

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

NEIGHBORS FOR RESPONSIBLE DEVELOPMENT

Case No. 02-1-0009

Petitioner,

FINAL DECISION AND ORDER

v.

CITY OF YAKIMA,

Respondent.

CONGDON ORCHARDS INC.

Interenors

I. BACKGROUND

On May 9, 2002, NEIGHBORS FOR RESPONSIBLE DEVELOPMENT, by and through their attorney, James Carmody, filed a Petition for Review.

On May 15, 2002, Respondent City of Yakima filed a Motion to Dismiss Petition for Review.

On June 7, 2002, the Board held a prehearing conference. The Board received a Stipulation and Agreed Order of Dismissal Regarding Respondent Yakima County. The Board dismissed Yakima County as a party and issued its Prehearing Order.

On June 7, 2002, the Board also heard and considered argument on the City of Yakima's Motion to Dismiss the Petition for Review as untimely filed. The Board issued its Order Denying the City of Yakima's Motion to Dismiss Petition for Review on June 18, 2002.

On June 26, 2002, Respondent City of Yakima filed a Motion for Reconsideration of Order Denying Motion to Dismiss Petition for Review.

On July 15, 2002, the Board issued its Order Denying Respondent City of Yakima's Motion for Reconsideration of Order Denying Motion to Dismiss Petition for Review.

On August 23, 2002, Congdon Orchards, Inc. filed a Motion to Intervene by and through their attorney, Michael Shinn.

On September 11, 2002, the Board held a telephonic status conference and considered the Motion to Intervene filed by Congdon Orchards. The Board issued its Order Allowing Intervention on September 12, 2002.

On September 17, 2002, the City of Yakima and Congdon Orchards filed Motions to Supplement the Record.

On September 19, 2002, Petitioner and Respondent filed a Request for Extension. The Board granted an extension to the parties for the purpose of continuing negotiation of settlement options. The Order Granting Extension was filed on September 23, 2002.

On October 14, 2002, the Board held a telephonic hearing on Motions to Supplement the Record. On October 25, 2002, the Board issued its Order Regarding Supplementation of Record.

On November 6, 2002, the Board held the Hearing on the Merits in Yakima. Present were D.E. "Skip" Chilberg as Presiding Officer, and Board Members Judy Wall and Dennis A. Dellwo. Present for Petitioner was James C. Carmody. Present for Respondent was Terrence I. Danysh and Raymond L. Paolella. Intervenor Congdon Orchards, Inc. ("Congdon") was represented by Terry C. Schmalz.

On November 15, 2002, the Board issued a Memorandum Opinion, a copy of which is attached as **Exhibit A**.

II. FINDINGS OF FACT

1. On April 30, 2001, Congdon Orchards filed an Application ("Congdon Application") with the City of Yakima for change in land use designation under the Yakima Urban Area Comprehensive Plan ("Comprehensive Plan"). The application was accepted by the City of Yakima and considered as a part of the annual comprehensive plan review process.

2. The Congdon Application requested an amendment affecting portions of three (3) parcels from commercial, residential and industrial Future Land Use Map designations to industrial and arterial commercial. The proposed amendments to the Comprehensive Plan Future Land Use Map affected three parcels totaling 197-acres out of a 725-acre tract of land owned by Congdon Orchards, Inc. situated within the Urban Growth Area of the City of Yakima. The Congdon property is also situated within the

Airport Safety Overlay (ASO) established for the Yakima Air Terminal.

3. The Yakima Urban Area Comprehensive Plan's Future Land Use Map in existence at the time of Congdon's Application contains areas designated as arterial commercial and industrial in the three parcels affected by Congdon's Application.

4. The City of Yakima and Congdon Orchards executed a Memorandum of Understanding on May 24, 2001. No public notice or participation was provided in the review and approval of the Memorandum of Understanding as required by the Growth Management Act (GMA). The Memorandum of Understanding was an integral part of the Comprehensive Plan amendment process.

5. The City of Yakima does not have an adopted ordinance providing for early and continuous public participation in the adoption or amendment of their Comprehensive Plan. The City claims to have followed guidelines for Administration of Development Permit Applications (YMC Ch. 16.05 - Public Notices).

6. The City of Yakima issued a "Request for Comments" (including agenda, notice of public hearing, partial land use application and map) on June 29, 2001. The notice package is attached to Petition for Review as Exhibit A. The notice set a public hearing before the Yakima Urban Area Regional Planning Commission ("Regional Planning Commission") for July 24, 2001.

7. The Request for Comments ("Notice" or "Initial Notice") was not posted to the property; published in a newspaper of general circulation; circulated to public or private groups with known interests; or placed in regional, neighborhood, ethnic or trade journals. The proposed amendment was not filed with (1) State of Washington-- Department of Community, Trade and Economic Development; (2) State of Washington Department of Transportation - Aviation Division; or (3) any other public agencies or departments.

8. The Initial Notice mailing included a map depicting Single-Family Residential (R-1) and Suburban Residential (SR) adjacent to perimeter residential neighborhoods. The notice also attached misleading locations for proposed changes, confusing narrative description and incomplete portions of the application.

9. At no time did the City of Yakima provide the public with a clear and accurate notice describing the location, scope or extent of the proposed change in the Future Land Use Map.

10. The Regional Planning Commission conducted a public hearing on Annual Comprehensive Plan Amendments on July 24, 2001. The City of Yakima received five (5) site-specific requests for amendments to the Comprehensive Plan Future Land Use Map. Included among the five (5) requested plan amendments was the Congdon Orchards Application. The public sparsely attended the hearing regarding Congdon Orchards.

11. On August 14, 2001, Yakima Urban Area Regional Planning Commission adopted Findings and Recommendations for the Year 2001 Yakima Urban Area Comprehensive Plan Amendments.

12. On August 22, 2001, the City of Yakima issued Notification of Yakima Urban Area Regional Planning Commission Recommendation to the Yakima City Council and Board of County Commissioners. The notice was mailed only to the parties of record. The City of Yakima did not send such notification to adjoining property owners, agencies or other interested parties.

13. On October 2, 2001, a joint public hearing on annual plan amendments was held by Yakima City Council and Board of County Commissioners for Yakima County.

14. On October 16, 2001, Yakima City Counsel adopted Ordinance 2001-56. The ordinance amended the Future Land Use Map relating to a portion the Congdon properties and authorized an expansion of arterial commercial and industrial land uses.

15. The City of Yakima and Congdon Orchards entered into a Development Agreement dated November 20, 2001.

16. On August 20, 2002, the City of Yakima rezoned the Congdon property and implemented the adopted amendments of the Comprehensive Plan Future Land Use Map established by Ordinance No. 2001-56. The rezone ordinance is a supplement to the record and denominated as Ordinance No. 2002-45.

