

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

TAXPAYERS FOR RESPONSIBLE GOVERNMENT,)	
)	
Petitioner,)	No. 96-2-0002
)	
vs.)	FINAL DECISION
)	AND ORDER
CITY OF OAK HARBOR,)	
)	
Respondent.)	
_____)	

PROCEDURAL HISTORY

On February 12, 1996, Taxpayers for Responsible Government (TRG) filed a petition challenging the Comprehensive Plan (CP, Plan) of Oak Harbor (City). The Plan was adopted December 5, 1995. The petition generally challenged the capital facilities element of the Comprehensive Plan and also included an issue involving public participation. A prehearing conference was held March 27, 1996, with a prehearing order entered April 4, 1996.

On April 15, 1996, the City filed dispositive motions with regard to three of the four issues noted in the prehearing order. After a telephonic hearing and briefing by the parties, a May 9, 1996, order ruled substantially in favor of the City except that one issue was reserved for consideration at the Hearing on the Merits, which was held May 29, 1996.

PUBLIC PARTICIPATION

The issue that the City did not challenge by motion involved TRG's contention that some of the foundational plans, relied upon and adopted by reference in the CP, were not adopted in compliance with the Growth Management Act (GMA,Act). Those adopted plans included the 1994 Oak Harbor Parks and Recreation Plan, 1994 Oak Harbor Comprehensive Water System Plan and the 1989 Oak Harbor Comprehensive Sewer System Plan.

The public participation process of the City started as early as January 28, 1992. The City

planning commission and council each held a public hearing in early 1992 requesting public comment and recommendations for the proposed County-wide Planning Policies (CPP). The Interim Urban Growth Area (IUGA) boundary review involved at least three public hearings before the City council, a joint workshop with the planning commissions of both the City and the County, public workshops and at least two City planning commission public hearings prior to forwarding a recommendation to Island County. The IUGA process included discussion of transportation issues as they related to establishment of the appropriate boundary. The planning commission and City council each held an additional hearing with regard to establishment of the level of service (LOS) standards for the transportation element of the Plan.

On April 19, 1994, a citizen comprehensive plan task force (CPTF) was established. Membership to the task force was appointed by the Mayor and confirmed by the City council. It included some 25 people involving a variety of citizen and stakeholder representatives. The group held over 34 meetings prior to publication of a draft CP in June 1995. While these meetings were not "public hearings" they were open to the public. TRG complained about the makeup of the mayoral appointments and a lower attendance at the meetings than desired. Under the evidence presented in this record, TRG has not carried its burden of demonstrating that this aspect of the public participation process violated GMA.

In addition to the task force, the CPP and IUGA public participation, the City also conducted a critical areas study, adopted the "North Whidbey Community Diversification Action Plan" and engaged in the EIS scoping process all of which involved public hearings and workshops. After publication of the draft CP, the City planning commission held 2 workshops and 3 public hearings prior to sending a recommendation to the City council. Another public workshop was held by the council, as well as 3 separate public hearings prior to adoption. TRG complained that in none of these hearings were the transportation or capital facilities elements of the Plan discussed in any detail by the public. The GMA requires that a local government provide an opportunity for early and continuous public participation. It does not require a local government to force people to attend, nor require that they discuss any particular part of the issue at hand.

Finally, TRG contended that the adoption by reference items violated the public participation requirements of GMA because no public hearings were held prior to the initial adoption of the 1994 Comprehensive Water System Plan and the 1989 Comprehensive Sewer System Plan.

While that is true, as early as September 28, 1994, the CPTF held a series of 4 meetings in which adoption of these plans by reference into the CP was discussed. Once the draft of the CP was published in June 1995, page 7 prominently listed the plans to be adopted by reference. At all the workshops and public meetings noted above, this issue was available for discussion and comment. The City also provided full opportunity for written comments at all times between the publication of the draft CP and its adoption five-months later. We find that Oak Harbor is in compliance with the GMA public participation process.

CAPITAL FACILITIES ELEMENT

TRG challenged the compliance of the capital facilities element of Oak Harbor's CP with RCW 36.70A.070(3)(d) which reads in part as follows:

"A capital facilities plan element consisting of...at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes;..."

A review of the Oak Harbor CP and incorporated capital facilities plan (CFP) does not support the contention of TRG, except as to funding for an additional reservoir.

