

STATE OF WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

BERT and GAYLE BARGMANN,
GREENFIELD
ESTATES
HOMEOWNERS' ASSOCIATION

Petitioners,

v.

CITY OF EPHRATA, a
municipal corporation,

Respondent

Case No.: No. 99-1-0008C

FINAL DECISION
AND ORDER

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I. PROCEDURAL HISTORY

On May 19, 1999, Bert and Gayle Bargmann filed a Petition for Review regarding Ordinance No. 99-9 amending the Ephrata Interim Comprehensive Land Use Plan, Ordinance 95-5 re Interim Zoning, a denied plat application and Capital Facilities.

On May 24, 1999, Greenfield Estates Homeowners filed a Petition for Review regarding Ordinance No. 99-9 as well as Ordinance 99-7, an Ordinance Creating Ephrata Municipal Code Chapter 17.55 entitled Comprehensive Plan and Development Regulation Amendments.

On June 1, 1999, Robert and Karen Sutter filed a Petition for Review on Ordinance 99-9.

Petitions were consolidated as Case No. 99-1-0008c.

On June 25, 1999, Petitioners Bargmann, represented by Counsel Robert Rowley, filed an Amended Petition and Motion to Amend Petition and Response to Ephrata Dispositive Motion.

On July 27, 1999, the Board issued a Prehearing Order establishing

issues and the briefing schedules.

On September 14, 1999 the Board held a Motions Hearing and issued an Order on October 8, 1999, denying Bargmann's dispositive motion on Issue No. 2. Issues were renumbered and will be presented separately by each Petitioner.

On October 29, 1999, Petitioners Sutter withdrew their petition and an Order of Dismissal was entered.

II. FINDING OF FACT

1. The City of Ephrata adopted its Comprehensive Plan (CLUP) in January 1997. City Ordinance 97-5 was referred by the city as their "interim" Plan.
2. The population density of the subject property was described as: "development densities in this area are typically one home per one to five acres".
3. The zoning regulations were adopted on April 5, 1995 by the City of Ephrata (City) and later adopted as the development regulations implementing the CLUP.
4. On April 7, 1999, the city adopted Ordinance 99-7, to be effective 5 days after passage and publication, which occurred on April 12, 1999. This Ordinance created a process for CLUP and the Development Regulations to be amended.
5. The City declared there was an emergency regarding the population densities found in the CLUP. On March 25, 1999, the city considered amendments to the CLUP, eliminating the above quoted density provision and similar ones in the other areas of the City. These amendments were adopted on April 21, 1999, after little public participation and 4 days after the effective date of Ordinance 99-7.

III. ISSUES, DISCUSSIONS AND CONCLUSIONS

Bargmann Issues:

1. Did adoption of Ordinance 99-9, which removed density designations from its Comprehensive Land Use Plan (CLUP), bring the City of Ephrata out of compliance with RCW 36.70A.070(1) and County Countywide Planning Policies (CWPP) 2B.I.A?

Petitioners' position: The Petitioners contend the City's removal of

the density designations from its CLUP moved the City out of compliance with RCW 36.70A.070(1), which requires: "Land use element shall include population densities, building intensities, and estimates of future population growth." Greenfield points out the record supports their belief that Ordinance 99-9 would remove density figure throughout the CLUP. (March 25th Planning Commission meeting and City of Ephrata press release of March 23, 1999.) They also point out the statement in the ordinance, "the amendment will remove references to a numeric density on all maps within the Ephrata Comprehensive Plan".

Respondent position: The City contends the resulting language "high," "medium" and "low" is enough to satisfy the statutory requirements. The City further points out there is no authority, which defines the terms "population density", or "building intensity". They contend the City is not required to designate the density by dwelling units per acre.

The city believes the land use elements containing the maps and text identifying commercial, industrial and residential areas and the ranges of residential densities to be achieved (high, medium, low) and their distribution within the corporate limits and within the UGA, are sufficient to comply with the Growth Management Act, (GMA).

Discussion: RCW 36.70A.070 is very specific in its demand. There must be maps, text covering objectives, principles and standards used to develop the plan. The land use element must designate the proposed general distribution and general location and extent of the uses of land, including commercial, industrial and residential areas. This section then makes a specific requirement that the land use element shall include population densities and building intensities. So vital is the need to know the specific distribution of the population that it is clear a more specific density for population and building intensities is needed than low, medium or high. While not ruling at this time whether the previous language meets the requirements of the law, it is clear the present language does not.