III. STANDARD OF REVIEW/JURISDICTION

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioner to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act. RCW 36.70A.320; *Grant County Association of Realtors v. Grant County*,

Eastern Washington Growth Management Hearings Board (EWGMHB) Case No.: 99-1-0018, Final Decision and Order, page 6 of 10 (May 23, 2000); and *1000 Friends of Washington v. Spokane County*, Eastern Washington Growth Management Hearings Board (EWGMHB) Case No.:01-1-0018, Final Decision and Order, page 3 of 14 (June 4, 2002).

The Washington Supreme Court has summarized the standards for Board review of local government actions under Growth Management Act. It was stated:

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 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. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 552, 14 P.3d 133, 138 (2000).

The Board will grant deference to counties and cities in how they plan under Growth Management Act (GMA). RCW 36.70A.3201. However, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County*, and 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.'" *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31 P.3d 28 (2001).

The Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

IV. LEGAL ISSUES, DISCUSSION AND CONCLUSIONS

A. Public Participation Requirements of the Growth Management Act.

The parties have consolidated the following public participation issues for purposes of argument, analysis and determination.

Issue 4.1:

Did City of Yakima violate the public participation requirements of RCW 36.70A.140 by failing to establish and implement procedures providing for early and continuous public participation in the amendment of comprehensive plans, including failure to notify affected property owners and provide accurate notice of proposed actions?

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Issue 4.2:

Did City of Yakima fail to provide effective notice of contemplated amendments to comprehensive plan in violation of RCW 36.70A.035 and .140 where such notice failed to disclose geographic areas for land use redesignation and included only an erroneous land use map?

Issue 4.3:

Did City of Yakima fail to provide effective notice of recommendations of the Regional Planning Commission (August 22, 2001) and setting public hearing before City Council on proposed amendments to Comprehensive Plan Future Land Use Map where such notice fails to identify proposed amendment, contains an erroneous land use map, and was not reasonably calculated to advise adjacent property owners and other affected or interested individuals?

Issue 4.4:

Did City of Yakima violate Growth Management Act (GMA) planning goal of public participation (RCW 36.70A.020(11)) by failing to provide effective and/or reasonable notice to property owners?

Petitioner's Position:

Petitioner contends the City of Yakima failed to establish and implement a program, which provided for early and continuous public participation in the process of amending comprehensive land use plans. It is noted that a key objective to the Growth Management Act (GMA) is to "dramatically increase public participation in land use planning." *Wilma v. Stevens County*, 1999 WL 373802 *4 (1999). The foundation for public participation is built upon statutory requirements established by Growth Management Act (GMA): RCW 36.70A.020(11) (planning goal encouraging citizen involvement); RCW 36.70A.035 (notice provisions); and RCW 36.70A.140 (participation programs).

Petitioner asserts the City of Yakima violated the public participation requirements in the following respects: (1) the absence of a public participation program for comprehensive plan amendments which insures early and continuous public involvement; (2) the failure to distribute "effective" notice to the public of proposed land use actions; (3) lack of notice to and coordination with the public, agencies and interested parties; and (4) failure to follow statutory and ordinance procedures purportedly applicable to review of annual amendment applications.

Petitioner contends that the sole public notice provided by the City of Yakima for the Congdon Orchards comprehensive plan amendment was a mailing purportedly sent to property owners within five hundred feet (500') of property boundaries. The notice was inaccurate, incomplete and misleading in virtually every respect. The notice did not contain clear and concise information on the scope and location of proposed amendments, zoning boundaries, property owners and areas of proposed changes, and included incomplete portions of the application. The notice attached an inaccurate and misleading site map depicting Single-Family Residential (R-1) and Suburban Residential (SR) land uses. The public was never provided with an accurate map disclosing either the location or nature of the proposed changes to the Future Land Use Map.

Petitioners contended that the City of Yakima did not have an adopted public participation policy or plan and failed to implement any of the reasonable notice provisions of RCW 36.70A.035. In particular, the City of Yakima failed to post notice on the property; circulate notice to affected or interested agencies; did not notify private or community groups with interests in the proposal; did not publish notice in a newspaper of general circulation; and failed to utilize any other means of public notification.

Petitioner notes that the City of Yakima failed to provide notice of proposed amendments to State of Washington, Department of Community Trade and Economic Development (CTED); Washington State Department of Transportation - Aviation Division; or any other public agencies.

The City of Yakima perpetuated distribution of misleading and inaccurate notice following Regional Planning Commission hearing on July 24, 2001. Notice of Recommendation by Regional Planning Commission was sent only to parties of record and not otherwise distributed or circulated to the public or agencies. The notification contained the same misleading map, zoning boundary, street address and owner

identification. Petitioner contends that the City of Yakima was aware of inaccuracies in prior notice and confusion regarding the scope, authority and purpose of the proposed plan amendments. Despite this knowledge, the City of Yakima failed to correct prior inaccuracies or otherwise inform the public of the specific proposed plan amendments.

Petitioner also asserts that the public was provided with misleading and/or inaccurate information through the public hearing process. Representatives of Congdon and the City of Yakima represented the plan amendments as “minor modifications” and continuously advised that issues of land use compatibility were more appropriate at later stages of the land use process (i.e., project review and/or rezone). Promises were also made to involve the public in the review and adoption of development agreements for the property. The City of Yakima failed to honor these commitments.

Respondent’s Position:

The City of Yakima contends it established and implemented procedures providing for early and continuous public participation in the annual comprehensive plan amendment process. The procedures were set forth in Administration of Development Permit Applications (Chapter 16.25 - “Public Notices”).

An initial notice of the proposed amendment was sent to all property owners disclosed on the records of the County Assessor as being within five hundred feet (500') of the Congdon property. The notice advised as to the date, time, and location of the public hearing before the Planning Commission and provided a period of time to submit written comments.

The specific information on the Congdon amendment included the name of the applicant, the location of the property, the parcel numbers, and the specific request, to “reclassify 12 parcels from various commercial, residential and industrial designations to medium-density residential, industrial and arterial commercial.” The notice also included portions of the land use application.

The City of Yakima also contended that notice of the Planning Commission’s findings and recommendations were circulated to all property owners within five hundred feet (500') of the Congdon perimeter. The City of Yakima’s Planning Manager provided testimony to this point. After further review of procedures in this case, however, the City of Yakima advised this Board that such information was incorrect and that the municipality notified all parties of record of such findings and

recommendations. The “parties of record” are individuals who commented on the proposed amendment during the public hearing or in writing, and individuals and organizations who requested such notice.

The City of Yakima acknowledged that the map and various information provided in the notice might be incomplete, inaccurate, and/or misleading. It is asserted, however, that the City of Yakima complied with the “spirit and intent” of the GMA and any alleged procedural flaws were minor or technical in nature.

The City of Yakima further contends that any errors in notification or process were “minor technical flaws” and that challenges to public participation failed under the provisions of RCW 36.70A.035(2)(b)(ii) and (iii). These provisions provide that additional notice and opportunity to comment are not required if the proposed change is “within the scope of the alternatives available for public comment” or only correct “typographical errors, correct cross references, make address or name changes, or clarify language of a proposed ordinance or resolution without changing its effect.”

