

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

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| JACK AND PAMELA CLARK   | ) | <b>Case No. 02-3-0005</b>       |
| REVOCABLE LIVING TRUST, | ) |                                 |
|                         | ) | <i>(Clark)</i>                  |
| Petitioner(s),          | ) |                                 |
|                         | ) | <b>FINAL DECISION AND ORDER</b> |
| v.                      | ) |                                 |
|                         | ) |                                 |
| CITY OF COVINGTON,      | ) |                                 |
|                         | ) |                                 |
| Respondent,             | ) |                                 |
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**I.      Background**

On April 1, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jack and Pamela Clark Revocable Living Trust (**Petitioner** or **Clark**). The matter was assigned Case No. 02-3-0005, and will be referred to hereafter as *Clark v. City of Covington*. Petitioner challenges Ordinance No. 02/02 of the City of Covington (**Respondent** or **City**) which amends the City’s Comprehensive Land Use Plan Future Land Use Map and replaces the Comprehensive Land Use Map (**CLUM**) with the Interim Future Land Use Map (**IFLUM**). The IFLUM makes changes in the land use designations specified in the Future Land Use Map in the City’s Comprehensive Land Use Plan. The Ordinance was adopted by the City Council on January 31, 2002. The grounds for the challenges are noncompliance with several provisions of the Growth Management Act (**GMA** or the **Act**).

On May 10, 2002, the Board conducted a Prehearing Conference (**PHC**); eight legal issues were set forth in the Prehearing Order (**PHO**).

On July 3, 2002, the Board received "Petitioner's Opening Brief" (**PPB**) and "Petitioner’s Motion to Enlarge Index of Administrative Record."

On July 24, 2002, the Board received "Respondent's Prehearing Brief" (**RPB**) and "Respondent's Memorandum In Opposition To Petitioner's Motion to Enlarge Index of Administrative Record."

On August 5, 2002, the Board received "Petitioner's Reply Brief" (**PRB**) and "Petitioner's Second Request to Take Official Notice and Reply to Respondent's Memorandum In Opposition To Petitioner's Motion To Enlarge Index of Record."

On Monday, August 12, 2002, the Board conducted a Hearing on the Merits (**HOM**) beginning at 10:00 a.m. in Room 1022 of the Financial Center at 1215 4<sup>th</sup> Avenue, in Seattle, Washington. Present for the Board were Edward G. McGuire, Joseph W. Tovar, and Lois H. North, Presiding Officer. The Board's legal extern, Staci Smith, was also in attendance. Dennis Reynolds represented the Petitioner Jack and Pamela Clark Revocable Living Trust. Duncan Wilson represented the Respondent City of Covington. Jack Clark was also in attendance. Brenda Steinman from Mills & Lessard, Seattle, provided court reporting services.

Prior to the presentation of the oral arguments by the parties, the Board **denied** the Petitioner's Motion to Enlarge the Index of Administrative Record. The Presiding Officer explained that this decision is based on two facts. First, the transcript offered by the Petitioner for inclusion was not a City of Covington official transcript. Second, the transcript concerned a meeting of the Planning Commission that occurred after the adoption of the challenged Ordinance No. 02/02.

At the close of the HOM, the Board requested that within 10 days, the City of Covington provide the Board and the Petitioner with copies of the City's new emergency Ordinance No. 16/02 (HOM Exhibit 1) along with all related public notices, hearing records, and City Council transcripts (HOM Exhibit 2). Ordinance No. 16/02 was enacted by the Covington City Council on July 23, 2002, just before the expiration of Ordinance No. 02/02<sup>[1]</sup> (the challenged Ordinance in this case), superseding Ordinance 02/02, Ordinance 16/02 reinstated the IFLUM previously adopted by Ordinance 02/02 for a period of six months.

On August 19, 2002, the Board received a letter (HOM Exhibit 3) from the City that stated,

Please find enclosed along with this letter a copy of the City's Agenda Item, a copy of Adopted Ordinance 16/02, a copy of the Adopted Ordinance 02/02, a copy of the publication indicating passage of Ordinance 16/02, a copy of the affidavit of Publication of the Public Hearing Notice and copy of the agenda from Tuesday July 23, 2002 for the City of Covington City Council.

