

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

PIRIE SECOND FAMILY LIMITED))
PARTNERSHIP, LP)	Case No. 06-3-0029
)	
Petitioner,)	(Pirie)
)	
v.)	
)	
CITY OF LYNNWOOD,)	ORDER ON DISPOSITIVE
)	MOTION
Respondent.)	
)	

I. PROCEDURAL HISTORY

On September 8, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Pirie Second Family Limited Partnership (**Petitioner** or **Pirie**). The matter was assigned Case No. 06-3-0029, and is hereafter referred to as *Pirie v. City of Lynnwood*. Petitioner challenges the City of Lynnwood’s (**Respondent, City** or **Lynnwood**) adoption of various Ordinances and Resolutions allegedly implementing the City Center Subarea Plan. The basis for the challenge is noncompliance with several provisions of the Growth Management Act (**GMA** or **Act**).

On September 12, 2006, the Board issued a “Notice of Hearing;” on October 16, 2006, pursuant to a request of the parties, the Board issued an “Order Granting a 30-day Settlement Extension.” Settlement discussions were unsuccessful and the matter continued according to the revised case schedule, as set forth in the Extension Order.

On November 16, 2006, the Board held the Prehearing Conference; and on November 20, 2006, the Board issued its Prehearing Order (**PHO**) establishing the final schedule and Legal Issues to be decided in this matter.

On November 29, 2006, the Board received “City’s Motion to Dismiss” (**Lynnwood Motion**). The City moved to dismiss three of the six challenged Ordinances and the two challenged Resolutions.

On December 6, 2006, the Board received “Petitioner’s Response to City’s Motion to Dismiss” (**Pirie Response**), with 21 attached exhibits.

The City of Lynnwood did not file a reply brief. All briefing was timely filed. The Board did not hold a hearing on the City's Motion to Dismiss.

II. DISCUSSION OF DISPOSITIVE MOTION

In the Petition for Review (PFR), Petitioner challenged the following Lynnwood Ordinances and Resolutions:

- Ordinance No. 2625 – Amending the City's Zoning Map [City Center Subarea]
- **Ordinance No. 2626 – Authorizing Agreements for the Development of Real Property and Establishing Processing Requirements**
- Ordinance No. 2627 – Establishing a Street Grid [City Center Subarea]
- **Ordinance No. 2628 – Establishing an Interim Mitigation Program [City Center Subarea]**
- **Ordinance No. 2629 – Amending the City's Reimbursement [Latecomer] Agreement Code Provisions**
- Ordinance No. 2630 – Relating to Undergrounding of Overhead Electric Wires [City Center Subarea]
- **Resolution No.2006-09 – Approving Voluntary Interim Mitigation Fees [City Center Subarea]**
- **Resolution No. 2006-10 – Approving an Agreement Template for No Protest LIDs**

See Attachments A-H to PFR, and Index Exs. 85, 78, 84, 80, 86, 83, 81 and 82, respectively. Ordinances and Resolutions in **bold** print are the enactments subject to the City's Motion to Dismiss.

The City moves to dismiss Pirie's challenges to: Ordinance Nos. 2626, 2628 and 2629, and Resolutions 2006-09 and 2006-10. The City asserts that these enactments did not amend the City's Comprehensive Plan or implement development regulations. Therefore, the City argues, the Board does not have subject matter jurisdiction to review these enactments. Lynnwood Motion, at 1-11.

The Board is charged with hearing and determining whether a local government's adoption, or amendment, of a comprehensive plan or development regulation complies with the goals and requirements of the Act. *See* RCW 36.70A.280. None of the challenged enactments adopts or amends the City of Lynnwood's comprehensive plan or City Center Subarea Plan. Each challenged enactment is allegedly an implementing development regulation. The GMA defines a development regulation, as:

[Development regulation or regulation] means 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).

The City argues that Ordinance No. 2626 merely authorizes the City to enter into Development Agreements with project proponent property owners and establishes review procedures and decision criteria for such agreements; it does not specifically implement the City Center Subarea Plan. *Id.* at 2. Petitioner agrees to dismiss Ordinance No. 2626 as it relates to Development Agreements generally, but reserves the right to challenge use of such Agreements as applied to any project implementing the City Center Subarea Plan. Pirie Response, at 3. The Board concurs, and will **grant** the City's Motion and **dismiss** Pirie's challenge to Ordinance No. 2626 from this proceeding.

The City explains that Ordinance No. 2628 provides for the mitigation of impacts to the City's transportation, parks and infrastructure systems caused by new development in the City Center. The City acknowledges that the mitigation program is tied to transportation and parks improvements and required dedications of land which is identified in Ordinance Nos. 2625 and 2627. Lynnwood contends that the mitigation does not regulate development of land use activities; rather, it is to mitigate the impacts of such development. Lynnwood Motion, at 3 and 8-9. Petitioner argues that the WHEREAS clauses in Ordinance No. 2628 clearly establish that the mitigation program is intended to implement the City Center Subarea Plan and is linked to Ordinance No. 2625 which rezones the City Center Subarea. Consequently, Pirie contends that the Ordinance is an implementing development regulation subject to the Board's review. Pirie Response, at 6-13. The Board agrees with Petitioner, but notes that application of mitigation measures would occur at the project level – the Board does not have jurisdiction to review project decisions.¹ Nonetheless, the Board will allow Petitioner to argue this issue on the merits. Therefore, regarding this Ordinance 2628, the Board will **deny** the City's Motion.