The City of Yakima finally argues that there has been a failure to establish that anyone was actually misled by the notice provided or unprepared for the public hearing before the Planning Commission or the City Council. The City contends Constructive notice was provided, and public comment was heard and considered by the City of Yakima in making its determination to adopt Ordinance No. 2001-56. Any confusion with regard to the application was corrected during the public hearings.

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Discussion:

A key objective of the Growth Management Act (GMA) is “to dramatically increase public participation in land use planning.” *Wilma v. Stevens County*, 1999 WL 373802 *4 (1999). The foundation for public participation is built upon the statutory requirements of RCW 36.70A.020(11) (planning goal encouraging citizen involvement); RCW 36.70A.035 (notice provisions); and RCW 36.70A.140 (participation programs). The GMA is a “bottom up” planning process designed to ensure that “citizens, communities, local governments, and the private sector coordinate with one another in comprehensive land use planning.” *City of Des Moines v. Puget Sound Council*, 97 Wn. App. 920, 932, 988 P.2d 933 (1999). A failure in the public participation process

undermines the “very core of the Growth Management Act” and the legitimacy of adopted comprehensive plan provisions and development regulations. The City of Yakima’s process in this case is fatally flawed.

(a) The City of Yakima Failed to Provide the Public With a Clear and Concise Notification of the Authority, Scope and Purpose of the Proposed Amendment to the Comprehensive Plan.

Local government has a duty to be clear and consistent in the way it characterizes the authority, scope and purpose of proposed planning enactments. The court in *City of Burien v. Central Puget Sound Growth Management Hearing Board*, 53 P.3d 1028 (2002) set forth the general rule as follows:

In its order, the board explained that while the requirement to consider public comment does not require elected officials to agree with or obey such comment, *local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning enactments.*

(Emphasis added.) This duty has been historically recognized by Growth Hearings Boards. *Friends of the Law v. King County*, 1994 WL 907890 (1994) (describing notice as “truth in labeling” and stating “[t]he county must also take great care to use concise, clear and unambiguous language in its notices”; *City of Burien v. City of SeaTac*, 1998 WL 472511 *6 (1998); *West Seattle Defense Fund v. City of Seattle*, 1995 WL 903147 *51 (1995) (“local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning amendments”); and *Happy Valley v. King County*, 1993 WL 839722 (1993) (“meaningful public participation depends upon local government being clear and consistent in the way it characterizes the authority, scope and purpose of the proposed planning enactments”).

The onus is not placed on the public to decipher ambiguous or misleading notices. *Vashon-Maury v. King County*, 2000 WL 1717577 (2000) (“To place the onus on the public to find out about the hearing, as the county suggests, misplaces the duty on the citizen rather than on government”).

The duty to provide clear and consistent information on planning enactments includes the mandate to provide “effective notice.” RCW 36.70A140 (“public meetings after effective notice.”). Effective notice is central to the planning process and “is a

necessary and essential ingredient in the public participation process." See, e.g., *WRECO v. City of Dupont*, 1999 WL 33100212 (1999) ("it is axiomatic that without effective notice the public does not have a reasonable opportunity to participate"); and *Vashon-Maury v. King County*, 2000 WL 1717577 *6 (2000) ("the foundation for plan making is public participation"). The issuance of "effective notice" prior to public hearing is the lynchpin of the public participation process. In the absence of "effective notice," the entire process fails to meet legislative mandates for public participation and citizen-based determinations with respect to land use planning.

The City of Yakima's initial notice on the Congdon Application was denominated "Request for Comments" and dated June 29, 2001. The notice was misleading to the extent that the attached map did not reflect proposed changes under the Comprehensive Plan amendment. The City failed to provide a notice to the public that clearly and concisely advised the public of the location, scope and purpose of the proposed amendment.

The public notice attached a map regarding the Congdon Orchards' proposal. The map did not disclose areas proposed for reclassification of land use designations; the location of commercial or industrial land uses; or a clear statement of the scope and purpose of the proposed amendment. The map was simply incorrect, inaccurate and misleading. The provision of an inaccurate map alone may be a basis for invalidation. *Kelly v. Snohomish County*, 1997 WL 453593 *7 (1997). At no point in the process was the public provided a map reflecting the location and type of land use change proposed by Congdon Orchards.

The errors in the notice, however, were not limited simply to the provision of an inaccurate and misleading map. A careful review discloses additional defects:

- The notice did not clearly identify the property subject to the amendment. The actual amend-ments did not involve the property at the addresses listed on the notice.
- The "zoning boundary" depicted on the map is misleading and fails to identify the area of proposed modifications.
- The written narrative included in the application incorrectly identifies that area under consideration. The narrative provides:

A modification of the existing northwesterly portion of the

Congdon property designated Low Density Residential and Medium Density Residential (on the future land use map) to the future land use designation of Arterial Commercial.

The proposed land use redesignations were not located in the “northwesterly portion of the Congdon Property” designated Low-Density Residential or Medium-Density Residential.

The errors and confusion regarding mapping of the proposal were clear to the City of Yakima at the time of hearing before Regional Planning Commission. Planning Commission members struggled to understand the proposal. Despite this knowledge, the City took no steps to correct and properly inform the public regarding the proposal.

The provision of defective and misleading notice did not end, however, with the original notice circulation. The confusion continued with the issuance of “Notification of Yakima Urban Area Regional Planning Commission Recommendation to the City Council/ Board of County Commissioners” dated August 22, 2001, (Petition for Review - Exhibit B). This notice was sent only to parties of record. The notice included the same map depicting Single Family (R-1) and Suburban Residential (SR) land uses adjacent to existing residential neighborhoods, and misidentified the “zoning boundary”. The notice contained no detailed description of the location of proposed changes or specific land use designations or reclassifications under the proposed amendment to the Comprehensive Plan. The sole description was to “reclassify 12 parcels from various commercial, residential and industrial designations.”

The City of Yakima failed to provide the community with “effective notice” of the proposed planning enactments. The confusion was perpetuated throughout the process. Despite knowledge of confusion regarding the proposal, no effort was made to correct the deficiencies and involve the community in this important proceeding. This cuts to the “very core” of GMA and cannot be excused as “minor errors” or “technical flaws.”

(b) The City of Yakima Failed to Comply with Notice and Participation Requirements of RCW 36.70A.035(1) and Adopted Ordinance Procedures.

The notice deficiencies in this case run much deeper than the failure to provide effective notice to the public. Each jurisdiction planning under GMA is required to “establish procedures providing for early and continuous public participation in the

development and amendment of comprehensive land use plans and development regulations implementing such plans.” RCW 36.70A.140. The City of Yakima acknowledged that it has not adopted a GMA public participation plan. The City deferred to its existing code to establish the means of notice and methods of public participation for this process.