HOM, Exhibit 3.

The Board had requested copies of the City Council meeting minutes from July 23, 2002. To this

point, the letter stated, "These are scheduled to be approved by the Council at their meeting on August 27, 2002. Upon approval of the minutes a copy will be sent to the board and to the opposing counsel." HOM, Exhibit 3.

The Board received copies of the meeting minutes on September 4, 2002.

## **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW**

Petitioner challenges the City of Covington's adoption of GMA Plan amendment, as adopted by Ordinance No. 02/02. Pursuant to RCW 36.70A.320(1), the City's adoption of Ordinance No. 02/02 is **presumed valid** upon adoption.

The **burden is on Petitioner**, Clark, to demonstrate that the action taken by the City is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by [the City of Covington] is **clearly erroneous** in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the City of Covington'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 the City of Covington 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 county's 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).

## **III. PREFATORY NOTE**

### **A. Mootness**

The Board takes note that the challenged Ordinance in this case (City of Covington Ordinance No. 02/02) expired before the date of the Hearing on the Merits. Ordinance No. 02/02 was passed on January 31, 2001 and published on February 5, 2002. It was effective for a six month period

which ended August 5, 2002. However, it was repealed and replaced by a substantively identical ordinance; Ordinance No. 16/02 adopted on July 23, 2002. This new ordinance adopted, for a period of six months, the same IFLUM that was adopted by Ordinance No. 02/02. The logical question to be raised at this point is, “Is this case challenging Ordinance No. 02/02 moot?”

This Board previously held in *Hayes v. Kitsap County*, that “The question of emergency ordinances, since repealed and replaced by interim ordinances, are moot; the Board will not hear and decide moot issues.” However, the Board also stated that, “The Board continues to adhere to the general rule regarding mootness; namely, a case is moot if a court can no longer provide effective relief. Likewise, the Board will make an exception to the mootness rule involving ‘matters of continuing and substantial interest.’” *Martin Hayes v. Kitsap County*, CPSGMHB, Consolidated Case No. 95-3-0081c, Final Decision and Order, April 23, 1996, at 4. See *Orwick v. Seattle*, 103 Wn.2d 249, 692 P. 2d 793 (1984). “As the Court stated in *Orwick*, at 253, ‘After a hearing on the merits, it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future.’” *Jody McVittie v. Snohomish County*, (*McVittie V*), CPSGMHB Case No. 00-3-0016, Final Decision and Order, April 12, 2001, at 10.

In this case, Ordinance No. 02/02 had expired prior to the HOM. However, a new emergency ordinance, Ordinance No. 16/02 had been adopted prior to the HOM. Ordinance No. 16/02 is substantively the same as the challenged ordinance in this case; the City’s FLUM is an issue of continuing and substantial public interest and importance. Therefore, the Board will not dismiss it as moot. The legal issues presented in the PHO are still valid as they relate to Ordinance No. 16/02. Based on this, the Board will proceed in addressing the legal issues as they apply to both Ordinance Nos. 02/02 and 16/02.

## **B. Order of Legal Issues**

The Board will first address the Petitioner’s challenge as to whether a valid emergency existed (Legal Issue No. 8). Then the Board will continue by addressing the legal issues as follows: No. 6; Nos. 3, 4, and 5; No. 2; and Nos. 1 and 7.

The Petitioner has requested that the Board find the City of Covington Ordinance 02/02 noncompliant with the GMA. The Petitioner also requests that the Board enter a determination of invalidity pursuant RCW 36.70A.302(2).

## **IV. LEGAL ISSUE NO. 8**

Does a valid emergency exist to justifying the adoption of Ordinance Nos. 02/02 and 16/02 without an opportunity for the public to comment?

A. Applicable Law

In the past the Board has determined that the GMA does not confer upon the Board the authority to determine whether a city's or county's declaration of an emergency is valid. *John Wallock v. City of Everett (Wallock I), CPSGMHB, Final Decision and Order, Case No.96-3-0025* December 3, 1996, at 10.