The CFP "6-year financing plan" found in volume 3, appendix A, pages 10-12 of the CP (Ex. 150) listed general funding sources for any and all capital facilities. This generalized source of funding for capital facilities is not in and of itself sufficient to comply with the specific requirement of RCW 36.70A.070(3)(d) that the plan "clearly identifies" funding sources. The CP did, however, directly tie sources and uses of funds in various other sections. Table CFP-10 identified 11 sources of public money for transportation capital facilities projects. The table noted the limitations, benefits and disadvantages of each source. Other tables in the CP projected probable adequacy and involved a calculation of what impact fees, if any, would have to be imposed to meet different assumptions about funding shortfalls. (Table CFP-12). The incorporated by reference "City of Oak Harbor 1994 Comprehensive Water System Plan" (Ex. 125) identified sources of public money to fund water system capital facilities improvements. Exhibit 127, the Comprehensive Sewage Plan, augmented the generalized list of public funding sources by discussing sources for sewer improvement projects. The Comprehensive Storm Drainage Plan (Ex. 128) identified a variety of sources of public money to fund capital facility

improvements. The Comprehensive Parks and Recreation Plan (Ex. 129) set forth three alternative project lists and clearly identified sources of public money to fund each of them.

The CFP stated that "existing schools have sufficient capacity to accommodate the 6-year projected increase in enrollment. Thus no funding sources for capital facility improvements over the next 6 years needed to be listed under .070(3)(d).

TRG pointed out that the CFP identified the need for a new reservoir over the 6-year period as part of the "water" portion of the plan. The generalized list of sources of public money found in Ex. 150, pages 10-12 does not sufficiently comply with the "clearly identifies" portion of the statute. While a minor point, the City is not in compliance with the GMA by this oversight.

TRG noted a number of issues both at the Hearing on the Merits and during its attempt to amend the issue statement covered by the City's dispositive motions. Many of those contentions are not addressed because of the restrictions found in the RCW 36.70A.280(1). While we have in two instances made holdings that expanded the issue statements, those cases were decidedly different than the procedural underpinnings of this case. In *Whatcom Environmental Council v. Whatcom County*, #94-2-0009 (Third Compliance Order, March 29, 1996) the expansion of issues involved urban growth outside of IUGA boundaries found non-compliant almost 2 years previously. In *Loomis v. Jefferson County*, #95-2-0066, we held that the County's attempt to establish an IUGA without healing the non-compliance found in the earlier case of *City of Pt. Townsend v. Jefferson*, #94-2-0006, constituted a blatant violation of GMA and was sufficient independent grounds to find non-compliance. In the instant case, we have not previously ruled on any of the capital facilities issues. Thus, we will not address these corollary or expanded issues. Nonetheless, the matters raised by TRG appear to have validity and it is hoped that they will be raised and addressed at the annual update of the CFP.

CONCURRENCY

The last issue in this case was one the City asked us to dispose of by motion. We reserved ruling after hearing arguments and now deny the City's motion. We will address the relationship between RCW 36.70A.020(12) (Goal 12) and the Oak Harbor Comprehensive Plan on the merits.

Goal 12 states:

"Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."

We have always held that GMA requires compliance with both the goals and the more specific requirements set forth in the Act. That compliance must involve both the process and the substance of the goals and requirements of the Act. *Clark County Natural Resources Council v. Clark County*, WWGMHB #92-2-0001 (*Clark County I*). Thus, the City's argument that applying Goal 12 would amount to the imposition of additional obligations to the city is rejected.

In reviewing Goal 12 it is helpful to analyze the statement in its component parts in order to establish the parameters set forth. Those component parts are:

- (1) Ensure;
- (2) Those public facilities and services necessary to support development;
- (3) Shall be adequate;
- (4) At the time the development is available for occupancy and use;
- (5) Without decreasing current locally established level of service (LOS) standards.

Goal 12 has often been described as the concurrency goal. Concurrency is defined in the procedural criteria established by the then Department of Community Development in WAC 365-195-070(3) as "...the situation in which adequate facilities are available when the impacts of development occur, or within a specified time thereafter." The phrase "adequate public facilities" is noted in WAC 365-195-210 as one not defined in the Act but which "means facilities which have the capacity to serve development without decreasing levels of service below locally established minimums." Additionally, in that same section, the procedural criteria defines the term "available public facilities" as including both facilities and services that "are in place or that a financial commitment is in place to provide the facilities or services within a specified time." Finally the section goes on to further define "concurrency" to include both the concepts of "adequate public facilities" and "available public facilities".