The City argues that “the process complied with existing city code requirements.” Because of the failure to follow its own code requirements, this claim is false. However, even if this argument were true, it does not relieve the City from responsibility to comply with the GMA, specifically RCW 36.70A.140. The GMA requires broad dissemination of proposals and alternatives and an opportunity for written comments and public meetings after effective notice providing for open discussion, consideration of, and response to, public comments.

RCW 36.70A.035(1) provides guidance on notice procedures that are reasonable components for satisfaction of the public participation requirements of the GMA. The statutory guides are as follows:

- (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 the property for site-specific proposals;
 - (b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
 - (c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
 - (d) Placing notices in appropriate regional, neighborhood, ethnic or trade journals; and
 - (e) Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

RCW 36.70A.035(1)(a)-(e) is the beginning point for analysis of notice

procedures. The City of Yakima failed to engage in an acceptable process for notice to the public of the proposed planning enactment. The municipality did not post the property; publish notice in a newspaper of general circulation; provide notice to public or private groups with interests (e.g. WSDOT - Aviation Division, general aviation pilots, West Valley Community Council, etc.); circulate the proposal to government agencies, departments or schools; or place notice in regional, neighborhood or trade journals. The City of Yakima literally did nothing to encourage broad-based public participation in the amendment process. The notification seeking public input was solely the distribution of the notice to adjacent property owners. The Central Puget Sound Board in *Weyerhaeuser Real Estate Company (WRECO) v. City of Dupont*, 1999 WL 33100212 *8 (1999) held that the requirements of RCW 36.70A.035(1) are not satisfied by only mailing notice to adjacent property owners. The Board stated:

Dupont's attempted notice procedures for plan amendments includes only mailed notice to adjacent property owners. This falls short of the requirements of RCW 36.70A.035(1). There are no provisions for notifying nonadjacent property owners. There are no provisions for notifying other affected or interested individuals. There are no provisions for notifying tribes. There are no provisions for notifying government agencies. There are no provisions for notifying businesses or organizations. Unless these individuals, groups or entities owned property adjacent to a proposed amendment area, they would not have any notice of the proposal.

The same problems are present in this case. The City of Yakima simply failed to provide reasonable notice or encourage public participation in the plan amendment process. "The City can, and must do better." *WRECO v. City of Dupont*, 1999 WL 33100212 *7 (1999).

(c) The City of Yakima Asserts that Notice Deficiencies were "Minor Errors that were Correctable Under RCW 36.70A.035(2)(b)(ii) and (iii).

The City of Yakima makes three (3) separate arguments to excuse the lack of effective notice and procedural compliance: (1) that the inaccuracies constituted "minor technical flaws" and that the municipality observed the "spirit of the program and procedures"; (2) the errors were corrected at the public hearing and were within "the scope of the alternatives available for public comment" -- RCW 36.70A.035(2)(b)(ii); and (3) the map was corrected at the public hearing and constituted minor and

technical issues authorized by RCW 36.70A.035(2)(b)(iii). The City argues that the errors were “*de minimus*.” The Board disagrees.

The City’s argument is based on RCW 36.70A.035(2)(b), which provides, in pertinent part, as follows:

(a) . . . [I]f 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 to 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 provided before the local legislative body votes on the proposed change.

(b) An additional opportunity for public review and comment is not required under (a) of this subsection if:

* * *

(ii) The proposed change is within the scope of the alternatives available for public comment;

(iii) The proposed change only corrects typographical errors, corrects cross references, makes address or name changes, or clarifies language of a proposed ordinance or resolution without changing its effect.

The notice and proposal circulated to the public did not contain either a “scope of alternatives” or full description of the scope, authority and purpose of the proposed amendment. There were no alternatives disclosed in public notice and a fundamental land use change can hardly be characterized as the correction of an error.

This Board has reviewed and rejected a similar argument in the context of adoption of an initial GMA comprehensive plan adoption. In *1000 Friends of Washington v. Spokane County*, Case No. 01-1-0018 (2002) this Board addressed the argument offered by the City of Yakima in this case. The Board stated:

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 commission’s 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.

The public notice for the Congdon Orchards' land use redesignation contained no alternatives or suggestions that alternative proposals would or could be adopted in the public hearing process. The fact that the map presented was a map of current land use designations, not future proposed designations under the proposed amendment, was disclosed to the Planning Commission and the few members of the public at the public hearing. The public that was not at the hearing was never notified or provided an opportunity to comment on the corrected/clarified proposal as required by RCW 36.70A.035(2)(b). In order to avail itself of the protection of RCW 36.70A.035(2)(b)(ii), the initial notice must specifically identify alternatives under consideration. This was not done in this case.

The City of Yakima next argues that the "minor and technical errors" were correctable under RCW 36.70A.035(2)(b)(iii). This provision addresses clerical corrections to defects such as typographical errors; corrections of cross references, names and addresses; or clarification of language in a proposed ordinance or resolution.

A fundamental change in a map amendment or consideration of a different map cannot in all fairness be characterized as "minor and technical" correction pursuant to RCW 36.70A.035(2)(b)(iii). As noted by this Board in *1000 Friends of Washington v. Spokane County*, there is no requirement that the change be "substantial." The clarifying language of the statute also recognizes that such change is appropriate (without further opportunity for review and comment) only where the clarification of the proposal is made "without changing its affect."

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Conclusion:

The Board finds a lack of adequate public participation, particularly in the early stages of the comprehensive plan amendment process. Attempts that were made to inform the public of the contemplated action were insufficient and contained inaccuracies. Assurances made to concerned neighbors that this proposal contemplated only minor adjustments were misleading. No prior notice of the proposed amendment was made to other public bodies, including CTED. The City has failed to provide early

and continuous public participation in the amendment process. The City's process is fatally flawed.

B. Public Participation and Memorandum of Understanding.

Issue 4.5:

Did the City of Yakima violate the public participation requirements of RCW 36.70A.140 and RCW 36.70A.020(11) by entering into a contractual relationship with a property owner pledging to initiate, process and support predetermined land use designations?

Petitioner's Position:

Petitioner contends the City of Yakima violated the public participation requirements of RCW 36.70A.140 and RCW 36.70A.020(11) by entering into a Memorandum of Understanding with Congdon Orchards which commits the municipality to "initiate, propose and suppose amendments, modifications and/or changes to the future land use designations, and the underlying zoning districts." The commitment establishes a course of action and specific modifications to both the Urban Area Comprehensive Plan and development regulations.

It is Petitioner's position the City of Yakima entered into the Memorandum of Understanding ("Memorandum" or "MOU") prior to the commencement of any public processes with respect to the Congdon Orchards property. The Memorandum of Understanding was executed by the parties on May 24, 2001 and contained the following agreement:

The City, through city management, agrees to initiate, propose and support amendments, modifications and/or changes to the future land use designations, and the underlying zoning districts, as proposed by Congdon in said Exhibit A. Said amendments, modifications or changes will be commenced through rezone and/or amendment or modification to the Urban Area Comprehensive Plan and city zoning ordinances. City management agrees to take all steps necessary to promptly, diligently and in good faith pursue these referenced amendments, modifications and/or changes.