In *Wallock I*, the Board stated that,

. . . the Board holds that its jurisdiction in relation to RCW 36.70A.130(2) extends only to determining compliance with that requirement, not to reviewing the circumstances, situations or events that may precipitate a proposed amendment. . . . [T]he Board notes that nowhere in the GMA is emergency defined, nor is there a requirement for a jurisdiction to define an emergency in its plan. More directly on point, RCW 36.70A.130(2)(b) does not address the procedures for declaring an emergency, nor confer jurisdiction upon the Board to review such a declaration.

*Wallock I*, at 10.

B. Discussion and Analysis

Nothing in the GMA or caselaw has changed regarding the Board's authority to review declarations of emergencies since the Board issued its decision in *Wallock I*. Therefore, the Board declines to address this issue, as it lacks subject matter jurisdiction.

C. Conclusions

The Board declines to address this issue, as it lacks subject matter jurisdiction to review a jurisdiction's declaration of emergency.

Petitioners challenge in Legal Issue 8 is **dismissed**.

V. LEGAL ISSUE NO. 6

Does adoption of Ordinance Nos. 02/02 and 16/02 contravene the GMA requirement, RCW 36.70A.130(2)(b), that proposed changes or amendments to a comprehensive land use plan and/or development regulations be considered concurrently, so that the cumulative effect of various proposals can be ascertained?

## A. Applicable Law

RCW 36.70A.130 provides in relevant part:

(2)(b) Except as otherwise provided in (a) of this subsection, all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court. (*emphasis added*).

## B. Discussion

### Position of the Parties

Petitioner Clark contends,

. . . RCW 36.70A.130 does recognize the use of emergency ordinances to amend comprehensive plans. Although the City does not purport to rely on RCW 36.70A.130 as authority for emergency adoption of the Plan amendment at issue here, . . . Under RCW 36.70A.130, any amendment or revision to the Comprehensive Plan must conform to GMA requirements for adoption of comprehensive plans, including the requirement that the City consider amendments to the comprehensive plan no more frequently than once every year . . . One exception to these requirements is that

*After appropriate public participation* a . . . city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court.

RCW 36.70A.130(2)(b) (*emphasis added*).

This exemption to the required Comprehensive Plan amendment process does not apply here.

The City counters this argument by highlighting the exemption stated in RCW 36.70A.130(2)(b). It continues, “Ordinance No. 02/02 plainly states that it ‘shall become effective immediately upon its passage as it has been determined to be a public emergency ordinance in accordance with RCW 35A.13.190 (sic).’ Ex. 9, p. 2.” RPB, at 17.

The City continued,

In light of the issues raised in WHIP’s appeal [*Whip II v. City of Covington*, CPSGMHB, Case No. 01-2-0026], the Council was concerned that the future land use map was inconsistent with the remainder of its Comprehensive Plan. Beyond that, it was fearful that the Board would issue a Declaration of Invalidity as a result of WHIP’s appeal and in recognition of that fact that the previous Council had approved a land use map which was out of sync with the rest of the plan. By enacting Ordinance No. 02/02, the City hoped to remedy the Plan and avoid a Declaration of Invalidity.

RPB, at 18.

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Analysis

As the Board has previously stated in *McVittie V*,

RCW 36.70A.130(2)(b) also authorizes two additional exceptions to the annual plan amendment review process. Plan amendments precipitated by an **emergency** and plan amendments required to resolve an appeal filed with a Board or a Court (**remand**) need not adhere to the once per year concurrent review, they may be considered at any time, as is necessary. However, even amendments flowing from these events may only be considered "after appropriate public participation."<sup>31</sup> The Legislature recognized that in these limited situations a **jurisdiction** will likely have to act quickly; thus, the full scope of the Act's public participation requirements were narrowed. (*footnote omitted.*)

*McVittie V*, at 23.

Because both Ordinance Nos. 02/02 and 16/02 were passed as emergency ordinances, both are exempt from the concurrent review requirement purportedly at issue in this case. Along with the concurrent review exception in RCW 36.70A.130(2)(b), this section does require that city and county legislative bodies may only adopt emergency amendments *after appropriate public participation*. This issue will be addressed in Section VI (Legal Issues 3, 4, and 5). (*emphasis*

*added*).

