

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

WILDLIFE HABITAT INJUSTICE)
PREVENTION, BRUCE DELH, ED)
NICHOLS, BUD SIZEMORE, JOEL and)
GINAGUDDAT, DEBORAH JACOBSEN,)
JON OWNES, and PATTI MELTON,)

Petitioners,)

v.)

CITY OF COVINGTON,)

Respondent,)

LEE J. MOYER,)

Intervenor)

WHIP, et al.,)

Petitioners,)

v.)

CITY OF COVINGTON,)

Respondent.)

LEE J. MOYER)

Petitioner,)

v.)

CITY OF COVINGTON)

CPSGMHB Case No. 01-3-0026

(WHIP II)

Coordinated with

CPSGMHB Case No. 03-3-0004

(WHIP III)

Consolidated with

CPSGMHB Case No. 03-3-0006c

(Moyer)

**FINAL DECISION AND ORDER in
the Coordinated WHIP II and
Consolidated WHIP III and Moyer**

Respondent.

)

Proceeding

)

I. PROCEDURAL Background

WHIP II

On, December 3, 2001, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Wildlife Habitat Injustice Prevention, Bruce Diehl, Ed Nicholas, Bud Sizemore, Joel and Gina Guddat, Deborah Jacobsen, Jon Owens and Patti Melton (**WHIP**). WHIP challenged the City of Covington's (**City or Covington**) adoption of its comprehensive plan. The matter was assigned Case No. 01-3-0026, and is referred to as *WHIP, et al., v. City of Covington (WHIP II)*.

Pursuant to the request of the parties, the Board granted four settlement extensions to allow the parties to resolve their dispute. At a second prehearing conference in January of 2003, the parties indicated that most of the issues had been resolved. However, in December of 2002, the City had amended its Plan, adopted a new future land use map (**FLUM**), and adopted a new zoning map and zoning code. Petitioners indicated that they still had issues related to these recent enactments and the Plan, and would likely be filing a new PFR. Two remaining issues are set forth, *infra*, for the *WHIP II* matter.

WHIP III:

On February 7, 2003, the Board received a letter from WHIP's counsel indicating that the new PFR would be filed by February 10, 2003.

On, February 10, 2003, the Board received the new PFR from WHIP^[1]. The matter was assigned Case No. 03-3-0004, and is referred to as *WHIP v. City of Covington (WHIP III)*. Petitioner challenges the City's adoption of Ordinance Nos. 37-02 through 56-02. These Ordinances amend the Plan, adopt a new future land use map (**FLUM**), adopt a zoning map, adopt a zoning code and adopt other development regulations. The thrust of Petitioners challenge is focused on a "Regional Commercial" designation in one area made by the City. The basis for the challenge is noncompliance with numerous provisions of the GMA.

On February 18, 2003, the Board issued a "Notice of Coordinated Proceedings for CPSGMHB Case Nos. 01-3-0026 and 03-3-0004 (*WHIP II & III*) and Revised Prehearing Order and Schedule."

Moyer:

On February 24, 2003, the Board received a PFR from Lee J Moyer (**Moyer**). The matter was

assigned Case No. 03-3-0006, and is referred to as *Moyer v. City of Covington* (**Moyer**). Moyer challenges the City of Covington’s adoption of Ordinance Nos. 55-02, 54-02, 51-02 and 42-02, amending the City’s Comprehensive Plan, adopting a Future Land Use Map (**FLUM**), adopting a zoning map and amending zoning regulations. These ordinances are among the same as those challenged in *WHIP III*. The focus of Petitioner’s challenge is a “Neighborhood Commercial” designation in one area made by the City.

On March 5, 2003, the Board issued a “Notice of Hearing [Possible consolidation *WHIP III*, CPSGMHB Case No. 03-3-0004] (**NOH**). The NOH set March 24, 2003 as the date for the prehearing conference (**PHC**). The first matter to be discussed was whether to consolidate the *Moyer* case with the *WHIP* proceeding.

On March 25, 2003, following the PHC, the Board issued a “Notice of Consolidation and Revised Prehearing Schedule” (**PHO**). The Order consolidated the *WHIP III* (PFR 03-3-0004) matter and the *Moyer* (03-3-0006c) matter into a consolidated proceeding. The *WHIP II* (01-3-0026) case was not consolidated since it challenges a different enactment than those challenged in *WHIP III* and *Moyer*. However, the briefing schedule and date for the hearing was coordinated with the *WHIP III* and *Moyer* cases. The net result of this action is that all three cases were briefed and heard concurrently, culminating in this Final Decision and Order (**FDO**).

On April 24, 2003, the Board received a letter from Moyer’s representative asking that the PHO be amended to include reference to violations of “due process requirements.”

On April 25, 2003, the Board issued an “Order Denying Request to Amend Prehearing Order,” noting that pursuant to WAC 242-02-558 the request was untimely. The Board, however, noted that Moyer’s challenge to Covington’s compliance with RCW 36.70A.020(6) was reflected in the PHO as Legal Issue 11, which is intended to cover PFR issues 5.11, 5.12 and 5.13 – to the extent the Board has jurisdiction to decide them.

B. Motions to Supplement And amend index

On March 19, 2003, the Board received Covington’s “Amended Index to Return of Record” (**Index**). ^[2]

On March 26, 2003, the Board received the Core Documents identified and requested by the Board.

The Board received no motions to supplement the Index during the time set forth for such motions in the March 25, 2003 PHO. However, in briefing prior to the Hearing on the Merits (**HOM**) the parties included Motions to Supplement the Record or Take Official Notice of items.

After hearing discussion and argument on the motions, the Presiding Officer ruled on those motions and the HOM. Additionally, at the HOM, the Board requested that the City provide a copy of the material submitted to CTED and Affidavits of Publication during 2002. The requested materials were provided to the Board on July 16, 2002. The Table below reflects those rulings and Exhibit Numbers.

Proposed Exhibit: Documents	Ruling – Exhibit No.
1. Aerial photo entitled <u>Alignment Option A and proposed retail layout</u> . WHIP Prehearing Brief, at 9.	<i>Admitted</i> – HOM Ex. #1
2. Covington Resolution No. 03/171 [TIP]. Covington Prehearing Brief, at 10.	<i>Board Takes Notice</i> – HOM Ex. #2
3. Covington Resolution No. 03/167 [CIP]. Covington Prehearing Brief, at 10.	<i>Board Takes Notice</i> – HOM Ex. #3
4. Board’s proceedings in <i>WHIP II</i> , CPSGMHB Case No. 01-3-0026. Moyer Prehearing Brief, at 6.	<i>Board Takes Notice</i> – HOM Ex. #4
5. “Survey of Neighborhood Business and Commercial Zoning Regulations.” Attachment A, Motion to Take Official Notice of Material Fact, filed with Moyer Reply brief.	<i>Admitted</i> – HOM Ex. #5
6. “Population of Cities and Towns and Counties Used for Allocation of Selected State Revenue State of Washington.” Attachment B, Motion to Take Official Notice of Material Fact, filed with Moyer Reply brief.	<i>Admitted</i> – HOM Ex. #6
7. “Excerpts from zoning regulations and use tables for various CPS jurisdictions.” Attachment C to Motion to Take Official Notice of Material Fact, filed with Moyer Reply brief.	<i>Admitted</i> – HOM Ex. #7
8. August 23, 2002 transmittal letter from David K. Delph [Covington] to Ike Nwankwo [CTED], with attachments.	<i>Admitted</i> – HOM Ex. #8

9. 22 Affidavits of Publication [A through V] from the South County Journal during calendar year 2002.

Admitted – HOM Ex. #9A – 9V

C. Dispositive Motions

No dispositive motions were filed in this coordinated and consolidated matter.

D. Briefing and Hearing on the Merits

On June 3, 2003, the Board received: 1) “WHIP’s Prehearing Brief,” with 8 attached exhibits (**WHIP PHB**); and 2) Petitioner Moyer’s “Petitioner’s Prehearing Brief,” with 37 attached exhibits (**Moyer PHB**).

On July 1, 2003, the Board received: 1) “Respondent’s Prehearing Brief in Response to WHIP’s Prehearing Brief,” with 10 attached exhibits [A-J] (**City Response – WHIP**); and 2) “Respondent’s Prehearing Brief in Response to Moyer’s Prehearing Brief,” with 21 attached exhibits (**City Response – Moyer**).

On July 10, 2003, the Board received Moyer’s “Petitioner’s Reply Brief,” (**Moyer Reply**), with an attached Motion to Take Official Notice of Material Facts. *See* Motions to Supplement *supra*.

On July 10, 2003, the Board held the Hearing on the Merits in Conference Room B on the 21st Floor of the Bank of California Building, 900 Fourth Avenue, Seattle, Washington. Board Members Edward G. McGuire, Presiding Officer, Lois H. North and Joseph W. Tovar were present for the Board. Petitioner WHIP was represented by Jean M. Bouffard. Petitioner Moyer was represented by Charles E. Maduell. Respondent City of Covington was represented by Duncan C. Wilson. Petitioners Lee J. Moyer and Ray Moyer and Andy Dempsey, Covington City Manager, also attended. Lynette Meachum, Board Extern, was also present. Court reporting services were provided by Scott Kindle of Mills and Lessard, Inc. The hearing convened at 10:00 a.m. and adjourned at approximately 1:30 p.m.

II. presumption of validity, burden of proof

and standard of review

Petitioners challenge the City of Covington’s adoption of its Comprehensive Plan, amendments to that Plan, adoption of a Future Land Use Map, adoption of a zoning map and zoning regulations, as adopted by Ordinance Nos. 24-01, 42-02, 54-02 and 55-02. Pursuant to RCW

36.70A.320(1), Covington’s adoption of these Ordinances are presumed valid upon adoption.

The burden is on Petitioners, WHIP and Moyer, to demonstrate that the actions taken by Covington are 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 actions taken by Covington are 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 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, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, “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 (Cooper Point)*, No. 26425-1-II, 108 Wn.App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

In affirming the *Cooper Point* court, the Supreme Court recently stated:

Although we review questions of law *de novo*, we give substantial weight to the Board’s interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed “[I]t is well settled that deference [to the Board] is appropriate where an administrative agency’s construction of statutes is within the agency’s field of expertise . . .

Thurston County v. Western Washington Growth Management Hearing Board, Docket No. 71746-0, November 21, 2002, at 7.

iii. board jurisdiction, Prefatory note and abandoned issues

A. Board Jurisdiction

The Board finds that both the WHIP and Moyer PFRs were timely filed, pursuant to RCW 36.70A.290(2); both WHIP and Moyer have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged

Ordinances, which adopt or amend the City's Comprehensive Plan and development regulations, pursuant to RCW 36.70A.280(1)(a).

B. Prefatory Note

In *WHIP II*, the challenge is to Covington's original adoption of its Comprehensive Plan by Ordinance No. 24-01 adopted September 25, 2001. Two Legal Issues (Legal Issues 1 and 2, *infra*) are posed in this PFR. The Board will address these first. Discussion of the *WHIP II* case begins on page 9.

In *WHIP III*, the challenge is to a series of Ordinances that: 1) amend Covington's Comprehensive Plan by adopting a new FLUM (Ordinance No. 55-02); 2) adopt a zoning map for the City (Ordinance No. 54-02); and 3) adopt the zoning code for the City (Ordinance No. 42-02). Each of these Ordinances was adopted December 17, 2002.

