

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

JOCELYNNE FALLGATTER and JEFF)	Case No. 05-3-0035
KIRKMAN,)	
)	(Fallgatter IV)
Petitioners,)	
)	
v.)	
)	
CITY OF SULTAN,)	ORDER of DISMISSAL
)	
Respondent.)	
)	

I. PROCEDURAL HISTORY

On June 27, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jocelynn Fallgatter and Jeff Kirkman (**Petitioners** or **Fallgatter**). The matter was assigned Case No. 05-3-0035, and is hereafter referred to as *Fallgatter IV v. City of Sultan*. Petitioners challenge the City of Sultan’s adoption of Resolution R05-08, adopting a water and sewer availability procedure. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On July 1, 2005, the Board issued a “Notice of Hearing” setting July 28, 2005, as the date for a prehearing conference (**PHC**). On that date, the Board held the PHC, and issued its prehearing order (**PHO**) establishing the final schedule and Legal Issues to be decided in this matter.

At the PHC, the City of Sultan submitted a “Motion to Dismiss”. The City sought to dismiss the PFR contending that the Petitioners challenge was untimely, or alternatively, that the Board does not have subject matter jurisdiction to review the challenged enactment – R05-08. The Board received a timely response brief from Petitioners and a timely reply brief from the City.

On September 21, 2005, the Board issued an “Order Denying Dispositive Motion” (**9/21/05 Order**). In short, the Board concluded that the PFR was timely filed and that the Board had jurisdiction to review R05-08, adopting a development regulation. *See* 9/21/05 Order, at 2-4.

On September 30, 2005, the Board received Petitioners' "Prehearing Brief" (**Fallgatter PHB**), with 8 attached exhibits.

On October 10, 2005, the Board received "City of Sultan's Motion to Dismiss" (**City Response - Dismiss**), with one attached exhibit. The City's motion indicates that, via the adoption of Resolution R05-24, the City has repealed Resolution R05-08. Consequently, the City asserts, Petitioners' challenge is now moot. City Response - Dismiss, at 1-2.

On October 18, 2005, the Board received Petitioners' "Response to City of Sultan's Motion to Dismiss" (**Fallgatter Reply**), with one attached exhibit.

II. DISCUSSION

By Resolution R 05-08, the City of Sultan adopted a Water and Sewer Availability Procedure for monitoring and establishing priorities for allocating its limited availability for sewer and water connections. See R 05-08 and attached Water/Sewer Availability Procedure.

Petitioners challenged this procedure as being noncompliant with various provisions of the GMA. In its initial motion to dismiss, the City asserted that the PFR was untimely and that the adopted procedure was not a development regulation subject to Board review. The Board's 9/21/05 Order resolved these questions, basically determining that the PFR was timely filed, and that the Water/Sewer Availability Procedures, adopted by R 05-08, were development regulations subject to review by the Board. See 9/21/05 Order.

Petitioners then filed a timely prehearing brief, *supra*. In response, the City filed a motion to dismiss the proceeding because it had adopted Resolution R 05-24, which repealed R 05-08 – the action subject to the challenge. Section 1 of Resolution R 05-24 provides, "Resolution 05-08 is hereby repealed." As a result of this action, the City argues that the present appeal is moot. City Response – Dismiss, at 1-2.

In reply, Petitioners contend that the City has an "affirmative duty to enact development regulations that implement the comprehensive plan. This affirmative duty is not repealed by repealing Resolution 05-08." Fallgatter Reply, at 2. Further, Petitioners assert that the repeal of Resolution 05-08 does not render the proceedings moot, since the City has not replaced the repealed development regulations with regulations that implement the City's Plan. *Id.* at 2-3. The thrust of Petitioners argument on this last point is that the City's Plan anticipates a phased approach to providing urban services (*Citing* Ex. 2; Sultan Comprehensive Plan provisions 2.1, 2.4, 2.6, 2.10, 2.11 2.14 and 3), and given the repeal of R 05-08, the City has not adopted regulations to effectuate these Plan goals and policies. *Id.* at 10-19.

The Board agrees with the City. Resolution 05-24 explicitly repealed Resolution 05-08. The development regulations challenged by these Petitioners have been repealed. There

is nothing left for the Board to review for compliance with the GMA, and there is no relief the Board can provide. Consequently, the Board dismisses Petitioners' challenge to the prior development regulation repealed by Resolution 05-24.

The Board notes that the City does have an affirmative duty to implement its comprehensive plan. The GMA is clear – the City must have development regulations and make capital budget decisions that are consistent with, and implement, its Plan. *See* RCW 36.70A.040(3)(d), .120 and .130(1)(d). It is also clear that *over the time horizon of its Plan*, the City of Sultan has a duty to *ultimately* provide urban services, including water and sewer services, for those urban areas within the “existing UGA.”¹ Nonetheless, the City has discretion as to how and when [within the Plan's time horizon] it chooses to provide the required urban services.

III. ORDER

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

- The City of Sultan's Motion to Dismiss is **granted**. Resolution 05-24 repealed Resolution 05-08, the subject of Petitioners challenge. Therefore, Petitioners appeal is moot.
- Petitioners' petition for review CPSGMHB Case No. 05-3-0035 *Fallgatter IV v. City of Sultan* is **dismissed with prejudice**.
- The hearing on the merits scheduled for November 3, 2005 is **cancelled** and this case is **closed**.

So ORDERED this 27th day of October 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

¹ The *only* UGA the City of Sultan has, at present, is the UGA designated by Snohomish County, *i.e.* the “existing UGA” – yellow delineation on Ex. 6. The UGA *recommended* by the City Council, has no force and effect, unless and until the County determines that the UGA needs to be expanded and includes the proposed additions in the City's UGA as urban areas. Until that time, these lands remain rural.

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300.²

² Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)