The City's press release of March 23, 1999 announcing the amendment to the Plan says they "will take public comment on an emergency measure to remove the density designation from the City's Comprehensive Land Use Plan," two days later. Clearly the City believed it was removing the density designation from the plan.

The Board determines the actions by the city are clearly erroneous in

view of the entire record before the Board and in light of the goals and requirements of the GMA

Conclusion: The City Ordinance 99-9 is found to be out of compliance with the GMA by their failure to include population densities and building intensities in their land use element.

2. In adopting Ordinance 99-9 did the City of Ephrata improperly use project review to generate amendments to its comprehensive land use plan in violation of the prohibitions of RCW 36.70A.470?

Petitioners' position: The Petitioners contend the City improperly used a review of a project to generate the amendments to its comprehensive land use plan.

Respondent position: The City contends it did not violate the GMA by its adoption of Ordinance 99-9. They did not discuss the origin of the amendments contained therein.

Discussion: This Board is not the place to examine the motivation of the legislative bodies for the amendments adopted. We do not have the authority to examine motivation, just the results and process. The City's motivation is immaterial to our decisions.

Conclusion: The Board finds the motivation of the City is not properly before us and we will not rule on this issue.

3. Did the process followed by the City of Ephrata in adopting Ordinance 99-9 and 99-7 fail to comply with requirements of the Growth Management Act (GMA) and local ordinances in the following particulars:

- a. Lack of compliance with RCW 36.70A.106 (1) and (3) by failing to notify CTED 60 days in advance of the proposed amendment?
- c. Failure of the City Council to include in its record, when considering Ordinance 99-9, any staff report, recommendation of the Planning Commission, or summary of opposing public comments generated before the Planning Commission?
- f. Failure to coordinate with other agencies and foster public participation as required by RCW 36.70A.020(11); RCW 36.70A.100, RCW 36.70A.130 (2)(a), RCW 36.70A.140, CWPP 2B.I.

E. and 6. I and III, and comprehensive land use plan Planning Goal 11?

h. Has the City of Ephrata failed to "show its work" in that it has failed to preserve tape recordings of proceedings and has not otherwise generated a record to support adoption of Ordinance 99-9 and 99-7?

Petitioners' position: The Petitioners, Bargmann and Greenfield emphasize the failure of the City to provide public participation in the adoption of Ordinances 99-7 and 99-9. They list the failures to give adequate notice, adequate time for comment, notice of the nature of the ordinance to be discussed, declaration of an emergency, adoption of a process for adoption of amendments effective 4 days before the adoption of the emergency ordinance, lack of record, lack of copies of the ordinance to be adopted, questions reflected in the record of whether the Planning Commission properly heard the matter and a breakdown of public participation.

Further alleged flaws with the process were listed. The Petitioners believed the City failed to notify CTED as required by law. They further contend the City failed to include various portions of the record.

Respondent position: The City contends this amendment was interim and not intended to be permanent, thus was not required to be sent to CTED. They then point out the lack of authority for the documents required to be included in the record. They also review the requirement for less public participation if there is an emergency and contend the Bargmanns failed to brief the issues as to how the City's adoption of Ordinance 99-9 violated CWPPs 6.I and 6.III. They contend further the Bargmanns did not challenge the adoption of 99-7 and did not brief the failure to preserve tape recordings.

Discussion: The Board does not believe the Petitioners have shown that the Respondent failed to show their work or there was a failure to coordinate with other agencies. However, both petitioners have shown this Board that there was a failure to provide adequate public participation.

The City contends there was an emergency, yet the evidence before the Board tells us the claimed problem has been known for a long time. The planning commission did not agree there was an emergency. The result of the process was a rushed-through change in the Plan with little public participation, little knowledge of the changes, and why and

what the effect would be. This can also be said of Ordinance 99-7. There was no public participation plan, little input, and passage of legislation that further restricts public input, I.e. \$300 fee for suggested amendments.

Public participation is the flagship of the Growth Management Act and is jealously guarded by this Board. While there is a legitimate argument we do not have the jurisdiction to rule on the action by a city to declare an emergency, that is not the case here. The City contends there is an emergency as provided under RCW 36.70A.130 and as such can amend the Plan more often than every year and with less public participation. We do have the jurisdiction to review this situation and we find that an emergency did not exist sufficient to quickly amend the Plan with less public participation than required.

The Board finds the action by the City is clearly erroneous in view of the entire record before us and in light of the goals and requirements of the GMA.

Conclusion: The Board finds Ordinances 99-7 and 99-9 are not in compliance with the GMA due to the City's failure to provide the opportunity for Public Participation required by the GMA.

