

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

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DAN OLSEN, BONNIE OLSEN,	)	<b>Case No. 03-3-0003</b>
ALLAN McFADDEN and KAREN	)	
McFADDEN,	)	<i>(Olsen)</i>
	)	
Petitioners,	)	
	)	
v.	)	
	)	<b>ORDER ON MOTIONS</b>
CITY OF KENMORE,	)	
	)	
Respondent.	)	

**I. Background**

On January 24, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Dan and Bonnie Olsen and Allan and Karen McFadden (**Petitioners** or **Olsen**). The matter was assigned CPSGMHB Case No. 03-3-0003, and is hereafter referred to as *Olsen v. City of Kenmore*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioners challenge the City of Kenmore’s (**Respondent** or **Kenmore** or **City**) adoption of Ordinance No. 02-0157 amending its development regulations. The basis for the challenge is noncompliance with provisions of the Growth Management Act (**GMA** or **Act**).

On January 30, 2003, the Board issued a “Notice of Hearing” in the above-captioned case. The Order set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On February 24, 2003, the Board received “Respondent’s Index to Record” (**Index**). The Board also received an “Amended Petition for Review” from Petitioners. The amended PFR merely corrected internal page references to the Plan. The Board accepted the amended PFR.

On February 24, 2003, the Board held the PHC and issued its “Prehearing Order” (**PHO**) establishing the final schedule, including deadlines for motions, and framing the Legal Issues.

On March 4, 2003, the Board received the following “Core Documents” from the City: 1)

Kenmore’s GMA Comprehensive Plan; and 2) Ordinance No. 98-0026 and appropriate sections of King County Code [KCC 21A.41.100].

On March 20, 2003, the Board received a “Motion to Supplement the Record” from Petitioners (**Olsen Motion – Supp.**). Attached were eight potential exhibits.

On March 21, 2003, the Board received “City of Kenmore’s Motion to Dismiss for Lack of Subject Matter Jurisdiction” (**City Motion – Dismiss**). Attached was one exhibit.

On March 27, 2003, the Board received “City of Kenmore’s Memorandum in Opposition to Petitioners’ Motion to Supplement the Record” (**City Response – Supp.**), and Petitioners’ “Rebuttal of Motion to Dismiss” (**Olsen Response – Dismiss**).

On April 2, 2003, the Board received Petitioners’ “Response to Memorandum in Opposition to Motion to Supplement the Record” (**Olsen Reply – Supp.**). The City did not file an optional reply brief on the motion to dismiss.

As stated in the PHO, Section IV, at 4, the Board did not schedule or hold a hearing on the motions.

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

Kenmore explains that Ordinance No. 02-0157 simply amended its zoning code to add a new subsection “which merely establishes a purely procedural mechanism by which the holder of an issued and existing CSDP [commercial site development permit] may request an extension of time limits specified in the CSDP for filing other permit applications or taking other specified actions.” **City Motion – Dismiss**, at 2.

The City contends that this timetable extension process – a ministerial process - is not a development regulation because it does not control the use of land, and therefore, it is not subject to Board review. **City Motion – Dismiss**, at 3 - 4. Kenmore suggests that a “purely ministerial ordinance, such as [Ordinance No. 02-0157]” is analogous to a transportation impact fee ordinance, which the Court of Appeals has held is not a development regulation because it does not control the use of land. *Citing: New Castle Investments v. City of LaCenter*, 98 Wash. App. 224, 237-38 (1999). Likewise, the City concludes that Ordinance No. 02-0157 does not control land use.

[Ordinance No. 02-0157] merely provides procedures for the Director of Community Development to follow in exercising the Director’s inherent ministerial authority to extend the time limits for previously granted permits. Both the authority to issue the

permit and the authority to grant the extensions existed prior to the enactment of the ordinance.

City Motion – Dismiss, at 4.

In response, Petitioners distinguish transportation impact fees, adopted pursuant to RCW 82.02.050-100, from the challenged development regulation amendment and counter that Ordinance No. 02-0157 is a development regulation that controls the use of land. Petitioner argues that Ordinance No. 02-0157 is a development regulation because “this ordinance allows the city to say that a permit approved under the GMA is still in effect. This constitutes a land use decision.” Petitioners continue, “[The Ordinance] is an ‘official control’ placed on the City on the amount of time allotted to developments for complying with the ordinance.” Olsen Response – Dismiss, at 2. Petitioners conclude that the Ordinance is within the subject matter jurisdiction for Board review. Olsen Response – Dismiss, at 3.

### Applicable Law and Discussion

Matters that are subject to Board review are set forth in RCW 36.70A.280, which provides in relevant part:

(1) A growth management hearings board shall hear and determine *only* those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in *compliance with the requirements of this chapter*, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. (Emphasis added.)

The Board’s jurisdiction is generally limited to determining compliance with the GMA. This Board has no authority or jurisdiction to review land use project permit decisions of a local government. In short, this Board has stated that its jurisdiction generally extends to review of comprehensive plans and development regulations adopted, or amended, pursuant to Chapter 36.70A RCW.