### **C. Conclusion**

The Board concludes that since both Ordinance Nos. 02/02 and 16/02 were passed as emergency ordinances, the concurrent review provisions of RCW 36.70A.130(2)(b) are not applicable.

Petitioners challenge on Legal Issue 6 is **dismissed**.

### **VI. LEGAL ISSUE NOS. 3, 4, & 5**

**Issue 3:** Did the City fail to comply with the notice provisions of a RCW 36.70A.035 in enacting Ordinance Nos. 02/02 and 16/02?

**Issue 4:** Has the City of Covington complied with the public participation requirements of RCW 36.70A.140 and RCW 36.70A.035 in adopting Ordinance Nos. 02/02 and 16/02?

**Issue 5:** Has the City of Covington, in adopting the Ordinance[s] [Nos. 02/02 and 16/02], complied with its procedure for amendment of its Comprehensive Land Use Plan and/or development regulations specified in its Plan and public participation program embodied in Ordinance Nos. 29/01 and 32/00 as required by RCW 36.70A.130(2)(b)?

#### **A. Applicable Law**

RCW 36.70A.035 provides in relevant part:

- (1) The public participation requirements of this chapter shall include notice provisions that are reasonably calculated to provide notice to property owners and other effective in interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendment to comprehensive plans and development regulations. Examples of reasonable notice provisions include:
- (a) Posting to property for site-specific proposals;
  - (b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
  - (c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
  - (d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and
  - (e) Publishing notice in agency newsletters for sending notice to agency mailing

lists, including general lists or lists for specific proposals or subject areas.

(2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, and opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

(b) An additional opportunity for public review and comment is not required under (a) of this subsection if:

(i) An environmental impact statement has been prepared under chapter 43.21C RCW for the pending resolution or ordinance and the proposed change is within the range of alternatives considered in the environmental impact statement;

(ii) The proposed change is within the scope of the alternatives available for public comment;

(iii) The proposed change only corrects typographical errors, corrects cross-references, makes address or name changes, or clarifies language of a proposed ordinance or resolution without changing its effect;

(iv) The proposed change is to a resolution or ordinance making a capital budget decision as provided in RCW 36.70A.120; or

(v) The proposed change is a resolution or ordinance enacting a moratorium or intern control adopted under RCW 36.70A.390.

(3) This section is prospective in effect and does not apply to a comprehensive plan, development regulation, or amendment adopted before July 27, 1997.

RCW 36.70A.140 provides in relevant part:

Each county and city that is required or chooses to plan under our RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program temper seizures shall not

render the comprehensive land use plan or development regulations invalid if the spirit of the program temper seizures is observed.

RCW 36.70A.390 provides in relevant part:

A county or city governing body that adopts a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing on the proposed moratorium, interim zoning map, interim zoning ordinance, or interim official control, shall hold a public hearing on the adopted moratorium, interim zoning map, interim zoning ordinance, or interim official control within at least sixty days of its adoption, whether or not the governing body received a recommendation on the matter from the planning commission or department. If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after this public hearing. A moratorium, interim zoning map, interim zoning ordinance, or interim official control adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium, interim zoning map, interim zoning ordinance, or interim official control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

In *McVittie V*, the Board concluded,

- The public participation **goal** provisions (RCW 36.70A.020(11) apply to the adoption of **all** plan and development regulation amendments regardless of duration or urgency.
- The public **notice** requirements (RCW 36.70A.035) apply to the adoption of **all** plan and development regulation amendments regardless of duration or urgency.
- Some degree of **public participation** (RCW 36.70A.130(2)(a) and (b)) is required **prior to** adoption of **any** plan amendment regardless of duration or urgency.
- Public participation (RCW 36.70A.140) is required **prior to** the adoption or amendment of **any** permanent development regulation.
- The **only** instance where **post adoption** public participation is allowed is when temporary or interim development regulations (RCW 36.70A.390) are adopted or amended.

*McVittie V*, at 20.

Additionally the Board stated, “Amendments precipitated by **emergencies** are clearly governed by .130(2)(b), not .140<sup>32</sup> or even .130(2)(a). Within the confines of the goals and requirements of the Act, local governments have discretion to determine what "**appropriate public participation**" to provide before they take action on **emergency** plan amendments.” *McVittie V*, at 23. (*footnote omitted*).

