

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

ROBERT CAVE and JOHN COWAN,	)	<b>Case No. 07-3-0012</b>
	)	
Petitioners,	)	
	)	
v.	)	<b>FINAL DECISION and ORDER</b>
	)	
CITY OF RENTON,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

---

SYNOPSIS

*In November 2006, the City of Renton adopted and applied a new zoning district to a 49-acre portion of the Upper Kenndale Area. With this rezone, which was enacted concurrently with an unchallenged comprehensive plan amendment to the land use designation, the area was down-zoned from an R-8 zoning district to an R-4 zoning district. Petitioners, two owners of properties in the down-zoned area, filed an appeal of this action challenging that the City did not comply with the GMA's requirements for notice and public participation, that the rezone was contrary to the City's infill development policies and provisions of the Renton Municipal Code, that private property rights were not considered, and that the rezone was not supported by a justifiable rationale.*

*The Board found that the City's actions were not clearly erroneous. Adequate notice was provided to the Petitioners and other members of the public, and both the Petitioners and others participated at a variety of levels during the City's decision-making process. In addition, the Board found that the Petitioners failed to demonstrate how the down-zone was inconsistent with the infill development policies or provisions of the City's own code.*

*The Board, granting deference to the City's planning decisions, concluded that it could not substitute its judgment for that of the City in regard to the justifying rationale for the rezone. Further, the Petitioners failed to demonstrate that the City's actions were arbitrary and discriminatory in regard to private property rights. The petition was dismissed.*

## I. BACKGROUND<sup>1</sup>

On January 29, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Robert Cave and John Cowan, (**Petitioners**), challenging the City of Renton's (**Respondent** or the **City**) adoption of Ordinance No. 5234. With Ordinance No. 5234, the City changed the zoning classification of properties within the Upper Kenndale area from a Residential 8 dwelling units per acre (R-8) zoning district to a Residential 4 dwelling units per acre (R-4) zoning district.<sup>2</sup>

On March 1, 2007, Board held a Prehearing Conference (**PHC**) in this matter. At the PHC, the Petitioners submitted a "Restatement of Issues Presented for Resolution" (**Restated Issues**), setting forth the legal issues for the Board to consider. The Board issued its Prehearing Order (**PHO**) on March 2, 2007, finalizing the Legal Issues to be resolved by the Board.

During the months of March and April 2007, the Board received several motions from the parties including a motion from the City to dismiss the PFR in its entirety on jurisdictional grounds or, in the alternative, to dismiss certain legal issues. The Board also received motions by the Petitioners to supplement the Record, to strike an exhibit included by the City as an attachment to its motion, and to amend their PFR. The Board did not hold a hearing on the motions. The Board issued its Order on Motions (**Order**) on April 30, 2007, denying the City's motion to dismiss the PFR in its entirety but allowing the dismissal of Legal Issue 10, a challenge grounded in the City's SEPA process, and denying the Petitioner's motion to supplement, strike, and amend. Order at 9-10.

In May and June, the Board received timely prehearing briefing and exhibits from the parties. The following references are used throughout this Final Decision and Order:

- Petitioners Cave and Cowan's Prehearing Brief – **Petitioners' PHB**
- Respondent City of Renton's Prehearing Response Brief – **City's Response**
- Petitioners Cave and Cowan Reply Brief – **Petitioners' Reply**

On June 14, 2007, the Board held a Hearing on the Merits (**HOM**) at the Board Offices beginning at 2:00 PM. Board Member Margaret Pageler presided, with Board members Ed McGuire and David Earling, the Board's Law Clerk Julie Taylor, and legal extern Linda Jenkins in attendance. Michael Gendler represented the Petitioner and Ann Nielsen represented the Respondent. Petitioners Robert Cave and John Cowan were in

---

<sup>1</sup> See Appendix A for full procedural background of this matter.

<sup>2</sup> On February 2, 2007, the Board issued its Notice of Hearing for this matter which included an "Intent to Consolidate" the instant matter with CPSGMHB Case No. 07-3-0011 *Petersen v. Renton*. The Board subsequently received a voluntary "Withdrawal of Petition" from Ms. Petersen and, on February 28, 2007, dismissed the *Peterson* matter.

attendance as were Erika Conkling and Rebecca Lind from the City of Renton's Planning Department. The Hearing on the Merits afforded the Board the opportunity to ask a number of questions and develop a clear understanding of the City's process and the Petitioners' challenge. Court Reporter services were provided by Barbara Hayden of Byers & Anderson. A transcript of the proceeding was ordered by the Board.

On June 18, 2007, the Board received briefing from the City in response to specific requests made by the Board at the HOM in regard to the application of Renton Municipal Code (RMC) 4-8-080(G) to the facts of this matter. The Petitioners' response to the City's submittal was received on June 19, 2007.

## **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS**

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the Legislature directed the Boards to hear and determine whether the challenged actions are in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The Legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). As articulated most recently by the Supreme Court, "the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance." *Lewis County v. Western Washington Growth Management Hearings Board (Lewis County)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

Legislative enactments adopted by the City of Renton pursuant to the Act are presumed valid upon adoption. RCW 36.70A.320(1). The burden is on the Petitioner to demonstrate that the actions taken by the City are not in compliance with the Act. 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 [the City of Renton] 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 the action of the City is 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, 849 P.2d 646 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to the City of Renton in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The Supreme Court has stated: "We hold that deference to [a jurisdiction's] planning actions that are consistent with the goals and requirements of the

GMA . . . cedes only when it is shown that a [jurisdiction’s] planning action is in fact a ‘clearly erroneous’ application of the GMA.” *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005). In *Lewis County*, the Court reaffirmed and clarified its holding in *Quadrant*, stating that: “. . . the GMA says that Board deference to [a jurisdiction’s] decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds.” 157 Wn. 2d at 506, fn. 16.<sup>3</sup>

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to only those issues presented in a timely petition for review. RCW 36.70A.290(1).

### **III. BOARD JURISDICTION, PREFATORY NOTE and PRELIMINARY MATTERS**

#### **A. BOARD JURISDICTION**

The Board finds that the PFR filed by Petitioners Cave and Cowan was timely filed, pursuant to RCW 36.70A.290(2); Petitioners Cave and Cowan have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, pursuant to RCW 36.70A.280(1)(a).

#### **B. PREFATORY NOTE**

In September 2005, owners of property located within the Upper Kennydale area – termed the Kennydale Blueberry Farm – requested that their 3.44 acre parcel of land be reclassified and rezoned from Low Density Residential with Resource Conservation zoning to Low Density Residential with *either* R-4 or R-8 zoning. Index No. 018. Because of this request, the City received comments from some neighboring property owners voicing concerns about the cumulative effects of recent development on critical areas within the Upper Kennydale area which had a land use designation of Residential Single Family with R-8 zoning. Index No. 103.

As part of its annual review cycle, the City then initiated a proposal for a rezone and comprehensive plan amendment for a larger portion of the Upper Kennydale area. The City proposed R-4 zoning (4 homes per acre) for 49 acres of Upper Kennydale. This would upzone the Blueberry Farm property and downzone the western side of the Upper Kennydale neighborhood from R-8 (8 homes per acre). The City held a public meeting in

---

<sup>3</sup> The *Lewis County* majority is in accord with prior rulings that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). See also, *Cooper Point Association v. Thurston County*, 108 Wash. App. 429, 444, 31 P.3d 28 (2001) (“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”); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3<sup>rd</sup> 1156 (2002).

