BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

CITIZENS FOR MOUNT VERNON and, CONCERNED CITIZENS OF MOUNT VERNON	)	No. 98-2-0006c
Petitioners,	)	FINAL DECISION AND ORDER
v.	)	
CITY OF MOUNT VERNON,	)	
Respondent,	)	
and	)	
BRIAR DEVELOPMENT COMPANY,	)	
Intervenor.	)	

Originating as a small trickle in British Columbia, the Skagit River begins its ceaseless journey. Building and winding, it eventually becomes the second longest river within the State of Washington. Ever changing, often in spite of the efforts of man, it flows and bends through northwest Washington. Near the end of its journey lies the City of Mount Vernon, the last urban center before the river empties into Skagit Bay.

In 1877, Harrison Clothier and Edward English established a small plat along the river and named it after the Potomac River estate of George Washington. In 1884, the southern half of Whatcom County was divided and named Skagit County. Two major floods occurred in 1892 and 1894. Those floods followed the 1891 fire that leveled the City a mere year after its incorporation. The early part of that decade also saw the coming of the railroad and the building of the county courthouse.

In the early 1970s Mount Vernon, with a population of 7,500, began to expand and change from a rural economy, primarily from the annexation of some 2.32 square miles during the first half of

the decade. The annexations converted agricultural lands to the north and east into significant commercial and residential development. Two new malls were established in 1971 and 1973. The population almost doubled to 13,000 by 1980. Ten years later, the population within the Mount Vernon urban growth area (UGA) had expanded to approximately 22,600 people, with a projection to 41,400 by 2013. The current comprehensive plan (CP) was adopted in 1995.

PROCEDURAL HISTORY

To aid in understanding the issues in this case we set forth, in more than usual detail, a procedural history. An initial petition was filed on November 4, 1997. It contended that the City had failed to adopt implementing development regulations (DRs) for the previously adopted CP. The petition further alleged that the City had not established a public participation program as required by RCW 36.70A.140 and that no action had been taken on amendments to the CP that had been proposed in 1996 and ones that had been proposed in 1997.

A joint motion to extend the time beyond the 180-day deadline was filed on December 30, 1997, to allow the parties to engage in mediation. An order extending the time was entered January 21, 1998.

Edward McGuire from the Central Puget Sound Growth Management Hearings Board was appointed Settlement Conference Officer and held a separate session with the parties. Although the mediation was not successful, it did assist the parties in further refining the issues.

On January 12, 1998, an amended petition was filed which reasserted the initial petition's issues and added a contention that recently adopted Ordinance #2844 did not comply with the Growth Management Act (GMA, Act). On February 12, 1998, a second amended petition was filed alleging the same challenge against Ordinance #2865, adopted on January 20, 1998.

A prehearing conference was held telephonically on February 18, 1998, and a prehearing order was issued February 27, 1998. The hearing on the merits was scheduled for April 28, 1998.

On March 5, 1998, a third amended petition was filed. We rejected that third amended petition

by Order dated March 13, 1998, for the reasons set forth therein. A new petition was filed March 16, 1998. It challenged the recent adoption of Ordinance #2864, which was also the basis of the third amended petition. We assigned the new petition case #98-2-0006. Petitioners filed their opening brief on March 20, 1998. The brief addressed the challenge to Ordinance #2864 found in the new petition.

After giving the parties an opportunity to respond to our proposal to consolidate the cases, we entered an order of consolidation on April 2, 1998. A supplemental prehearing order was issued April 16, 1998, which included the issue concerning Ordinance #2864. The hearing on the merits was rescheduled and held at Skagit Valley Community College on June 17, 1998.

Under RCW 36.70A.320, the CP, DRs, and amendments to each, are presumed valid upon adoption and the petitioners have the burden of proving a lack of compliance under the clearly erroneous standard in light of the entire record and the goals and requirements of the GMA. Additionally, under RCW 36.70A.3201, the Legislature has directed us to "grant deference to… cities in how they plan for growth, consistent with the requirements and goals of this chapter." RCW 36.70A.290(2) requires that a challenge to a CP, DR, or amendment to either, must be filed within 60 days after publication by a city or any challenge thereafter is precluded. That provision has particular applicability to the issues in the case and will be discussed later in this order.