The memorandum provisions were adopted without public participation, review or notification. Petitioner notes that Ordinance No. 2001-56 specifically adopted the comprehensive plan amendments set forth in the Memorandum of Understanding. The City of Yakima acknowledged in public hearing that the amendments were in accordance with the annexation agreements with Congdon Orchards.

Respondent's Position:

The City of Yakima contends the Memorandum of Understanding is not a contract and does not bind the City to any particular action. The public participation requirements of the GMA are not involved because the memorandum does not dictate the form, substance or timing of proposed amendments to the City's comprehensive plan. The City of Yakima posits that City management, not the City Council, entered into the Memorandum of Understanding with the express purpose of assisting in the regulatory process, but in no way promising a particular result. City management recognized, by so doing, that it could not bind the City Council to ultimately approve any subsequent development agreement, or for that matter, rezone ordinance. Any subsequent development agreement or rezone ordinance would have to stand on its own merits. The City of Yakima argues that, because the Memorandum of Understanding did not dictate the form, substance, or timing of proposed amendments to the City's Comprehensive Plan, the Memorandum of Understanding was not subject to the public participation requirements of the GMA. (In any case, the City argues that the Memorandum of Understanding did, indeed, appear on the City Council's agenda in the spring of 2001, which agenda was publicly disseminated through the City's usual public participation procedures.)

Congdon Orchards further contends that the Board lacks jurisdiction to impose public participation requirements on a non-GMA action. The Washington State Court of Appeals, Division II, in *City of Burien v. Central Puget Sound Growth Management Hearings Board, the City of SeaTac, and the Port of Seattle*, 113 Wn. App. 375, 53P.3rd 1028 (2002) pointed out that Growth Management Hearings Boards have limited jurisdiction.

Congdon Orchard points out in *City of Burien*, the City of SeaTac proposed comprehensive plan and zoning amendments in accordance with an inter-local agreement to settle litigation with the Port of Seattle. The inter-local agreement reflected the parties' agreement to "adopt the planning, land use, and zoning provisions set forth in Exhibit "A" thereto and [to] implement the same." *Id.* at 379. The parties to the inter-local agreement in *Burien* agreed to adopt a coordinated land use map that would be implemented by the city's zoning map, updated to recognize the Port's master plan, and that both the City Council and the Port Commission would adopt a coordinated land use map. *Id.* at 381. The Agreement did not, however, serve as a substitute by itself for SeaTac's enactment of ordinances amending its Comprehensive Plan. *Id.* at 381. The City of Burien challenged the inter-local agreement arguing that it circumvented the public participation requirements of the Growth Management Act, as

negotiations on the inter-local agreement were not open to the public.

Congdon contends the arguments made by *Burien* are identical to the arguments made by petitioner herein. However, the Growth Management Hearings Board in Burien, in rulings affirmed by Thurston County Superior Court and then the Washington State Court of Appeals, held that the inter-local agreement did not, by its terms, amend SeaTac's comprehensive plan or development regulations. Because there was a separate process for that, the Board, Superior Court, and Court of Appeals held, "the negotiation and execution of the ILA itself, a non-GMA action, is not subject to the public participation requirements of the GMA over which the Board has jurisdiction." *Id.* at 389.

Congdon contends the City of Burien's arguments are identical to the arguments presently made by petitioner. Their challenge invariably boils down to the claim that the Memorandum of Understanding itself supposedly mandates amendments to the Comprehensive Plan, thus "contracting away" the City's legislative authority to enact such changes. According to the Court of Appeals, however, the "contracting away" challenge is a more fitting challenge for a quo warranto proceeding under Chapter 7.56 RCW. But the Board lacked jurisdiction to hear such a challenge; therefore argument that [the municipality] improperly contracted away its legislative authority is not properly before us for review." *Id.* At 388, footnote 13.

Discussion:

The GMA contemplates and requires a long-term planning process that is build upon public involvement and participation. The directive is for "early and continuous public participation in the development and amendment of comprehensive plans." RCW 36.70A.140. While the Board recognizes that a direct or implied commitment is important to a developer, such commitments cannot be made outside of the public participation process.

It has been recognized that an agreement that influences or dictates the form, substance or timing of amendments to a comprehensive plan is subject to Board jurisdiction and may be violative of GMA public participation requirements. The court in *City of Burien v. Central Puget Sound Growth Management Hearings Board*, 113 Wn. App. 375, 384, 53 P.3d 1028 (2002) summarized this Board's authority in its review of an inter local agreement:

Here, the Board clarified the limits of its jurisdiction, explaining that the

negotiation and execution of the ILA itself was a non-GMA action and, thus, was not subject to the Board's jurisdiction. But it ruled that "provisions of the ILA, if any, that are included as plan or zoning code amendments are subject to the provisions of RCW 36.70A.140 during the plan or zoning code amendment process. We presume the Board meant it could not review the ILA itself, but it could -- and did -- review the process by which portions of the ILA became amendments to SeaTac's comprehensive and zoning plans.

Burien claims that the Board lacked jurisdiction to conclude that the ILA "influenced, but did not dictate, the form, substance and timing of some of the proposed planning and zoning code amendments." On the contrary, as to the ILA, that is the one surviving issue the Board did have jurisdiction to address.

This Board has jurisdiction to determine if the Memorandum of Understanding influenced or dictated the form, substance and timing of the proposed amendment to the comprehensive plan.

The Memorandum of Understanding specifically identifies map amendments to both the comprehensive plan and zoning ordinance. The City of Yakima agreed to "initiate, propose and support amendments, modifications and/or changes to the future land use designations, and the underlying zoning districts" (MOU ¶4(b)). While arguably not a contractual obligation, the agreement commits the City to a course of action and an implied outcome. Congdon Orchards reasonably expected such outcome as a condition to annexation of the property. Because of the implied commitment to an outcome, the process by which those portions of the Memorandum of Understanding ultimately became a part of the Comprehensive Plan amendment, must meet the requirements of the GMA public participation statutes. The public needs to participate in such an important part of the move toward amendment of the Comprehensive Plan.

The implied commitment to an outcome impairs the subsequent public participation in the comprehensive plan process. Inherent in the concept of public participation is the necessity that decision makers exercise legislative authority in an independent and unencumbered manner. For the GMA process to work, the public must be heard before commitments are made by the local jurisdiction. Here, they were not. The development and signing of the Memorandum of Understanding was the first step in the development and enactment process for the comprehensive plan amendment. A

true and independent public participation process cannot exist under the shadow of a nonpublic process carrying an implied commitment to a particular outcome.