In the *WHIP III* PFR, WHIP raises seven Legal Issues (Legal Issues 3 through 10, *infra*). The Board has grouped these issues into three topical areas: Internal Consistency and Implementation of the Plan (Legal Issues 4, 5 and 6); Internal Consistency – Subarea Plan (Legal Issues 6 and 7); and Goals (Legal Issue 3). After addressing *WHIP II*, the Board will address *WHIP III*. As addressed *infra*, Legal Issue 9 was abandoned; and Legal Issue 10, requesting Invalidity will be addressed in a separate section of this FDO, following the Board's review of the compliance issues in both the WHIP and Moyer PFRs. Discussion of the *WHIP III* case begins on page 10.

In *Moyer*, the challenge is to the same Ordinances noted in *WHIP III*, and Ordinance No. 51-02 (adopting Plan amendments – in particular, Plan Amendment 02-027). Moyer poses 13 Legal Issues for the Board to resolve. Again, the Board has grouped the issues into topical areas: Notice and Public Participation (Legal Issue 11); OCD Notification (Legal Issue 12); Internal Consistency and Implementation of the Plan (Legal Issues 2, 3, 4, 5, 6, 7 and 10); and Goals (Legal Issues 1, 8 and 9). Moyer abandoned Legal Issue 7. *See infra*. The Moyer challenge is the final set of issues the Board addresses. As with WHIP, Moyer has requested Invalidity (Legal Issue 13). The requests for Invalidity by both WHIP and Moyer are addressed together in a separate section of this FDO. Discussion of the *Moyer* case begins on page 21.

C. ABANDONED ISSUES

The Boards Rules of Practice and Procedure provide:

A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue.* Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied). Additionally, the Board’s March 25, 2003 PHO stated, “Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits.” PHO, at 7. The Board finds no argument relating to Legal Issue 9^[3] in WHIP’s PHB. See WHIP PHB, at 1-10. Consequently, the Board deems WHIP’s Legal Issue 9 to be **abandoned**.

Likewise, the Board finds no argument relating to Legal Issue 7 in Moyer’s PHB, at 1-30. Consequently, the Board deems Moyer’s Legal Issue 7 to be **abandoned**.

iv. WHIP II [CPSGMHB Case No. 01-3-0026]

A. Legal Issues

WHIP’s challenge in this matter is to the City of Covington’s initial adoption of its GMA Comprehensive Plan on September 25, 2001. This was accomplished in Ordinance No. 24-01.

The PHO set forth Legal Issues 1 and 2 as follows:

1. *Did the City of Covington (City) fail to be guided by, and comply with, the goals of the Act as set forth in RCW 36.70A.020, when it enacted Ordinance No. 24-01, which adopted the City’s GMA Plan, in particular but not limited to, the land use element provisions of the Plan? [Intended to cover portions of issues 3.1^[4] and 3.2 in the 12/3/01 PFR.]*
2. *Did the City fail to comply with the internal consistency requirements of RCW 36.70A.070(preamble), when it enacted Ordinance No. 24-01, which adopted the City’s GMA Plan? [Intended to cover portions of issues 3.1 and 3.2 in the 12/3/01 PFR.]*

B. Applicable Law and Discussion

The newly incorporated City of Covington adopted its GMA Comprehensive Plan on September 25, 2001, via Ordinance No. 24-01. Review of WHIP’s PHB indicates that Petitioner fails to

argue how any of the goals, policies or maps adopted by Ordinance No. 24-01 fail to be guided by the goals of the Act or otherwise fail to comply with the GMA. WHIP PHB, at 1-10. Instead, Petitioner relies upon language in the text of the September 25, 2001 Plan (Ordinance No. 24-01) to argue that the amendatory Ordinances adopted on December 17, 2002 do not comply with various provisions of the Act. Also, Petitioner WHIP references maps adopted in this Plan to argue internal inconsistency with the December 17, 2002 enactments. The Board addresses these issues in its discussion of *WHIP III, infra*. Consequently, the challenges articulated in WHIP's PFR 01-3-0026 are dismissed with prejudice.

C. Conclusions – WHIP II

- WHIP's PFR 01-3-0026, challenging the adoption of Ordinance No. 24-01 is **dismissed with prejudice**.

V. WHIP III [CPSGMHB Case No. 03-3-0004]

The focus of WHIP's challenge in this case is the City's designation of parcels of land in an area north of Kent-Kangley Road on its FLUM (Ordinance No. 55-02), Zoning Map (Ordinance No. 54-02), Downtown Subarea Plan Map and Plan provisions from the original GMA Plan (Ordinance No. 24-01).

A. Legal ISSUES [By Topic]

1. **Internal Consistency and Plan Implementation [Legal Issues 4, 5 and 8]**

The PHO set forth Legal Issue 4, 5 and 8 as follows:

4. *Did the City fail to comply with the internal consistency requirements of RCW 36.70A.070(preamble) and .130 when it adopted the Plan's FLUM, because the Regional Commercial designation on the FLUM is inconsistent with the Regional Commercial provisions of the Plan (Plan, at 2-9), the phasing provisions of the Plan, and the designation permits large scale regional retail uses adjacent to residential neighborhoods (Plan, at 4-2)? [Intended to cover Issue 3.3 and part of 3.2 from the 2/10/03 PFR.]*

5. *Did the City fail to comply with the consistency and implementation requirements of RCW 36.70A.040 and .130 when it adopted the Regional Commercial zoning map designation and zoning regulations (including specific citations to 21A.08.070A and 21A.06.682), for the same reasons noted in Issue 2 supra? [Intended to cover Issue 3.3 and portions of 3.2 from the 2/10/03 PFR.]*

8. *Did the City fail to comply with the consistency and implementation requirements of RCW 36.70A.040 and .130 when it adopted its zoning regulations, because of the uses allowed by the Downtown Commercial and Regional Commercial zoning districts are inconsistent with and do not implement the Plan provisions for these designations? [Intended to cover Issue 3.5 from the 2/10/03 PFR.]*

Applicable Law and Discussion

RCW 36.70A.070(preamble) provides in relevant part;

The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

RCW 36.70A.130(b) also includes and reflects this internal consistency requirement:

Any amendment of or revision to a comprehensive land use plan shall conform to this chapter [including the internal consistency requirement]. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

RCW 36.70A.040 provides in relevant part:

[E]ach city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan. . .

Additionally, this Board has stated:

Internal consistency means that provisions are compatible with each other and that they fit together properly. In other words, one provision may not thwart another. Consistency can also mean more than one policy not being a roadblock for another; it can also mean that policies of a comprehensive plan, for instance, must work together in a coordinated fashion to achieve a common goal.

West Seattle Defense Fund v. City of Seattle (WSDF), CPSGMHB Case No. 94-3-0016, Final Decision and Order, (Apr. 4, 1995), at 34.

Position of the parties:

WHIP's argument regarding internal inconsistency leans heavily upon one Plan provision.

Petitioner asserts, “The City’s Comprehensive Plan at 2-9 specifically requires that Regional Commercial designations be ‘located adjacent to existing large commercial uses in close proximity to major transportation corridors.’ On the plan’s FLUM and the Zoning Map however, the subject Regional Commercial designation is not located adjacent to existing large commercial uses.” WHIP PHB, at 4-5. Therefore, WHIP contends, the FLUM and Zoning Map are inconsistent with the Comprehensive Plan.

Covington responds that the phrase that WHIP relies upon is part of a descriptive paragraph that “expresses the City’s general concept of the Regional Commercial area,” but does not impose specific locational requirements. City Response – WHIP, at 13-14. The City points out that there are no land use policies or land use goals for Regional Commercial that require its location to be adjacent to existing large commercial uses. City Response – WHIP, at 14. The City also notes that the subject property abuts the Downtown Commercial zone on two sides, it is proximate to the downtown urban core and substantial commercial development is near the site along SR 516. City Response - WHIP, at 15 and 19. Also missing from the zoning code is any requirement that Regional Commercial designations be adjacent to large commercial uses or that no part of it border Residential areas. Further, neither the Plan nor the development regulations define large commercial uses. City Response –WHIP, at 16-17. Finally, Covington argues that as a City [UGA] it has discretion to locate urban uses within its city-limits. City Response – WHIP, at 17-18.

Discussion:

The Board is persuaded and agrees with the arguments presented by the City. Several facts noted by the City, *supra*, demonstrate that the City’s designation is not in error.

First, the language relied upon by WHIP in making its argument appears in a general description of the various designations on the City’s FLUM. The Plan’s description of the “Regional Commercial” provides:

The Regional Commercial designation is intended to provide a wide range of primarily auto-oriented commercial uses to serve City residents and the surrounding area. The Regional Commercial designation recognizes that a diverse and vital downtown is a key element of a healthy tax base structure for the City and provides for local and regional economic development needs and employment opportunities. The Regional Commercial designation is located adjacent to existing large commercial uses in close proximity to major transportation corridors. Provisions will be made to ensure pedestrian-friendly development with attractive design, adequate buffering, landscaping, appropriate pedestrian amenities, and safe and efficient parking and vehicle circulation.

Plan, at 2-9. This language is descriptive of the City’s concept and general intent for the Regional Commercial designation; although it indicates the desired location of these designations, it does not establish locational criteria for the designation of the Regional Commercial designation. As the City correctly points out, “none of the Land Use Policies or Land Use Goals for Regional Commercial requires that it be located adjacent to existing large commercial uses. (Citations omitted). If that were truly a directive, surely those Policies and Goals would have so specified.” City Reply – WHIP, at 13.

Second, as noted by the City, the Regional Commercial FLUM and Zoning designation are within the boundaries of the downtown subarea, adjacent to the downtown urban core, and in close proximity to substantial commercial development along SR 516. The Board notes that goals and policies within the Land Use Element and Downtown Element encourage Regional Commercial activities such as mixed uses and big box retail within the urban core. *See* LNG 13.0, LNP 13.1-13.5, and DTG 2.0, DTP 2.1-2.2, Plan, at 2-25 and 4-9, respectively.

Third, the adjacent zoning is “Downtown Commercial,” and “High Density Residential 8du/acre,” which is evidence of the City’s desires to see this area develop with commercial and compact urban development. Additionally, as the City notes, the zoning regulations do not require Regional Commercial to be adjacent to existing large commercial uses.

Finally, the City is correct with reference to Board deference. This is especially true within a jurisdiction’s city-limits. The Board will generally defer to the judgment of a City in exercising its discretion in designating urban uses within the confines of the City. *See* Goals Discussion, *infra*.

Regarding Legal Issues 4, 5, and 8, the Board agrees with Covington. Petitioners have **failed to carry their burden** in demonstrating that the FLUM and Zoning Map are inconsistent with the comprehensive plan and zoning regulations. Further, review of the Plan, FLUM and Zoning Map and regulations reveal no internal inconsistency. The City’s actions, related to Legal Issues 4, 5 and 8, **comply** with the internal consistency provisions of the GMA. Finally, since the City’s action was not clearly erroneous in view of the entire record and in light of the goals and requirements of the GMA, this Board will grant deference to Covington’s local legislative decisions on these Legal Issues.

Conclusion – Internal Consistency and Plan Implementation

Petitioners have **failed to carry their burden** in demonstrating that the FLUM and Zoning Map are inconsistent with the comprehensive plan and zoning regulations. Further, review of the Plan, FLUM and Zoning Map and regulations reveal that the “Commercial Regional” designation on the FLUM (Ordinance No. 55/02); the “Regional Commercial” designation on the Zoning Map

(Ordinance No. 54/02) are internally consistent. The City's actions, related to Legal Issues 4, 5 and 8, **comply** with the internal consistency provisions of the GMA.