- (1) Ensure.

In the context of the GMA, the directive nature of the word "ensure" imposes a duty on local

governments which, while not amounting to an absolute guarantee, means more than a very generalized policy statement. In order to comply with this portion of the Act a local government must not only state *what* it plans to do but also *how*. This can be done in the context of a comprehensive plan, development regulations or a combination of both. The critical factor involves a specific articulated methodology to reasonably assure compliance with concurrency.

(2) Those public facilities and services necessary to support development.

Public facilities and public services are defined in RCW 36.70A.030(12) and (13). The definitions are broad and far reaching. They include both build-out concepts such as streets, sewer systems, parks and schools along with provider services such as education, safety, environmental protection and public health.

The more difficult definitional concept of Goal 12 is identifying "those" facilities and services which are necessary to support development. Oak Harbor argued that Goal 12 only applies to the transportation element, while petitioners argued that Goal 12 applies to *all* public facilities and services.

The City contended that since RCW 36.70A.070(6)(e) applies concurrency to the transportation element of the CP, concurrency of all other public facilities and services are necessarily excluded. In *Reading, et al. v. Thurston County, et al.*, (*Reading*), WWGMHB, #94-2-0019, we said:

"The concurrency goal of the Act is specifically directed to the transportation element by RCW 36.70A.070(6)(e), which provides that after adoption of the comprehensive plan, development regulations must be adopted that prohibit the approval of a development which would cause a transportation facility LOS to decline below those designated in the comprehensive plan."

The City concluded from this statement and from .070(6)(e) that concurrency was a sole function of transportation development regulations. The City has misread both the Act and our holding in *Reading*. The fact that development regulations must be adopted to prohibit transportation LOS's to decline does not mean that no other concurrency requirements are in place. Rather the sweeping language of Goal 12 and the definitions of public facilities and public services found in the Act, lead to the opposite conclusion.

Petitioner contended that all public facilities and services must meet the concurrency goal of the Act. This argument goes too far. The Legislature chose the word "those" rather than the word "all". Achieving concurrency for all public facilities and services might well be an impossible standard. While local governments have occasionally had difficulty in complying with the goals and requirements of the Act, none are intended to be impossible to achieve.

The procedural criteria found in WAC 365-195-070(3) notes that concurrency "should" be achieved for "public facilities" in addition to transportation facilities. The WAC notes that such additional "facilities" should be locally defined and should include at least domestic water systems for areas within and without urban growth areas and sanitary sewer systems within urban growth areas. The procedural criteria do not address any recommendations for "public services" in addition to public facilities.

In addition to the definitions of public facilities and public services found in the Act, other planning statutes provide additional evidence of legislative intent. RCW 58.17.110(2) requires, in part, that the legislative body make written findings that appropriate provisions are made for such public facilities and services as "open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary waste, parks and recreation, playgrounds, schools and school grounds...". RCW 19.27.097 states that an applicant for a building permit must provide evidence of an adequate water supply. RCW 82.02.050(1)(a), dealing with impact fees, states that it is the "intent of the Legislature...to ensure that adequate facilities are available to serve new growth and development."

The general scheme of the GMA is that within the parameters of the goals and requirements of the Act, local governments have a wide variety of discretion to make localized decisions. *Clark County I*. Because the Legislature chose to use the word "those" instead of "all" we conclude that local governments have the discretion to determine which public facilities and services are necessary to support development. A county may have entirely different priorities on public facilities and services than that of a city. An urban growth area outside of current city boundaries may have different public facility and service requirements than either within municipal boundaries or for county areas outside UGAs.

This discretion is not unfettered however, but must be within the confines of the goals and requirements of GMA. In determining what public facilities and services are "necessary to support development" a local government must consider all aspects of public facilities and public services and make a reasoned decision as to what facilities and services are necessary and how to subject those facilities and services to concurrency requirements. The resulting decision must be within the bounds of discretion afforded to local governments by the Act. *Clark County 1*.

(3) Shall be adequate to serve development.