Conclusion:

While the Board recognizes that a “Memorandum of Understanding” is important for a developer, those portions relating to the amendment to the Comprehensive Plan must be subject to the GMA public participation process. The vitality of public participation and independent decision-making cannot and should not be eviscerated by pre-existing, nonpublic contractual agreements. While arguably not a contractual obligation, the Memorandum of Understanding commits the City to a course of action and an implied outcome. If it did not do that, the developer would not commit the substantial sums of money necessary to proceed with the development.

C. General Aviation Airport - Consultation.

ISSUE 4.8:

Did City of Yakima fail to comply with RCW 36.70A.510 and RCW 36.70.547 by failing to file proposed amendments to the comprehensive plan with Washington State Department of Transportation, Aviation Division; failing to engage in formal consultation with airport owners and managers, private airport operators, general aviation pilots, ports, and the Aviation Division of the Department of Transportation prior to enactment of the comprehensive plan amendments; and adopting a comprehensive plan amendment which fails to discourage siting of incompatible uses adjacent to general aviation airports?

-
Petitioner’s Position:

Petitioner notes that the GMA was amended to (1) discourage the siting of incompatible land uses adjacent to general aviation airports; (2) require submission of proposed amendments to Washington State Department of Transportation, Aviation Division; and (3) engage in consultation with airport owners and managers, private airport operators, general aviation pilots, ports, and the Aviation Division of the Department of Transportation prior to the adoption or amendment of comprehensive plan provisions. It is contended that the City of Yakima failed to follow the statutory directives in this case.

-
Respondent’s Position:

The City of Yakima contends that any alleged procedural deficiencies are minor and technical,

and cause neither prejudice nor deprivation of benefits. Because the City complied with the spirit of the GMA, subsequently communicated with the Department of Transportation to resolve any outstanding issues, and adopted an amendment that ensures compatible uses, the City was in compliance with RCW 36.70.547 and RCW 36.70A.510.

The City

of Yakima further argues that because the City was engaged in reviewing an amendment to a comprehensive plan, and not the “proposed or adopted” plan itself, the City was in compliance with the GMA by adopting the Ordinance “during the normal course of land use proceedings” and was under no obligation to provide specific notice to the Aviation Division of the Washington State Department of Transportation with regard to an amendment of the comprehensive plan. The City of Yakima finally contends that the Record shows that the City began discussions to ensure appropriate proposed designation of land in the Airport Safety Overlay following submission of the Congdon application.

The City points to the following correspondence included in the Record to support its argument. On April 30, 2001, the City received Congdon’s application for an amendment to the City’s Comprehensive Plan. At that time, Congdon, the City, and the Yakima Air Terminal—McAllister Field (“Airport”) began discussions to ensure appropriate proposed designation of the land in the Airport Safety Overlay. On May 15, 2001, the Airport Manager offered comments to the City regarding Congdon’s proposed application and a draft Memorandum of Understanding to be entered into by the City and Congdon. In that correspondence, a local airport official clarified that potential zoning changes must be consistent with federal and state regulations relating to the protection of airspace and the siting of incompatible uses. On May 24, 2001, the Airport Manager confirmed in correspondence to Congdon that the proposed land use development and related improvements on the Congdon property were compatible with the use and development provisions of the Yakima Municipal Code and subject to all applicable Federal Aviation Administration and State of Washington rules, regulations, and ordinances. Finally, in its letter dated August 20, 2002, the Aviation Division stated that its “primary interest . . . is that the City of Yakima Airport Safety Overlay remain intact to allow compliance with RCW 36.70A.510. It is our opinion that the proposed [rezone] ordinance allows full compliance and enforcement of the Airport Safety Overlay and therefore we support the language [of the rezone] as presented to the Yakima City Council.”

Congdon Orchard contends their application was to amend the Future Land Use Map of the Yakima Urban Area Comprehensive Plan, to make three Future Land Use Map changes to replace medium density residential, high density residential, and neighborhood commercial designated uses with industrial and arterial commercial designated uses. Congdon contends that these Future Land Use Map changes which could not, by themselves, result in any physical development of the three parcels until

subsequent zone changes were effected, could not, and did not by themselves, affect a general aviation airport. These changes were on a map only, and could not by themselves produce conforming development of the property until zone changes occurred. If the amendment of a Comprehensive Plan does not affect a general aviation airport, then the amendment is not subject to RCW 36.70.547. See RCW 36.70A.510. It is Congdon's position that the Future Land Use Map designations were not the basis for land use permit decisions, which is the function of the Yakima zoning map. And, when Congdon subsequently submitted its rezone application, the Department of Transportation's Aviation Division was notified and comments on Congdon's proposed rezone were received as evidenced by the findings contained in Yakima Ordinance No. 2002-45, satisfying RCW 36.70A.510.

Discussion:

The entire seven hundred twenty-five (725) acres of property owned by Congdon Orchards lies within the Airport Safety Overlay (ASO) for Yakima Air Terminal. Yakima Air Terminal is a "general aviation airport" and subject to planning requirements set forth in the GMA.

The GMA was amended in 1996 to recognize the inherent social and economic benefits of aviation and require that land use planning include consideration of general aviation airports. RCW 36.70A.510 provides:

Adoption and amendment of comprehensive plan provisions and development regulations under this chapter affecting general aviation airports are subject to RCW 36.70.547.

Congdon Orchards proposed an amendment to the Urban Area Comprehensive plan. RCW 36.70.547 provides:

Every county, city, and town in which there is located a general aviation airport that is operated for the benefit of the general public, . . . shall, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport. *Such plans and regulations may only be adopted after formal consultation* with: airport owners and managers, private airport operators, general aviation pilots, ports, and the Aviation Division of the Department of Transportation. All proposed and adopted plans and regulations shall be filed with the aviation division of the department of transportation within a reasonable time after release for public consideration and comment.

Washington State Department of Transportation (“WSDOT”) - Aviation Division was established under the GMA as an integral part of the land use planning process. The purpose of the legislation was described by WSDOT - Aviation Division as follows:

Through Washington State *Senate Bill 6422*, which amended the Washington State Growth Management Act and associated provisions in the Act, the state recognized the inherent social and economic benefits of aviation. The law requires every city and town, code city, charter city and county having a general aviation airport in its jurisdiction to discourage the siting of land uses that are incompatible with the airport. *The policy to protect airport facilities must be implemented in the comprehensive plan and development regulations as they are amended in the normal course of land use proceedings. Formal consultation with the aviation community is required and all plans must be filed with the Washington State Department of Transportation WSDOT Aviation Division. Further, the law requires the establishment of an airport land use compatibility technical assistance program available to local jurisdictions.*

(Emphasis added.)

RCW 36.70A.510 was enacted to address the exact course of conduct exercised in this case. WSDOT Aviation Division noted the historic planning problems associated with general aviation airports. It was noted:

Local land use authorities are responsible for insuring compatible land use and appropriate zoning requirements around airports. The Washington State Transportation Committee noted a disturbing trend of disregard relative to the unique siting and use characteristics of airports by local land use jurisdictions. This disregard, or in some cases, a lack of information on the particular needs of airports, is evidenced in the number of approved, incompatible adjacent land uses.

