

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

CITY OF ELLENSBURG,)	
)	
Petitioners)	Case No. 95-1-0003
)	
vs.)	FINAL DECISION AND ORDER
)	
KITTITAS COUNTY,)	
)	
Respondent)	
_____)	

Procedural History.

On February 24, 1995, the City of Ellensburg, Washington (“the City”), by and through its attorney, Paul Sullivan, filed a Petition for Review with the Eastern Washington Growth Management Hearings Board (“the Board”), appealing the adoption process of the county-wide planning policies embodied in Kittitas County Resolution No. 94-153.

On April 20, 1995, Petitioner filed a Motion to Add to the List of Exhibits.

On April 26, 1995, the Board issued its Prehearing Order setting forth the motion and briefing schedule and stating the mutually agreed upon legal issue.

On May 18, 1995, the Board held a Motions Hearing in its office. Present were Board members; Tom

Williams, Presiding Officer, and Judy Wall; the Board's Administrative Assistant, Barbara Hill; Paul Sullivan, attorney for Petitioner; and Greg Zempel, Prosecuting Attorney for Respondent, Kittitas County. At the hearing Respondent moved to limit the record.

On May 25, 1995, the Board issued its Order on Motions defining the extent of the record.

On July 25, 1995, the Board held a Hearing on the Merits at 10:00 a.m. in the City Council chambers, City of Ellensburg, Washington. Present were Board Members; Tom Williams, Presiding Officer, Judy Wall and D. E. "Skip" Chilberg. Also present were Barbara Hill, the Board's Administrative Assistant; Brooke Robinson, Court Reporter; Paul Sullivan, Attorney for Petitioner; and Greg Zempel, Attorney for Respondent.

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Discussion.

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Legal Issue: Whether Kittitas County's adoption of Resolution No. 94-153 violated the Growth Management Act for failure to comply with the public participation requirements of the Act?

Introduction

Public participation is central to the Growth Management Act (the "GMA" or the "Act"). RCW 36.70A.020(11) provides:

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

In addition to planning goal no. 11, the public participation requirements and coordination requirements

are expanded upon in subsequent sections of the Act, in particular RCW 36.70A.100, .110, .140 and .210. The latter section prescribes a collaborative process for the development and adoption of county-wide planning policies, which is the subject of the resolution in question.

Positions of the Parties.

a. the City of Ellensburg.

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Pursuant to RCW 36.70A.210(2) the County and the cities of the County entered into a framework agreement for the adoption of a county-wide planning policy. The agreement adopted by the Ellensburg City Council on November 4, 1991 and by the Kittitas County Commissioners on February 4, 1992, herein designated as “Agreement No. 1”, contained a ratification and adoption provision that required the County to adopt all ratified policies. Since the County admits that the policies it adopted differed from the “ratified” policies, it violated both the agreement and the public participation requirements of the Act.

The City, also, argues that if another agreement, herein designated as “Agreement No. 2” is found to be controlling, it too was violated. Additionally, the City argues that the requirements of the State Environmental Policy Act (SEPA) were not followed and that this provides another basis for invalidation.

b. Kittitas County.

It is the County’s position that Agreement No. 2 was the agreement approved by the County Commissioners and the cities and as such is the controlling agreement. The County fulfilled the requirements of this agreement and complied with the public participation requirements of the Act when it adopted Resolution No. 94-153.

If Agreement No. 1 is found to be controlling, the County argues that it is void as against public policy

because it represents an unlawful delegation of legislative authority. Further, it argues that the SEPA argument is without merit.

RCW 36.70A.210(2).

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RCW 36.70A.210(2) prescribes a procedural framework for the adoption of a county-wide planning policy and provides in pertinent part:

The legislative authority of a county that plans under RCW 36.70A.040 shall adopt a county-wide planning policy in cooperation with the cities located in whole or in part within the county as follows:

(a) No later than sixty calendar days from July 16, 1991, the legislative authority of each county that as of June 1, 1991, was required or chose to plan under RCW 36.70A.040 shall convene a meeting with representatives of each city located within the county for the purpose of establishing a collaborative process that will provide a framework for the adoption of a county-wide planning policy. In other counties that are required or choose to plan under RCW 36.70A.040, this meeting shall be convened no later than sixty days after the date the county adopts its resolution of intention or was certified by the office of financial management.

(b) The process and framework for adoption of a county-wide planning policy specified in (a) of this subsection shall determine the manner in which the county and the cities agree to all procedures and provisions including but not limited to desired planning policies, deadlines, ratification of final agreements and demonstration thereof, and financing, if any, of all activities associated therewith;

(e) No later than July 1, 1992, the legislative authority of the county shall adopt a county-wide planning policy according to the process provided under this section and that is consistent with the agreement pursuant to (b) of this subsection, and after holding a public hearing or hearings on the proposed county-wide planning policy.