4. Does Ephrata's adoption of Ordinance 99-9 fail to comply with the requirements of RCW 36.70A.040(3)(d), RCW 36.70A.030(8), Comprehensive Land Use Plan LU-56, Policy 8, and CWPP 6.I requirements that development regulations implement the Comprehensive Land Use Plan rather than the reverse?

Petitioners' position: The Petitioners contend the City has distorted the way the Legislature intended the GMA to proceed. They point out the GMA requires the City to adopt development regulations to implement the Comprehensive Plan. They believe the city must therefore conform the regulations to the Plan and not the reverse.

Respondent position: The city contends Ordinance 99-9 removed one inconsistency between the Plan and the City's Development Regulations and this promoted the purposes of the CLUP.

Discussion: The record is clear that the City wanted the change so the plan would conform to the existing Zoning, (see record of March 25 city council meeting). The Board views this issue as a request to review the motives of the city. However, this Board will not review

the motives of the legislative body adopting legislation, but will look at the results and whether it is in conformity with the law.

Conclusion: This issue is not properly before us, we will not resolve this issue.

5. Does Ephrata's adoption of an "interim" Comprehensive Land Use Plan violate the requirements of RCW 36.70A.040 to adopt a final Comprehensive Land Use Plan? Does Ephrata lack authority under the GMA to adopt an "interim" Comprehensive Land Use Plan?

Petitioners' position: The Petitioners believe the City does not have the authority to adopt an "interim" Comprehensive Land Use Plan and therefore is not valid.

Respondent position: The City contends the Plan was clearly interim and there is no prohibition of the development of such a plan. The City goes further and asserts the Petitioners are too late to object, the time for a petition on this issue has passed.

Discussion: The GMA makes no provision for an interim Comprehensive Plan. Any Comprehensive Plan adopted by a County or a City is a final plan, which may be amended as provided by law. The City is correct in that any petition seeking review of this plan would be late at the time this petition was filed and is not properly before us.

Conclusion: This issue is not properly before us and will not be decided.

6. Has Ephrata adopted any development regulations to implement its Comprehensive Land Use Plan. If not, is Ephrata not complying with the GMA? If it has, do the adopted development regulations fail to implement the Comprehensive Land Use Plan as required by the legislation identified in Issue #5?

Petitioner position: The Petitioners are asking the Board to give an opinion as to whether, even if the Ordinance is declared to be in non-compliance, does the Plan remain out of compliance.

Respondent position: The City declares the time for such an issue has passed. The Petitioners did not file a petition within 60 days of the passage of the subject legislation.

Discussion: The GMA prohibits us from giving declaratory judgments. We can decide issues that are properly before us. Neither the Plan nor the development Regulations were timely appealed and therefore are not before us.

Conclusion: The Petitioners failed to timely raise this issue and we find in favor of the City.

7. Did Ephrata fail to comply with the "emergency" Comprehensive Land Use Plan amendment provisions of RCW 36.70A.130 when adopting Ordinance 99-9 in that:

- a. It failed to provide for appropriate public participation?
- b. It failed to adopt an amendment or revision that conforms with RCW 36.70A?
- c. No actual "emergency" within the meaning of RCW 36.70A.130 existed or was shown by the record to exist?

Discussion: This issue need not be decided because we have decided in issue 4 that the City is not in compliance with the GMA in their passage of Ordinances 99-7 & 99-9. We found there was not appropriate public participation and the "emergency" did not exist.

Conclusion: See Issue 4.

8. Does adoption of Ordinance 99-9 fail to comply with the requirements of RCW 36.70A.130(2)(b) in that no consideration was given by Ephrata to cumulative effects of the amendment?

Discussion: Because the Board has already found the City to be in non-compliance, we need not answer this issue.

Conclusion: It is not necessary to address this issue.

Greenfield Estates Issues:

1. Did the City of Ephrata, when adopting Ordinance 99-9, fail to comply with SEPA requirements by failing to prepare or submit an environmental checklist or otherwise conduct environmental review?

Petitioner position: Greenfield contends the City failed to comply

with SEPA by failing to submit an environmental checklist or otherwise conduct an environmental review. They point out SEPA documentation is glaringly absent for this ordinance in the City's Index of Record, even though Greenfield specifically raised this issue. Ordinance 99-7, passed pursuant to the GMA, requires the inclusion of a "SEPA checklist".

Respondent position: The City admits it did not submit a checklist, but their brief ends there.

