

**State Of Washington**  
**GROWTH MANAGEMENT HEARINGS BOARD**  
**FOR EASTERN WASHINGTON**

1000 FRIENDS OF WASHINGTON  
and NEIGHBORHOOD ALLIANCE  
OF SPOKANE,

Petitioner,

v.

SPOKANE COUNTY,

Respondent.

Case No.: 01-1-0018

FINAL DECISION AND  
ORDER

### I. Procedural History

On December 20, 2001, 1000 Friends of Washington and Neighborhood Alliance of Spokane, by and through their attorney John Zilavy, filed a Petition for Review.

On January 25, 2002, the Board held a Prehearing conference. Present were Dennis Dellwo, Presiding Officer, Board Members Skip Chilberg and Judy Wall. John Zilavy was present representing Petitioners. Present for Respondent was Robert Binger, Spokane Deputy Prosecuting Attorney. The Board issued the Prehearing Order on January 28, 2002.

On February 19, 2002 Petitioners filed a motion requesting that the Board order Spokane County to provide an Index of Record that complied with WAC 242-02-520. Spokane County filed its response on March 5, 2002.

On March 26, 2002, a Motion Hearing was held. Presiding Officer, Dennis Dellwo, Board Members Skip Chilberg and Judy Wall were present. The parties were represented by counsel, John Zilavy for the Petitioners and Robert Binger for Spokane County. The Board denied Petitioners motion upon Respondent's agreement not to seek reimbursement for costs associated with copying and shipping the entire record to attorney for Petitioners.

On May 10, 2002, the Board held the Hearing on the Merits. Presiding Officer, Dennis Dellwo, Board Members Skip Chilberg and Judy Wall were present. The parties were represented by counsel, John Zilavy for the Petitioners and Robert Binger for

Spokane County.

## **II. Findings of Fact**

1. On March 8, 2001, the Spokane County Planning Commission adopted its Comprehensive Plan and Capital Facilities Plan, issuing Findings of Fact and Decision.

2. The Board of County Commissioners (BOCC) held three public hearings on the recommended Comprehensive Plan and Capital Facilities Plan, May 2, 3, and 8, 2001.

3. Between July 11 and August 24, 2001, the BOCC held 22 deliberative sessions during which the Recommended Comprehensive Plan was discussed. No public comment or testimony was taken or contemplated during these deliberative sessions.

4. On August 24, 2001,

following deliberations but without further public hearings on the Comprehensive Plan since May 8, 2001, the BOCC issued a strikethrough version titled Board of County Commissioners Revisions to Planning Commission Recommendation Spokane Comprehensive Plan.

5. The "strikethrough" version of the Comprehensive Plan contained the 21 policy amendments at issue in this action.

6. On November 5, 2001, the BOCC adopted the Amended Comprehensive Plan that incorporated the substantive changes from the above strikethrough, Revised Plan. In addition the BOCC made and adopted 51 changes to the County's Comprehensive Plan Land Use Map designations.

## **III. Standard of Review**

The Spokane County Comprehensive Plan is presumed valid. The burden of proof is on the Petitioners, 1000 Friends of Washington and the Neighborhood Alliance of

Spokane, to demonstrate that the plan is not in compliance with the Growth Management Act (GMA). RCW 36.70A.320 and *Grant County Association of Realtors v. Grant County Case Eastern Washington Growth Management Hearings Board* (EWGMHB) Case No.: 99-1-0018 Final Decision and Order p. 6 of 10 (May 23, 2000).

The Washington Supreme Court has set out the standards the Growth Board is to apply to the Spokane County Comprehensive Plan:

The Board is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations. [RCW 36.70A.280](#), .302. The Board "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." [RCW 36.70A.320\(3\)](#). To find an action "clearly erroneous," the Board must be "left with the firm and definite conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

*King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133, 138 (2000).