Based on the above, it is clear that RCW 36.70A.035 regarding notice applies and the applicable law governing the public participation requirements for the City’s Ordinance Nos. 02/02 and 16/02 is RCW 36.70A.130(2)(b). It provides in relevant part:

. . . However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court.

RCW 36.70A.130(2)(b), (emphasis added).

## **B. Discussion**

The Petitioner's challenges in these three legal issues focus on what the GMA requires in the way of public notice and public participation. The Board will examine both the public notice and the public participation procedures of the City in enacting Ordinance Nos. 02/02 and 16/02.

### Positions of the Parties regarding: Notice

Clark contends that before amending a comprehensive plan, a local government has a duty under the GMA to disseminate effective notice of public hearings. In speaking of Ordinance No. 02/02 the Petitioner stated,

The Notice failed to comply even with the minimum City requirements for publishing notice because it was not published at least ten days in advance of the meeting. Nor did it comply with the GMA or due process requirements because it was not reasonably calculated to provide notice of an opportunity to review or comment on the proposed action. The Notice vaguely states that an Interim Future Land Use Map will be considered by the City Council, but nowhere does it indicate if there will be a public hearing, or if comments will be accepted, or even when or if a Comprehensive Plan amendment will be considered or adopted by the City Council. The Notice provided no explanation as to affected properties or the nature or purpose of the contemplated action if the Interim Map was adopted. The Notice is clearly inadequate

under the GMA, the City's public participation ordinance, and procedural due process.

PPB, at 15.

Covington responded to this assertion,

On Friday, January 25, 2002, the Agenda was posted at City Hall, at the Covington Library and on the City's website. Respondent's Ex. 28 and Ex. 31, Respondent's Request to Take Official Notice. In addition, a Notice of Special City Council-Meeting-Workshop was posted at the same three places on January 26, 2002. Ex. 4. Said the Notice was also published in the County Journal that same day Ex. 6. In part, the Notice advised the public that the Special City Council Meeting would be held on January 31, 2002 to,

‘Consider Motion to Ratify the City Attorney Entering into Joint Motion of the Petitioners and Respondent for Extension of Timing Re: Issuance of Decision with regard to: *Wildlife Habitat Injustice Prevention, et al. v. City of Covington* (W.H.I.P. Appeal), Consider Ordinance Adopting an Interim Land Use Map Pursuant to the Authority of RCW 36.70A.390, . . .’

Ex. 4. The Notice further provided that, on the Friday before the meeting, Agenda information would be posted at City Hall, the City library and on the City's web site. Finally, for further information, the Notice directed citizens to contact the City Clerk at (253) 638-1110. *Id.*

RPB, at 5-6.

The City continued,

In preparation for that meeting, City staff prepared a so-called "blue book" for each item on the Agenda. Ex. 8. The bluesheet provides a detailed explanation of the Agenda item, along with a copy of any proposed ordinances or resolutions. Bluesheets are routinely generated for each City Council meeting and are always provided to the public prior to a meeting. The bluesheets for the special January 31 meeting, as well as all of the exhibits attached thereto, were available to the public at City Hall beginning on Friday, January 25, 2002, six days prior to the Council meeting. *See* Respondent's Ex. 31, Respondent's Request to Take Official Notice.

RPB, at 6.

Petitioner Clark countered,

Here, even the less intensive level of public participation urged by the City in its Brief fails to meet the GMA public participation goals and requirements. First, as the City must concede, there never was notice of a public hearing. In none of the documents proffered by the City as providing notice of the action to be taken by the City is there any mention of a public hearing to be held by the City on proposed Ordinance No. 02/02. Neither the Notice of Special Meeting/Workshop nor the Agenda for that meeting make any mention of a public hearing by the City Council or any other official body on proposed Ordinance No. 02/02. Instead, as the City admits, these documents indicate only that an ‘ordinance adopting an interim land use map pursuant to the authority of RCW 36.70A.390’ would be ‘considered’. No mention is made as to how or why the land use map is to be amended even though, as the City also admits, it intended only to redesignated (*sic*) three properties designated Regional Commercial. Respondent’s Pre-Hearing Brief, at 14. Nor was there any mention of a ‘blue sheet’ available at City Hall in any notice or agenda.