One week prior to the hearing on the merits in this case we received a notice of appearance from counsel for petitioners. The arguments made at the hearing on the merits on behalf of petitioners were significantly more specific than the ones provided in the opening brief. We therefore allowed the City and intervenor to supply supplemental post-hearing briefs and allowed petitioners to file a supplemental reply brief.

Because of the procedural history and lack of challenges to the CP and/or certain ordinances, it is important to delineate what this case is not about. This case is not about compliance or noncompliance of the CP. The plan was adopted in 1995 and was not challenged. This case is not about a challenge to Ordinance #2840 which readopted the preexisting zoning code. This case is not about Ordinance #2879 (adopted April 15, 1998), in spite of the fact that parties on both sides have urged us to consider that ordinance's application to this case. This case is not

about the public participation process involved in the adoption of Ordinances #2844, #2864, and #2865.

Finally, this case is not about invalidity of the challenged ordinances. Although the parties spent significant time both in their briefing and in the oral argument at the hearing on the merits concerning the issue of invalidity, we are not able to rule on it. The claim of invalidity was not contained in the statement of issues in any of the original or amended petitions. The claim was contained in the relief-requested section of the petitions. Significantly, invalidity was not set forth as an issue in either the original or supplemental prehearing orders. The 1997 amendment to RCW 36.70A.290(1) provides clear legislative direction that, absent a claim in the statement of issues or prehearing order, a Board is precluded from deciding or addressing an issue. This is not a hyper-technical matter, but rather clear legislative policy which we will not waive. Having determined what this case is not about, we turn to the issues about which this case is.

1996 & 1997 AMENDMENTS TO THE CP

Two particular challenges were made concerning this claim. First, petitioners contended that the City had not acted upon proposed amendments to the CP and DRs as part of the City's process in 1996 and additional proposed amendments in 1997. Ordinance #2879 was adopted on April 15, 1998. The City contended, and petitioners did not dispute, that adoption of Ordinance #2879 rendered the failure to act challenge moot. Although the argument and record did not reflect whether the 1997 proposed amendments were acted upon with the same clarity as was shown for the 1996 proposed amendments, we are convinced that the issue is moot as to the failure to act challenge. Any challenge to Ordinance #2879 must come through the petition process. Such a petition was filed July 13, 1998.

The second challenge on the 1996 proposed amendments involved 2 ordinances that were adopted out of sequence with Ordinance #2879. Ordinance #2782 was adopted November 26, 1996, notice of which was published shortly thereafter. That ordinance amended the CP to adopt the overall economic development plan (OEDP) (Ex. 26) as an element of the CP. Ordinance #2759, which amended a map of the CP (Ex. 19), was adopted July 24, 1997.

Petitioners contended that the earlier out-of-sequence adoptions violated RCW 36.70A.132(b) that requires the "cumulative affects" of proposed amendments to be "considered." Both ordinances contained findings stating that the cumulative affects of each, in conjunction with the other proposed 1996 amendments, were considered prior to passage of the ordinance.

We do not decide the claim presented by petitioners that "considered" and "adoption" are intended by the GMA to be synonymous. Neither ordinance was challenged within 60 days of publication of notice of their adoption and therefore review is precluded.

PUBLIC PARTICIPATION PROGRAM

RCW 36.70A.140 provides that each local government planning under the Act:

> "…[S]hall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development *and amendment* of comprehensive land use plans and development regulations implementing such plans. The procedure shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments."… (emphasis supplied)

In response to this challenge, Mount Vernon contended that Ordinance #2856, adopted on December 10, 1997, complied with the GMA requirements for a public participation program. The City also contended that petitioners did not properly challenge Ordinance #2856.