2. Internal Consistency – Subarea Plan [Legal Issues 6 and 7]

The PHO set forth Legal Issue 6 and 7 as follows:

6. *Did the City fail to comply with the internal consistency requirements of RCW 36.70A.080 and .070(preamble) and .130, when it adopted the Regional Commercial designation on the FLUM while the Downtown Subarea Plan designates the same area as Downtown Commercial? [Intended to cover part of Issue 3.4 from the 2/10/03 PFR.]*

7. *Did the City fail to comply with the consistency and implementation requirements of RCW 36.70A.040 and .130 when it adopted the Regional Commercial designation on the zoning map while the Downtown Subarea Plan designates the same area as Downtown Commercial? [Intended to cover part of Issue 3.4 from the 2/10/03 PFR.]*

Applicable Law and Discussion

The relevant provisions of RCW 36.70A.070(preamble), .130(b) and .040 are set forth under Legal Issues 4, 5 and 8 *supra*. These provisions of the GMA are also at issue for Legal Issues 6 and 7. Additionally, Petitioner alleges noncompliance with RCW 36.70A.080. RCW 36.70A.080, dealing with Optional Elements, provides as follows:

(1) A comprehensive plan may include additional elements, ^[5] items or studies dealing with other subjects relating to the physical development within its jurisdiction

(2) A comprehensive plan may include, where appropriate, subarea plans, each of which is consistent with the comprehensive plan.

Position of the parties:

WHIP asserts that the City's Plan Policy LNP 1.6 ^[6] requires the adoption of a Downtown Subarea and the City has, in fact, adopted a "downtown subarea plan" as evidenced by the Downtown Element and Maps 4.1 and 4.2. Further, to demonstrate internal inconsistency, WHIP points to the FLUM and Zoning Map designations adopted by Ordinance Nos. 55/02 and 54/02, which depict the area in question as "Commercial Regional" (on the FLUM) and "Regional

Commercial” (on the Zoning Map); these designations, WHIP contends, are inconsistent with the “Downtown Commercial” designation indicated on Map 4.1, entitled “Downtown Subarea Plan. [7],” WHIP does not reference any of the Goals or Policies [8] contained within the Downtown Element to illustrate internal inconsistency. [9] WHIP PHB, at 5-6.

Covington argues:

[T]he City never adopted a Downtown Subarea Plan. Other than the map, there is no plan at all. Map 4.1 appears in the Downtown Element, the text of which includes just one reference to that document: “The Downtown Subarea is shown on Map 4.1 and encompasses 595.9 acres of varying parcel sizes.” [See Plan, at 4-1.] Other than that single statement, there is no mention of a Downtown Subarea Plan, [10] and none was ever passed. Since there was no subarea plan, there can be no inconsistency between it and the Comprehensive Plan.

While the map’s caption suggests otherwise, all it really depicted was the boundaries of the City’s downtown area. It was not intended to designate zones within that area. In contrast, the Downtown Future Land Use Map did designate zones but was superseded by the notation “Refer to Future Land Use Map.” [See Plan, at 4-7.]

City Response – WHIP, at 22.

Discussion:

The Downtown Element is not a mandatory element that the GMA requires to be included in a GMA Comprehensive Plan. Therefore, at minimum, it is an optional element that the City chose to adopt and incorporate into its GMA Plan. Relying on LNP 1.6 and the notation on Map 4.1, WHIP interprets the “Downtown Element” as a “Downtown Subarea Plan.” Nomenclature aside, the Downtown Element, whether it is deemed a subarea plan or not, and its associated maps, must be internally consistent with the remainder of Covington’s Plan and the FLUM.

The focus of WHIP’s argument is that the “Downtown Commercial” designations depicted on Map 4.1, entitled “Downtown Subarea Plan” and the designations of “Commercial Regional” [FLUM] and “Regional Commercial” [Zoning Map] are inconsistent. The Board agrees.

The City’s claim that Map 4.1 was included merely to depict the “boundaries of the City’s downtown area” is unpersuasive, since the FLUM and the Zoning Map also contain “boundaries of the *Downtown Subarea*.” (Emphasis supplied.) See FLUM and Zoning Map. The boundaries

of the downtown area are clear from these maps, making the stated purpose of Map 4.1 unnecessary.

The inclusion of Map 4.2 entitled “Downtown Future Land Use Map” with the notation to “Refer to Future Land Use Map” only adds to the confusion and creates additional internal inconsistency. On their face, the FLUM, Zoning Map, Maps 4.1 and 4.2 are inconsistent and noncompliant with the requirements of RCW 36.70A.070(preamble), .130 and .040. The Board will **remand** the relevant Ordinances with direction to the City to take legislative action to remove the internal inconsistencies on the respective maps.

Conclusion – Internal Consistency – Subarea Plan

The “Commercial Regional” designation on the FLUM (Ordinance No. 55-02); the “Regional Commercial” designation on the Zoning Map (Ordinance No. 54-02); the “Downtown Commercial” designation, [\[11\]](#) on Maps 4.1 (Ordinance No. 24-01) and the entirety of Map 4.2 are internally inconsistent and **do not comply** with the requirements of RCW 36.70A.070 (preamble), .130 and .040. The Board will **remand** the relevant Ordinances with direction to the City to take legislative action to remove the internal inconsistencies on the respective maps and adopt internally consistent designations.

3. Goals [Legal Issue 3]

The PHO set forth Legal Issue 3 as follows:

*3. Did the City fail to be guided by, and comply with, the goals of the Act, when it designated the area north of Kent-Kangley and adjacent to a residential neighborhood as Regional Commercial [\[12\]](#) on the Plan’s FLUM and the zoning map and do the adopted zoning regulations comply with the goals of the Act?
[Intended to cover Issue 3.1 from the 2/10/03 PFR.]*

Applicable Law and Discussion

The GMA planning goals “guide the development and adoption of comprehensive plans and development regulations.” RCW 36.70A.020. Petitioner WHIP argues that the City was not guided by Goals (2), (3), and (10) in adopting a Comprehensive Plan, FLUM, and Zoning Map that designated 15 acres of vacant land north of Kent-Kangley as Regional Commercial. RCW 36.70A.020 (2), (3), and (10) provide:

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

The Board has stated, “[T]o show substantial noncompliance with a planning goal, a petitioner must identify that portion of the challenged enactment that is not consistent with, or thwarts, the planning goal, and explain why the identified portion does not comply with that goal.” *Rabie v. City of Burien (Rabie)*, CPSGMHB Case No. 98-3-0005c, Final Decision and Order, (Oct. 19, 1998), at 6.

Position of the parties:

Petitioners argue that locating a Regional Commercial area adjacent to existing single family neighborhoods reduces the quality of life for the city's residents in violation of Goal 10. WHIP notes that the City's *Vision Statement* represents Covington's interpretation of the GMA goals.

[13] WHIP contends that the *Vision Statement* expresses the desire to enhance the quality of life and small town character of Covington. Covington's *Vision Statement* provides:

The City of Covington is a place where community, business and civic leaders are partners in building a city that is family-oriented, safe and pedestrian friendly. *A community that proudly invests in enhancing our small-town character* and natural environment, and provides diverse recreational opportunities as well as remaining financially responsible.

Plan, at 1-1, (emphasis supplied). WHIP alleges that acts contrary to the *Vision Statement*, including the challenged Regional Commercial designations, are therefore contrary to the Goals of the Act. WHIP PHB, at 7-8.

Additionally, WHIP alleges that a Wal-Mart store proposed for the subject property requires the creation of a new access road, increasing traffic and negatively impacting the environment in violation of Goals 3 and 10. *See* HOM Ex. 1. WHIP argues that the road will lead to “noise, car exhaust, and headlights at night” and is contrary to Plan Policy DTP 2.2 which states, “[S]pecial emphasis will be taken to minimize traffic impacts in Regional Commercial areas.” Finally, Petitioner alleges that the circumstances which violate Goals 3 and 10 also constitute a violation of Goal 2, which encourages the prevention of sprawl. WHIP PHB, at 8-10.

In response, the City argues that other than alleging noncompliance with Goal 2, “Nothing in [WHIP’s] brief describes how the [Regional Commercial] designation fails to “[r]educe the inappropriate conversion of undeveloped land into sprawling, low-density development. RCW 36.70A.020(2).” Thus, the City suggests, WHIP has failed to carry the burden of proof. City Response – WHIP, at 5. Additionally, to support its position that the Regional Commercial designations do not constitute sprawl, the City cites to this Board’s decision in *Ann Aagaard, et al., v. City of Bothell (Aagaard)*, where the Board stated:

Although the property is currently undeveloped, its location within the UGA means it is destined for urban development. The location of property within the UGA also means that [the petitioner’s] assertion that ‘higher density development encourages sprawl’ is fundamentally wrong. Once a UGA has been drawn, as here, an urban development within the UGA automatically reduces sprawl. Localized intensification of use within a UGA is not sprawl – it is the opposite of sprawl – compact urban development.

City Response – WHIP, at 5; citing *Aagaard*, CPSGMHB Case No. 94-3-0011, Final Decision and Order, (Feb. 21, 1995), at 20, (emphasis supplied). The City continues, “To further the goal of compact urban development, the City made a substantive planning choice to site the Regional Commercial area adjacent to the downtown core, just north of SR 516. It is entirely appropriate that urban growth be channeled out from that core to this adjacent area.” City Response – WHIP, at 5.

Regarding Goal 10, the City observes that the only support offered by Petitioner is reference to a SEPA condition for a road involved with a pending Wal-Mart project on the site. Petitioner’s arguments related to the proposed access road are project-specific concerns to be addressed during the permitting process, not before this Board. The City suggests that the real issue for WHIP is not whether City was guided by Goal 10, but whether the City should issue the necessary permits for the proposed development – an issue which the Board is not empowered to decide. City Response – WHIP, at 6-7. Nonetheless, the City contends that the road is consistent with its Plan and then references 11 different Plan goals and policies to illustrate that the City is protecting the environment and enhancing the City’s quality of life. City Response – WHIP, at 7-9.

On Goal 3, the City notes that Petitioner’s focus in challenging this goal is again, the road, and does not address the directive language of the Goal. Instead, the City asserts that WHIP relies upon a restrictive interpretation of the term “minimize” as it relates to its Plan Policies. The City contends that “minimize” does not mean no new ingress and egress at all. Finally, the City offers HOM Ex. 2 [Covington’s Transportation Improvement Program - **TIP**] and HOM Ex. 3 [Covington’s Capital Improvement Program - **CIP**], both of which include the road, to

demonstrate that it has complied with Goal 3. City Response – WHIP, at 9-11.

Discussion:

Cities have many important and challenging duties under the Act, including the accommodation of urban development. While the range of certain city choices will be constrained by detailed and directive GMA provisions,^[14] comprehensive plans embody many other local choices not subject to such specific GMA provisions. In such instances, the Board will grant broad deference to choices about how growth is to be accommodated within city limits. As the Board has previously stated, “These choices include the specific location of particular land uses and development intensities, community character and design, spending priorities, level of service standards, financing mechanisms, site development standards and the like.” *Aagaard*, at 9.

In the present case, the Board notes that WHIP’s attack on the “Regional Commercial” designation focuses on two basic contentions: first, that the designation constitutes impermissible “sprawl” and, second, that the designation is inconsistent with the City’s “Vision Statement” and therefore its Plan. The Petitioner is incorrect on both counts.