* * *

These concerns form the basis for the creation and enactment of *Senate Bill 6422*. This bill requires local jurisdictions to protect airports from encroachment by incompatible land use, and provides the mechanisms by which this may be accomplished.

The statutory directive is clear and unambiguous: (1) the local jurisdiction must

engage in formal consultation with airport owners and managers, and WSDOT Aviation Division prior to adoption of comprehensive plan amendments; and (2) file proposed plans with WSDOT Aviation Division within a reasonable time after release for public comment. The City of Yakima failed to meet either of the mandated requirements.

The City of Yakima incorrectly asserts that the aviation provisions do not apply to amendments to comprehensive plans. RCW 36.70A.510 specifically applies to “amendment of comprehensive plan provisions.” In a similar manner, RCW 36.70.547 provides that “such plans and regulations may only be adopted or amended after formal consultation” with the aviation industry and agencies. The language is clear and the directive unambiguous.

The City of Yakima and Congdon Orchards contend that there was consultation with Yakima Air Terminal, citing a letter from Bob Clem (Airport Manager) to Terry C. Schmalz (attorney for Congdon Orchards) dated May 24, 2001. By letter dated August 20, 2002, Yakima Air Terminal clarified its intention with respect to the correspondence. It was stated as follows:

If my letter of May 24, 2001, to Terry Schmalz, a representative of Congdon Orchards, is understood to mean that the City of Yakima no longer has to determine the compatibility of Class (1) uses in the Airport Safety Overlay (ASO), that understanding is incorrect. The Yakima Air Terminal staff and its board of directors believes that the Reviewing Official for the ASO under YMC Chapter 15.30 has an affirmative duty to consult with the Yakima Air Terminal manager and its staff and the Aviation Division of the Department of Transportation before any change in present use is allowed. *The reviewing official must determine that the new use is not a “potentially incompatible land use.” The reviewing official must base his or her decision, not on my letter of May 24, 2001, but upon a thorough review of all comments and factors surrounding a change in use. The reviewing official must exercise sound and independent judgment. My letter of May 24, 2001, was never intended to act as a substitute for a thorough and thoughtful review of all comments and factors surrounding a change in use.*

(Emphasis added.) The City of Yakima and Congdon Orchards argue that the letter is a substitute for a thorough and thoughtful review of all comments and factors surrounding the change in use. The letter of May 24, 2001, neither satisfies nor substitutes for the statutory requirements of RCW 36.70A.510 and RCW 36.70.547.

The City of Yakima argues that compliance can be achieved after the fact and without the critical information or technical assistance being provided to the decision makers. This assertion is incorrect. WSDOT - Aviation Division recognized that the “resource information is needed by jurisdictions to insure opportunities for informed land use decision making.” Compatibility Guide - 2. It was further stated:

The airport land use compatibility program identified three areas which embody critical quality of life and safety issues relevant to airport operation and community health and welfare; there are concerns surrounding height hazards, safety and noise.

These critical compatibility areas form a nexus around which decision makers and stakeholders must craft responsible land use policies to preserve airports and to protect the health, safety and welfare of communities.

Compatibility Guide - 11. The purpose of technical assistance is to inform and guide the decision maker in consideration, review and determinations regarding adoption or amendments to comprehensive plans and development regulations. In this case, the decision makers had no information, input or assistance prior to the adoption of Ordinance No. 2001-56. An after-the-fact process is not an appropriate substitute for the clear directions established by Growth Management Act.

Conclusion:

The City of Yakima’s failure to comply with RCW 36.70A.501 and RCW 36.70.547 was clearly erroneous.

D. Internal Consistency

Issue 4.6:

Does City of Yakima Ordinance 2001-56 violate RCW 36.70A.070 because such amendment creates an internal inconsistency within the Urban Area Comprehensive Plan, specifically as the amendments relate to at least the following comprehensive plan purpose statements, including their goals, objectives and policies: G2.2, G4.2, L1.1, H3, H3.1, C4.3, C5.1, C5.2, S1.4 and Figure III-2 “Land Use Compatibility Chart”?

Petitioner’s Position:

Petitioner contends that Ordinance No. 2001-56 creates an internal inconsistency within the Urban Area Comprehensive Plan. It is asserted that the amended land use designations are in conflict with various plan provisions including the Land Use

Compatibility Chart.

Petitioner further contends that the amendment and internal consistency must be based on existing plan provisions and it is impermissible to adopt an amendment creating an inconsistency with prior provisions.

Respondent's Position:

The City of Yakima contends that the Comprehensive Plan is a "guide" or "blueprint" for making land use decisions. The "Future Land Use Map" and "Land Use Compatibility Chart" are generalized guidelines and only a portion of the decision making process. All such guides were integrated in the hearing process and implemented through the ordinance.

Congdon contends that its Future Land Use Map changes did not create internal inconsistencies in Yakima's Urban Area Comprehensive Plan. RCW 36.70A.070. For instance, the changes proposed for Parcel 181333-11001 from Medium Density Residential and Industrial to Industrial only created more property for industrial use, but did not increase the size of Industrial and Medium Density Residential designations in Parcel 181329-13405 and Neighborhood Commercial designations in Parcel 181329-41400, with Arterial Commercial designations by virtue of Congdon's Application connected pre-existing areas of Arterial Commercial designated land uses together. Congdon contends this is compatible. Congdon did not introduce new land use designations to these parcels. The pre-existing Future Land Use Map already contemplated Arterial Commercial use in this area. Matching Arterial Commercial to Arterial Commercial, and Industrial to Industrial uses on Congdon's property, along major and developing arterials, Nob Hill Boulevard and South 64th Avenue, created economically viable development areas, and addressed multiple goals, policies and objectives of Yakima's Urban Area Comprehensive Plan.

Discussion:

Petitioner has failed to convince the Board of any internal inconsistencies in the City's Comprehensive Plan. Petitioner's arguments would effectively bar any amendments to a comprehensive plan, including amendments to correct an existing inconsistency.

Conclusion:

The Future Land Use Map changes did not introduce new land uses for the

parcel's in question, and Congdon's Application did not create any inconsistency within the Urban Area Comprehensive Plan.