In addition, as the City also admits, the ‘notice’ and agenda were posted at City Hall and at the local library only six days before the meeting at which the Council adopted Ordinance No. 02/02 and the ‘notice’ was published in a local newspaper just five days before of (*sic*) the action was taken by the City Council. Worse, the interim land use map proposed to be adopted was not available until the day of the hearing, as the City concedes in its Brief. Respondent’s Pre-Hearing Brief, at 13. There was thus no way for a citizen to know what changes to the Comprehensive plan Land Use Map were even contemplated until the day of the hearing!

PRB, at 11.

Position of the Parties regarding: Opportunity for Public Comment

As to the public participation aspect of these legal issues, Petitioner Clark argues,

The City adopted Ordinance No. 02/02 without a public hearing or other opportunity for public review or comment. The Ordinance itself acknowledges that it is being adopted without a public hearing, for it provides that one will take place within 60 days. Ex. 9. Under no circumstances can such total disregard of opportunity for public input be considered compliant with the public participation requirements of the GMA where notice was inadequate.

PPB, at 16.

The City maintained that “Ordinance No. 02/02 is GMA complaint, because, pursuant to RCW 36.70A.130(2)(b), it was passed after appropriate public participation when an emergency existed and to resolve an appeal of the city’s comprehensive plan.” PPB, at 9. (*emphasis added*).

The City continued,

Because it changed the Comprehensive Plan, Ordinance No. 02/02 is properly characterized as an amendment to that Plan. Generally, proposed amendments are to be evaluated concurrently no more than once every year. RCW 36.70A.130(2)(a) and (b). In addition, they are subject to the full panoply of public participation as mandated by RCW 36.70A.140.

As an exception to that rule, however, RCW 36.70A.130(2)(b) provides:

[A]fter appropriate public participation the County or City may adopt amendments or additions to its Comprehensive Plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court.

To paraphrase that statute, the amendment must be preceded by 'appropriate public participation,' must 'conform with this chapter' and must be adopted to resolve an appeal of a comprehensive plan or in response to an emergency. As discussed below, Ordinance No. 02/02 clearly qualifies without exemption, and Clark Trust cannot meet its burden of proving otherwise.

RPB, at 10.

The Clark Trust however urges the Board to judge public participation by the criteria established in our RCW 36.70A.140 and the City’s own program. As previously affirmed by this Board, those criteria are not relevant to this inquiry. Instead, the Board will assess the 'appropriateness' of the public participation.

Within the context of RCW 36.70A.130, 'appropriate public participation' is not defined in the GMA. Nevertheless, in this case, the notice and opportunity to be heard were more than appropriate.

RPB, at 12.

The City proceeded by enumerating the ways in which it informed the public that an IFLUM was being proposed in Ordinance No. 02/02. These included Posting of the Agenda for the January 31, 2002 Meeting, details of the Agenda, availability of Bluesheet Packets with copies of the Future Land Use Map. RPB, at 12-13.

At the meeting itself, the public was twice given an opportunity to comment on the proposed Ordinance. Before Ordinance No. 02/02 was passed, the City Manager explained again that it would reenact the Future Land Use Map that was in place before passage of the Comprehensive Plan. In addition, the Planning and Community Development Director pointed out the three parcels which would be given different designations on the interim map.

RPB, at 13-14.

### Analysis

Regarding the notice requirements of RCW 36.70A.035 the Board finds that in enacting Ordinance No 16/02 (a reenactment of Ordinance No. 02/02) the City published a Notice of proposed Ordinance No. 16/02 in the South County Journal on July 13, 2002, to be considered at the July 23, 2002 City Council Meeting (10 days prior to the Meeting). The City had a Public Hearing on proposed Ordinance No. 16/02 at its regular City Council Meeting on July 23, 2002. This is indicated on the copy of the City's Agenda for the July 23, 2002 Meeting. At the Board's request, copies of these documents were submitted to the Board and the Petitioner on August 16, 2002, subsequent to the HOM.