Regarding Goal 2, the Board notes that the designated Regional Commercial area is within the city limits of Covington which is, by definition, a UGA. Further, the designation is within the boundaries of Covington’s “Downtown Subarea.” Within this downtown boundary, the area to the west and south of the site is zoned “Downtown Commercial;” and the area to the east is zoned “High Density Residential 8 du/ac.^[15]” See Zoning Map. The City correctly points to the Board’s holdings in *Aagaard* that “localized intensification of [land] use within a UGA is not sprawl – it is the opposite of sprawl – compact urban development.” The Board affirms its holding in *Aagaard*.

In a GMA sense,^[16] the “sprawl” that the Act directs local governments to “reduce” is “the inappropriate conversion of undeveloped land into sprawling, low-density development.” RCW 36.70A.020(2). Therefore, in a city context, the only way to run afoul of this statutory direction is to designate urban land for “low-density development” without sufficient environmental justification.^[17] That is not the case here, and the Board therefore rejects WHIP’s arguments on this point.

The Board also rejects WHIP’s argument that the designation violates the GMA because of an alleged inconsistency with the City’s adopted “Vision” statement. A review of Covington’s “Vision” statement reveals a number of aspirational, rather than objectively measurable, values. For example, it espouses a Covington that is “pedestrian friendly,” and “well designed,” with

“small town character” and a “sense of permanence.” WHIP PHB, at 4. Even if pieces of this “Vision Statement” were construed to be Comprehensive Plan policies, they are not specific and directive enough to limit local discretion in legislative actions such as localized plan designations and regulations. To the extent that much of WHIP’s argument focused on a specific project, (*i.e.*, the proposed Wal-Mart), their contentions about how to achieve consistency with Covington’s adopted “Vision Statement” are appropriately addressed to the City’s permit review processes, not to this Board.

Petitioner’s concerns related to the access road of the Wal-Mart project are outside this Board’s jurisdiction to decide. Further, Petitioner has not identified how the Regional Commercial designation, in and of itself, alters the quality of life or small town character of Covington [Goal 10]. Nor has Petitioner demonstrated noncompliance with Goal 3. The Board notes that the City has included the “road” in its TIP and CIP, as required by GMA. WHIP has **failed to carry the burden of proof** in demonstrating how the Regional Commercial designation is inconsistent with the Plan’s Vision statement or fails to be guided by, or thwart, Goals 2, 3 and 10 of RCW 36.70A.020.

Conclusion - Goals

Petitioners have **failed to carry their burden** in demonstrating how the City of Covington’s actions were not guided by, or thwart, Goals 2, 3 and 10 of the GMA [RCW 36.70A.020(2), (3) and (10)].

B. Summary of Conclusions for WHIP III

- Petitioners have **failed to carry their burden** in demonstrating that the FLUM and Zoning Map are inconsistent with the comprehensive plan and zoning regulations. Further, review of the Plan, FLUM and Zoning Map and regulations reveal that the “Commercial Regional” designation on the FLUM (Ordinance No. 55/02); the “Regional Commercial” designation on the Zoning Map (Ordinance No. 54/02) and the zoning regulations (Ordinance No. 42/02) are internally consistent. The City’s actions, related to Legal Issues 4, 5 and 8, **comply** with the internal consistency provisions of the GMA. [RCW 36.70A.070(preamble), .130 and .040.]
- The “Commercial Regional” designation on the FLUM (Ordinance No. 55/02); the “Regional Commercial” designation on the Zoning Map (Ordinance No. 54/02); the

“Downtown Commercial” designation, [\[18\]](#) on Maps 4.1 and the entirety of Map 4.2 (Ordinance No. 24-01) are internally inconsistent and **do not comply** with the requirements of RCW 36.70A.070(preamble), .130 and .040.

- Petitioners have **failed to carry their burden** in demonstrating how the City of Covington’s actions were not guided by, or thwart, Goals 2, 3 and 10 of the GMA [RCW 36.70A.020(2), (3) and (10)].

VI. Moyer [CPSGMHB Case No. 03-3-0006c]

The focus of Moyer’s challenge is the City’s designation of several parcels of land along S.E. 256th Street and 180th Avenue S.E. in Covington. The challenge involves Ordinance Nos. 42-02, 51-02, 54-02 and 55-02.

A. Legal Issues [By Topic]

1. Notice and Public Participation [Legal Issue 11]

The PHO set forth Legal Issue 11 as follows:

11. Has the City failed to comply with the notice and public participation requirements of RCW 36.70A.035, .130, .140 and its own public participation procedures as embodied in Ordinance Nos. 29-01 and 32-00? [Intended to cover Issues 5.11, 5.12 and 5.13, PFR, at 4.]

Applicable Law and Discussion

RCW 36.70A.035 provides in relevant part:

(1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals...

(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, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

RCW 36.70A.130 provides in relevant part:

2(b) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and RCW 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year.

RCW 36.70A.140 provides in relevant part:

Each county and city that is required to plan under 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.

Additionally, the Board has held that public notice must inform members of the public of the nature of a pending change. *Home Builders Association of Kitsap County v. City of Bainbridge Island*, CPSGMHB Case No. 00-3-0014, Final Decision and Order (Feb. 26, 2001). When the scope of an action changes after public notice and public hearing, RCW 36.70A.035(2) requires additional analysis and public participation. *Radabaugh v. City of Seattle*, CPSGMHB Case No. 00-3-0002, Final Decision and Order (July 26, 2000). Public participation is dependent upon the public first having notice. “It is axiomatic that without effective notice, the public does not have a reasonable opportunity to comment.” *Andrus v. Bainbridge Island*, CPSGMHB Case No. 98-3-0030, Final Decision and Order (Mar. 31, 1999), at 6-7.

Position of the parties:

Petitioner Moyer’s concern focuses on Plan amendment 02-027, as adopted by Ordinance No. 51-02; and its relationship to Ordinance No. 55-02 (the FLUM), Ordinance No. 54-02 (Zoning Map) and Ordinance No. 24-01 (the Zoning regulations).

Moyer argues that the City failed to comply with the central tenets of the GMA’s notice and public participation requirements.

Specifically, no notice of any public hearing for any of the proposed amendments to the Comprehensive Plan or Development Regulations gave any warning or indication that Petitioner's property would be redesignated and downzoned to the new Neighborhood Commercial designation and zoning regulations. Instead, the only amendment proposed for which any notice was given that pertained to Mr. Moyer's ownership indicated that the property would be designated and zoned Community Commercial. (Citations omitted). Nor was Petitioner given mailed notice of the zoning change, as required by Ordinance No. 32-00.

The action ultimately taken by the City Council, redesignation and downzone of the property to the new "Neighborhood Commercial" classification was not even one of the alternatives considered by the Council during the Comprehensive Plan amendment process. It apparently first surfaced at a December 10, 2002, City Council meeting, months after the public hearing on the Comprehensive Plan had closed. Not only was Petitioner not given notice of such actions, he had no reason to believe that such action was contemplated by the Council and thus no reason or opportunity to provide comments and input. Nor did any other member of the public.

Moyer PHB, at 25-26. Petitioner also asserts that the City did not even comply with its own notice and public participation requirements as set forth in Ordinance No. 32-00. Moyer PHB, at 25.

Petitioner continues, "[N]othing in the notice or record indicates that the public in general and Petitioner in particular were informed about the nature of the pending change – *i.e.*, the redesignation and downzone of Petitioner's property to 'Neighborhood Commercial'." Moyer PHB, at 26.

Moyer also acknowledges that, in certain limited circumstances (*See* RCW 36.70A.035(2)(a) and (b)), the GMA allows amendments after the opportunity for public review and comment has passed. However, Petitioner contends, "Here, none of these public participation requirements are satisfied. . . . Under these circumstances, the City Council's consideration and adoption of last minute amendments . . . violates the public participation goals and requirements of the GMA, in particular RCW 36.70A.140, .035(2) and RCW 36.70A.020(11)." Moyer PHB, at 28.

In response, the City contends that it "provided all appropriate notices of its proposal to amend the Comprehensive Plan and to adopt development regulations. . ." City Response – Moyer, at 15. The City continues, "[N]o rezone was adopted. Petitioner's property remains zoned as Neighborhood Commercial to this day. Petitioner's real complaint is that he was not "up zoned" to Community Commercial which had more intensive uses." *Id.* The City also asserts that Petitioner, through his attorney, participated throughout the entire process. *Id.*

Further, Covington argues, “There is a further claim from the Petitioner that the City’s determination not to up-zone his property is a “new” action, not otherwise proposed or considered as an option, after the public hearing closed. What the City Council actually did was maintain the zone on the three Neighborhood Commercial parcels.” City Response – Moyer, at 15. “At the meetings of December 10 and 17, 2002, the City Council took public comment. (Citations omitted). Even after the Council directed staff to zone only one parcel of property as Community Commercial, the Petitioner chose not to address the Council on either the FLUM or Zoning Map issues on December 17, 2002. Nor did the Petitioner address the new Development Regulations passed on the same evening. The proposal was not changed. The options previously endorsed by the Petitioner were simply not enacted. No further notice, public review or comment was necessary.” City Response – Moyer, at 16-17.

In reply, Moyer argues that contrary to the City’s assertion, “Petitioner’s property was redesignated and rezoned to the new Neighborhood Commercial designation and zone, a zoning designation that provides for much less intensive commercial uses and that by any definition or measure constitutes a substantial downzone of Petitioner’s property from its prior designation.” Moyer Reply, at 7. Petitioner continues:

[T]he only amendment pertaining to Petitioner’s property for which notice was given is Amendment 02-027, which proposed renaming the Neighborhood Commercial designation to “Community Commercial” and redesignating all properties designated and zoned Neighborhood Commercial to the new Community Commercial designation and zoning. (Citation omitted). Neither Petitioner in particular nor the public in general was ever given notice of any other Comprehensive Plan or zoning amendments pertaining to Petitioner’s property. The City even concedes as much, stating in its Response Brief that the alternative options for designating and zoning the five properties within existing Neighborhood Commercial were not even proposed or considered until the December 10, 2002, City Council meeting, which was only a week before the City Council adopted one of these new alternatives but months after the public hearing had closed. Although the City alleges that Petitioner did not testify at either the December 10 or December 17, 2002 City Council meeting about the proposed alternatives for designating and zoning existing Neighborhood Commercial properties, in fact no one did, which is not surprising since no notice of a public hearing on such alternatives was ever provided.

Moyer Reply, at 7-8.

Discussion:

It is undisputed that Petitioner's property was designated Neighborhood Commercial on the City of Covington's Interim Future Land Use map. *See Plan*, at 2-13 –“Interim” Future Land Use map, dated September 25, 2001. It is also undisputed that the City Council published ^[19] notice on July 13, 2002, and held a public hearing on July 23, 2002, regarding Amendment 02-027. Moyer Ex. 20 and HOM Ex. 9M. These notices provided, in relevant part:

The purpose of the public hearing is to receive comments on the following:

(g) Amendment CPA 02-027 – Amend the Land Use Element *to rename the existing Neighborhood Commercial designation on the Interim Future Land Use Map Legend to Community Commercial and add a new Neighborhood Commercial designation for future use.*

HOM Ex. 9M and Moyer Ex. 20, (emphasis supplied).