Discussion: Because of the decision already made, finding the City in non-compliance, we need not resolve this issue. However, the Growth Management Hearings Boards have the jurisdiction to review the City's compliance with SEPA and the City is bound under the terms of that law just as a citizen would be.

Conclusion: It is not necessary to decide this issue because of our previous finding of non-compliance. It is hoped the City will examine SEPA and their own laws and fully comply with them when this Ordinance is revisited.

2. Did adoption of Ordinance 99-9, which removed density designations from its CLUP, bring the City of Ephrata out of compliance with RCW 36.70A.070(1) and CWPP 2B. I. A?

Discussion: This issue has been addressed, see Bargmann Issue 1. Because of the similarity of the issues, where possible, we addressed them only once.

Conclusion: The City Ordinance 99-9 is found to be out of compliance with the GMA by their failure to include population densities and building intensities in their land use element.

3. In adopting Ordinance 99-9 did the City of Ephrata improperly use project review to generate amendments to its CLUP in violation of the prohibitions of RCW 36.70A.470?

Discussion: This issue has been addressed, see Bargmann Issue 2.

Conclusion: The Board finds the motivation of the City is not properly before us and we will not rule on this issue.

4. Did the process followed by the City of Ephrata in adopting Ordinance 99-9 and 99-7 fail to comply with requirements of the GMA and local ordinances in the following particulars:

- a. Failure of the Planning Commission to hold a public hearing on Ordinance 99-9 in violation of EMC 17.03.060 (Ephrata Municipal Code)?
- b. Failure of the City Council to include in its record, when considering Ordinance 99-9, any staff report, recommendation of the Planning Commission, or summary of opposing public comments generated before the Planning Commission as required by EMC 17.03.060 A.4 and B?
- c. Failure to provide notice to the public of the form and content of the proposed Ordinance 99-07 and failure to publish notice of otherwise the public prior to either Planning Commission recommendation or City Council action on that ordinance in violation of RCW 36.70A.130(2)(a)?
- d. Failure to hold a public hearing on Ordinance 99-07 as required by its adopted CLUP, page EX-12 (per development regulation EMC 18.48.010)?
- e. Failure to coordinate with other agencies and foster public participation as required by RCW 36.70A.020(11), RCW 36.70A.130(2)(a), RCW 36.70A.140, CWPP 2B and 6. I and III, and CLUP Planning Goal Paragraph 11?

Petitioner position:

Respondent position:

Discussion: This issue was addressed, see Bargmann Issue 3. Greenfield's issue more specifically raised the lack of public participation upon which our decision was primarily decided. Because of the similarity of the two issues, we considered them together and found that the City was not in compliance with the GMA. The allegations of the violation of local laws over which we have no jurisdiction, were not considered.

Conclusion: The Board finds Ordinances 99-7 and 99-9 are not in compliance with the GMA due to the City's failure to provide the opportunity for Public Participation required by the GMA.

5. Does Ephrata's adoption of Ordinance 99-9 fail to comply with the requirements of RCW 36.70A.040(3)(d), RCW 36.70A.030(8), CLUP LU-56, Policy 8, and CWPP 6 I requirements that development regulations implement the CLUP rather than the reverse?

Discussion: See Bargmann Issue 4.

Conclusion: This issue is not properly before us, we will not resolve this issue.

6. Does Ephrata's adoption of an "interim" CLUP violate the requirements of RCW 36.70A.040 to adopt a final CLUP? Does Ephrata lack authority under the GMA to adopt an "Interim" CLUP?

Discussion: See Bargmann Issue 5.

Conclusion: This issue is not properly before us and will not be decided.

7. Has Ephrata adopted adequate development regulations to implement its CLUP? If not, is Ephrata not complying with the GMA? If it has, do the adopted development regulations fail to implement the CLUP as required by the legislation identified in Issue #5?

Discussion: See Bargmann Issue 6.

Conclusion: The Petitioners failed to timely raise this issue and we find in favor of the City.

8. Did Ephrata fail to comply with the "emergency" CLUP amendment provisions of RCW 36.70A.130 when adopting Ordinance 99-9 in that:

- a. It failed to provide for required public participation in violation of RCW 36.70A.130(2)(a)?
- b. It failed to adopt an amendment or revision to its CLUP which ensured that development regulations implement the CLUP, thus violating RCW 36.70A.040 93)(d) and Ephrata's CLUP page LU-56, Policy 8?
- c. No actual "emergency" within the meaning of RCW 36.70A.130 existed or was shown by the record to exist?