August 2006 to receive feedback from affected property owners. Index No. 137. The proposal was originally referenced by the same file number as the Kennydale Blueberry Farm request (#2006-M-2) but was subsequently segregated and assigned its own unique file number - #2006-M-8. Index No. 106.

Two public hearings were held on the matter. On September 20, 2006, the City's Planning Commission held a public hearing at which written and oral comments were received in regard to the proposed rezone. Index No. 128. At the Planning Commission's regular meeting in October, the commissioners *voted 5 to 1 to reject* the City Planning Staff's recommendation to approve the R-4 area-wide rezone. Index No. 171. On November 13, 2006, the City Council held another public hearing which gave property owners and other interested parties further opportunity to voice their opinion on the City's proposal. Index No. 232. Further consideration of the proposal was made at the City Council's regular meeting of November 20, 2006. Index No. 244. At this meeting, the Council did not take a final vote on the proposal but did concur with City Staff's recommendation to downzone the area to R-4 and not accept the Planning Commission's recommendation to retain the existing R-8 zoning.

The Action Challenged:

On November 27, 2006, at a regular meeting of the City Council, the Council unanimously voted to approve Ordinance No. 5234 which would change the zoning classification for a 49-acre tract of the Upper Kennydale area from an R-8 zoning district to an R-4 zoning district.

### C. PRELIMINARY MATTERS

During the Board's motion practice, the City asserted that the Petitioners did not challenge the correct ordinance – Ordinance No. 5228 – which amended the comprehensive plan land use designation for certain portions of the Upper Kennydale area from Single Family Residential (**SFR**) to Low Density Residential (**LDR**), and that several of the legal issues presented directly correlate to the unchallenged ordinance. In its April 30, 2007 Order on Motions, the Board specifically stated that:

“...the Petitioners did not challenge Ordinance 5228 and are not allowed to raise any challenges based on this ordinance.”

Order on Motions (April 30, 2007) at 8.

In its Response Brief, the City renews its argument that Legal Issues 3, 4, 5, 6, 8, and 9 should be dismissed insofar as these issues relate to Ordinance No. 5228. City's Response at 13-14. The City asserts that the Petitioners' repeated references to alleged violations of the City's Comprehensive Plan equate to a challenge to Ordinance No. 5228. *Id.* at 14. The Board interprets the City's request as an *untimely* Motion for Reconsideration of its April 30, 2007 Order on Motions, and it is **denied**. The Board is

well aware of the distinction between Ordinance No. 5228, amending the comprehensive plan land use designation for a portion of the Upper Kenndale area, and Ordinance No. 5234, amending the zoning district applicable to this same area, and is capable of distinguishing arguments that give rise to the former. Ordinance No. 5228 is simply not before the Board to review.

In addition, within its Response Brief, the City has alleged that the Petitioner has abandoned several issues. The Board's discussion in regard to abandonment of issues will be provided within the context of each issue *infra*.

#### **IV. LEGAL ISSUES AND DISCUSSION**

The PHO, as modified by the April 30, 2007 Order on Motions, sets forth 9 legal issues.<sup>4</sup> The Board concludes that these issues are grounded in alleged violations of the GMA's goals and/or requirements for:

- Notice and Public Participation (Legal Issues 1, 2, 6, 7)
- Urban Growth Areas and Urban Density (Legal Issue 3)
- Private Property Rights (Legal Issue 4)
- Consistency and Procedural Compliance (Legal Issues 5, 6, 8, and 9)

The Board discussed these issues in this order below.

##### **A. NOTICE AND PUBLIC PARTICIPATION (Legal Issues 1, 2, 6, and 7)**

Petitioners' Legal Issues 1, 2, 6, and 7, as stated in their Restatement of Issues and the PHO, set forth allegations that the City failed to comply with the GMA's mandate to ensure public participation in the planning process and to provide notice that apprises property owners that their rights and interests would be affected by the proposed action. These Legal Issues allege violations of both the GMA (RCW and WAC) and Renton's own municipal code (RMC) and comprehensive plan policies.

The Board's PHO sets forth Legal Issues 1, 2, 6, and 7, as each relates to notice and public participation, as follows:

1. *Did the City of Renton violate the mandates of the Growth Management Act for early and continuous public participation – RCW 36.70A.140, RCW 36.70A.020(11)?*
2. *Did the City violate the GMA provisions for notice reasonably calculated to alert the affected public – RCW 36.70A.035 – where the notice of the City*

---

<sup>4</sup> See Appendix B for full text of Legal Issues.

*Council public hearing provided no identification of or information about the proposed downzone?*

6. *Did the City violate its Comprehensive Plan by morphing a proposed Comprehensive Plan amendment and rezone ... initiating the downzone as a new proposal in the first quarter of the year in accordance with the Comprehensive Plan – RCW 36.70A.035, ..., 36.70A.140, WAC 365-195-600, RMC 2-10-3, Comprehensive Plan, Planning Process, i-1 and i-2?*
7. *Did the morphing of a proposal to redesignate and rezone ... violate requirements for early and continuous public participation and for public notice calculated to provide notice to property owners that their rights and interests would be affected? RCW 36.70A.035, ..., 36.70A.140, WAC 365-195-600, RMC 2-10-3, Comprehensive Plan, Planning Process i-1 and i-2.*

### **Applicable Law<sup>5</sup>**

RCW 36.70A.020(11) provides:

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

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, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include ... (a) posting ... (b) publishing ... (c) notifying public or private groups with known interest... (d) placing notice in appropriate ... journals, and (e) publishing notice in agency newsletter or sending notice to agency mailing list...

---

<sup>5</sup> Petitioners Legal Issues 6 and 7 allege violations of RMC 2-10-3 and the Planning Process described in the Comprehensive Plan. RMC 2-10-3 delineates the functions of the City's Planning Commission and no where within the PHB do Petitioners argue a violation of this section of the RMC; it is deemed **abandoned**. As to the Planning Process, the Board first notes that the text relied on by the Petitioners is found on Page I-3 on the City's Comprehensive Plan, last amended 12/12/05. The sections provided on Page 18 of Petitioners' PHB are not quoted directly from the current comprehensive plan, but rather are citations from a 12/8/97 version (See Petitioners' Exhibit 33). Therefore, since these "principles" are no longer in effect, any argument presented by Petitioners based on this outdated verbage is irrelevant.

RCW 36.70A.140 provides:

[Each City] 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 ... Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

WAC 365-195-600 mirrors the requirements of RCW 36.70A.140 and provides various recommendations that jurisdictions may implement to satisfy these requirements.<sup>6</sup>

### **Discussion and Analysis**

#### *Position of the Parties*

Petitioners acknowledge that they attended and participated in the City's decision-making process. However, they assert that (1) the notice for the November 13, 2006 City Council hearing was inadequate and (2) the City's untimely and expedited review of this rezone failed to encourage and facilitate public participation and adequately notify impacted property owners. Petitioners' PHB at 13-19, 21.