In the initial petition filed November 4, 1997, the issue concerning a lack of a GMA public participation program was raised. Adoption of Ordinance #2856 thereafter would not preclude review of the Ordinance where the City claimed it as GMA compliance.

The language of Ordinance #2856 clearly demonstrates that it was not intended to fulfill the requirements of RCW 36.70A.140. In section 010 (purpose and applicability) the ordinance states that it is designed to:

> "[E]stablish a set of processes *(sic)* to be used for land use and development proposals subject to review under"…

the building and construction, subdivision and zoning sections of the Mount Vernon Municipal Code (MCC). A section by section review of the ordinance leaves no question that it is not designed for GMA compliance, but rather for permit review compliance under RCW 36.70B.

Even if Ordinance #2856 was intended for GMA compliance, we reject the City's contention that it fulfills the public participation program requirements of RCW 36.70A.140. The Ordinance does not contain any program except for an opportunity to comment on permit applications. The City, in designing a GMA compliant ordinance, should also be mindful of the requirements of RCW 36.70A.035 and .470.

IMPLEMENTING DEVELOPMENT REGULATIONS

In addressing the three ordinances at issue in this case, the petitioners contended that those amendments to the City's DRs directed ad hoc planning through the permit approval/denial process not in compliance with the GMA. Further, petitioners contended that since the CP does not have regulatory affect, the standards provided in Ordinances #2844 and #2865 were insufficient to implement the CP as required by the GMA. Petitioners also contended that the ordinances were inconsistent with the CP. Finally, Petitioners contended that Ordinance #2864 was not in compliance with the GMA because no designation of a commercial/light industrial zone was contained in the CP.

The City and intervenor contended that under the process set forth in the CP it was necessary to review three separate code provisions, the CP, the PUD ordinance, and the zoning code. The City and intervenor pointed out that the zoning code was "largely unimportant" because the CP specified allowable uses, and the procedural requirements and implementation for those uses came from the PUD ordinance. The City and intervenor contended that Ordinance #2844 gave regulatory effect to the uses provided in the text of the CP. They asserted that Ordinance #2865 provided specific locations based upon the language of the CP and an applicant developed market analysis, which amounted to appropriate criteria for determining nonresidential uses in the residential zones. Additionally, the City and intervenor claimed that Ordinance #2865 provided significant public participation for the site-specific process involved in the PUD permit decision. Finally, the City and intervenor contended that Ordinance #2864 implemented the provisions of

the OEDP previously adopted as an element of the CP.

The first step for a decision in this case involves review of the recent Supreme Court decision in *Citizens v. Mount Vernon*, 133 W.2d 861 (1997) (*Citizens*). The holding in the *Citizens* case has implications, however, beyond this one.

The *Citizens* case involved an appeal by intervenor of a Superior Court decision and a contention that the CP and zoning code of Mount Vernon authorized approval of a commercial planned unit development in a single-family zoned neighborhood. At the time of the application, the City had adopted its GMA CP but had not adopted GMA DRs. The City voted to annex the area in question and then took a second vote to approve the preliminary PUD. At p. 864 the Court characterized the Mount Vernon CP as one that designated areas with "future potential need for Neighborhood Community Retail," but noted that the CP did not "specify the size, intensity, or location of any future commercial development."

The Superior Court had determined that:

1. The CP failed to provide specific standards for making specific land use decisions;
2. Even if the CP could be used as a approval document, the project and the existing R-2A zone were inconsistent with the CP; and
3. The project was inconsistent with existing zoning regulations.

At p. 871, the Supreme Court determined that the existing Mount Vernon code did not authorize a commercial PUD in a residential zone. Under the heading RCW 36.70B.030, the Court addressed the contention that the CP was the only document necessary to authorize the PUD and that it provided sufficient guidelines to sustain the City's action. The Supreme Court at p.873 stated that:

> "The present case presents a problem because the statute above suggests…a comprehensive plan can be used to make a specific land use decision. Our cases hold otherwise…."