This component imposes upon local governments both the duty and the right to determine the adequacy of public facilities and services. For each public facility and service a local government must determine its current adequacy level as well as its future ability to add to those facilities and services. This total level should then be viewed in light of current demands and a determination made as to what balance is left either for reserves or for new development. A methodology must be adopted which will measure the resulting available adequacy level against that which will be required by any specific development application to determine if sufficient capacity remains to serve that development. Obviously, the concept of adequacy will be an ongoing process but the mechanism for providing the information to the local decision-maker must be in place at either the comprehensive plan or development regulation stage. As required by RCW 36.70A.070(6)(e) development regulations also must be in place that prohibit new development that would make transportation facilities inadequate.

(4) At the time of occupancy and use.

The unanswered legislative direction on this component of Goal 12 relates to the timing of determining the adequacy of public facilities and services. Under the transportation element of concurrency found in RCW 36.70A.070(6) a 6-year maximum period is allowed for achieving concurrency if a financial commitment is in place to complete the improvements or strategies. The capital facilities element found in .070(3)(d) requires a 6-year plan to finance capital facilities, but does not specify that such a period is "concurrent with the development" as is done in .070(6). RCW 36.70A.110(3) provides a phasing requirement for urban growth to be located first in areas "that have adequate existing public facility and service capacities to serve such development." Secondly, growth should be phased into areas with adequate public facilities and services from a combination of existing and additional public facilities and services to be

provided by "either public or private sources". Goal 12 uses the phraseology of availability "for occupancy and use".

We conclude that local governments have discretion within the confines of the Act to determine the proper phasing of concurrency and the timing of either immediate occupancy and use or a period of time during which a firm financial commitment is in place in order to "ensure" that the public facilities and services are adequate.

(5) Without decreasing current service levels below locally established minimum standards.

This component imposes a requirement for local governments to establish a baseline for public facilities and services so that an objective test is available. A local government must determine whether "new development" places additional demands that would create a decline of LOS below the previously locally adopted minimums.

SUMMARY

Compliance with Goal 12 requires local governments to adopt either policies or regulations or a combination that provide reasonable assurances, but not absolute guarantees that the locally defined (within the perimeters of the Act) public facilities and services necessary for future growth are adequate within previously established LOS levels to serve that new growth either at the time of occupancy and use, or within an appropriately timed phasing of growth connected to a clear and specific funding strategy. The growth phasing and funding strategies will of necessity need to be more flexible for later years and more definitive in the immediate future. Such policies or regulations or combination must include a process that answers both the questions of what will be done, and how the goal will be achieved.

Applying Goal 12 to the CP we recognize that Oak Harbor had locally established that transportation, water and sewer concurrencies would be achieved. We note that the City also adopted concurrency LOS standards for parks and recreations, schools, fire, police and drainage issues.

To the point that the Oak Harbor CP has progressed it has certainly done an excellent job. The difficulty arises because of the confusion engendered by adopting LOS standards for these

various public facilities and services without subjecting them to analysis of whether Goal 12 applies. Deficiencies exist both as to the mechanism (how) the City proposes to ensure compliance with the GMA and whether the City actually considered and made a reasoned determination of what "those" public facilities and services necessary to support new development were. The CP provides a good list of current capacities and adequacies. It needs more work in determining future capacities and financial strategies necessary to ensure adequacy.

The CP does not provide a process for determining how Goal 12 will be achieved. The City argued that development regulations were the proper place for that determination to be made. Whether or not that is true, the City has not completed such development regulations even though the deadline for adoption has passed. Thus, we are unable to find the City in compliance with the Act.

It is important to recognize that the concept of concurrency is not an end in and of itself but a foundation for local governments to achieve the coordinated, consistent, sustainable growth called for by the Act. Perhaps the best synopsis of the requirements of concurrency is found in petitioner's reply brief, page 12 as follows:

"Concurrency requires adopted level of service standards, a projection of future needs, a financially feasible capital facilities financing plan that meets those needs, and the assurance that the facilities will be in place within a specified time frame related to the timing of projected development".

We could not have said it better.

ORDER

The Oak Harbor CP is not in compliance with the GMA. In order to achieve compliance the City must adopt policies and/or regulations that establish a mechanism for ensuring those public facilities and services necessary for development are adequate within appropriately specified and financially feasible time frames. The City must also clearly identify the funding source for the new reservoir. These changes must be completed by December 15, 1996.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

SO ORDERED this 16th day of July, 1996.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
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Les Eldridge
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