V. INVALIDITY

Discussion and findings of fact:

The Board rarely invokes invalidity. Invalidity can only be invoked when the Board finds the actions taken by a city or county seriously impair the goals of the GMA. In this case, we find such impairment exists. For the GMA planning process to work, citizens must have confidence in the planning process. The public must be heard before commitments are made. Here, they were not. The development and signing of the Memorandum of Understanding is a part of the development and enactment process of the amendment of the comprehensive plan in this case. The Board declares the actions taken by the City, in its amendments of the Comprehensive Plan, to be invalid. The statutory authority for "invalidation" is established by RCW 36.70A.302(1), which provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
 - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
 - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

If it is determined that a comprehensive plan or development regulation "would substantially interfere with the fulfillment of the goals" of the GMA, the Board may invalidate that part or parts of the plan or regulation. *Wells v. Western Washington Growth Management Hearings Bd.*, 100 Wn.App. 657, 666, 997 P.2d 405 (2000). Invalidity is a matter of the Board's discretion to be determined on a case-by-case basis. *King County v. Central Puget Sound Growth Management Hearing Board*, 138 Wn.2d at 181, citing *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 561-62, 958 P.2d 962 (1998).

The primary factor to be considered in the context of invalidation is whether continued validity of the plan amendment would substantially interfere with the goals of GMA. RCW 36.70A.320(1)(b). The City of Yakima cites *Whidbey Environmental Action Network v. Island County*, 1997 WL 652518 (1997) as establishing a “three-part test” for analyzing the “substantial interference” standard of GMA. The Board indicated that it will “keep in mind” the following factors:

Hence, whether a development regulation meets GMA's test of substantial interference depends on three factors:

- a. The magnitude (or egregiousness) of the violation of GMA;
- b. How long the violation has occurred;
- c. How much longer it will likely occur absent invalidation.

* * *

We will keep this three-pronged test in mind as we examine each of the challenged regulations, ICC 17.02.150 (h), (i), and (k), set against the backdrop of Island County's long standing, continuing non-compliance.

The first factor to consider under *Whidbey Environmental Action Network* is the magnitude (or egregiousness) of the violation of the GMA. The GMA violations in this case are fundamental and pervasive deviations from clear procedures and statutory directives, including (1) absence of established public participation procedures; (2) failure to provide effective notice of the scope, authority and purpose of proposed amendments; (3) knowing noncompliance with directives of RCW 36.70.547; (4) perpetuation of misleading notice in subsequent public transmittals; and (5) the commitment to a process with an implied outcome. The invocation of invalidity is mandated in this case. Public participation is the “very core” of the GMA. The validity of any plan or amendment must be suspect if the public is not engaged in the process of adopting the amendment. It is also significant that planning under the GMA is an interactive process that finds its foundation in the comprehensive plan. Noncompliance with the public participation requirements of the GMA during the early stages of planning taints all subsequent actions since development regulations must implement and be consistent with the comprehensive plan.

The magnitude of noncompliance is exacerbated by the failure by the City of Yakima to utilize any of the reasonable notice procedures of RCW 36.70A.035. The City of Yakima did not post the subject property; publish notice in a newspaper of general

circulation; circulate notice to interested agencies or departments; submit the plan and consult with WSDOT - Aviation Division; provide copies to Department of Community, Trade and Economic Development (CTED); or notify interested organizations or groups (e.g., West Valley Community Council). There was simply no effort to broadly disseminate the proposal and secure enhanced public participation.

As a general proposition, the Board in *Vashon-Maury v. King County*, 1995 WL 903209, considered facts similar to this case and invalidated a municipality's planning action for failure to provide appropriate public participation. More specifically, Boards have found that errant or deficient notice is, in itself, sufficient to invalidate a planning enactment. The Board in *Kelly v. Snohomish County*, CPSGMHB Case No. 97-3-0012c, 1999 WL 250185, *3 (1999) invalidated a land use designation because Notice contained, among other inadequacies, an inaccurate map. The Board stated:

It is the process effecting the amendment, not the amendment itself, that the Board found to be noncompliant with the GMA and that caused the determination of invalidity. . . . (W)hat the Board found non-compliant with the public participation requirements of the Act was the erroneous notice regarding the Cavalero Hill property. The Board never addressed the substance of the redesignation of the property. However, since the notice was in error, the public participation process consequently failed to comply with the GMA, and that amendment (Cavalero Hill) adopted pursuant to the defective notice was found invalid.

It is the combination of errors and process defects that leads us to issue our order of invalidity. This is a significant land use matter for the citizens of the community and their right to participate in a meaningful manner must be respected and protected. Growth Management Act provides this protection.

An order of invalidity is appropriate where there is a "potential for vesting" of inappropriate land uses during a period of remand. *Vashon-Maury v. King County*, 1997 WL 1717577 *8 (1997). The Board in *Bennet v. City of Bellevue*, 2002 WL 31549122 *12 (2002) recognized that invalidation was appropriate where the continued validity of the ordinance would potentially allow for vesting. The Board found:

Further, the Board finds that the continued validity of the Ordinance would allow additional vesting of permits to an inappropriate land use regulation . . .

The potential for vesting exists. An order of invalidity is essential to preserve the status quo and prevent substantial interference with Goal 11 -- public participation -- of the Growth Management Act (GMA).

VI. ORDER

1. Having reviewed the record and documents in this case, considered the argument of the parties, and having deliberated on the matter, the Board finds the actions of the City of Yakima clearly erroneous and in noncompliance with the GMA in the following respects:

(a) The City of Yakima violated the public participation requirements of RCW 36.70A.140 by failing to establish and implement procedures providing for early and continuous public participation in the amendment of comprehensive plans related to Congdon Orchards.

(b) The City of Yakima failed to provide effective public notice of amendments to the comprehensive plan proposed by Congdon Orchards in violation of RCW 36.70A.035 and RCW 36.70A.140.

(c) The City of Yakima failed to meet public participation requirements of RCW 36.70A.035(1) by failing to reasonably provide notice calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and other organizations.

(d) The City of Yakima violated the GMA planning goal, public participation. (RCW 36.70A.020(11)).

(e) The Memorandum of Understanding entered into by the City and Congdon Orchards failed to include a public participation process in the areas affecting the CP amendments as required by RCW 36.70A.140.

(f) The City of Yakima failed to comply with RCW 36.70A.510 and RCW 36.70.547 because of their failure to file proposed amendments to the Comprehensive Plan with Washington State Department of Transportation, Aviation Division and failing to engage in formal consultation with airport owners and managers, private airport operators, general aviation pilots, ports, and the Aviation Division of the Department of Transportation prior to enactment of the comprehensive plan amendments.

2. The continued validity of the following would seriously impair the goals of the Growth Management Act (GMA), and this Board finds the following:

(a) Memorandum of Understanding dated May 24, 2001 by and between the City of Yakima and Congdon Orchards shall be invalidated as to paragraph 4(b).

(b) Ordinance 2001-56 shall be invalidated with regard to that portion of the ordinance to the Congdon Orchards future land use designation amendment.

3. The City of Yakima shall take action to comply with this Order within one hundred eighty (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 (10) DAYS OF SERVICE OF THIS FINAL DECISION AND ORDER.

SO ORDERED this 5th day of December 2002.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD

D.E. "Skip" Chilberg, Board Member

Judy Wall, Board Member

Dennis Dellwo, Board Member