#### **IV. Legal Issue and Discussion**

**Issue 1:** Did Spokane County's adoption of a Comprehensive Plan with 21 policy amendments and 51 amendments to the Comprehensive Plan Land Use Map designations recommended by the Planning Commission violate RCW 36.70A.020(11) (the Growth Management Act's (GMA) public involvement goal), RCW 36.70A.035(2) (which requires a notice and an opportunity for public comment for amendments adopted after the end of the usual public comment period) or RCW 36.70A.140 (which requires early and continuous public involvement) because the public was not given notice of the amendments and a chance to comment on them prior to adoption?

#### **Petitioner's Position:**

The Petitioners contend that the County failed to provide for the required public participation prior to the adoption of the 21 policy changes, which were made after the last public hearing.

The Petitioners point out that the GMA's key objective is to dramatically increase public participation in land use planning. The GMA requires those jurisdictions planning

under the Act to encourage citizen participation and involvement in the process. Planning Goal 11 is said to encourage citizens to participate throughout the growth management planning process.

The Petitioners contend this statutory requirement of public participation was not followed during the BOCC's deliberations on the comprehensive plan wherein they adopted 72 amendments. It is claimed the amendments were all considered after the County Council's May 2, 3, and 8th 2001 hearings. For all 72 amendments, the Petitioners contend the BOCC provided no public notice of or public hearing on these changes before the November 5th decision to adopt the amended comprehensive plan.

The Petitioners contend these changes were significant. An example was Change 1 where 51 amendments to the proposed land use plan map were made. Other changes included changing "shall" to "should" and "provide" to "encourage". Change 5 expanded the number of rural activity centers. Eight policies were deleted.

The Petitioners contend the County violated RCW 36.70A.035(2) because the County made 72 changes to the comprehensive plan after the end of the usual public comment period without public notice and an opportunity for public comment.

The Petitioners anticipated a possible argument by the County that RCW 36.70A.035(2) does not apply because this is the initial adoption of a comprehensive plan and this statute would only apply to amendments. But the Petitioners believe the "amendments" are the changes to the document on which the public hearing or other public comment process was held. The Central Board agreed with this position in *Andrus, et al. v. City of Bainbridge Island*, CPSGMB Case No. 98-3-0030 Final Decision and Order pp. 5 (March 31, 1999).

They believe the County may argue the 72 amendments may fall under the exception in RCW 36.70A.035(2)(b)(ii) for alternatives available for public comment. However, the Petitioners contend the amendments are not in the record that predates the County's three hearings in May of 2001.

The Petitioners contend the failure to involve the public in the changes made by the BOCC violates RCW 36.70A.140 requirements for continuous public involvement. The Petitioners demonstrate where notice was given of the various BOCC deliberation meetings after May 2001, testimony or input was not sought from the public. In two of the cases the public was informed: "No public testimony will be considered".

The Petitioners believe they have shown the Board substantial evidence in the record that Spokane County violated RCW 36.70A.140's requirement for continuous public involvement in the adoption of the comprehensive plan with the 72 BOCC amendments.

The Petitioners addressed the County's reply brief in five sections.

1. Petitioners contend the issue is not whether the changes are small, medium or large; the issue is whether the changes should have been made without providing adequate notice to the public. The Petitioners contend the "freezing out the public from participating in future land use decisions is precisely what the GMA seeks to prevent." (Reply Brief p.3).
2. The Petitioners contend RCW 36.70A.035 does apply to the subject amendments because:
  - a) A CPSGMHB case has held that the term "amendment" refers to any change made to a document on which public hearing was held and comment invited.
  - b) It is unlikely that the legislature would put so much emphasis on public participation, yet partially exempt the process leading up to adoption of the initial comprehensive plan; and,
  - c) Resolution 1-1059, which adopted the amended plan explicitly, states this is an update of the original Comprehensive Plan adopted in 1980.
3. The Petitioners contend the changes at issue were not "within the range of alternatives" considered in the EIS, as claimed by the County. The Petitioners contends the County lists no site-specific references or examples in the EIS where these changes were addressed. The Petitioners point out that nowhere in the EIS is there even a general, much less site-specific discussion of converting Large Tract Agriculture or Rural Conservation to Rural Traditional, or of changing Large Tract Agricultural to allow for the construction of a golf course or any discussion of any of the 21 policy changes that were ultimately adopted.
4. The Petitioners contend the several letters cited in the record by the County which address the specific changes made does not support the