These facts indicate that the City provided adequate notice for adoption of the ordinances adopting the IFLUM. Consequently, the Board concludes that the City complied with the notice requirements of RCW 36.70A.035 when it adopted the IFLUM.

Regarding the opportunity for public comment, this Board has acknowledged in the past, that when an emergency exists or when an appeal is pending, the time required to fully comply with RCW 36.70A.140 (Comprehensive plans – Ensure public participation) may not exist. In addition, section .390 deals with moratoria, interim zoning controls – public hearings, not emergency amendments and .035 deals with the public participation notice provisions. In addition, the City's public participation requirements for both ordinances are governed by .130(2) (b). Therefore, the Board will not address the issues raised regarding RCW 36.70A.390 or RCW 36.7A.140.

In addition, the issues raised by the Petitioner with regard to the City of Covington Ordinance

Nos. 32/00 and 29/01 are not relevant or applicable to this case. The Board has reviewed these ordinances and found that they establish the public participation requirements for comprehensive plan and development regulation amendments. However, they do not address and are not applicable to ordinances adopted in an emergency situation or to resolve an appeal pending before a Growth Management Hearings Board. *See* PPB, at 14. Ex. 12 and 13.

Thus, the question for this Board remains, "Was there appropriate public participation pursuant to RCW 36.70A.130(2)(b) before the City enacted Ordinance Nos. 02/02 and 16/02?"

The Board finds that for Ordinance No. 02/02, the City gave six days notice of the Council meeting and offered opportunity for public comment at the January 31, 2002, meeting. However, no public comment was offered at that time. RPB, at 12, 14. For the subsequent Ordinance No. 16/02, the City gave 10 days notice for the July 23, 2002, public hearing and took public comment at the hearing. *See* HOM Exhibit 2 at 5.

The Board concludes that the City did make a "good-faith" effort to notify and inform the public as well as to take public comment before the passage of the Ordinance No. 02/02 and the subsequent Ordinance 16/02. The six days notice the City gave prior to the adoption of Ordinance 02/02 is *adequate* for this situation due to the small scope and straightforward nature of the issue. Consequently, Covington complied with the appropriate public participation requirements of RCW 36.70A.130(2)(b) when it adopted the IFLUM ordinances.

### **C. Conclusions**

The Board concludes that the City complied with the notice requirements of RCW 36.70A.035 when it adopted the IFLUM Ordinances. [Legal Issue 5]

The Board also concludes that the City of Covington met the "appropriate public participation" requirements of RCW 36.70.130(2)(b) in enacting its emergency Ordinance Nos. 02/02 and 16/02, adopting the IFLUM. [Legal Issue 5]

In addition, the Board finds that Ordinance Nos. 32/00 and 29/01 are inapplicable for the adoption of emergency ordinances.

Petitioner's challenge in Legal Issue 4 is dismissed.

## **VII. LEGAL ISSUE NO. 2**

Has the City of Covington complied with requirements of RCW 36.70A.106(3) as to notification of the State Office of Community Development (OCD) of its intent to amend its Comprehensive Land Use Plan and/or development regulations and, having failed to notify OCD, whether this

failure renders the Ordinance non-compliant and invalid under GMA?

**A. Applicable Law**

RCW 36.70A.106(1) provides in relevant part:

Each county and city proposing adoption of a comprehensive plan or development regulations under this chapter shall notify the department [OCD] of its intent to adopt such plan or regulations at least 60 days prior to final adoption.

RCW 36.70A.106(3) provides in relevant part:

Any amendments for permanent changes to a comprehensive plan or development regulation that are proposed by county or City to its adopted plan or regulations shall be submitted to the department [OCD] in the same manner as initial plans and development regulations under this section. Any amendments to comprehensive plan or development regulations that are adopted by a county or city shall be transmitted to the department [OCD] in the same manner as initial plans and regulations under this section.

(emphasis added).