The staff reports that accompanied this amendment at the July 23, 2002 public hearing explained that the amendment, “[W]ould rename the existing “Neighborhood Commercial” land use designation on the map legend to “Community Commercial” and authorize a new “Neighborhood Commercial” designation with a notation on the map legend indicating “None Currently Designated.” Moyer Ex. 22, City Ex. 14. The attached Proposed Future Land Use and Zoning map reflect this change and include the notation.

Amendment 02-027 also included text amendments to the Plan that describe the Community Commercial designation and amend Plan provisions LNG 12.0, LNP 12.1 and LNP 12.2. Additionally, the staff report notes, “[M]ajor changes needed to fully implement these amendments will need to be made in Title 21 of the Development Regulations. Suggested changes to the development standards and permitted use tables for these zones will be forwarded to the Council under separate cover for discussion and deliberation.” Moyer Ex. 22, with attached maps, City Ex. 14.

Following public hearing on the all the proposed Plan amendments, the City Council recessed, then, reconvened. The public hearing was not continued. City Ex. 13, Moyer Ex. 21.

Also in the same July 13, 2002, published notice, the City indicated that the City Council would hold a public hearing on August 13, 2002, to receive comments on “Development Regulations for Title 21A Zoning and the Zoning Map. HOM Ex. 9M, Moyer Ex. 23. These zoning text amendments created and distinguished uses permitted in both the Community Commercial (CC) and Neighborhood Commercial (NC) zones, with the CC zone permitting more commercial uses than the NC zone.

On August 13, 2002, the public hearing was held. Following the public hearing portion of the meeting, the public hearing was declared closed. Moyer Ex. 24.

At the hearing on the merits the Board asked when the public hearing on the Plan amendments, FLUM, Zoning Map and development regulations was closed. None of the parties disputed that the public hearing process regarding Plan Amendment 02-027 (Ordinance No. 51-02), the FLUM (Ordinance No. 55-02), the Zoning Map (Ordinance No. 54-02) or the Development Regulations (Ordinance No. 42-02) was closed by August 13, 2002.

On November 9, 2002, the City published a "City of Covington SEPA Notice: Addendum to the Comprehensive Plan." The SEPA notice stated, in relevant part:

As proposed under CPA No. 02-027, the existing "Neighborhood Commercial land use designation on the Interim Future Land Use Map legend would be *renamed* to "Community Commercial." A new "Neighborhood Commercial" land use designation would also be created and *reserved for future use*.

HOM Ex. 9S, (emphasis supplied).

Given the notice provided, staff reports, recommendations and the hearings held through August 13, 2002, and the November 9, 2002, SEPA notice, it is not unreasonable for Petitioner, or any other citizen in Covington, to conclude that the City intended to:

1. Adopt Plan amendment 02-027, including the text changes, and a FLUM change indicating that the interim "Neighborhood Commercial" is now "Community Commercial" and the new "Neighborhood Commercial" designation is reserved for future application;
2. Adopt a new Zoning Map that implements and is consistent with the FLUM and Plan; and
3. Adopt Development Regulations that include a CC and CN zone with separate uses allowed.

This appears to be exactly what Petitioner and perhaps other citizens of Covington were lead to believe.

However, at a December 3 and 10, 2002, City Council Study Session the Council discussed alternatives to the FLUM and Zoning Map. City Ex. 18 and 19. And at the December 10, 2002, Council meeting, the Council again discussed various alternatives to the FLUM and Zoning Map. Moyer Ex. 28, 29. Based upon the record, and the notices received by the Board, there is

no indication whatsoever that any of these proposed options or alternatives were the subject of any public notice, nor were they subject to explanation, review and comment at a public hearing where the public would have the opportunity to participate. On December 17, 2002, the Council adopted Ordinance Nos. 42-02, 51-02, 54-02 and 55-02. *See each Ordinance respectively.*

The product of the Council's action was:

1. Amendment 02-027 was adopted by Ordinance No. 51-02. But the attachments to Ordinance No. 51-02 indicate that *only* the text portion amending the Plan was adopted. The accompanying maps with the "renaming" of NC to CC and notation next to NC "none currently designated" *were not adopted.*
2. The FLUM was adopted by Ordinance 55-02. It amended the FLUM and ***designated both Neighborhood Commercial*** [with a red dot] *and Community Commercial on the map* [indicated by red on the map – however, the legend does not include this designation]. There are only four commercial designations outside the Downtown core. Three are Neighborhood Commercial and one is Community Commercial.
3. The Zoning Map was adopted by Ordinance No. 54-02. The Zoning Map is consistent with and implements ***both the NC and CC designations*** from the FLUM.
4. The Development Regulations were adopted by Ordinance No. 42-02. The zoning regulations include allowed uses for both the CC and NC zones, the CC zone permitting more intensive use.

The net result of the Council's action was not only the creation and adoption of a new Plan and Zoning designations to be applied some time in the future, but the *application* of the new designations on the FLUM and Zoning Map. These actions affect the property of Petitioner and others. These actions are far from the proposed actions that were the subject of public notice and well beyond the scope of what the general public had the opportunity to comment on.

The effect of the City's actions resembles the classic advertising "bait and switch." The City advertised that it intended to do one thing, then, at the eleventh hour, it did something else entirely. The City gave notice and held public hearings to accept testimony on Amendment 02-027, with attached maps. The Amendment indicated the *status quo* would be maintained but anticipated a two-tiered scheme for commercial designations ^[20] that would be applied in the future. Then, during December of 2002, the City considered and adopted, on December 17, 2002, *only the text* of Amendment 02-027, and a FLUM and Zoning Map, which applied the new designations on the FLUM and Zoning Map. This is not what was "advertised" or available for public comment.

As these changes affect Petitioner Moyer specifically, although the “name” of the designated classification remains “Neighborhood Commercial,” the uses now permitted within that classification are reduced from those that were previously allowed per the Interim FLUM and zoning. The Moyer property was clearly redesignated and rezoned without Petitioner having any notice or the opportunity to participate on the Council’s ultimate decision. The City’s actions related to these Ordinances were clearly erroneous and utterly failed to comply with the notice and public participation requirements of the GMA.

Conclusion – Notice and Public Participation

The Board finds and concludes that the City’s adoptions of Amendment 02-027 (Ordinance No. 51-02), the FLUM (Ordinance No. 55-02) and the Zoning Map (Ordinance No. 54-02) as they relate to the Community Commercial and Neighborhood Commercial amendments and designations were **clearly erroneous** and **do not comply** with the notice and public participation requirements of RCW 36.70A.035, .130, and .140. These Ordinances will be **remanded** to the City with direction to provide notice reasonably calculated to provide notice to property owners and other affected and interested individuals; and to provide the opportunity for public review and comment on these or any other proposed modification to the Plan, maps or development regulations.

2. OCD NOTIFICATION [Legal Issue 12]

The PHO set forth Legal Issue 12 as follows:

12. Has the City adequately complied with the requirements of RCW 36.70A.106 (3) as to notifying the State Office of Community Development (OCD) of its intent to amend its Plan and FLUM, adopt a new zoning map, and adopt new development regulations and, having failed to notify OCD, whether this failure renders the Ordinances non-compliant and invalid under the GMA?

Applicable Law and Discussion

RCW 36.70A.106 provides in relevant part:

(1) Each county and city proposing adoption of a comprehensive plan or development regulation under this chapter *shall notify the department of its intent to adopt such plan or regulations at least sixty days prior to final adoption.* State agencies including the department may provide comments to the county or city on the proposed comprehensive plan, or proposed development regulations, during the

public review process prior to adoption.

...

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

(Emphasis supplied).

Position of the parties:

Petitioner Moyer does not dispute the fact that the City notified OCD regarding its intent to adopt amendments to its development regulations and zoning map, specifically Amendment 02-027. However, Moyer does assert “While the City subsequently adopted Plan Amendment 02-027, it did not adopt the Land Use Map implementing the Amendment – *i.e.*, a Land Use Map renaming the existing Neighborhood Commercial areas Community Commercial. . .” Moyer continues, “In other words, it failed to notify CTED of a substantial downzone of more intensively-zoned commercial properties, the only commercial properties outside the City’s downtown commercial zone – by any measure, a significant change to the amendments that CTED received notice of.” Moyer PHB, at 29.

The City counters that the OCD notification requirements do “not require that the ordinances be passed in identical form to that which is submitted to CTED.” . . . The statute itself even contemplates that comments may be made by CTED after their review of proposed changes.” City Response – Moyer, at 17

Discussion:

The materials regarding the City’s proposed regulatory changes, transmitted to OCD by the City on August 23, 2002, does not include a copy of a zoning map. HOM Ex. 8. However, included in those materials are “Zoning Use Tables” that clearly distinguishes permitted and conditional uses for both the Community Commercial (CC) and Neighborhood Commercial (CN) zones. HOM Ex. 9, at 411-418. Also included in the OCD transmittal is a Preliminary Staff Analysis that states:

Pursuant to the proposed revisions to the CP contained in CPA 02-027, amendments to this title serve to implement modifications affecting commercial uses in the CC and CN zones. This proposal would create a “new” Community Commercial (CC)

zone (essentially the current Neighborhood Commercial (CN) zone on the Interim Future Land Use Map) and create a new CN zone intended for smaller scale truly neighborhood level commercial activities. . . . As proposed for modification, the new CN zone would be a “floating zone” at the present time (i.e., it would require a CP Future Land Use Map amendment in order to designate such a zone on the ground.). . . .

HOM Ex. 9, at 346.

Petitioner is correct that OCD was never notified that the Moyer property would be affected by the creation and application of the new zoning scheme; however, the City is correct on the law. RCW 36.70A.106 requires that OCD be notified of a jurisdiction’s “intent to adopt” a plan, regulation or amendment thereto. The notice is provided to allow the state to review and comment on proposals. This review and comment period allows the state the opportunity, as well as the public, to influence the outcome of the proposed legislation.

Significantly, RCW 36.70A.106(2) requires that the City “shall transmit a complete and accurate copy of its comprehensive plan or development regulations to the department within ten days after final adoption.” What is finally adopted must also be submitted to OCD. The presence of this section of the Act supports the notion that the sixty-day notice of intent to adopt is in anticipation of potential changes following review and comment. The Board concludes that the City has adequately complied with the requirements of RCW 36.70A.106(3) as to properly notifying the State Office of Community Development (OCD).

Conclusion – OCD Notification

Covington has adequately **complied** with the requirements of RCW 36.70A.106 (3) as to notifying OCD of its intent to amend its Plan, the FLUM, adopt a new zoning map, and adopt new development regulations.

3. INTERNAL CONSISTENCY AND PLAN IMPLEMENTATION

[Legal Issues 2, 3, 4, 5, 6, 7 and 10]

The PHO set forth Legal Issues 2, 3, 4, 5, 6, 7 and 10 as follows:

2. *Whether the City’s zoning map and development regulations implementing the new “Neighborhood Commercial” designation are non-compliant with the GMA for the same reasons set out in Issue 1, supra?*

3. *Did the City when adopting the new Comprehensive Land Use Plan FLUM*

designations applicable to Petitioner's property fail to comply with the internal consistency requirements of RCW 36.70A.070(preamble), .010 and .020, specifically, the land use and transportation elements of the Plan?

4. Did the City fail to comply with the consistency and implementation requirements of the RCW 36.70A.040 and .130 when it adopted its zoning map and development regulations for the new "Neighborhood Commercial" zone, because the adopted measures impose uses on Petitioner's property inconsistent with the land use and transportation elements of the Plan?