requirement that reasonable notice be given as an invitation to public comment. The Petitioners recognize that the County has a particularly good Public Participation Program (PPP), but contend they did not follow it. The County PPP requires that "proposals or alternatives should be published and available 10 days prior to a public meeting or hearing scheduled for their discussion or a decision."

5. Finally the Petitioners contend the letters and testimony referred to by the County do not establish that the adopted changes were broadly available for public comment. The Petitioners believe these letters only show the individual's interest in that particular change or their special knowledge of a prospective change. This does not show notice to the public.

### **Respondent's Position:**

The County points out that the County held three public hearings to consider the Recommended Comprehensive Plan and Capital Facilities Plan, May 2, 3 and 8, 2001. The BOCC left the record open for written comments on the Planning Commission recommended Comprehensive Plan, the Final Supplemental Environmental Impact Statement and the Steering Committee recommendations until May 31, 2001. The County confirms it held 22 deliberation sessions between July 11 and August 24, 2001. The County states on August 14, 2001, the BOCC held a public hearing to consider the City of Spokane's Urban Growth Area proposal, which was continued to August 23, 2001. On November 5, 2001, the County adopted the comprehensive plan and findings and conclusions supporting the comprehensive plan in Resolutions No. 1-1059 and No. 1-1060. These resolutions document the changes made by the BOCC, reasons for the changes, and the process used to prepare and adopt the plan.

The County then listed the changes that were made in the Comprehensive Plan. After each change the County stated the basis of such change. The basis mostly consisted of letters dating from May 2001, or earlier or testimony received at the three May 2001, hearings.

The County further contends RCW 36.70A.035(2) does not apply in this case. That statute requires additional public participation where an amendment is considered to the Comprehensive Plan after closing of public comment and does not fit within the listed exceptions. The County contends this statute does not apply where the County had no

Comprehensive Plan at that time.

If the Board was to hold that this statute is applicable, the County contends the changes were predominately based upon testimony and/or documents submitted during the review and comment period, before the record was closed. Therefore, no additional time frame for review was required.

The County further contends that the changes to the Comprehensive Plan map and text set forth in the briefs are within the range of alternatives considered in the Environmental Impact Statement and as such an additional opportunity for comment was not required.

The County further contends that the 72 amendments at issue are not substantial changes and as such an additional opportunity for comment was not required.

Finally the County contends that the changes were within the scope of alternatives available for public comment as evidenced by the testimony and/or documents upon which the changes were based. On this basis, the County believes, pursuant to the Public Participation Guidelines an additional opportunity for comment was not required.

The County

argued that it is complying with the Public Participation Program Guidelines. The exceptions to additional public comment in the County's Public Participation Program Guidelines include those alternatives that are within the range considered in the environmental impact statement or within the scope of alternatives available for public comment. The County contends that it is required to follow the Public Participation Program Guidelines and it has done so.

### **Discussion:**

RCW 36.70A.020(11) is one of the listed Goals of the Growth Management Act: 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(2) again provides for public participation, but in the specific area of comment upon amendments to a comprehensive plan or development regulations:

(2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provide before the local legislative body votes on the proposed change.

RCW 36.70A.140 is another, but more universal provision for public participation under the GMA. In that statute, the County is required to:

...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 County has developed its own Public Participation Plan and has been found compliant with the GMA. The County now is required to follow the plan.