Ordinance No. 02-0157 provides, in relevant part:

KCC 21A.41.100 Limitation of permit approval

A. A commercial site development permit approved without a phasing plan *shall be null and void* if the applicant fails to file a complete building permit application

(s) for all buildings within three years of the approval date, or by a date specified by the Director, and fails to have all building permits issued within four years of the commercial site development permit approval date; or

B. A commercial site development permit approved with a phasing plan *shall be null and void* if the applicant fails to meet the conditions and time schedules in the approved phasing plan.

C. The Director *may* grant one or more extensions of the time limits set forth in subsection A and B above, each of a duration determined by the Director, if the following findings are made:

- a. Initial building permits have not been submitted or the project has not been completed due to causes beyond the applicant's control, such as litigation, acts of God, unanticipated site conditions or adverse market conditions;
- b. The applicant has shown a good faith effort to commence or complete the project within the time previously allotted;
- c. Conditions identified as part of SEPA or other permit processes remain appropriate to address project impacts. The Director has the authority to establish additional conditions designed to address incremental changes in project impacts arising or occurring as a result of any extension of time; and
- d. The period of the extension granted is reasonable in light of the conditions warranting the extension and the incremental changes, if any, in project impacts.

Ordinance No. 02-0157, Section 1 (emphasis supplied).

Here the question posed is whether Ordinance No. 02-0157 is a development regulation that fits within the Board's review parameters. As Petitioners correctly note, the GMA defines "Development regulation" as:

*The controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application as defined in RCW 36.70B.020 even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.*

RCW 36.70A.030(7), (emphasis supplied).

The City does not dispute that Ordinance No. 02-0157 amends its zoning code, which is clearly a development regulation per the GMA definition *supra*. Instead, Kenmore contends that these “purely ministerial” provisions of its zoning code do not control the use of land and therefore are not development regulations which the Board can review.

Petitioners disagree, and argue that the extensions “allow the city to say that a permit approved under the GMA is *still in effect*” and that the extensions govern “the *amount of time* allotted to developments for complying with the ordinance.” Olsen Response – Dismiss, at 2 (emphasis supplied). In other words, the extensions effect the viable lifetime of the issued permit. The Board agrees with Petitioners. Controls placed on development or land use activities include: *what* uses are permitted; *where* the uses will be permitted; *how* development of the permitted uses is to proceed; and *when* development is expected to occur.

The City’s code recognizes this timing component of land use regulation. It provides that approved commercial site development permits “*shall be null and void*” if the applicant fails to meet certain time schedules. KCC 21A.41.100(A) and (B), *supra*.

The challenged provision [KCC 21A.41.100(C)] allows <sup>[1]</sup> the Director to grant one or more extensions to the permit timeframes, if certain findings are made. KCC 21A.41.100 (C), *supra*. Once the time period has run, and absent an extension granted by the Director, an applicant that fails to undertake the required actions within the set timeframes possesses a permit that is “**null and void.**” Therefore, by operation of law, the previously approved development permit is effectively terminated. Consequently, specified timeframes for action, and extensions of such timeframes, are “controls placed on development or land use activity.” **The Board holds that a development regulation that establishes the time period for which a permit is valid does, in effect, control development and the use of land. And the same is true of amendments that alter previously established timeframes. Such timing regulations are “development regulations” under the GMA and are thus subject to Board review.**

Ordinance No. 02-0157 authorizes the City’s [Planning] Director to grant extensions to time schedules or timeframes for existing permits. The power to grant extensions affects the time period for which permits are valid, thereby controlling development and the use of land. Therefore, the timing and extension provisions of Ordinance No. 02-0157 are development regulations, pursuant to the GMA, and are subject to Board review. The City’s motion to dismiss for lack of subject matter jurisdiction is **denied**.

### Conclusion

Development regulations that establish, or affect the time period for which permits are valid, control development and the use of land. Such timing regulations are “development regulations” under the GMA subject to Board review. Ordinance No. 02-0157 authorizes the City’s [Planning] Director to grant extensions to time schedules or timeframes for existing permits. The power to grant extensions affects the time period for which permits are valid, thereby controlling development and the use of land. Therefore, the timing and extension provisions of Ordinance No. 02-0157 are development regulations, pursuant to the GMA, and are subject to Board review. The City’s motion to dismiss for lack of subject matter jurisdiction is **denied**.

