State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

NEIGHBORS FOR RESPONSIBLE DEVELOPMENT Petitioner, v. CITY OF YAKIMA, Respondent. CONGDON ORCHARDS INC. Interenors	Case No. 02-1-0009 ORDER ON CONTINUED NON-COMPLIANCE AND CONTINUED INVALIDITY

I. PROCEDURAL 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 Reconsider-ation 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.

On December 5, 2002, the Board issued a Final Decision and Order.

On April 3, 2003, Respondent, City of Yakima requested that a Compliance Hearing be held in this matter.

On April 25, 2003, the Board held a compliance hearing. All parties were present and represented by counsel. The Board continued the compliance hearing to May 9, 2003. On May 8, 2003, City of Yakima filed its Supplemental Brief on Compliance.

On May 9, 2003, the Board heard arguments regarding compliance and invalidity and later received further briefing from the parties.

II. FACTUAL BACKGROUND

This Compliance Hearing was in response to a Motion for Compliance Hearing filed by the City of Yakima, hereafter referred to as "City". Since the Board's Final Decision and Order (FDO), the City has adopted Ordinance No. 2003-19, "to provide procedures for amending the Yakima Urban Area Comprehensive Plan." This Ordinance established a public participation program for amendments to the Comprehensive Plan. Further, this case was appealed and a Thurston County Superior Court decision found the Board lacked jurisdiction over the "Memorandum of Understanding" (MOU) between the City and Congdon Orchards, and also remanded the issue of the determination of invalidity of Ordinance No. 2001-56 for further consideration by the Board. (Cause No. 03-2-00015-6). The following addresses the Thurston County Superior Court Remand and the City request for a Compliance Hearing.

First, the Board will address the request for a finding that the City is no longer out of compliance with the GMA or the Orders of this Board. The Board will then follow with a review of their finding of invalidity.

III. ISSUES AND DISCUSSION

Issue 1:

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.

Discussion: The City responded to the Board's FDO by passing Ordinance No. 2003-19, which establishes procedures to ensure public participation in The Comprehensive Plan amendment process. At the Compliance Hearing, the Petitioner acknowledged the adequacy of the Ordinance to ensure public participation in the Comprehensive Plan amendment process.

On review of the Ordinance, the Board is surprised to find the Ordinance is limited only to Comprehensive Plan amendments.

RCW 36.70A.140 requires "procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans." Clearly, the RCW requirement goes beyond the applicability provisions in Ordinance No. 2003-19. While the provisions for public participation are deemed adequate, the provisions must apply to all GMA actions

provided for in RCW 36.70A.140. Ordinance No. 2003-19 fails in that regard.

Conclusion:

The City has failed to comply with RCW 36.70A.140, Issue No. 1, by failing to provide a procedure for public participation in the preparation and amendment of development regulations.

Issue Nos. 2, 3, and 4:

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

Discussion: The City of Yakima failed to meet the public participation requirements of RCW 36.70A.305(1) by failing to provide adequate notice to property owners and other effected and interested individuals, tribes, government agencies, businesses, school districts, and other organizations.

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

The City argues that our Order is prospective only and no further action should be necessary. The City contends that the adoption of Ordinance No. 2003-19, the public participation ordinance for all future GMA actions, is sufficient.

Petitioners argue that a flawed process results in a flawed ordinance. Therefore, the Petitioner believes the Ordinance must again go through the amendment process, but with the use of a valid public participation program. Ordinance No. 2001-56 has been found invalid by this Board because of serious errors in involving the public in the amendment process, to the point of substantially interfering with the goals of the GMA.

The City has chosen to take no action regarding an Ordinance the Board has determined invalid and out of compliance. While the City has adopted an ordinance providing for public participation, which, with broader applicability will comply with the GMA, it has not been applied to the invalid Ordinance in question. Therefore, a finding of continued non-compliance is required for issues 2, 3, and 4.

Conclusion:

The City continues to be out of compliance on Issues 2, 3, and 4.

Issue No. 5:

The Memorandum of Understanding entered into by the City and Congdon

Orchards failed to include a public participation process in the areas affecting the Comprehensive Plan amendments as required by RCW 36.70A.140. Thurston County Superior Court has ruled the Board lacks jurisdiction to review the Memorandum of Understanding.