These three statutes

convince us that the legislature intended that public participation enjoy a high priority under the Growth Management Act. "This Board has always held that public participation was the very core of the Growth Management Act." *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c Final Decision and Order p. \*6 of 16 (May 21, 1999). At a minimum, this means that the public must have an opportunity to comment on amendments to the Planning Commission recommendation prior to adoption by the local legislative body unless the amendments fall under one of the exceptions in RCW 36.70A.035(2)(b).

Up until the events covered by this Petition, Spokane County has generally done a good job in fulfilling its obligations under the public participation statutes. Spokane County has complied with the GMA in adopting comprehensive Public Participation Policies and Guidelines. The Planning Commission followed the guidelines by holding four public hearings for receiving comments and testimony on a recommended Comprehensive Plan before considering changes and another public hearing on the changes they were considering before making their recommendation.

Inexplicably, the Board of County Commissioners chose to discontinue adherence to the Public Participation Guidelines after it received the recommended Comprehensive Plan from the Planning Commission. Instead, the Spokane BOCC adopted the Comprehensive Plan with 21 textual amendments and 51 land use map changes, while providing no opportunity for public participation or comment on these amendments. We are convinced that failure to hold a public hearing before adopting the amendments was clearly erroneous and not compliant with the GMA.

### **Initial Comprehensive Plan Not Exempted from RCW 36.70A.035**

The County's argument that the challenged Comprehensive Plan is an initial plan, not an amendment and therefore exempt from the public hearing requirement of

36.70A.035 is without merit. The adopting Resolution itself states in two places that this is an “update” of the Comprehensive Plan originally adopted in 1980.

Further, we agree with petitioners that “amendment,” as it’s used in 36.70A.035 (2)(a) refers to amendments or changes made to a planning document during the legislative body’s consideration of the plan or development regulations. Each amendment or change made during this process, that is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one additional opportunity for public comment with appropriate notice and time to review the amendments prior to adoption. No other interpretation makes sense given the importance the GMA places on public participation as evidenced by the three statutes at issue in this case. Nor is any other interpretation reconcilable with the clause contained in 36.70A.140 that requires “early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations . . .” This is also the conclusion of the both the Western Washington Growth Management Hearings Board and the Central Puget Sound Growth Management Hearings Board. See *Panesko, et al. v. Lewis County, et al.*, Western Washington Growth Management Hearings Board (WWGMHB) Case No. 00-2-0031c Final Decision and Order; *Butler, et al. v. Lewis County, et al.* WWGMHB Case No. 99-2-0027c Compliance Order; & *Smith, et al. v. Lewis County, et al.*, WWGMHB Case No. 98-2-0011c Compliance Order p. \*5 (March 5, 2001) and *Radabaugh v. City of Seattle*, Central Puget Sound Growth Management Hearings Board (CPSGMHB) Case No. 00-3-0002 Final Decision and Order pp. \*11-12 (July 26, 2000). While the decisions of these boards do not bind us, we do agree with their analysis.

We therefore find that the 21 text changes and 51 land use map changes at issue in this case were “amendments” to the Comprehensive Plan under the meaning of RCW 36.70A.035(2)(a). These amendments were “considered” after the opportunity for public review and comment had passed and therefore an additional opportunity for review and comment on the proposed change was required before adoption by the BOCC. RCW 36.70A.035(2)(a). Cities and counties have discretion under RCW 36.70A.035(2) on how to give notice and how to provide opportunities for public comment. A hearing, for example, is not required in all cases although it should be considered where, as here, there are many changes covering a wide variety of topics and geographic areas.

## **Amendments are Not Clarifications or Corrections of Errors**

Spokane County argues that the 21 textual amendments and 51 land use map amendments were not “substantial,” and therefore the County is exempted from holding further public hearings on the amendments.

The Board declines to accept this argument. First, RCW 36.70A.035(2) does not require that the amendments be significant. RCW 36.70A.035(2)(b)(iii) does provide an exemption to the requirement to provide an opportunity to review and comment on the amendments for correcting errors or clarifying language “without changing its effect.” Second, all of the amendments challenged by Petitioner change a policy from the Planning Commission’s Recommended Comprehensive Plan in a way that does not fall under any of the exemptions in RCW 36.70A.035(2)(b). For example, many of the textual amendments change “shall” to “should” and “require” to “encourage.” This changes mandatory policies to discretionary policies. In some cases, policies were deleted altogether.