The Court then went on to cite a number of cases that dealt with the Planning Enabling Act found in RCW 36.70. The Court continued to characterize a CP as a "guide" or "blueprint" to be used when making specific land use decisions. The Court stated that:

> "Since a comprehensive plan is a guide and not a document designed for making specific

> land use decisions, conflicts surrounding the appropriate use are resolved in favor the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an *inconsistent* comprehensive plan." (emphasis supplied)

The Court noted at p. 874 that the "legal effect of approving a planned unit development is an act of rezoning," citing both *Lutz v. City of Longview* 83 W.2d 566 (1974) and *Parkridge v. City of Seattle* 89 W.2d 454 (1978). At p. 876 the Court said:

> "…Planned unit developments allow for flexibility in planning, in design, or in density. They do not permit ad hoc land use decisions merely because a developer has decided to employ the PUD process."

In the *Citizens* case the Court did not discuss the GMA. For example, the Court did not discuss the impact of either RCW 36.70A.110(1) or (6) which appear to require regulatory effect in CP adoption. Likewise the Court did not discuss the provisions of RCW 36.70A.070 and the mandatory elements contained therein, or the apparent regulatory effect of the CP process in siting essential public facilities found in RCW 36.70A.200. Many commentators prior to the issuance of the *Citizens* decision had asserted that the GMA provided for a regulatory impact by adoption of a CP.

We may have agreed with the commentators as to the regulatory effect of a CP prior to the *Citizens* decision. In fact, without the pronouncements of the Supreme Court found in *Citizens* we may well have decided this case differently. Nonetheless, *Citizens* is the final interpretation of those issues and any change from that decision must come from the Legislature.

Because of the relegation of the CP to a "guide" or "blueprint," it becomes necessary for local governments to be even more specific in fulfilling the requirement of RCW 36.70A.040(3)(d) to adopt DRs "that are consistent with and implement the CP." Since the Supreme Court has ruled that the plan itself is a mere blueprint, it becomes critical to determine what the GMA means in requiring that DRs be *consistent* with the CP and as a separate issue, what the GMA means in requiring that the DRs *implement* the CP. We view these concepts as distinct ones, although some overlap exists.

In defining consistency in this case we are not dealing with the "internal consistency" requirement of a CP. See WAC 365-195-500. Rather, in reviewing the procedural criteria found

in WAC 365-195, we are persuaded that the consistency required between DRs and the CP is adequately defined in WAC 365-195-210 as meaning that "no feature of a plan or regulation is incompatible with any other feature of a plan or regulation."

This is a different concept than the one of *implementing* DRs which are defined at WAC 365-195-800 as:

> " 'Implement' in this context has a more affirmative meaning than merely 'consistent' (See WAC 365-195-210(5)). 'Implement' connotes not only a *lack of conflict* but sufficient scope to *carry out fully* the goals, policies, standards and directions contained in the comprehensive plan." (emphasis supplied)

The requirements of implementing DRs for a CP then are twofold:

1. A lack of conflict (which is similar to the consistency requirement).
2. DRs that <u>fully</u> carry out the CP.

As noted by intervenor at p. 22 of its opening brief, Ordinances #2844 and #2865 were adopted to "correct errors" found by the Supreme Court in *Citizens*. It is accurate, as pointed out by the City and intervenor, that the text of the CP in chapter 3 does provide some general guidance for the use and location of nonresidential (multi-family and retail) locations in residential areas. The Supreme Court has ruled in *Citizens* that the text provided only a general guideline and was insufficient for specific land use decisions. While it is true that the text at p. 3-5 of the CP establishes criteria for reviewing a PUD, petitioners are correct that the criteria does not specify particular standards for either approval or denial.