5. Are the City's new FLUM, development regulations and new zoning map, invalid because they implement land use designations: (a) not found in the Plan [see Issue 1] and/or (b) are inconsistent with Plan designations and policies?

*6. Are Ordinance Nos. 55/02, 54/02, 51/02 and 42/02 (the **Ordinances**) non-compliant with GMA requirements requiring consistency and predictability in the land use decision-making process, RCW 36.70A.050 (sic?), including internal inconsistency, and consistency between the Plan and FLUM (RCW 36.70A.070)?*

7. Did the City fail to comply with the requirement of RCW 36.70A.070(5) (sic (6)) which requires consistency between the land use and transportation element of the Plan, when it adopted the "Neighborhood Commercial" designation for Petitioner's property, because the property has adequate transportation and utility infrastructure sufficient to service city-wide commercial needs?^[21]

10. Whether Petitioner's property should have been designated "Community Commercial" on the FLUM and zoning map because the Moyer property is: (a) located upon both a major and minor arterial, with (b) adequate transportation and utility infrastructure to serve area-wide commercial needs, (c) is well-sited and suited for intensive, larger-scale urban commercial uses intended to serve the entire community, and (d) is vested and has been zoned for community business in the past?

Applicable Law and Discussion

RCW 36.70A.070(preamble) provides in relevant part;

The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

RCW 36.70A.130(b) also includes and reflects this internal consistency requirement:

Any amendment of or revision to a comprehensive land use plan shall conform to this chapter [including the internal consistency requirement]. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

RCW 36.70A.040 provides in relevant part:

[E]ach city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan. . .

Additionally, as the Board quoted *supra*, the Board has stated:

Internal consistency means that provisions are compatible with each other and that they fit together properly. In other words, one provision may not thwart another. Consistency can also mean more than one policy not being a roadblock for another; it can also mean that policies of a comprehensive plan, for instance, must work together in a coordinated fashion to achieve a common goal.

WSDf, FDO, at 34.

Also, the Board has stated, “For internal consistency challenges pursuant to RCW 36.70A.070 (preamble), it is appropriate and necessary for the Board to review plan amendments for consistency with preexisting plan provisions.” *LMI/Chevron v. Woodway*, CPSGMHB Case No. 98-3-0012, Final Decision and Order (Jan. 8, 1999), at 39.

In Legal Issue 3, Petitioner Moyer also challenges the City’s compliance with RCW 36.70A.010 which provides:

The Legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public’s interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and health, safety, and high quality of life enjoyed by residents of this state.

In one of its prior decisions, the Board has stated, “RCW 36.70A.010 is not a substantive or even procedural requirement of the Act, and it creates no specific local government duty for compliance apart from the subsequent goals and requirements of the Act.” *See Litowitz, et al., v. City of Federal Way*, CPSGMHB Case No. 96-3-0005, Final Decision and Order, (Jul. 22, 1996), at 14. The Board continues to subscribe to this holding, and will not review compliance with the

legislative findings of .010.

Position of the parties:

Petitioner Moyer argues that Comprehensive Plan Amendment 02-027 specifies that the existing Neighborhood Commercial land will be renamed Community Commercial, and a new Neighborhood Commercial designation will be created on the FLUM, with the notation “None Currently Designated.” Because the FLUM adopted in connection with the amendment instead maintains a Neighborhood Commercial designation on all but one of the properties in question, and makes no mention of the Community Commercial designation, Petitioner argues that the FLUM is inconsistent with the text of the Amendment 02-027. Moyer PHB, at 13-14.

Similarly, Petitioner argue that the Zoning Map adopted in connection with Amendment 02-027 is also inconsistent because it shows only one of the former Neighborhood Commercial zones renamed to the Community Commercial designation. Moyer PHB, at 15. Additionally, Moyer asserts that the new provisions for the Neighborhood Commercial zone found in the Development Regulations (Ordinance No. 42-02), as applied to the Neighborhood Commercial designations are inconsistent with Amendment 02-027. Moyer PHB, at 16. Petitioner then argues why his property is more appropriately designated Community Commercial, under the new scheme adopted by the City. Moyer PHB, at 16-20.

The City responds, “With Ordinance 51-02, the Covington City Council adopted *text amendments* to the Comprehensive Plan.” City Response – Moyer, at 6, (emphasis supplied). These text amendments described the intent of the Community Commercial land use designation and amended a goal and two policies of the Plan – LNG 12.0 and LNP 12.1 and 12.2. Neither the non-italicized text, the staff report, nor any maps were adopted in Amendment 02-027 (Ordinance No. 51-02). City Response – Moyer, at 7-8.

The City also asserts that the Zoning Map and FLUM designations are consistent, [\[22\]](#) since only the text was adopted in Amendment 02-027, there is no inconsistency between the Amendment, FLUM or Zoning Map. City Response – Moyer, at 8-9. The City concludes that none of the actions are inconsistent.

Finally, the City counters Petitioner’s claims regarding the appropriateness of a Community Commercial designation and asserts that the Council considered and deliberated on the appropriate designation for Petitioner’s property. The Council decided it should be Neighborhood Commercial, under the terms of the adopted Development Regulations, FLUM and Zoning Map. The City also questions whether the Board should substitute its judgment for that of the City on this decision. City Response – Moyer, at 10-12.

Discussion:

Review and comparison of the Zoning Map and FLUM indicates that they are consistent with regard to the delineation of Neighborhood Commercial designation. As to the Community Commercial delineation, except for the apparent scrivener's error in the legend of the FLUM, these designations are also consistent. As such, the Zoning Map is consistent with, and implements the FLUM.

There is no evidence or argument provided to indicate that the standards and uses for the CC and CN designations in the Zoning Regulations do not implement the Zoning Map or Plan. Likewise, there is no inconsistency between the FLUM and Zoning Map and the text of the Plan and Zoning in what the Council actually adopted when it adopted Amendment 02-027 (Ordinance No. 51-02).

The question of whether any one property is better suited for a given urban designation than another is one the Board will not answer. As discussed in *WHIP III, supra*, if (following notice and the opportunity for public review and comment, and supported by the record) a city chooses a particular type of urban designation permitting certain urban uses within city-limits, the Board will defer to the City's judgment. It is within the discretion of local government under the GMA. However, as discussed and decided in Legal Issue 11, *supra*, the fatal flaw in the City's action was the lack of notice and opportunity for public participation regarding Amendment 02-027, the FLUM and the Zoning Map. Neither the Petitioner, nor any other member of the public, was accorded the opportunity to persuade or influence the City regarding its final action, and how it would affect their property interests.

The City's efforts leading up to its final adoption were clearly misleading, and noncompliant with the notice and public participation provisions of the GMA. Nonetheless, whether by accident or design, the City's actions maintained internal consistency as required by the GMA. Consequently, the Board cannot find that the adopted Ordinances are internally inconsistent. However, the City is advised that, following the remand, related to Legal Issue 11, the City must continue to maintain internal consistency and have the development regulations implement the Plan –and avoid scrivener's errors.

Conclusion – Internal Consistency and Plan Implementation

Petitioner Moyer has **failed to carry the burden** of demonstrating that the FLUM and Zoning Map and Amendment 02-027 are internally inconsistent with the comprehensive plan and zoning regulations as required by RCW 36.70A.070(preamble), .130 and .040.

4. GOALS [Legal Issues 1, 8 and 9]

The PHO set forth Legal Issues 1, 8 and 9 as follows:

1. *Whether designation of Petitioner’s property as “Neighborhood Commercial on the FLUM is consistent with and in compliance with the goals and requirements of the GMA to guide commercial development to locations where appropriate, as required by RCW 36.70A.010, .020(1) and .130(1)(b)?*

8. *Do the Ordinances violate GMA goals requiring urban in-filling, RCW 36.70A.020(1), RCW 36.70A.110(1) and encouraging economic development, RCW 36.70A.020(5), thereby rendering them noncompliant?*

9. *Has the City, in adopting the Ordinances, acted in an arbitrary, capricious and discriminatory manner to Petitioner in violation of Goal 6 (Property rights), RCW 36.70A.020(6)?*

Applicable Law Discussion

Petitioner challenges whether the City’s actions were guided by, and comply with, the following provisions of RCW 36.70A.020 – the Goals of the GMA:

(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 unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, 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.

The Board has already addressed the provisions of RCW 36.70A.010, *supra*, and will not discuss it further under this topic. Similarly, Petitioner Moyer does not specifically argue compliance with RCW 36.70A.110(1), but does argue about compliance with Goal 1.

Position of the parties:

To commence argument related to compliance with these GMA goals, Petitioner states, “Had appropriate consideration been given [to these goals], the City Council could not have taken the action it did in redesignating and down-zoning Petitioner’s property to Neighborhood Commercial consistent with these GMA goals.” Moyer PHB, at 21.

The entirety of Petitioner’s argument regarding compliance with Goals 1 and 5, is:

The substantial downzone of Petitioner’s property to less intensive commercial use, given its location, property characteristics, the availability and intensity of transportation and other urban facilities and services in the vicinity, vested status, and the market need for more intensive commercial uses outside the downtown zone violates GMA Goals (1) and (5). It does so by failing to encourage the appropriate intensity of urban commercial use at a site well-suited for such uses (and long designated for such uses both under King County and the City’s prior Comprehensive Plans), and thereby, does not comply with the urban growth, urban in-filling, and economic development goals of the GMA.

Moyer PHB, at 21.

Regarding Goal 6, Petitioner argues,

[T]he City violated the arbitrary and discriminatory prong of Goal 6 by redesignating and down-zoning Petitioner’s property from a commercial designation and use that the City had established in a Comprehensive Plan adopted less than a year before, without any justification or evidence in the record supporting the change, without warning, and in disregard of Planning Staff and Planning Commission recommendations. By down-zoning the Moyer property apparently at the behest of a vocal and organized group of citizens, where no studies, analysis or even information in the record justify the down-zone, the City failed to protect “a legally recognized right of a landowner from being singled out for unreasoned and ill-conceived action.” (Citing, *Point Roberts Registered Voters Association v. Whatcom County*, WWGMHB Case No. 00-2-0052, Final Decision and Order, (Apr. 6, 2001).

Moyer PHB, at 22. Moyer also argues that “not in my backyard” opposition is not an appropriate rationale for decisions. (Citing *Hapsmith, et al., v. City of Auburn (Hapsmith)*, CPSGMHB Consolidated Case No. 95-3-0075c, Finding of Noncompliance, (Feb. 13, 1997)). Petitioner then goes on to argue that an application for a proposal on the property is vested and must be considered under the law in place at the time the application was filed. Moyer PHB, at 22-24.

Both Petitioner Moyer and the Respondent City of Covington acknowledge that the Board does

not have jurisdiction to determine whether an application has vested. Moyer PHB, at 23; and City Response – Moyer, at 14-15. Both cite to prior CPSGMHB cases to this effect. The parties are correct, hence, the Board will not discuss the vesting issue further.

Regarding Goals 1 and 5, the City asserts that its action complies with Goal 1 since it permits commercial development in an urban area where facilities and services can be provided in an efficient manner. “[Goal 1] does not direct the types of development.” City Response – Moyer, at 11. Likewise, the City contends that allowing commercial development in the urban area is encouraging economic development as articulated in Goal 5. City Response – Moyer, at 12-13.