The Board reaches a similar conclusion with respect to the 51 challenged amendments to the land use map. As Petitioners point out, just four of these map amendments re-designate over 1600 acres from the recommended Comprehensive Plan. The County asserts that the acreage involved is minimal when compared to the 1,128,832 acres within Spokane County and is therefore not a substantial change.

We decline to accept this view. Again, there is no requirement that the changes must be substantial and no evidence the map amendments were merely correcting errors or otherwise fall under any of the exemptions in RCW 36.70A.035(2)(b).

## **Changes Were Not Within the Scope of the Alternatives Available for Comment at the Public Hearings**

Spokane County further argues that all of the challenged amendments were within the scope of alternatives available for public comment at the three public hearings held on May 2, 3 and 8, 2001, citing as evidence the letters and testimony received that addressed the adopted amendments. The County argues that no public hearing was therefore required pursuant to RCW 36.70A.035(2)(b)(ii). The County further argued at the Hearing on the Merits that the notice for the public hearings stated that the Board of County Commissioners might make changes to the Comprehensive Plan prior to

adoption. This

notice, the County argues, satisfies constitutional due process and brings the challenged amendments under the purview of 36.70A.035(2)(b)(ii), precluding the need for any further public hearings.

The Board declines to adopt the County's arguments. The fact that the County received letters from certain citizens requesting or discussing language adopted later as amendments,

does not demonstrate that the amendments were within the scope of alternatives available for public comment. The Growth Management Act requires that the public have the opportunity to contribute its voice to the development of comprehensive plans and development regulations. Preceding that opportunity must be effective notice, reasonably calculated to alert the public to the alternatives that may become part of the final comprehensive plan. There was nothing in either the notices for the three public hearings, or in the text of the Planning Commissions recommended Comprehensive Plan that was the subject of the hearings that would alert the general public that the adopted amendments at issue were on the table for consideration. Nor was there any notice that the county had received letters requesting comprehensive plan changes and inviting the public to review the letters and comment on the changes being considered. We therefore find that the 72 challenged amendments were not among the scope of alternatives available for public comment.

### **Changes Where Not Within the Scope of EIS**

The County further argues that the challenged amendments were within the range of alternatives considered in the environmental impact statement (EIS) prepared pursuant to the State Environmental Policy Act (SEPA) and simultaneous with the development of the Comprehensive Plan. Therefore the County was not required to provide additional opportunities for public comment pursuant to RCW 36.70A.035(2)(b)(i).

Again, this Board cannot agree with the County. The alternatives were discussed only generally in the environmental impact statement and do not approach the specificity required that would have alerted interested members of the public that the challenged amendments would be considered and adopted with the Comprehensive Plan. We therefore find that the 72 amendments were not within the range of alternative addressed in the environmental impact statement.

### **Conclusion:**

The Board finds that the County's actions as challenged by Petitioners were

clearly erroneous under RCW 36.70A.035 of the Growth Management Act. The County failed to provide an opportunity for the public to comment on the 72 amendments to the adopted Comprehensive Plan at issue in this case. The County has failed to comply with the Growth Management Act. This matter is therefore remanded back to Spokane County for action consistent with this conclusion.

**V. Order**

1. Spokane County is not in compliance with the Growth Management Act due to its failure to provide reasonable notice and an opportunity for review and comment on the on the 72 amendments challenged by Petitioners herein as required by RCW 36.70A.035 (2).
2. Spokane County shall comply with this order within 180 days.

**Pursuant to RCW 36.70A.300(5), 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 4<sup>th</sup> day of June 2002.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD

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Dennis Dellwo, Board Member

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Judy Wall, Board Member

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D. E. "Skip" Chilberg, Board Member