Lynnwood explains that Ordinance No. 2629 amends and modifies the City's existing code provisions allowing developers of certain infrastructure to recover a prorated share of costs incurred from providing improvements from properties that benefit from such construction – *i.e.* latecomer agreements. The City contends that this Ordinance does not amend its implementing development regulations. Lynnwood Motion, at 3-4 and 9-10. Petitioner asserts that Ordinance No. 2629 also is part of the regulatory bundle to be used by the City in implementing the City Center Subarea Plan and that the Ordinance is a

¹ See *Hanson, et al. v. King County*, CPSGMHB Case No. 98-3-0015, Order Granting Dispositive Motions, (Sep. 28, 1998); *Petersville Road Area Residents v. Kitsap County*, CPSGMHB Case No. 00-3-0013, Order on Motions, (Oct. 23, 2000); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868 (1997); and *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 2d 169, 179 (2000).

development regulation since it is linked by a “WHEREAS” in the Ordinance to the City Center Subarea Plan. Pirie Response, at 13-17. The Board notes that the “WHEREAS” cited by Petitioner states, “WHEREAS, the City anticipates that properties in the City Center sub-area and city-wide will develop, and that major infrastructure improvements will be needed as a result of such development.” See Ordinance No. 2629, at 1. The Board concludes that the provisions of this Ordinance are intended to apply city-wide, not just to the Subarea. However, rather than imposing a control on development or land use activities (See RCW 36.70A.030(7)), this Ordinance modifies existing city law and authorizes a *reimbursement process* for the costs of private financing for certain types of infrastructure. It is not a development regulation. The Board will **grant** the City’s Motion and **dismiss** Pirie’s challenge to Ordinance No. 2629 from this proceeding.

The City asserts that Resolution No. 2006-09 establishes a “voluntary interim mitigation fee table and optional payment terms.” Lynnwood asserts that these fees are a source of revenue for improvements that benefit the general public and are not intended to regulate a particular development. Lynnwood Motion, at 4 and 10. Petitioners assert that a “WHEREAS” in this Resolution links it to development of new parks and plazas in the City Center Subarea and “confirms the implementation strategy and actions using ‘impact fees’ as development regulations to fund the acquisition of parks and plaza properties . . .” Pirie Response, at 17. The Board notes that the Resolution authorizes “*Voluntary Interim Mitigation Fees*,” it does not permanently *require* any such fee. The Board also questions the legal effect of adopting such voluntary fees by resolution. Further, to the extent this fee is characterized as an “impact fee,” the Board has consistently held it does not have jurisdiction to review such impact fees.² The Board will **grant** the City’s Motion and **dismiss** Pirie’s challenge to Resolution 2006-09 from this proceeding.

The City notes that Resolution No. 2006-10 merely adopts a standard template or form for No Protest Local Improvement District Agreements. The City contends this is a standard form to be used by the City generally. As such, the Board has no jurisdiction to review this form. Lynnwood Motion, at 4 and 10. Petitioner argues the “City has included No Protest LID agreements as a form of revenue generation as an additional tool in its linked packet of development regulations to fund capital improvements for the acquisition of parks properties within the City Center Subarea.” Pirie Response, at 19. The Board finds that this Resolution adopts a “template” – *a blank form to be filled in* – for use by the City and property owners to initiate No Protest LID Agreements. Resolution No. 2006-10 does not impose a control on development or land use activity. The Board will **grant** the City’s Motion and **dismiss** Pirie’s challenge to Resolution 2006-10 from this proceeding.

² See CPSGMHB Digest of Decisions 1992-April 2006, Keyword “Impact Fees”, at 309 – 312, *citing* numerous CPSGMHB cases. See also: *Open Frame v. City of Tukwila*, CPSGMHB Case No. 06-3-0028, Order of Dismissal, (Nov. 17, 2006).

III. ORDER

Based upon review of the Petition for Review, the 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's Motion to Dismiss Ordinance No. 2626 is **granted**. Petitioner's challenge to Ordinance No. 2626, pertaining to Development Agreements, generally, is **dismissed** from this matter.
- The City's Motion to Dismiss Ordinance No. 2628 is **denied**.
- The City's Motion to Dismiss Ordinance No. 2629 is **granted**. Petitioner's challenge to Ordinance No. 2629, pertaining to Reimbursement Agreements, generally, is **dismissed** from this matter.
- The City's Motion to Dismiss Resolution 2006-09 is **granted**. Petitioner's challenge to Resolution No. 2006-09 is **dismissed** from this matter.
- The City's Motion to Dismiss Resolution 2006-10 is **granted**. Petitioner's challenge to Resolution No. 2006-10 is **dismissed** from this matter.
- The following Lynnwood Ordinances are still pending before the Board: Ordinance Nos. 2625, 2627, 2628 and 2630. Petitioner has framed 12 Legal Issues³ challenging whether these Ordinances comply with various provisions of the GMA. **The Board hereby imposes a 50 page limit on Petitioner's Prehearing Brief, a 50 page limit on Respondent's Response Brief, and a 20 page limit on Petitioner's Reply Brief.**

So ORDERED this 22nd day of December, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Board Member

Edward G. McGuire, AICP
Board Member

³ See 11/20/06 PHO, at 8-10.

Margaret A. Pageler
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.