Petitioners' allegation in regard to a failure of the City in encouraging public participation stems primarily from insufficient notice and rests on the notice of the November 13, 2006 public hearing before the City Council. Petitioners allege that the notice:

- Did not inform Petitioners that the "concurrent rezonings" were applicable to their property,
- Did not describe the "general nature" or "magnitude" of the proposed amendments,
- Contained only a "vague" "shorthand" description of the proposed amendments, and
- Did not provide assistance to an interested citizen in understanding the impact and reach of the proposal.

---

<sup>6</sup> Citation to this section of the WAC is limited to the Petitioners' issue statement. No further reference is made in the briefing to WAC 365-195-600.

Petitioners' PHB at 14-18. Relying on prior Board cases which considered whether the notice provided by the jurisdiction was "reasonably calculated to provide notice" to affected individuals, the Petitioners assert that the City's notice of the November 13 public hearing was inadequate. Petitioners cite to *Orton Farms LLC v. Pierce County*, CPSGMHB Case No. 04-3-0007c, Final Decision and Order (Aug. 2, 2004); *Kelly v. Snohomish County*, CPSGMHB Case No. 97-3-0012c, Final Decision and Order (July 30, 1997), and *Home Builders Assoc. of Kitsap County v. City of Bainbridge Island*, CPSGMHB Case No. 00-3-0014, Final Decision and Order (Feb. 26, 2001) in support of their assertion.<sup>7</sup>

In response, the City asserts that in arguing notice and public participation by focusing on the November 13, 2006 City Council hearing, the Petitioners have ignored the many other opportunities afforded both the Petitioners and other members of the public. City's Response at 17. The City points to several documents provided in the Record which demonstrate adequate notice to affected property owners, general publication and posting, and the opportunity to submit both written and oral comments to the Planning Commission and City Council. *Id.* at 17-18. The City notes that both of the Petitioners were actively involved throughout the decision-making process and were able to comment, both in writing and in person. *Id.* at 18.

In reply, Petitioners note that the City did not respond to the Petitioners' claim that the notice for the November 13 City Council hearing was inadequate or that the truncated process discouraged public participation by going from "conception to done deal in two months." Petitioners' Reply at 8, 10. Petitioners assert that the City's argument in regard to public participation is supported primarily by meetings that occurred before the Upper Kennydale rezone was under consideration and, even to opportunities for comment after the rezone was adopted. *Id.* at 8-9. Petitioners state that the short duration of the

---

<sup>7</sup> In *Orton Farms*, the Board concluded that Pierce County's notices were inadequate because the notices did not provide the *general nature and magnitude of the proposed amendments* nor did the notices reflect the *changes made to designation criteria during the evolution of the amendments*. *Orton Farms*, CPSGMHB 04-3-007c at 15-16.

In *Kelly*, the Petitioner asserted that the County's public notice was insufficient regarding the redesignation of certain lands and the adoption of a Plan policy directing future rezoning of those lands (Cavalero Hills). *Kelly*, CPSGMHB 97-3-0012c at 5-9. In making its determination that the County failed to provide adequate notice, the Board contrasted the 'only' notice issued by the County for the Cavalero Hills area to other, *more specific, notices* that the County had issued for amendments to the comprehensive plan and implementing regulations which *identified areas where changes were being considered* which succeeded in reasonably apprising citizens of the County's contemplated actions. *Id.*

In *Home Builders of Kitsap County*, in reviewing the public participation procedures established by the City when adopting an amendment to its critical areas regulations, the Board determined that although the City published and posted the Agenda for the Council thereby notifying the public that an amendment was being considered, the record did not indicate that the notice to individuals, organizations, or other affected property owners *informed them of the nature of the pending change* so as to allow an interested citizen in *understanding the impact and reach* of the amendment. *Home Builders of Kitsap County*, CPSGMHB 00-3-0014c, Final Decision and Order (Feb. 26, 2001).

adoption process failed to afford citizens sufficient time to review documents and to provide meaningful comments. *Id.* at 11.

### *Board Discussion*

The Board concurs with the Petitioners that public participation is a keystone for the GMA. The GMA contains several provisions addressing citizen involvement in comprehensive land use planning, including those cited by the Petitioners – RCW 36.70A.020(11), .035, and .140. See *McNaughton v. Snohomish County*, CPSGMHB Case No. 06-3-0027, Final Decision and Order (Jan. 29, 2007) at 29; *Laurelhurst, et al v. Seattle*, CPSGMHB Case No. 03-3-0016, Final Decision and Order (March 3, 2004); *McVittie v. Snohomish County*, CPSGHMB Case No. 00-3-0016, Final Decision and Order (April 12, 2001).

In addition, the Board further concurs that in order to ensure public participation, a City or County must provide notice that is “reasonably calculated to provide notice to property owners and other affected and interested individuals.” RCW 36.70A.035(1); *Andrus v. City of Bainbridge Island*, CPSGMHB Case No. 98-3-0030c, Final Decision and Order (March 31, 1999) at 6-7 (without effective notice, the public does not have a reasonable opportunity to participate); *Weyerhaeuser Real Estate Co. v. City of Dupont*, CPSGMHB Case No. 98-3-0035, Final Decision and Order (May 19, 1999) at 6 (public notice is at the core of public participation).

*Did the City provide adequate and effective notice of its proposed action so as to ensure that members of the public had a reasonable opportunity to participate?*

A review of the Record before the Board reveals several notices disseminated by the City in regard to the rezone of the Upper Kennydale area and therefore the resolution of this issue should not rest solely on a single notice as Petitioners argue.

Notice of August 23, 2006 Meeting. The first, a “flyer”-style notice, is entitled “Upper Kennydale R-4 Rezone Meeting.” Index No. 137; Petitioners’ Exhibit 12; City’s Exhibit 3. Included within this exhibit is a mailing list of the property owners to whom the “flyer” was sent. Both Petitioners Cave and Cowan are indicated as recipients of the “flyer” notice, and neither alleges that they did not receive it. *Id.* In addition, from the City’s Index it appears that the meeting noticed in the “flyer” generated extensive public comments in regard to the rezone (Index Nos. 72 through 93, 95, and 98 through 101). Included in these comments, were those of the Petitioners – Index No. 98 (Cowan) and Index No. 99 (Cave).

*The Board concludes that this initial notification of the proposed rezone was adequate and effective so as to provide affected and interested persons with the opportunity to participate.* The notice states the purpose of the meeting – “...to present the proposal to, and receive feedback from, affected property owners.” The notice clearly denotes a map

of the proposed rezone with boundaries outlined and provides text which explains the proposal and includes definitions of the zoning districts under consideration.

Notice of September 20, 2006 Planning Commission Public Hearing. Second, on September 8, 2006, the City mailed notice of a September 20, 2006 Planning Commission public hearing to property owners and parties of record, more than 100 addresses in all, including both Petitioners. Index No. 109; Petitioners' Exhibit 16. This notice stated that the City is considering a map amendment to change "the designation of a 49-acre area of Upper Kennydale ... from Single Family Residential with R-8 zoning to Low Density Residential with R-4 zoning." This mailed notice included a map delineating the boundaries of the proposed rezone. *Id.* In addition to the mailing, notice of the September 20<sup>th</sup> Planning Commission public hearing was published in the *King County Journal* on September 14, 2006. The published notice similarly addressed the proposed change to the Upper Kennydale area and specifically included tax parcel numbers (PIDs) for affected properties. Index No. 114<sup>8</sup>; Petitioners' Exhibit 17. The Record demonstrates that Petitioner Cave, in addition to numerous other members of the public, was present at this hearing, with the minutes denoting "Mr. Cave is against the rezone of the ... Upper Kennydale. This is a tax disadvantage for owners that have paid taxes at an R-8 designation versus R-4." Index No. 128, City's Exhibit 8.