The Controlling Agreement.

The Board finds the controlling framework agreement to be Agreement No. 1, which is represented in Petitioner's exhibits No. 2 and No. 4 and Respondent's exhibit No. 3. The Board makes this finding for the reasons set forth below. The Board notes, however, that the record contains internal contradictions and

that the adoption process and record keeping procedures could have been improved. ^[1]

Upon a motion for production of the original documents for Agreements Nos. 1 and 2, the County produced Agreement No. 1, a document signed by Kittitas County Chairperson Seubert as well as representatives of several of the cities and bearing page nos. 2092003-007. This document has the same pages nos. identified in “Commissioners’ Proceedings, Kittitas County, Washington” for February 4, 1992, which provides in pertinent part:

Process Approval KCCOG Agreement Process Commissioners

Moved to approve Kittitas County Conference of Governments Agreement on Process for Adopting County Planning Policies. Seconded, carried and signed by Chairperson Seubert. 2092003-007. Petitioner’s exhibit no. 3.

Agreement No. 2, the other original document provided by the County, was unsigned and without pagination. Upon a request by Respondent, The Board granted the County until August 8, 1995, to provide additional information regarding these documents. The County provided no additional information.

Against this evidence is the indication that the individual members of the Kittitas County Council of Governments attempted to modify the agreement prior to the County’s adoption. Respondent’s exhibit no. 9. There is, however, no showing that the cities in their legislative capacities adopted this changed agreement. Respondent relies on the statement of Tom Pickerel that “all the town mayors had signed the agreement but not the Board of Commissioners” in the January 23, 1992 Kittitas County Council of Governments minutes. Respondent’s exhibit no. 9. The same minutes later in the meeting show motions for the changes in Agreement No. 1 that evolved into Agreement No. 2. Thus the cities by this evidence could only have adopted Agreement No. 1 at that time, because the changes made to Agreement No. 1, which created Agreement No. 2, had not yet been made.

The County has presented no other evidence that the cities adopted Agreement No. 2.^[2] If Agreement No. 1 was the only agreement adopted by the cities, it would make sense that the County would have adopted this agreement as their minutes of February 4, 1992 indicate. If this is not the case, there should be evidence that the cities adopted the latter agreement. The record fails to provide such evidence.

RCW 36.70A.290(4) mandates that the Board base its decision on the record developed by the county with one limited exception. The Board has consistently held to this mandate. It has not, nor does it now choose to enter into a de novo review. As the County suggests there may be problems with the record, but it is the record of this case. The Act requires the Board to make its decision on this record.^[3]

The Act requires the adoption of a framework agreement between the cities and the County for the adoption of a county-wide planning policy. Agreement No. 1 was such an agreement. The physical evidence indicates that the cities and the County adopted this agreement. There is no evidence that Agreement No. 2 was adopted by the cities and evidence that Agreement No. 2 was adopted by the County is outweighed by the physical evidence. For these reasons the Board finds that Agreement No. 1 is the controlling agreement.

Is Agreement No. 1 Void as an Unlawful Delegation of County Legislative Authority?

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The County argues that if Agreement No. 1 is found to be the controlling agreement, then it is void as against public policy because it represents an unlawful delegation of legislative authority. Specifically it argues that the ratification provision represents this unlawful delegation of authority. The Board disagrees. First, RCW 36.70A.210(2)(a) prescribes a collaborative agreement between the cities and the County for a framework for the adoption of a county-wide planning policy. Subsection (b) says this agreement may include procedures and provisions for ratification of final agreements. The agreement's provision is consistent with RCW 36.70A.210(2); it simply does what the Act authorized. There is no

delegation problem. The process was never given exclusively either to the County or the cities.

Second, the terms of the ratification provision in Agreement No. 1 allow the County to block any policy with which it disagrees. For this reason, also, there can be no finding of unlawful delegation of authority.

Compliance with RCW 36.70A.210(2).

RCW 36.70A.210(2)(b) says the framework agreement shall determine the manner in which the cities and the county agree to all procedures and provisions associated with a county-wide planning policy, including ratification of final agreements. And RCW 36.70A.210(2)(e) provides that the legislative authority of the county shall adopt a county-wide planning policy that is consistent with the agreement pursuant to subsection (b).

The parties are required to have a framework agreement. The parties are free, however, to determine and negotiate the content of this agreement. It may or may not include a ratification provision, but once an agreement is adopted, the development and adoption of the county-wide planning policy must be consistent with the agreement. RCW 36.70A.210(2)(e).

