sup>[5]</sup> The Board's PHO, setting forth the Legal Issues to be resolved by the Board is hereby amended accordingly. Appendix A to this Order sets forth the Legal Issues remaining before the Board in this matter.

So ORDERED this 30<sup>th</sup> day of April, 2002.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD<sup>[6]</sup>

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Edward G. McGuire, AICP  
Board Member

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Joseph W. Tovar, AICP  
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

### **Appendix A**

#### **Legal Issues Remaining in *Miller v. City of Bremerton*, CPSGMHB Case No. 02-3-0003**

1. *Did the City of Bremerton (City) fail to comply with the requirement of RCW 36.70A.130 to conduct annual and concurrent Plan amendment review, when it amended its Plan and Zoning Map by adopting Ordinance No. 4771 in August 2001 and Ordinance Nos. 4783, and 4784 in November?*<sup>[7]</sup>
3. *Did the City fail to comply with the notice and public participation requirements of RCW 36.70A.035, RCW 90.58.130, RCW 43.21C.075 and .110, WAC 197-11-340, BMC 21-02 and BSMP 7-5-3, when it amended its Plan by adopting Ordinances Nos. 4783 and 4784, specifically relating to PL00-0054 (Exhibit B-1 to each Ordinance)?*<sup>[8]</sup>
5. *Did the City fail to comply with the housing element requirements of RCW 36.70A.070(2) when it amended its Plan by adopting Ordinance No. 4783?*<sup>[9]</sup>
6. *Did the City fail to comply with the land use element requirements of RCW 36.70A.070(1), regarding drainage, flooding and stormwater, when it amended its*

*Plan by adopting Ordinance No. 4783?* <sup>[10]</sup>

[1] The Board's March 7, 2002 PHO set forth the noted Legal Issues as follows:

2. Did the City [of Bremerton] fail to comply with the Requirements of RCW 90.58.140(3), RCW 43.21C.110, WAC 173-26-110(2) and WAC 197-11-230, when it failed to amend its Shoreline Master Program when it amended its Plan by adopting *Ordinance No. 4771* in August of 2001?
4. Did the City fail to comply with the notice and public participation requirements of RCW 36.70A.035, RCW 90.58.130, RCW 43.21C.075 and .110, WAC 197-11-340, Bremerton Municipal Code (**BMC**) and Bremerton Shoreline Master Program (**BSMP**) 7-5-3, when it amended its Plan by adopting *Ordinance No. 4771*, specifically relating to PL00-0061?
5. Did the City fail to comply with the housing element requirements of RCW 36.70A.070 (2) when it amended its Plan by adopting *Ordinance Nos. 4783 and 4771*?
6. Did the City fail to comply with the land use element requirements of RCW 36.70A.070 (1), regarding drainage, flooding and stormwater, when it amended its Plan by adopting *Ordinance Nos. 4783 and 4771*?

March 7, 2002, PHO, at 7-8 (emphasis supplied).

[2] The City also responded to a request of the presiding officer regarding what remedies might be available to the Board if the Board were to find for Petitioners on Legal Issue 1. The City also argued that a remand on Legal Issue 1 is not warranted. Bremerton Motion, at 2-3. Legal Issue 1 is not part of the City's motion. Consequently, the Board will entertain argument on Legal Issue 1 in subsequent briefing and at the Hearing on the Merits. It will be decided by the Board in the Final Decision and Order.

[3] Petitioners' response reacted to the City's comments on Legal Issue 1, not to whether the PFR challenging Ordinance No. 4771 in Legal Issues 2, 4, 5 and 6 was timely. Miller Response, at 1.

[4] The Board notes that Ordinance Nos. 4783 and 4784 were enacted by the City in November 2001 and published on December 4, 2001. Again, Petitioners' PFR was filed on January 30, 2002. Neither the Petitioner nor the City disputes that the PFR challenging these Ordinances was timely filed. The Board agrees.

[5] Legal Issues 5 and 6 as they relate to Ordinance No. 4783 are still before the Board. To summarize: Legal Issues 1, 3, 5 and 6, as amended (related to Ordinance Nos. 4783 and 4784) are still before the Board.

[6] Board Member North did not participate in this decision.

[7] This issue statement derives from Issue 3.A in the PFR, which states as follows:

3.A. By enacting Ordinances 4783, 4784 and 4771; did the City fail to comply with the concurrency requirement of annual submissions as specified in RCW 36.70A.130 and RCW 90.58; and did it fail to comply with RCW 36.70A.172? Were the Legal notices posted by the City defective in not representing requisite data according to the requirements of RCW 36.70A and SEPA? [PFR 02-3-0003, at 2.]

[8] This issue statement derives from Issue 3.B in the PFR, which states as follows:

3.B. In enacting Ordinances 4783, 4784; specifically PL00-0054, and Ordinance 4771; specifically PL01-0016 – did the City fail to comply with the public participation requirements of RCW 36.70A.035, RCW 90.58, implementing WAC 197-11-340, BMC 21-02 and the BSMP 7-5-3-? [PFR 02-3-0003, at 4.]

[9] This issue statement derives from issue 3.C in the PFR, which provides as follows:

3.C. In enacting Ordinances 4783, 4784 and 4771: did the City fail to comply with RCW 36.70A.070 (2) by neglecting to study and report methods to preserve the vitality and character of the established residential neighborhoods? [PFR 02-3-0003, at 5.]

[10] This issue statement derives from issue 3.D in the PFR, which provides as follows:

3.D. In enacting Ordinances 4783, 4784 and 4771; did the city fail to comply with RCW 36.70A.070? [PFR 02-3-0003, at 6.]