*The Board concludes that this notification was adequate and effective so as to provide affected and interested persons with the opportunity to participate.* Both the published notice and the mailed notice stated the purpose of the public hearing – "...to consider the potential amendments to the Comprehensive Plan Land Use Map, *concurrent re-zoning or potential zoning* of properties..." Index No. 109 (Emphasis added). Both notices provided the public with the boundaries of the proposal, either via text, the use of a map, or by reference to PIDs.<sup>9</sup>

The Board further notes that the notice was mailed to affected property owners and other interested parties 12 days prior to the hearing but that publication did not occur until September 14<sup>th</sup>, just 6 days before the hearing.<sup>10</sup> Although both RCW 36.70A.035 and WAC 365-195-600(2)(a) set forth recommendations for compliant notice, neither provides specific time requirements (i.e. 10 days prior to public hearing). Any requirement for time limitations would therefore be established within a jurisdiction's adopted public participation regulations.<sup>11</sup> Petitioners did not argue this and the Board will not argue it for them. Furthermore, both RCW 36.70A.140 and WAC 365-195-

---

<sup>8</sup> The Index to the Record submitted by the City denotes this exhibit as a "Revised" Notice.

<sup>9</sup> The City asserts that it also posted notice of hearings on the City's website and at libraries. City's PHB at 17. No citation was made to the record to support this assertion

<sup>10</sup> Careful review of the City's Index to the Record reveals an affidavit dated September 10, 2006 from the *King County Journal* pertaining to a "Notice for Planning Commission Public Hearing." A copy of this document was not submitted as an exhibit by either party.

<sup>11</sup> Although Petitioners point to RMC 4-8-090(D) (which speaks to the requirements for the "Notice of Public Hearings" including time limitations) when arguing about the notice of the November 13, 2006 hearing, their argument is focused not on timing but on the required content of the notice.

600(1) provide that: “[E]rrors in exact compliance with the established procedures shall not render the comprehensive plan or development regulations invalid if the spirit of the procedures is observed.” The Board finds that the extensive mailing list which notified those property owners who would be specifically affected by the proposed rezone, in combination with the newspaper publication, even if only six days prior to the hearing, clearly evidences that the spirit of the GMA’s public participation requirements was satisfied and adequate notice was provided.

Notice of November 13, 2006 City Council Hearing. Finally, with the City’s annual review cycle nearing its end, on November 2, 2006, the City mailed notice of a November 13, 2006 public hearing before the City Council<sup>12</sup> to Petitioners and over 100 other property owners and parties of record. Index No. 214; Petitioners’ Exhibit 21. The City also published notice of this public hearing in the *King County Journal* on November 3, 2006. Index No. 215; Petitioners’ Exhibit 20. The notice for this hearing simply stated:

2006 Comprehensive Plan Amendments, concurrent rezonings, zoning text amendments, and development agreement for the former Aqua Barn site.

This is the notice on which Petitioners focus their argument, asserting that this notice provides only a “shorthand description of ‘rezones’ without any description, map, or inclusion of even the file number used in all of the meeting minutes or agendas to designate the Upper Kennydale rezone.” Petitioners’ PHB at 18, citing *Kelly v. Snohomish County*.

The Board would agree if, as in *Kelly*, this had been the *only notice* of the proposed rezone or if it pertained to a single City Council meeting *where the final action* on the challenged ordinance *occurred*. This is not the case. Review of the notice demonstrates that the City did provide the date, time, and place for the public hearing, an invitation to the public to submit written or oral comments, and the purpose of the hearing – the consideration of 2006 Comprehensive Plan amendments and concurrent rezoning – which included the Kennydale changes. Although the City could have further delineated each

---

<sup>12</sup> It should be noted that Petitioners questioned the validity of this hearing because of defects of notice. Mayor Keolker responded that “this public hearing is a courtesy hearing, and the required hearing was with the Planning Commission on September 20.” Index No. 232 at 386-387. At the HOM, the Board specifically requested analysis in regard to RMC 4-8-080(G) which provides land use permit procedures and classifies a comprehensive plan map amendment with an associated rezone as a Type “X” permit. The procedures for a Type X permit denote that an Open Record Hearing is required, with “PC, CC” defined as the reviewing body. The City asserts that -080(G) provides that either the Planning Commission *or* the City Council may hold the hearing and that -080(G) merely states the “types of permits;” it is -080(H) that sets forth the review process, with this section of the RMC requiring that the Planning Commission hold a hearing and issue a recommendation to the City Council, who has the authority for final decisions. The Board will defer to the City’s interpretation of its own code in this instance but points out the confusion created by table of “procedures” in -080(G) and flow chart of “processes” in -080(F). In addition, despite the Mayor’s statement, there was a public hearing held by the city council.

and every amendment, as it did in its notice of the September 20 Planning Commission public hearing (Index No. 114), the notice for the November 13 City Council public hearing in conjunction with numerous opportunities for public involvement – both before and after this date – provided for notice of the proposed rezone which reasonably notified affected individuals of the City’s intent. *See* Index No. 107, Agenda Planning Commission 9/6/06; Index No. 109, Notice of Public Hearing; Index 114, Published Notice of Public Hearing; Index No. 129, Agenda Planning Commission 9/20/06; Index 247, Agenda City Council 11/27/06. The Board notes that the Record reflects both Petitioners attended and testified at this public hearing. Index No. 232, Petitioner’s Exhibit 22. The final adoption of Ordinance 5234 did not occur until the City Council’s regular meeting of November 27, 2006. Index No. 247, Petitioners’ Exhibit 29. *Therefore, the Board concludes that this notice was adequate and effective so as to provide affected and interested persons with the opportunity to participate.*

*Did the City provide early and continuous public participation when it “morphed” the original rezone proposal?*

Although the ability of the public to participate is inherently linked to notice which the Board has found to be sufficient in this matter, the Petitioners further allege that the transformation (or “morphing”) of a site-specific rezone for the Blueberry Farm into an area-wide rezone of 49 acres which spanned just a few months – from inception to adoption – did not encourage participation, but rather discouraged it. This portion of Petitioners’ argument is keyed on compliance with RMC 4-9-180 which is discussed in Section D *infra*.

The Board acknowledges that an expedited timeline for adoption of an ordinance could potentially interfere with the public’s ability to participate; the GMA provides no specific time parameters that a jurisdiction must adhere to in adopting development regulations. In addition, as noted *supra*, the City provided continuing opportunities for the public to provide input from initiation of the Kennydale Blueberry Farm proposal to the expansion of the rezone consideration to the Upper Kennydale Area to the adoption of the challenged ordinance.