**B. Discussion**

Positions of the Parties

Petitioner argued that Ordinance No. 02/02 is an amendment subject to the mandatory notification requirements of RCW 36.70A.106. Petitioner stated, "By its terms, Ordinance No. 02/02 amends the City's Comprehensive Plan Future Land Use Map and the amendments contained therein do not purport to be anything other than permanent changes to the City's Comprehensive Plan or, alternatively, new development regulations." PPB, at 20.

The City Respondent countered this argument by emphasizing that RCW 36.70A.160 (3) states, "[a]ny amendments for permanent changes to a comprehensive plan . . . by a . . . city to its adopted plan . . . shall be submitted to the department . . ." (*emphasis added*). RPB, at 22-23.

The City continued,

By its terms, however, Ordinance No. 02/02 was an 'interim' measure rather than a "permanent" one. In fact, the ordinance specified that the interim map is 'readopted

as the Future Land Use Map for the City of Covington for a period of six months or until further modification by City Council.' Ex. 9. Accordingly, the notice requirement of RCW 36.708.106 was not triggered.

RPB, at 22-23.

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Analysis

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The Board agrees with the arguments and rationale provided by the City. The IFLUM, as its name implies is an **interim** measure, not a permanent FLUM. Consequently the OCD notification requirements of RCW 36.70A.106 are not applicable.

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**C. Conclusions**

The Board finds that RCW 36.70A.106(1) and (3) applies to permanent changes to comprehensive plans and development regulations, not to interim measures that are explicitly effective for a limited period. Based on the record, the Board finds that both City Ordinance Nos. 02/02 and 16/02 were adopted as interim measures and therefore do not trigger the OCD notice requirement of Section .106(1) or (3).

**VIII. LEGAL ISSUE NOS. 1 & 7**

**Issue 1:** Do Ordinance Nos. 02/02 and 16/02 fail to comply with RCW 36.70A.070 because they are not consistent with and fail to implement the City's Comprehensive Land Use Plan?

**Issue 7:** Do Ordinance Nos. 02/02 and 16/02 violate GMA goals of RCW 36.70A.020(1)(5) and (6)?

**A. Applicable Law**

RCW 36.70A.070 provides in relevant part:

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and description text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

RCW 36.70A.020 provides in relevant part:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployment and for disadvantaged persons, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

## **B. Discussion**

Legal Issues No. 1 and No. 7 are concerned with the consistency requirements and goals of the GMA.

The City of Covington, to this date, has not adopted a complete and final Comprehensive Plan because it does not have a permanent Future Land Use Map (FLUM) in place. Until such time as the City has a permanent, final, and complete Comprehensive Plan accompanied by a permanent FLUM, the Board will not examine these documents for consistency or for compliance with the goals of the GMA.

The Board also notes that the City has not yet adopted Development Regulations or Zoning to implement the Comprehensive Plan and the FLUM.

## **C. Conclusions**

The Board concludes that it need not and will not address Legal Issues 1 & 7.

## **IX. Invalidity**

The Petitioner has requested that the Board make a determination of invalidity for the City of Covington's Ordinance No. 02/02. PPB, at 21.

The applicable law provides:

**RCW 36.70A.302**      **Determination of invalidity – Vesting of development permits – Interim controls.**

- (1) A board may determine that part of 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 of 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.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Petitioner alleged that continued validity of Ordinance No. 02/02 would substantially interfere with the fulfillment of Goals 1, 5, and 6 of the GMA. PPB, at 12-13.

The Board has not made a finding of noncompliance for the City of Covington. Nor has the Board issued a Remand Order. Consequently, there is no basis for issuing a determination of invalidity. Therefore, the request for invalidity is **denied**.

## **X. ORDER**

Having reviewed and considered the GMA, prior Orders of the Boards, the above referenced documents, having considered the briefing and oral arguments of the parties, and having deliberated on the matter, the Board orders;

1. The City of Covington's enactment of Ordinance Nos. 02/02 and 16/02 adopting an Interim Future Land Use Map was not clearly erroneous, and the City has complied with the challenged requirements of the GMA.

So ORDERED this 27th day of September 2002.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Lois H. North  
Board Member

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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.

So ORDERED this 27th day of September 2002.

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[\[1\]](#) Ordinance No. 02/02 was published on Feb 5, 2002 and would have expired on August 5, 2002.