Ordinance #2844 (amending the zoning code) provides language in various sections that PUDs "may include additional uses recommended by the Comprehensive Plan (i.e. multi-family and/or commercial retail centers)." This language is contained in each of the 5 residential zoning classifications. Section 8 of Ordinance #2865 (which amended the PUD ordinance) allows permitted uses in the zoning district:

> "[R]ecommended by the comprehensive plan where the PUD is located may be permitted in a PUD, subject to the criteria and allowable densities established in this chapter and the recommendations of the comprehensive plan,…"

Section 18 of #2865 lists a number of criteria that are to be "primary considerations" before approval. The listed criteria involve generalized language concerning relationships of the proposal to the type of existing development, site amenities, traffic issues, etc. Section 34, concerning multi-family PUDs, specifies that the "hearing examiner and city council will determine the maximum number of multi-family units allowed" through consideration of enumerated criteria. Once again the criteria is in generalized language and concerns "consideration" of character and impacts on the surrounding areas, the location and bulk of the proposed units, uses, and densities, critical area protection, design, and landscaping. Section 36 allows density increases for "designed factors" from the "degree of distinctiveness and the desirable variation achieved." Finally, section 45 of Ordinance #2865 provides that commercial facilities allowed in any residential PUD "shall be based on the recommendations of the comprehensive plan <u>and</u> on a market analysis furnished by the applicant." The market analysis is designed to demonstrate that the amount of land proposed is needed and "can realistically be supported in commercial use." The ordinance goes on to list 5 items, in generalized language, of what is to be contained in the analysis.

In light of the Supreme Court decision that the CP did not, in and of itself, provide sufficient standards to allow land use decisions to be made and that even if it did, the CP was only designed to be a guide, we hold that neither Ordinance, #2844 nor #2865 comply with the Act.

These ordinances amend the previously adopted DRs. RCW 36.70A.130(1) states that "…Any change to development regulations shall be consistent and implement the comprehensive plan." The Act requires "implementing" DRs that fully carry out the goals, policies, standards, and directions of the CP. These ordinances do not contain specific standards for deciding in advance whether a project does or does not qualify for approval.

Ordinance #2864 is designed to implement the goals and objectives of the City's OEDP adopted as an element of the CP by Ordinance #2782. The OEDP does not specify any locations of this proposed commercial/limited industrial district. This ordinance is in violation of RCW 36.70A.070 requiring a map or maps and descriptive text location, and RCW 36.70A.040(3)(d) requiring consistency between the plan and the DRs.

ORDER

In order to comply with the GMA, the City of Mount Vernon must adopt DRs that fully implement the provisions of its CP. That adoption must occur within 180 days of the date of this order. A public participation program must be adopted within 120 days in order to comply with the Act.

The findings of fact required by RCW 36.70A.270(6) are attached hereto and incorporated by reference.

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

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 23rd day of July, 1998.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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William H. Nielsen
Board Member

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Les Eldridge
Board Member

FINDINGS OF FACT

CASE # 98-2-0006c

1. The Mount Vernon comprehensive plan (CP) was adopted in 1995. No challenge to its compliance with the Growth Management Act (GMA, Act) was made.

2. Ordinance #2844 was adopted November 5, 1997.

3. Ordinance #2864 was adopted January 23, 1998.

4. Ordinance #2865 was adopted January 20, 1998.

5. Ordinance #2879 was adopted April 15, 1998. Its adoption renders moot the claim that the 1996 and 1997 amendments had not been acted upon by the City of Mount Vernon.

6. Review of Ordinance #2782, adopted November 26, 1996, and Ordinance #2759, adopted July 24, 1997, is precluded by the failure to challenge either of the ordinances within the 60-day time limitation after publication of the notice of adoption.

7. The City of Mount Vernon has not adopted a public participation program ordinance as required by RCW 36.70A.140. Ordinance #2856, adopted December 1997, does not comply with the requirements of a GMA public participation program.

8. Ordinance #2864 does not comply with the Act because it is not consistent with the CP and does not fulfill the requirement of RCW 36.70A.070 that requires maps and text showing designations of the commercial/light industrial area.

9. Ordinance #2844 (amending the zoning code) and #2865 (amending the PUD ordinance) do not provide sufficient independent and detailed standards to fully implement the comprehensive plan and therefore do not comply with the GMA.