### Conclusion

The Petitioners **failed to carry their burden** in proving that the City did not comply with the GMA’s requirements for notice and public participation. The Board finds and concludes that the City complied with the GMA’s requirements for adequate and effective notice and that the City provided property owners and other interested parties with early and continuous opportunities to participate in the decision-making process. The City of Renton’s adoption of Ordinance No. 5234 was **guided by, and complies with**, the goals and requirements of RCW 36.70A.020(11), .035, and .140. **Legal Issues 1, 2, 6, and 7, as each relates to notice and public participation, are DISMISSED with prejudice.**

## **B. URBAN GROWTH AREAS and URBAN DENSITY (Legal Issue 3)**

The Board's PHO sets forth Legal Issue 3 as follows:

*Legal Issue 3. Did the City's downzone violate GMA policies and provisions – RCW 36.70A.010, 36.70A.110 and 36.70A.020, and the policies and provisions of the City of Renton Code – RMC 4-1-020, 4-1-060, 4-9-180, 4-9-020, and Comprehensive Plan (Land Use Objective LU-A, LU-B, and LU-C and policy LU-11, Planning Process, i-2) for urban growth within urban growth areas that are already characterized by urban development and have adequate existing public facility and service capabilities to facilitate and accommodate such growth?*

### **Applicable Law<sup>13</sup>**

RCW 36.70A.020(1) provides:

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

### **Discussion and Analysis**

#### *Position of the Parties*

Petitioners' argument in regard to Legal Issue 3 is based solely on RCW 36.70A.020(1) and that goal's language for encouraging urban development in areas where adequate public infrastructure, such as roads and freeway connections, exists. RCW 36.70A.020(1); Petitioners' PHB at 30.

In response, the City argues that the Petitioners have provided conclusory statements without any showing of why the R-4 zoning district, taken in the larger context of the entire City, isn't providing for appropriate growth. City's Response at 11-12. The City asserts that zoning at four dwelling units per acre (4 du/acre) has always been accepted by the Board as "appropriate" urban density and is within the City's discretion. *Id.*

---

<sup>13</sup> In addition to RCW 36.70A.020, Petitioners' legal issue asserts violations of 36.70A.010 and .110, RMC 4-1-020, -060, 4-9-020, -180, and Comprehensive Plan policies and objectives LU-A, LU-B, LU-C, and LUD-11. The Petitioners failed to cite or argue any of these provisions in their PHB, and they are deemed **abandoned**. In regards to RCW 36.70A.020, the Petitioners cite only to .020(1) and therefore the argument here is limited to that provision.

In reply, the Petitioners suggest that their argument on this issue is concise, not conclusory, and that various facts and policies were provided in the PHB to support their argument. Petitioners' Reply at 5-6.

### *Board Discussion*

While the Board would agree with the Petitioners that concise argument is, in fact, argument, the Petitioners have failed to provide any argument. Section H of their PHB provides the entirety of the argument presented in support of Legal Issue 3 and is comprised of a recital of GMA Goal 1, the definition for public facilities (36.70A.030(12)), and a statement that there are adequate public facilities in this area to serve future growth which will now be discouraged because of the City's decision to downzone the area. What Petitioners have failed to argue is how the application of R-4 zoning to the Upper Kenndale area, as opposed to prior R-8 zoning, will hinder development except in basic mathematical terms. A downzone in an urban area to a lower, but still urban density, is not a *per se* violation of the GMA Goal for urban growth. Although Petitioners' assertion that their PHB contains various facts and policies to support their argument is noted, it is not for the Board to pull these together to formulate an argument - that is for the Petitioners.

### **Conclusion**

Petitioners have **failed to carry the burden of proof** of sufficiently demonstrating how application of R-4 zoning will discourage growth within an urban growth area in violation of RCW 36.70A.020(1). The Petitioners have failed to argue and therefore have abandoned all claims related to RCW 36.70.010 and .110, RMC 4-1-020, -060 and 4-9-020, -180, and LU-A, LU-B, LU-C, and LU-11. **Legal Issue 3 is DISMISSED with prejudice.**

### **C. PRIVATE PROPERTY RIGHTS (Legal Issue 4)**

Petitioners' Legal Issue 4, as stated in the Restatement of Issues and PHO, provides:

*Legal Issue 4. Did the City's downzone violate the policies and provisions of the GMA – RCW 36.70A.020, City of Renton Code – RMC 4-4-030, 4-1-060, 4-9-180, and Renton Comprehensive Plan by failing to preserve petitioners' property rights in downzoning their urban residential property?*

Although the Petitioners do not cite to a specific section of 36.70A.020, the Board reads this issue as alleging a violation of .020(6) - Goal 6 of the GMA.

## Applicable Law<sup>14</sup>

RCW 36.70A.020(6) provides (emphasis added):

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*.

RMC 4-4-030(A)(2) provides, in relevant part:

It is the intent of this Section to provide the City, especially the Development Services Division ... with criteria to make consistent and rational land use recommendations and decisions that ... (2) recognize property rights...

## Discussion and Analysis

### *Position of the Parties*

Petitioners argue that GMA Goal 6 and RMC 4-4-030(2) both require the protection of private property rights, and were violated by the City's arbitrary action in downzoning Petitioners' land because the City did not provide sufficient and actual environmental justification for low-density development. Petitioners' PHB at 24.

The City equates the Petitioners argument to a "takings" argument and asserts that the Petitioners have failed to demonstrate that the City's action was both "arbitrary and discriminatory." City's Response at 12 (Emphasis in original).

Petitioners make no direct response in regard to this legal issue.

### *Board Discussion*

RCW 36.70A.020(6), or Goal 6 of the GMA, states that "property rights of landowners shall be protected from arbitrary and discriminatory actions." The Board has previously stated that in order for petitioners to prevail in a challenge based on Goal 6, they must prove that the action taken by a local jurisdiction is *both* arbitrary *and* discriminatory; showing only one is insufficient to overcome the presumption of validity that is accorded to local jurisdictions by the GMA. See *Shulman v. City of Bellevue*, CPSGMHB Case No. 95-3-0076, Final Decision and Order (May 13, 1996) at 12; *Keesling v. King County*, CPSGMHB Case No. 05-3-0001, Final Decision and Order (July 5, 2005) at 28-33.

---

<sup>14</sup> Legal Issue 4 cites to RMC 4-1-060, 4-9-180 and, generally, to the Renton Comprehensive Plan. The Petitioners failed to cite or argue any of these provisions in their PHB and they are deemed **abandoned**.

Although the Petitioners assert that the City's action was *arbitrary*, they failed to make any argument concerning *discrimination* in their opening brief and conceded this fact during the HOM. HOM Transcript at 55.<sup>15</sup> An arbitrary decision is one that is not merely an error in judgment but is "baseless" and "in disregard of the facts and circumstances." *Keesling, supra*, at 32. Given the public process framework for the rezone decision, the Board cannot conclude that the City's action was unreasoned or taken without regard and consideration of the facts and circumstances surrounding the action. Therefore, the Board finds and concludes that the action was not arbitrary. Further, since the Petitioners have failed to even argue that the City's action in adopting Ordinance No. 5234 was discriminatory, Petitioners have clearly **failed to carry the burden of proof** to overcome the presumption of validity.