Discussion: This issue need not be decided because we have decided in Bargmann issue 4 that the City is not in compliance with the GMA in their passage of Ordinances 99-7 & 99-9. We found there was not appropriate public participation and the "emergency" did not exist.

9. Does adoption of Ordinance 99-9 fail to comply with the requirement of RCW 36.70A.130(2)(b) in that no consideration was given by Ephrata to cumulative effects of the amendment?

Discussion: Because the Board has already found the City to be in non-compliance, we need not answer this issue.

10. Does adoption of Ordinance 99-9 result in elimination of CLUP provisions designed to assure compatibility of adjacent land uses, both within the city and where the city adjoins rural adjacent county properties, thus violating RCW 36.70A.070(5)(c), CLUP Housing Goals and Policies #2, #3, and Objective A, and CWPPs 5.I.D.1, 5.I.F.2, and 5.I.F.3?

Discussion: Because we found the City is not in compliance with the GMA in previous issues, it is unnecessary to resolve this issue. The City will have to reexamine compatibility of adjacent land uses when they begin the process of coming into compliance.

11. Was the City required by RCW 36.70A.130 to have adopted guidelines and procedures for amending the CLUP prior to considering amendments?

a. Was the City required to follow the guidelines set forth in Ordinance 99-07 when concurrently considering an amendment to the CLUP?

Petitioner position: Greenfield asserts the City must adopt guidelines and procedures for amending the CLUP prior to considering amendments.

Respondent position: The City asserts the amendment process (Ordinance 99-7) had already been adopted prior to adoption of Ordinance 99-9 and the City had complied with the procedures contained in RCW 36.70A.130 and Petitioners had failed to meet their burden.

Discussion: Ordinance 99-7 went into effect 5 days after publication, four days before the adoption of Ordinance 99-9. This was after

public comment on 99-9 had closed. The City failed to have a public participation program whereby proposed amendments or revisions of the plan are considered.

Conclusion: The Board has already found the City out of compliance with the GMA and their failures reflected by this discussion strengthen the basis for such a finding. This issue need not be further decided.

12. Is the City of Ephrata, even if Ordinance 99-9 is invalidated or repealed, out of compliance with the GMA for its failure to adopt development regulations that:

- a. Create zones to implement the use zones required by the CLUP?
- b. Assign density levels mandated by the CLUP?
- c. Protect against incompatible adjacent land uses?

Petitioner position: Greenfield contends that even if Ordinance 99-9 is declared invalid or out of compliance, the development regulations are out of compliance with the GMA. They list a number of failures as seen by Greenfield.

Respondent position: The City contends the Greenfields failed to file a timely petition and therefore are unable to raise these issues.

Discussion: The Petitioners must file a petition challenging a City action within 60 days after the publication of such legislative action. However, there is no statutory time limit for filing a failure to act petition. The City itself called this a failure to act challenge in its brief. The City also points out there is a mixing of failure to act challenges and compliance issues. It is not our place to separate the issues, decide where there was a failure to act or compliance questions. The Petitioner must do that, and they have not. Because of this, the Board must find that the time for challenge has passed. If there is truly a failure to act which can be separately considered, this challenge could be brought at any time.

Conclusion: In matters that are failure to comply issues, the time has passed where a petition may be filed in this matter. The Board will not hear this issue.

13. Is the City relying upon Ordinance 99-9 and its failure to adopt implementing development regulations, to make project decisions that undermine the goals and policies of the GMA, the CWPPs and the City's CLUP?

Discussion: The Petitioners are asking this Board to invalidate the Ordinances 99-7 and 99-9. RCW 36.70A.302 provides that all or part of a comprehensive plan or development regulations may be held invalid if the board not only finds the acts noncompliant but includes findings that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of the GMA. The impact of such a finding has serious consequences and should not be done except in cases where the interference is clear. The Petitioner has not carried its heavy burden of showing the Ordinances substantially interfere with the fulfillment of the goals of the GMA. They have not provided us with examples resulting from or expected to result from the Ordinances that would substantially interfere with the fulfillment of the goals of the GMA.

V. ORDER

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A. Ordinances 99-7 and 99-9 are found in non-compliance with the Growth Management Act and are remanded and the City is directed to come into compliance within 90 days from the date of this Order.

B. The Petitioners' request for a finding of invalidity is hereby denied.

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This is a final order for purposes of appeal.

Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this final decision and order.

SO ORDERED this 22nd day of December, 1999.

**EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS**

BOARD

D.E. "Skip" Chilberg, Presiding Officer

Judy Wall, Board Member

Dennis A. Dellwo, Board Member