In this case the ratification provision, section 4 of Agreement No. 1, required the County to adopt all ratified policies. The County admits it did not do this. Respondent's brief at page 6. The County is not in compliance with RCW 36.70A.210(2).^[4]

SEPA Compliance.

The County admitted at the Hearing on the Merits that it had not followed the required SEPA procedure.

It is not necessary for the Board to base its decision on this issue. The County, however, has a duty to

comply with the State Environmental Policy Act.

The Standard of Review.

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Respondent argues that it is entitled to a presumption of validity granted in RCW 36.70A.320 and that Petitioner must show by a preponderance of the evidence that the County erroneously applied the Act.

Petitioner argues that the presumption of validity granted by this section extends only to comprehensive plans, development regulations and amendments, thereto, and, therefore, is inapplicable to the county-wide planning policy process.

The Board finds that Petitioner has met its burden of proof. Because of this finding, it need not answer the question regarding the presumption of validity.

Effect of RCW 36.70A.140.

Respondent suggests that RCW 36.70A.140, one of several sections addressing the public participation requirements of the Act, grants it latitude to skirt the requirements imposed by RCW 36.70A.210(2). It points to the following part of the Section:

Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulation invalid if the spirit of the procedures is observed.

The Board disagrees. RCW 36.70A.140 is addressing specific public participation concepts and citizen involvement in the GMA process. The language cited refers to the citizen involvement process addressed in Section 140. Neither does this language limit the requirements imposed by other sections of the Act, nor does it override the agreement into which the parties entered.

Conclusion.

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The adoption of Resolution 94-153 was not in compliance with the requirements of RCW 36.70A.210(2), because the adoption process failed to fulfill the public participation requirements of the Act.^[5]

Findings of Fact.

1. The City of Ellensburg City Council adopted one and only one framework agreement for the development of a county-wide planning policy, Agreement No. 1, on November 4, 1991. Petitioner's exhibits nos. 1, 2 and 4.
2. Kittitas County adopted the same agreement, Agreement No. 1, on February 4, 1992. Respondent's exhibit no. 3 and Petitioner's exhibit nos. 3 and 4.
3. Agreement No. 1 contained a provision prescribing the process for ratification of county-wide planning policies. Respondent's exhibit no. 3.
4. The county-wide planning policies adopted in Resolution 94-153 differed from the "ratified" policies presented to the Kittitas County Board of County Commissioners for adoption. Respondent's brief at page 6.
5. Agreement No. 1 is not void as against public policy, because it does not represent an unlawful delegation of the County's legislative authority. The agreement's ratification provision cannot be exercised without the County's consent. Approximately 40 percent of the total county population resides in the county rather than within the county's cities. Respondent's exhibit no. 7. Since the provision requires agreement of conference members representing 75 percent of the population, the County can

block any policy with which it disagrees. Respondent's exhibit no. 3.

FINAL DECISION AND ORDER.

The Board finds Kittitas County Resolution 94-153 is not in compliance with the requirements of the Growth Management Act.

The Board, therefore, remands Resolution 94-153 to Kittitas County for further consideration and revision to bring it into compliance with the Growth Management Act and the principles of this opinion.

Kittitas County shall bring Resolution 94-153 into compliance with the requirements of the Growth Management Act by November 20, 1995.

This is a Final Order under RCW 36.70A.300 for purposes of appeal.

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SO ORDERED this 22nd day of August, 1995.

**EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD**

Tom Williams, Presiding Officer

Judy Wall, Board Member

[1]

The County argues that shortcomings in its process and documentation early in the Growth Management effort are reasons to set aside the signed original document, Agreement No. 1, in favor of an unsigned original document, Agreement No. 2. Respondent's brief at page 11.

[2]

A letter dated January 30, 1992 by County Planning Director Pickerel requests that the cities' mayors review Agreement No. 2 and sign if they find it acceptable. Aside from the question of whether an individual mayor as opposed to the city council of one of the cities acting as a body is empowered to adopt the modified agreement, there is no evidence that there was ever any form of adoption of Agreement No. 2 by the cities or the County for that matter. The original of Agreement No. 2 is unsigned.

[3]

The Board notes that the County has the primary responsibility for maintaining the record. It was the only party in a position to have corrected the problems with the record that it has alleged.

[4]

If the Board were to have found that the County adopted Agreement No. 2, there would be no effective agreement, because the record indicates the cities only adopted Agreement No. 1. Because the framework agreement required by RCW 36.70A.210(2) is a condition precedent to adoption of a county-wide planning policy, the County under this analysis similarly would not be in compliance with the Growth Management Act.

[5]

If the Kittitas County Council of Government's members did, in fact, agree to the changes that created Agreement No. 2, then it should not be a burdensome task to have the cities and the County in their legislative capacities adopt the modifications.