Legal Issue 4 also makes reference to RMC 4-4-030, which is simply a statement that the City recognizes private property rights. The minutes of the November 13, 2006 City Council meeting indicate that the City Council took the impact of its actions on property values into consideration, effectively meeting this requirement. Index No. 232.

### **Conclusion**

Petitioners have **failed to carry the burden of proof** in showing that the City's action was arbitrary and discriminatory, in violation of RCW 36.70A.020(6), or that the City failed to consider property rights when taking the challenged action. The Petitioners have failed to argue and therefore have abandoned all claims related to RMC 4-1-060, RMC 4-9-180, and non-cited provisions of the City's Comprehensive Plan. **Legal Issue 4 is DISMISSED with prejudice.**

### **D. CONSISTENCY and PROCEDURAL COMPLIANCE (Legal Issues 5, 6, 8, and 9)**

Petitioners' Legal Issues 5, 6, 8, and 9 as stated the PHO, provide:

*Legal Issue 5. Did the City violate the policies and provisions of the GMA – RCW 36.70A.070, 36.70A.115, 36.70A.010, 36.70A.040, the Renton City Code – RMC*

---

<sup>15</sup> The City staff rationale for the downzone did not hold up to argument. One purported rationale was environmental – that downzoning would result in better drainage controls in a sensitive basin around the Blueberry Farm. However, no attempt was made to protect the whole drainage area, whether through downzoning or tightened critical areas regulations. HOM Transcript 64, *et seq.* Further, the scientific study on which the City claimed to rely contained no support for the staff rationale. Index 35, HOM Exhibit 2.

A second staff rationale was that the line between the properties downzoned to R-4 (west) and those remaining R-8 (east) was drawn because the western area contained large, un-subdivided lots. HOM Transcript at 72-73. However, this left several large un-subdivided lots east of the line with twice the development value (and twice the drainage impact) of lots on the west side of the line.

*4-1-020, 4-4-030, 4-1-060, 4-1-070, and the Renton Comprehensive Plan which requires consistency between development regulations and the Plan?*

*Legal Issue 6. Did the City violate its Comprehensive Plan by morphing a proposed Comprehensive Plan amendment and rezone specific to one – three acre parcel of agriculturally designated and zoned property into a rezone to downzone 49 acres of property designated and zoned urban residential R-8, rather than initiating the downzone as a new proposal in the first quarter of the year in accordance with the Comprehensive Plan – RCW 36.70A.035, 36.70A.040, 36.70A.140, WAC 365-195-600, RMC 2-10-3, Comprehensive Plan, Planning Process, i-1 and i-2?*

*Legal Issue 8. Did the City fail to show its work to justify the downzone, where it entered no findings of fact, provided no rationale for its decision in its ordinance, and where the downzone has irregular and illogical boundaries, contrary to RMC 4-9-180?*

*Legal Issue 9. Was the decision to downzone the 49 acres of urban property already designated for residential development clearly erroneous, where the downzone is contrary to provisions and policies governing residential urban growth in urban areas which have sufficient infrastructure capacity, where the downzone boundaries are irregular and illogical, and where the presence of wetlands suggested as a rationale for the downzone applies only to some portions of the area downzoned? RMC 4-9-180, 4-9-020.*

### **Applicable Law<sup>16</sup>**

Petitioners' Legal Issues reference several provisions of RCW 36.70A, WAC 365-195, RMC, and the City's Comprehensive Plan. However, when arguing these legal issues (5, 6, 8, and 9), Petitioners' argument relies on RMC 4-9-020, 4-9-180, and the City's Comprehensive Plan Planning Process. The Petitioners then raise new sections of the GMA and City codes, not previously cited within these legal issues, including 36.70A.020(2) and .020(4), RMC 4-2-020, and Comprehensive Land Use policies LU-9 and LU-123.

As noted elsewhere in this Order, the Petitioner is not permitted to raise arguments based on provisions of the GMA, the RMC, or Comprehensive Plan that were not specifically set forth in the Legal Issues. While the Board has no wish to be over-technical, the GMA requires "a detailed statement of the issues" presented by petitioners, and the statute forbids the Board to opine on matters that go beyond the stated legal issues. RCW 36.70A.290(1). In addition, as noted *supra* (Footnote 5), the City's Planning Process

---

<sup>16</sup> As has been noted in other sections of this Order, any provision of law cited in the Petitioners' legal statement which was not briefed is deemed abandoned.

identified by Petitioners has been amended and the provisions argued are no longer applicable.

For these Legal Issues, the Board will cite to relevant provisions of RMC 4-9-020 and 4-9-180 in its discussion below.

## **Discussion and Analysis**

### *Position of the Parties*

Petitioners assert that the City, in down-zoning a portion of Upper Kenndale, did not act in conformance with its own comprehensive plan policies and/or development regulations. With Legal Issues 5, 6, and 7, Petitioners' challenge pertaining to inconsistency stems from allegations that the rezone "goes against the [policies contained in the] City of Renton Comprehensive Plan" (§E – Legal Issue 5, Petitioners' PHB at 23) or that the failure of the City to follow comprehensive plan provisions demonstrates a "lack of consistency between the development regulations and the [comprehensive] plan." (§C – Legal Issues 5 and 7, *Id.* at 19; §D – Legal Issues 5 and 6, *Id.* at 22). Petitioners then assert that this inconsistency creates violations of RCW 36.70A.020(11), .040, and .140. *Id.* at 22.

For Legal Issues 8 and 9, Petitioners argue that the City has failed to provide sufficient justification for the area-wide rezone in violation of RMC 4-9-180 (process and decisional criteria for rezones) and RMC 4-9-020 (process for the adoption of and amendments to the City's Comprehensive Plan). *Id.* at 25-29. To support this assertion, Petitioners point out that the City's action perpetuates the "evils of sprawl" and fails to provide diverse and affordable housing. *Id.* In addition, Petitioners argue that the rezone maintains irregular boundaries which have no environmental rationale. *Id.* at 29-30.

In response, the City argues that the Board lacks subject matter jurisdiction over RMC provisions or Comprehensive Plan policies when the Petitioners have failed to relate these provisions and/or policies to an alleged violation of the GMA. City's Response at 9-10. The City further asserts that the Petitioners have not provided any evidence to support their inconsistency argument. *Id.* at 10, 14.

The Petitioners reply that their PHB sets forth the basis for the inconsistency claim. It is demonstrated by the City's failure to encourage infill development at R-8 densities, and to comply with provisions of its own code such as those related to adequate public participation. Petitioners' Reply at 3-6. In addition, Petitioners argue that they cited 36.70A.020(2) and supporting case law within their PHB and it is now too late for the City to argue that the Petitioners' claim is outside the Board's jurisdiction, especially in regard to urban growth and density. *Id.* at 5.

## *Board Discussion*

Petitioners are asking the Board to determine whether the City has applied the provisions of its own development regulations correctly. These provisions set forth the criteria a reviewing official must use to determine whether or not to approve a rezone or comprehensive plan amendment.<sup>17</sup> Although Legal Issues 8 and 9 cite to certain sections of RMC 4-9, Petitioners' argument is based on RMC 4-1-060 and prior Board decisions expounding on the negative consequences of urban sprawl, without a single reference to RMC 4-9. *See* Petitioners' PHB §G at 25-29. The Board deems the Petitioners' assertion that the City violated RMC 4-9 as **abandoned**.