The City responds to the Goal 6 claim by asserting that its actions were not ill-conceived, unreasoned or ill considered, but instead supported by appropriate information and extensive discussion by the Council which is reflected in the record. Citing to Council minutes and transcripts included in the record.) City Response – Moyer, at 13-5. The City also notes, “[M]ere conclusory statements are insufficient to demonstrate a clearly erroneous action.” City Response – Moyer, at 13.

In reply, Petitioner again takes issue with the City over whether the property was redesignated and rezoned; again argues about the vested nature of an application and asserts the property is suited for more intensive commercial development. Moyer Reply, at 2-7.

Discussion:

As to Goals 1 and 5, the Board agrees with the City. Both Goals 1 and 5, encourage economic and urban growth where it is deemed appropriate according to the City’s Comprehensive Plan and where it can be efficiently accommodated. Petitioner does not identify how the City’s zoning of Petitioner’s property as Neighborhood Commercial is not guided by or thwarts Goals 1 and 5. Since the current Neighborhood Commercial designation allows commercial development within the City, albeit not as much as Petitioner would like, the City’s action is guided by these Goals. Covington is not stopping or discouraging economic development in an urban area where commercial development is appropriate.

Second, the City is presented with a choice according to its Comprehensive Plan and Zoning regulations of whether to designate appropriate areas, including Petitioner’s property, as Neighborhood Commercial or Community Commercial. Either designation could be appropriate. After hearing from affected property owners and the public, it is within the City’s discretion to choose an appropriate designation, so long as it is consistent with the Comprehensive Plan. Petitioner has **failed to carry the burden** of demonstrating that the City’s actions were clearly erroneous and not guided by Goals 1 and 5 of the GMA.

With regard to Goal 6, the Board concludes that the City did not act in an arbitrary and

discriminatory manner to Petitioner. This Board has said that in order to prevail on a challenge of discriminatory treatment, the petitioner must prove that the action taken by the city is both arbitrary and discriminatory. *See Shulman v. City of Bellevue*, CPSGHMB Case No. 95-3-0076, Final Decision and Order, (May 13, 1996).

Petitioner fails to show how the City's actions are arbitrary since the City has provided information indicating opposition to an increase in commercial use of the subject property and reasons why intense commercial use is inappropriate. City Response – Moyer, at 16; and Exhibits 4-9. Beyond this opposition, the City Council Meeting from December 10, 2002, indicates several other reasons for zoning Petitioner's property Neighborhood Commercial. For instance, at the start of that meeting City Manager, Andrew Dempsey, explained that Community Commercial designations should not be within a mile of each other, thus Council members had to choose between designating a property Community Commercial at 180th and 256th (where Petitioner's property is located) or 164th and 256th. Further at that same meeting, Councilmember Lanza expressed concern with traffic impacts on surrounding schools if the whole intersection is zoned Community Commercial. City Ex. 19. Though the discussions above provide very little indication as to what the basis was for the City Council's decision, there is no convincing proof that the decision was arbitrary or discriminatory.

Finally, Petitioner argues that City Council decisions based upon citizen complaints or opposition are arbitrary. Moyer PHB, at 22. Petitioner's reliance upon the *Hapsmith* case is misplaced. In *Hapsmith*, this Board concluded that citizen complaints and opposition to the siting of an essential public facility (EPF) cannot be a basis to support an action that precludes the siting of an EPF facility, as required by RCW 36.70A.200. The facts and choices in this case are clearly distinguishable from *Hapsmith* and the siting of an EPF. Therefore, with regard to Goal 6, the Board concludes that the City's actions were not arbitrary, since there is evidence (information, minutes and transcripts) that demonstrates the City's actions were not unreasoned or ill-conceived. Petitioner has **failed to carry the burden** of demonstrating that the City's action was not guided by Goal 6.

However, having reached this conclusion, the Board is mindful that the City woefully failed to comply with the notice and public participation provisions of the Act with regard to its decisions on this matter. On remand on that issue the City must avail itself of the information, comment and arguments provided by Petitioner and the public. Whether the City Council reaches the same conclusions after full notice and public hearing on the issue remains to be seen.

Conclusion - Goals

Petitioner Moyer has **failed to carry the burden** of demonstrating that the City's action was not guided by, and noncompliant with, Goals 1, 5 and 6 [RCW 36.70A.020(1), (5) and (6)].

B. Summary of Conclusions for Moyer

- The City’s adoption of Amendment 02-027 (Ordinance No. 51-02), the FLUM (Ordinance No. 55-02) and the Zoning Map (Ordinance No. 54-02) as they relate to the Community Commercial and Neighborhood Commercial amendments and designations was **clearly erroneous** and **does not to comply** with the notice and public participation requirements of RCW 36.70A.035, .130, and .140. These Ordinances will be **remanded** to the City with direction to provide notice reasonably calculated to provide notice to property owners and other affected and interested individuals; and to provide the opportunity for public review and comment on these or any other proposed modification to the Plan, maps or development regulations.
- Covington has adequately **complied** with the requirements of RCW 36.70A.106 (3) as to notifying OCD of its intent to amend its Plan, the FLUM, adopt a new zoning map, and adopt new development regulations.
- Petitioner Moyer has **failed to carry the burden** of demonstrating that the FLUM and Zoning Map and Amendment 02-027 are internally inconsistent with the comprehensive plan and zoning regulations, as required by RCW 36.70A.070(preamble), .130 and .040.
- Petitioner Moyer has **failed to carry the burden** of demonstrating that the City’s action regarding the FLUM and Zoning Map was not guided by, and noncompliant with, Goals 1, 5 and 6 [RCW 36.70A.020(1), (5) and (6)].

VII. SUMMARY OF BOARD CONCLUSIONS: WHIP II, WHIP III and MOYER

WHIP II:

- WHIP’s PFR 01-3-0026, challenging the adoption of Ordinance No. 24-01 is **dismissed with prejudice**.

WHIP III:

- Petitioners have **failed to carry their burden** in demonstrating that the FLUM and Zoning Map are inconsistent with the comprehensive plan and zoning regulations. Further, review of the Plan, FLUM and Zoning Map and regulations reveal that the “Commercial Regional” designation on the FLUM (Ordinance No. 55-02); the “Regional Commercial” designation on the Zoning Map (Ordinance No. 54-02) and the zoning regulations (Ordinance No. 42-02) are internally consistent. The City’s actions, related to Legal Issues 4, 5 and 8, **comply** with the internal consistency provisions of the GMA.

- The “Commercial Regional” designation on the FLUM (Ordinance No. 55-02); the “Regional Commercial” designation on the Zoning Map (Ordinance No. 54-02); the “Downtown Commercial” designation, [\[23\]](#) on Maps 4.1 (Ordinance No. 24-01) and the entirety of Map 4.2 are internally inconsistent and **do not comply** with the requirements of RCW 36.70A.070(preamble) and .130.
- Petitioner WHIP has **failed to carry the burden of proof** in demonstrating how the City of Covington’s actions were not guided by, or thwart, Goals 2, 3 and 10 of the GMA [RCW 36.70A.020(2), (3) and (10)].

Moyer:

- The City’s adoption of Amendment 02-027 (Ordinance No. 51-02), the FLUM (Ordinance No. 55-02) and the Zoning Map (Ordinance No. 54-02) as they relate to the Community Commercial and Neighborhood Commercial amendments and designations was **clearly erroneous** and **does not to comply** with the notice and public participation requirements of RCW 36.70A.035, .130, and .140. These Ordinances will be **remanded** to the City with direction to provide notice reasonably calculated to provide notice to property owners and other affected and interested individuals; and to provide the opportunity for public review and comment on any such proposed change.
- Covington has adequately **complied** with the requirements of RCW 36.70A.106 (3) as to notifying OCD of its intent to amend its Plan, the FLUM, adopt a new zoning map, and adopt new development regulations.
- Petitioner Moyer has **failed to carry the burden** of demonstrating that the FLUM and Zoning Map and Amendment 02-027 are internally inconsistent with the comprehensive plan and zoning regulations, as required by RCW 36.70A.070(preamble), .130 and .040.
- Petitioner Moyer has **failed to carry the burden** of demonstrating that the City’s action regarding the FLUM and Zoning Map was not guided by, and noncompliant with, Goals 1, 5 and 6 [RCW 36.70A.020(1), (5) and (6)].

VIII. INVALIDITY REQUESTS

Both Petitioners assert that the City of Covington’s actions substantially interfere with the goals of the Act and urge the Board to enter a determination of invalidity. *See* PHO, at 9 and 11 [*WHIP* Legal Issue 10 and *Moyer* Legal Issue 13]. [\[24\]](#)

RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation 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.
- (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.

The Board has found that Covington's inclusion of Map 4.1, the "Downtown Subarea Plan" in its Comprehensive Plan yields an internal inconsistency and is noncompliant with RCW 36.70A.070 (preamble). Further, the Board has found that Covington's notice and public participation process for the adoption of Plan Amendment 02-027 failed to comply with the requirements of RCW 36.70A.035, .130 and .140. This Order will **remand** these issues back to the City for remedial action. Consequently, pursuant to RCW 36.70A.302, the Board now considers whether to enter a determination of invalidity on either or both of the actions.

WHIP: Map 4.1 – Downtown Subarea Plan:

The Board has found the incorporation of Map 4.1 into the City's Comprehensive Plan **noncompliant** with RCW 36.70A.070(preamble). The designations found on the FLUM and zoning map govern land uses within the downtown area, not those found on Map 4.1. However, the confusion created by inclusion of Map 4.1 in the Plan is easily remedied. Consequently, the Board **declines to enter a Determination of Invalidity** regarding Map 4.1 – Downtown Subarea Plan.

Moyer: Notice and Public Participation:

The Board has found the City's notice and public participation process for Plan Amendment 02-027, the FLUM and Zoning Map was **clearly erroneous** and **noncompliant** with RCW

36.70A.035, .130 and 140. The question now, is whether this finding of noncompliance substantially interferes with the fulfillment of the Goals of the Act. RCW 36.70A.020(11) deals directly and specifically with the importance of public participation. It provides:

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

In light of the City's utter failure to involve its citizens for approximately four months preceding its adoptions of Ordinance Nos. 51-02, 54-02 and 55-02, as discussed in this FDO and accompanying Findings of Fact, the Board concludes that the continued validity of the City's Ordinances **substantially interfered** with the fulfillment of Goal 11. The City did not encourage the involvement of its citizens in the planning process pertaining to these Ordinances as they relate to the Neighborhood Commercial and Community Commercial designations and provisions. Therefore, the Board enters a **Determination of Invalidity** for these enactments as they relate to the Neighborhood Commercial and Community Commercial designations and provisions.

IX. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

WHIP II:

- WHIP's PFR 01-3-0026, challenging the adoption of Ordinance No. 24-01 is **dismissed with prejudice**. This case is closed.

WHIP III:

- The "Commercial Regional" designation on the FLUM (Ordinance No. 55/02); the "Regional Commercial" designation on the Zoning Map (Ordinance No. 54/02); the "Downtown Commercial" designation, on Map 4.1 (Ordinance No. 24-01) and the entirety of Map 4.2 are **clearly erroneous**, internally inconsistent and **do not comply** with the internal consistency requirements of RCW 36.70A.070(preamble) and .130. The Board hereby **remands** Ordinance Nos. 55/02, 54/02 and 24-01, with direction to the City of Covington to take the necessary legislative actions to remove the internal inconsistencies between these maps.