Discussion: The Thurston County Superior Court, reviewing this case on appeal, has remanded this issue with direction to dismiss. The Court concluded that the Board did not err in reviewing the MOU to see if the agreement dictated amendments to the plan or zoning laws. Once the Board determined that there were no amendments or that amendments were not dictated by the MOU, the Board did err in assuming jurisdiction and invalidating some of its provisions. *The Court cited Burien v. Growth Management Hearings Board*, 113 Wn. App. 375, 53 P 3rd 1028 (2002), which held that an interlocal agreement, which was not executed under the GMA and which did not amend the municipality's comprehensive plan or zoning regulations, is not subject to the public participation requirements of the GMA.

The Thurston County Court held that the *Burien* court decided that if an agreement dictated amendments or actually amended a comprehensive plan or zoning code, then a growth management board has jurisdiction over the agreement. On the other hand, if the agreement merely influenced, but did not bind the decision maker, then there is no GMA jurisdiction. Because this Board did not conclude that the MOU was a binding contract between Yakima and Congdon, the Board did not have jurisdiction. The matter was remanded to the Board with direction to dismiss this issue.

Conclusion:

Issue No. 5 is dismissed.

Issue No. 6:

The City of Yakima failed to comply with RCW 36.70A.510 and RCW 36.70A.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.

Discussion: The City argues it has complied with our Order through the City's request for review of Ordinance No. 2003-19 by appropriate agencies. In other words, again, the City believes it need take no further action regarding Ordinance No. 2001-56. To achieve a valid Comprehensive Plan amendment, i.e., Ordinance No. 2001-56, it must be subject to a valid adoption process, with adequate public participation. The City has failed to do that.

Conclusion:

Issue No. 6 is in continued non-compliance.

Invalidity:

The City has requested a lifting of the Boards order of invalidity for Ordinance No. 2001-56, based on (1) its adoption of Ordinance No. 2003-19, a public participation process, and the Thurston County Superior Court remand directing further review of our Order of Invalidity.

Discussion: As addressed herein, the City has chosen to take no action regarding Ordinance No. 2001-56. We have found continued non-compliance on all issues except that dealing with the Memorandum of Understanding, which we have dismissed.

During the Compliance hearing, the Board orally noted that there are two remedies available to the City which would bring them into compliance, (1) rescinding the Ordinance, or (2) remedying the Ordinance, i.e., subject it to an adequate adoption process. The Compliance hearing was continued for two weeks, with a decision made by the City to do neither at that time. This response leaves the Board no alternative but to order continued invalidity. To declare Ordinance 2001-56 valid after no adequate public review, as mandated by RCW 36.70A.140, would deny the public its right to be heard on a significant GMA action affecting their community. The City's response continues to substantially interfere with the goals of the Growth Management Act and its fulfillment and public purpose.

The City has not taken legislative action that would allow the Board to remove its finding of invalidity. Removing the invalidity would allow the amendment to be simply out of compliance and valid until future action of the City takes place. The City has done nothing in the past months and little is now expected. The finding of invalidity is the only tool that will force the City to follow the GMA and allow adequate public participation in this amendment of the Comprehensive Plan. Again, the Board notes the

City may either repeal the faulty Ordinance or redo the adoption process but with adequate public participation to come into compliance.

The Thurston County Superior Court directed the Board to review the finding of invalidity in light of the dismissal of Issue 5, lack of public participation in the adoption of the MOU. The Board finds that the MOU was not a principal basis for the finding of invalidity. The central basis for the finding of invalidity was the dismal failure of the City to provide for public participation.

The principle focus of the finding of invalidity was upon public participation and the failure to comply with statutory directives of the GMA. These failures continue unabated.

Conclusion:

The Board reaffirms it's finding of invalidity of portions of Ordinance No. 2001-56. The continued validity of said Ordinance substantially interferes with and seriously impairs the goals of the Growth Management Act.

IV. ORDER

1. The City continues to be out of compliance on Issue 1 due to its failure to adopt a Public Participation Plan, which need be followed in all the areas required by RCW 36.70A.140.
2. The City remains out of compliance on Issues 2, 3, and 4 and 6.
3. Issue 5 is dismissed as directed by Thurston County Superior Court, Case No. Cause No. 03-2-00015-6.
4. The Board's finding of Invalidity remains in place.

SO ORDERED this 19th day of May 2003.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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D.E. "Skip" Chilberg, Board Member

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Judy Wall, Board Member

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Dennis Dellwo, Board Member