### **III. DISCUSSION OF MOTION TO SUPPLEMENT THE RECORD**

RCW 36.70A.290(4) provides:

The board shall base its decision on the record developed by the city . . . and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

Petitioners ask the Board to supplement the record with eight proposed exhibits. Olsen Motion – Supp., Attachments 1-8. Many of the proposed exhibits involve correspondence that relates to the Lake Pointe Project Commercial Site Development Permit timetable or its extension; others include suggested language for amending the City’s code. The City objects to including any of the proposed exhibits, arguing that Petitioners failed to provide any reasons why the exhibits should be included, and argued further that such exhibits are not necessary nor could they be of substantial assistance to the Board in reaching its decision. City Response – Supp., at 1-6. The City contends:

[The eight] documents show only that extensions under the old code provisions were requested and granted, and that a new eighteen-month extension was also granted . . . under the newly enacted City ordinance. The letters have no bearing upon the issues raised on appeal, which are apparently directed to the fairness of the underlying ordinance which affected the ability of the development director to grant extensions of time in which to commence construction under a previously issued building permit. The communications proffered have no bearing on the issue of whether the underlying ordinance is in fact fair and in compliance with the various authorities cited by Olsen in its statement of issues.

City Response – Supp., at 6.

Petitioners reply that, pursuant to the Board’s PHO, the proposed exhibits were attached to their motion and the motion indicated these documents “should be of assistance to the Growth Management Hearings Board in making its decision.” Olsen Reply – Supp., at 1, and Olsen Motion – Supp., at 1. Additionally, Petitioner notes that some of the correspondence contains draft language authorizing the Director to extend the time period for permits. Petitioner also contends that it is important for the Board to know the full context surrounding adoption of the amendatory ordinance. Olsen Reply – Supp., at 2-3. The Board agrees with Petitioner.

The Board has determined that the eight proposed exhibits submitted by Petitioners may be necessary or of substantial assistance to the Board in reaching its decision. The eight exhibits are **admitted** to the record. These exhibits, if referenced and cited in briefing, will be accorded the weight they merit.

The parties are cautioned that **each exhibit submitted with briefing** <sup>[2]</sup> **must be relevant** to the issues before the Board. An exhibit listed on the Index as a part of the record below, or its admission as a supplemental exhibit, does not necessarily mean that a specific exhibit is relevant to the legal issues, as set forth in the PHO.

**The items included in the Record, as discussed *supra* and noted in the summary table below, have been determined to be necessary or may be of substantial assistance to the Board in reaching its decision.**

In the summary tables below:

- “*Admitted*” means the proposed exhibit becomes a supplemental exhibit. Each new exhibit is assigned an Exhibit No.

<b>Proposed Exhibit: Documents</b>	<b>Ruling – Exhibit No.</b>
1. Memo from Jack McCullough to Mike Kenyon dated 7/13/01	<i>Admitted</i> – Supp. Ex. #1
2. Memo from Jack McCullough to Mike Kenyon dated 8/2/01	<i>Admitted</i> – Supp. Ex. #2
3. Letter from Mike Kenyon to John C. McCullough dated 8/8/01	<i>Admitted</i> – Supp. Ex. #3
4. Memo from Jack McCullough to Bob Sokol and Mike Kenyon dated 1/4/02	<i>Admitted</i> – Supp. Ex. #4
5. Letter from Jack McCullough to Bob Sokol and Mike Kenyon dated 3/15/01	<i>Admitted</i> – Supp. Ex. #5

6. Letter from Jack McCullough to Bob Sokol dated 5/30/02	<i>Admitted</i> – Supp. Ex. #6
7. Letter from Bob Sokol to Jack McCullough dated 6/26/02	<i>Admitted</i> – Supp. Ex. #7
8. Letter from Bob Sokol to Jack McCullough dated 1/30/03	<i>Admitted</i> – Supp. Ex. #8

The Record for CPSGMHB Case No. 03-3-0003 consists of the items listed in the City of Kenmore's Index; and the items included in the Record as noted in the Summary Table *supra*. These documents constitute the Record for this proceeding. Unless otherwise provided for, exhibits shall be filed with prehearing briefs. Only relevant and referenced exhibits need to be attached to briefs. Each exhibit filed with the Board shall reference the document numbers as indicated in the Index or as specified above. *PHO, Section IX.*

#### **IV. ORDER**

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

- The City's motion to dismiss for lack of subject matter jurisdiction is **denied**.
- Petitioners' motion to supplement the record is **granted**, as set forth *supra*.

So ORDERED this 7<sup>th</sup> day of April 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member

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Lois H. North  
Board Member

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Joseph W. Tovar, AICP  
Board Member

Note: The Order on the motion to dismiss 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. Orders on supplementing the record are not subject to a motion to reconsider.

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[1] The Board notes that Black's Law Dictionary, Seventh Edition, at 1011, defines 'ministerial' as: "Of or relating to an act that involves obedience to instructions or laws instead of discretion, judgement or skill." In the Ordinance, the Director's authority to grant extensions is permissive (*may*), which implies discretion, not mandatory (*shall*).

[2] Note that Core Documents have been provided to the Board and may be referenced in briefing with attached *excerpts* from such documents. Likewise, exhibits admitted as supplemental exhibits in this Order, need not be attached to briefing. However, such exhibits must be referenced by the assigned exhibit number.