Moyer:

- The City's adoptions of Amendment 02-027 (Ordinance No. 51-02), the FLUM (Ordinance No. 55-02) and the Zoning Map (Ordinance No. 54-02) as they relate to the Community Commercial and Neighborhood Commercial amendments and designations were **clearly erroneous** and **do not comply** with the notice and public participation requirements of RCW 36.70A.035, .130, and .140. The Board hereby **remands** Ordinance Nos. 51-02, 54-02 and 55-02, as noted *supra*, with direction to the City of Covington to provide notice reasonably calculated to provide notice to property owners and other affected and interested individuals and provide the opportunity for public review and comment on these or any other proposed changes.
- Additionally, the Board has determined that the continued validity of the City's Ordinances [*i.e.*, Amendment 02-027 (Ordinance No. 51-02), the FLUM (Ordinance No. 55-02) and the Zoning Map (Ordinance No. 54-02)] as they relate to the Community Commercial and Neighborhood Commercial amendments **substantially interferes** with the fulfillment of Goal 11. Therefore, the Board has entered a **Determination of Invalidity** for these enactments as they relate to the Neighborhood Commercial and Community Commercial designations and provisions.

WHIP III and Moyer:

The Board **remands** Ordinance Nos. 24-01, 51-02, 54-02, and 55-02 to the City of Covington with the following directions:

1. By no later than **January 22, 2004**, the City shall take appropriate legislative action to bring the City's GMA Comprehensive Plan, FLUM, Zoning Map and zoning regulations into compliance with the goals and requirements of the GMA, as interpreted and set forth in this Final Decision and Order (**FDO**).
2. By no later than **January 29, 2004**, 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 interpreted and set forth in this FDO. The SATC shall explain and distinguish the actions taken to comply with the *WHIP* remand and the *Moyer* remand. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on Petitioners *WHIP* and *Moyer*.
3. By no later than **February 9, 2004**, the Petitioners may file with the Board

an original and four copies of Comments on the City's SATC. Petitioners shall simultaneously serve a copy of their Comments on the City's SATC on the City.

4. By no later than **February 12, 2004**, 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. February 15, 2004** at the Board's offices. With the consent of the parties, the compliance hearing may be conducted telephonically.

If the City takes legislative compliance actions prior to the January 22, 2004 deadline set forth in section 1 of this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 31st day of July 2003.

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.

APPENDIX A

Findings of Fact

1. On September 25, 2001, the newly incorporated City of Covington adopted its GMA Comprehensive Plan. *See* Ordinance No. 24-01.
2. As part of its September 25, 2001 enactment of its GMA Comprehensive Plan, the City included Map 4.1 [Downtown Subarea Plan map] and Map 4.2 [Downtown Future Land Use map]. *See* Ordinance No. 24-01.
3. Map 4.1, the Downtown Subarea Plan map, designates the area challenged by WHIP as “Downtown Commercial.” *See* Ordinance No. 24-01; Plan, at 4-3.
4. Map 4.2, the Downtown Future Land Use map, contains an uncertain designation for the area challenged by WHIP, but includes the note “Refer to Future Land Use Map” on its face. *See* Ordinance No. 24-01; Plan, at 4-7.
5. The City’s “Future Land Use Map,” adopted December 17, 2002, by Ordinance No. 55/02, designates the area challenged by WHIP as “Commercial Regional.” *See* Ordinance No. 55/02; Plan, at 2-13.
6. The City’s “Zoning Map,” adopted December 17, 2002, by Ordinance No. 54/02, designates the area challenged by WHIP as “Regional Commercial.” *See* Ordinance No. 54/02; City of Covington Zoning Map dated 12/17/02.
7. Petitioner Moyer’s property was designated as Neighborhood Commercial on the City of Covington’s Interim Future Land Use map. *See* Plan, at 2-13 – “Interim” Future Land Use map, dated September 25, 2001.
8. The City published notice on July 13, 2002 and held a public hearing on July 23, 2002 regarding Plan Amendment 02-027. The notice provided:

The purpose of the public hearing is to receive comments on the following:

...

(g) Amendment CPA 02-027 – Amend the Land Use Element to *rename the existing Neighborhood Commercial designation on the Interim Future Land Use Map legend to Community Commercial and add a new Neighborhood Commercial designation for future use.*

See Moyer Ex. 20, HOM Ex. 9M.

9. The same published notice also indicated that there would be a public hearing on the new zoning code and zoning map on August 13, 2002. See HOM Ex. 9M, Moyer Ex. 23.
10. The staff reports accompanying Amendment 02-027 at the July 23, 2002 public hearing were consistent with the notice. Attached to the text amendment were maps with the new Community Commercial designation shown and a notation on the legend next to the new “Neighborhood Commercial” designation indicating “None Currently Designated.” See Moyer Ex. 22, City Ex. 14.
11. The public hearing on Amendment 02-027, the FLUM, new zoning code and zoning map was closed following the August 13, 2002 City Council meeting. Moyer Ex. 24, HOM testimony.
12. The City’s November 9, 2002 SEPA notice indicated that “The existing ‘Neighborhood Commercial’ land use designation on the Interim Land Use Map legend would be renamed to ‘Community Commercial.’ A new ‘Neighborhood Commercial’ land use designation is reserved for future use.” HOM Ex. 9S
13. On December 17, 2002, the City Council adopted Ordinance Nos. 42-02, 51-02, 54-02 and 55-02, without holding an additional public hearing to hear testimony on changes that occurred between August 13, 2002 and their adoption. See Ordinances, and meeting minutes.
14. Ordinance No. 51-02 adopted only the text amendments to the Plan, not the map amendments attached and described in the notice. See Ordinance No. 51-02
15. Ordinance No. 55-02 adopted the FLUM, designating both Community Commercial and Neighborhood Commercial areas. Petitioner’s property was not indicated as Community Commercial. See Ordinance No. 55-02
16. Ordinance No. 54-02 adopted the Zoning Map, designating both Community Commercial and Neighborhood Commercial areas. Petitioner’s property was not indicated as Community Commercial. See Ordinance No. 54-02

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- [1] The same Petitioners were listed in the new PFR as those that filed the previous PFR.
- [2] Covington's Index was submitted on January 9, 2003, prior to the Order on Coordination and Consolidation. This Index reflects the materials considered by the Covington Council for its December 19, 2002 actions.
- [3] Legal Issue 9 states, "Did the City fail to comply with the requirement of RCW 36.70A.070(6), which requires consistency between the land use and transportation element, when it adopted the Regional Commercial designation on the FLUM, because road access is minimal? [*Intended to cover Issue 3.6 from the 2/10/03 PFR.*]"
- [4] At the 2/11/03 conference, WHIP indicated that in relation to issue 3.1, it was withdrawing its challenges regarding drainage, housing analysis, capital facilities, utilities and open space. WHIP also withdrew its challenges relating to public participation, SEPA, and inclusion of a constraints map.
- [5] RCW 36.70A.070 sets for the "mandatory elements" that must be included in each jurisdiction's GMA comprehensive plan. The mandatory elements are: land use, housing, capital facilities, utilities, rural [for counties only], transportation, economic development* and park and recreation.* [* these two elements are only required if funding is provided prior to the December 1, 2004 review and update.]
- [6] LNP 1.6 provides: Covington shall designate a Downtown Subarea, within which employment, multifamily residential, mixed-use, infrastructure and transit improvements shall be concentrated. Plan, at 2-20.
- [7] The Downtown Element, and Maps 4.1 and 4.2, were adopted by Ordinance No. 24-01, on September 25, 2001, the date the City initially adopted its GMA Comprehensive Plan. See Ordinance No. 24-01 and Plan, at Chapter 4, and 4-3 and 4-7.
- [8] The Downtown Element enumerates some 32 goals and policies to guide development within the downtown area. The Board notes that three policies specifically deal with Regional Commercial uses in the downtown area – DTP 2.0 through DTP 2.2. Plan, at 4-9.
- [9] At WHIP PHB, at 10, WHIP references DTP 2.2, which says, "Special emphasis will be taken to minimize traffic impacts in regional commercial areas." However, this citation, and the following conclusory statement, "The City is now proposing a transportation system expansion," do not appear to go to any WHIP argument regarding internal inconsistency.
- [10] The Board suggests that the City review more closely the Downtown Element's Goals and Policies for references to the downtown subarea. This term is used in DTG 3.0, DTP 3.1, DTG 4.0, DTG 6.0 and DTP 6.2.
- [11] The Board notes that another property, not at issue in this matter, is designated on the FLUM and Zoning Map as Commercial Regional and Regional Commercial; yet it is indicated as some type of residential or mixed use on Map 4.1.
- [12] The area north of Kent-Kangley that was designated as Regional Commercial is at issue in this case. Further reference to the Regional Commercial designation refers to this location.
- [13] "The goals, policies and strategies of this Plan have been developed to reflect the Vision Statement and Vision

Plan articulated by Covington residents. . . “Plan, at 2-2.

[14] For example, the Act’s requirements for transportation concurrency (RCW 36.70A.070(6)) and critical areas protection (RCW 36.70A.060(2)), are very specific and directive. The manner in which concurrency and critical areas provisions limit local discretion were examined in *Bennett v. Bellevue*, CPSGMHB Case No. 01-3-0022c, FDO, Apr. 8, 2002, and *Tulalip v. Snohomish*, CPSGMHB Case No. 96-3-0029, FDO, Jan. 8, 1997, respectively.

[15] du/ac means dwelling units per acre.

[16] In an early case, the Board examined the nature of sprawl, major negative consequences of sprawl and GMA tools to combat sprawl. *Bremerton, et al., v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, FDO, Oct. 9, 1995, at 25-32.

[17] The Board has consistently articulated this principle in a series of city cases: *Litowitz v. Federal Way*, CPSGMHB Case No. 96-3-0005, FDO, July 22, 1996; *Hensley v. Woodinville*, CPSGMHB Case No. 96-3-0031, FDO, Feb. 25, 1997; *LMI/Chevron v. Woodway*, CPSGMHB Case No. 98-3-0012, FDO, Jan. 8, 1999.

[18] The Board notes that another property, not at issue in this matter, is designated on the FLUM and Zoning Map as Commercial Regional and Regional Commercial, yet this property is also indicated as some type of residential or mixed use on Map 4.1.

[19] The City of Covington publishes its notice in the South County Journal (now the King County Journal).

[20] The Board notes that other commercial designations apply within the downtown subarea boundary. However, the only commercial designations beyond this area are Community Commercial and Neighborhood Commercial.

[21] This Legal Issue was **abandoned** by Petitioner Moyer.

[22] However, the City acknowledges that the FLUM does not include a Community Commercial notation [red color] in the legend, like the Zoning Map. The City contends this oversight is a scrivener’s error. City Response – Moyer, at 9.

[23] The Board notes that another property, not at issue in this matter, is designated on the FLUM and Zoning Map as Commercial Regional and Regional Commercial, yet this property is also indicated as some type of residential or mixed use on Map 4.1.

[24] WHIP’s request for invalidity – Legal Issue 10:

If the Board finds the City has not complied with the goals or requirements of the Act in addressing the issues 1-9 supra, does such noncompliance substantially interfere with the fulfillment of the goals of the Act,^[24] *and merit a determination of invalidity? [Intended to cover Issue 3.10 from the 12/3/01 PFR and Issue 3.7 from the 2/10/03 PFR.]*

Moyer’s request for invalidity – Legal Issue 13:

If the Board finds the City has not complied with the goals or requirements of the Act in addressing Moyer Legal Issues 1-12 supra, does such noncompliance substantially interfere with the fulfillment of the goals of the Act, and merit a determination of invalidity?