Furthermore, the mere reference in a legal issue that a jurisdiction's action is "contrary to provisions and policies governing residential urban growth in urban areas" does not permit the Petitioner to argue any and all GMA and City code provisions that relate to urban areas. *See Skills, Inc. v. City of Auburn*, CPSGMHB Case No. 07-3-0007, Final Decision and Order (July 18, 2007), at 6. Therefore, the Board concludes that the Petitioners have inadequately briefed Legal Issues 8 and 9 and these issues are deemed **abandoned**.

The Board has previously held that development regulations are required to implement and be consistent with a jurisdiction's Comprehensive Plan. RCW 36.70A.040; .140(1)(d); *Bremerton, et al v. Kitsap County (Bremerton II)*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004) at 14; *Alberg et al v. King County*, CPSGMHB Case No. 95-3-0041c, Final Decision and Order (Sept. 13, 1995) at 17. The Petitioners are not alleging that the development regulations themselves (*i.e.* the decisional criteria for rezones) are in conflict with the City's Comprehensive Plan. Rather, the Petitioners allege that it is the rezone of the Upper Kenndale area from R-8 to R-4 that is inconsistent with various policies (*i.e.* infill, diversity and affordability of housing, public participation) contained within the City's Comprehensive Plan.

RCW 36.70A.3201 requires that the Board grant deference to a jurisdiction in how it plans for growth, so long as the jurisdiction's policy choices, including map designations, are within the parameters of the goals and requirements of the GMA. The Board has previously stated that:

The ultimate designation of any property remains in the local jurisdiction's discretion so long as the designation complies with the requirements of the [GMA] and is internally consistent.

---

<sup>17</sup> Although the Board's jurisdiction is limited to reviewing actions for compliance with the GMA, the Board notes that it does have jurisdiction to review a city or county's activities for compliance with its Comprehensive Plan (RCW 36.70A.120) and it can review a jurisdiction's development regulations to determine whether they are consistent with and implement the Comprehensive Plan (RCW 36.70A.040, *et al*).

*Hapsmith et al v. City of Auburn (Hapsmith I)*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996) at 25.

The question of whether one property is better suited for a given urban designation than another is one the Board will not answer...if 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.

*WHIP/Moyer v. City of Covington*, CPSGMHB Case No. 03-3-0006c, Final Decision and Order (July 31, 2003) at 35.

Changing the zoning district for a portion of Upper Kennydale to implement and make it consistent with the comprehensive plan land use designation of RLD is not only required by the preamble to 36.70A.070 (requiring development regulations to implement the comprehensive plan) but is within the City's discretion.<sup>18</sup> Here, the Record demonstrates numerous opportunities for public involvement, investigation, study, and deliberation by the Planning Commission and City Council. After considering all relevant evidence submitted, the City Council unanimously approved Ordinance No. 5234, with full knowledge of differing opinions and recommendations.

Furthermore, Petitioners assert that the transformation of a 3-acre site-specific rezone into a 49-acre area-wide rezone which subsequently bypassed the filing requirements of the City's annual cycle is inconsistent because Renton's Code requires that amendments to the Comprehensive Plan must be filed by December 15<sup>th</sup> for consideration the following year. Petitioners' PHB at 20-21. The foundation for the Petitioners' argument comes from RMC 4-9-180(F) which sets forth the criteria for rezones requiring a comprehensive plan amendment, including that the proposed amendment meets the review criteria of RMC 4-9-020(G).

From RMC 4-9-020(G) the Petitioners extract a single phrase – “the requested amendment is timely” – and allege that the City's request for an area-wide rezone was to be filed by December 15, 2006 and, therefore, the proposal was untimely and non-compliant with the cited RMC provisions.

Petitioners misread the provisions of the RMC. RMC 4-2-020 sets forth the City's comprehensive plan amendment process. This section derives from RCW 36.70A.130's language that comprehensive plans may not be amended more than once every year.

---

<sup>18</sup> RCW 36.70A.3201 provides: “...the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.”

Although the Board has previously stated that the concurrent adoption of plan amendments and implementing development regulations may be the wisest course of action to avoid inconsistencies, the once-yearly limitation of .130 does not apply to development regulations, such as a rezone, which are permitted to occur at any time.<sup>19</sup> *City of Bremerton v. Kitsap County (Bremerton II)*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004) at 14; *Keesling v. King County*, CPSGMHB Case No. 97-3-0027, Final Decision and Order (March 23, 1998), at 5. The challenged action in this instance is the rezone of the Upper Kennydale area – a development regulation - which may be amended at any time to achieve consistency with the comprehensive plan.

As the Board reads the cited RMC provisions, rezones requiring a comprehensive plan amendment must meet *the review criteria of RMC 4-9-020(G)* with the four criteria pertaining to (1) the vision of the Comprehensive Plan, (2) business plan goals, (3) elimination of conflicts, and (4) accommodate new policy directives. RMC 4-9-020(G)(1)-(4). Timeliness is not a stated review criterion.

Petitioners further assert that the rezone does not conform to the specific criteria of RMC 4-9-180(F), namely compliance with policies within the City’s Comprehensive Plan, and that the City made generalized rationales for the rezone that were not sufficient. With this argument, the Petitioners are asking the Board to review the proposal and substitute its judgment for that of the City Council. This the Board will not do. *See* RCW 36.70A.3201.

### **Conclusion**

The Petitioners have **failed to carry the burden** of demonstrating that the City of Renton’s action in adopting Ordinance No. 5234 was clearly erroneous and inconsistent with the goals and policies of the City’s Comprehensive Plan. **Legal Issues 5, 6, 8, and 9 are DISMISSED with prejudice.**

### **V. ORDER**

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, the Board’s prior orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. The Petitioners **failed to carry their burden** of proving that the City did not comply with the GMA’s requirements for notice and public participation. The City of Renton’s adoption of Ordinance No. 5234 was **guided by**, and **complies with**, the goals and requirements of RCW 36.70A.020(11), .035, and .140. **Legal**

---

<sup>19</sup> As noted *supra*, the Petitioners failed to file a timely challenge of Ordinance No. 5228, the comprehensive plan amendment, which would have been subject to the annual cycle timing limitations.

**Issues 1, 2, 6, and 7, as each relates to notice and public participation, are DISMISSED with prejudice.**

2. Petitioners have **failed to carry the burden of proof** of sufficiently demonstrating how application of R-4 zoning violates RCW 36.70A.020(1) which seeks to encourage urban development in urban areas. **Legal Issue 3 is DISMISSED with prejudice.**
3. Petitioners have **failed to carry the burden of proof** of showing that the City's action was arbitrary and discriminatory, in violation of RCW 36.70A.020(6), or that the City failed to consider property rights when taking the challenged action. **Legal Issue 4 is DISMISSED with prejudice.**
4. The Petitioners have **failed to carry the burden** of demonstrating that the City of Renton's action in adopting Ordinance No. 5234 was clearly erroneous and inconsistent with the goals and policies of the City's Comprehensive Plan. **Legal Issues 5, 6, 8, and 9 are DISMISSED with prejudice.**
5. The matter of *Cave/Cowan v. City of Renton*, CPSGMHB Case No. 07-3-0012, is **closed.**

So ORDERED this 30<sup>th</sup> day of July, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

---

Margaret A. Pageler  
Board Member

---

Edward G. McGuire, AICP  
Board Member

---

David O. Earling  
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.<sup>20</sup>

---

<sup>20</sup> 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

## APPENDIX A

### Procedural Background

#### A. General

On January 29, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Robert Cave and John Cowan (**Petitioner** or **Cave/Cowan**). The matter was assigned Case No. 07-3-0012.<sup>21</sup> Petitioner challenges the City of Renton's adoption of Ordinance No. 5234 (**Ordinance**). The Ordinance *changes* the zoning classification of certain properties within the City of Renton. The grounds for the challenge are noncompliance with several sections of the Growth Management Act (**GMA** or **Act**) and the State Environmental Policy Act (**SEPA**).

On February 2, 2007, the Board issued a "Notice of Hearing and Intent to Consolidate"; on March 1, 2007, the Board held the PHC; and on March 2, 2007, the Board issued a "Prehearing Order" setting the schedule and Legal Issues for this case.

#### B. Motions to Supplement the Record and Amend the Index

On March 1, 2007, the Board received Renton's "Index of Documents."

On March 1, 2007, the Board received Cave/Cowan's "Restatement of Issues Presented for Resolution."

On March 6, 2007, the Board received Renton's Comprehensive Plan, Comprehensive Plan Land Use Map, and Zoning Maps.

On March 13, 2007, the Board received Renton's "Amended/Supplemental Index."

---

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)

<sup>21</sup> This PFR was initially consolidated with the PFR of Ines Somerville Petersen, challenging the same Renton ordinance and others. Ms. Petersen withdrew her petition and her PFR was dismissed. *Petersen v. City of Renton*, CPSGMHB Case No. 07-3-0011, Order of Dismissal (Feb. 28, 2007).

On April 10, 2007, the Board received Renton's "Attachment D to the Renton City Ordinance #5228."

On April 12, 2007, the Board received Renton's "Second Amended/Supplemental Index." Also on April 12, 2007, the Board received Renton's "Attachment 'A' and 'B' from Index No. 240."

### C. Dispositive Motions

On March 22, 2007, the Board received "Respondent's Motion to Dismiss," with 18 exhibits and attachments. On April 11, 2007, the Board received Renton's "Table of Attached Exhibits to Respondent's Motion to Dismiss," listing seven exhibits and their corresponding Index numbers. On April 13, 2007, the Board received Renton's "Table of Attached Exhibits to Respondent's Motion to Dismiss," listing 18 exhibits and their corresponding Index numbers.

On April 5, 2007, the Board received "Robert Cave and John Cowan's Response in Opposition to City of Renton's Motion to Dismiss," with 29 exhibits and attachments. On April 11, 2007, the Board received Cave/Cowan's "Statement of Attached Exhibits," a table listing the 29 attached documents and their corresponding Index numbers.

On April 12, 2007, the Board received "Respondent's Reply to Petitioner's Brief and Objection to Supplement the Declaration of John Cowan."

On April 13, 2007, the Board received "Petitioners' Motion to Strike 'Attachment D' and Related City Arguments," a document identified by the City of Renton as Attachment D to Ordinance No. 5228. (The Board received Renton's Attachment D on April 10, 2007.)

On April 20, 2007, the Board received Renton's "City's Response to Petitioners [sic] Motion to Strike Attachment 'D' to Ordinance 5228," with two attachments – "Declaration of Bonnie Walton," and "Declaration of Loni Johnson."

On April 26, 2007, the Board received Cave/Cowan's "Reply Memorandum of Petitioners in Support of Motion to Strike."

The Board did not hold a hearing on the dispositive motions.

On April 30, 2007, the Board issued its "Order on Motions." The Order **denied** Cave/Cowan's motion to **strike** Renton's "Attachment D." The Order **denied** Cave/Cowan's request to **supplement** the record with the Cowan Declaration, Cave Declaration, and Gendler Declaration. The Order **granted** Renton's motion to **dismiss** Cave/Cowan's Legal Issue No. 10, the SEPA issue. The Order **denied** Renton's motion to **dismiss** Cave/Cowan's PFR on the basis of mootness. The Order **denied** Renton's motion to **supplement** the record with the Walton and Johnson declarations. The Order **denied** Renton's motion for **final disposition** of Legal Issue Nos. 1 and 2. The Order

**denied** Cave/Cowan's motion to **amend** the PRF to include a challenge to Ordinance No. 5228.

On May 10, 2007, the Board received "Petitioners Robert Cave and John Cowan's Motion for Reconsideration" of the Board's April 30, 2007, Order of Dismissal.

On May 14, 2007, the Board issued its "Order Requesting Answer to Motion for Reconsideration," directing that the City of Renton file an Answer to the Petitioners' Motion for Reconsideration.

On May 16, 2007, the Board received "Respondent City of Renton's Response to Petitioners' Motion for Reconsideration" and "Table of Attached Exhibits to Respondent City of Renton's Response to Petitioners' Motion for Reconsideration," with one attached exhibit: Ordinance No. 2536.

On May 21, 2007, the Board received "Petitioners Robert Cave and John Cowan's Reply to Renton's Response to Motion for Reconsideration."

On May 23, 2007, the Board received "Respondent City of Renton's Objection to Petitioners' Reply," with one attached exhibit: "Affidavit of Publication" from the King County Journal.

On May 24, 2007, the Board issued its "Order on Motion for Reconsideration." The Order **denied** Cave/Cowan's request to **amend** their PFR by adding a challenge to Ordinance No. 5228.

#### **D. Briefing and Hearing on the Merits**

On May 11, 2007, the Board received the "Prehearing Brief of Petitioners Robert Cave and John Cowan," with 41 attached exhibits (**Cave/Cowan PHB**).

On May 25, 2007, the Board received the "Respondent's Prehearing Brief," with 22 attached exhibits" (**Renton Response**).

On June 6, 2007, the Board received "Petitioners Robert Cave and John Cowan's Reply to Respondent's Prehearing Brief" (**Cave/Cowan Reply**).

On June 14, 2007, the Board held a hearing on the merits at the Attorney General's Office, Chief Sealth Room, 20<sup>th</sup> Floor, 800 5<sup>th</sup> Avenue, Seattle, Washington. Board members Margaret Pageler, Presiding Officer, David Earling and Edward G. McGuire were present for the Board. Also present were the Board's Law Clerk, Julie Taylor, and Board Extern Linda Jenkins. Petitioners Cave/Cowan were represented by Michael W. Gendler and Lauren Rasmussen. Respondent City of Renton was represented by Ann Nielsen. Also attending were: Rebecca Lind (City of Renton), Erika L. Conkling (City of

Renton), Robert Cave, and John Cowan. Court reporting services were provided by Barbara L. Brace of Byers and Anderson, Inc. The hearing convened at 2:00 p.m. and adjourned at approximately 3:30 p.m.

On June 18, 2007, the Board received “City of Renton’s Response to Board’s Inquiry RE Renton Municipal Code 4-8-080G,” with one attached exhibit.

On June 19, 2007, the Board received “Petitioners’ Supplemental Brief” with the Petitioners’ response to Renton’s RMC 4-8-080G with respect to “Type X” review.