

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

MICHAEL L. ACHEN AND CATHERINE	)		
J. ACHEN,	)		
	)	No. 99-2-0040	
Petitioners,	)		
	)		FINAL DECISION
v.	)		AND ORDER
	)		
CITY OF BATTLE GROUND,	)		
	)		
Respondent.	)		
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**SYNOPSIS OF THE ORDER**

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We find that we do not have jurisdiction to review the validity of the City of Battleground’s impact fee enactments (Ordinances #99-031, #99-032, and Resolution #99-033). We further find that petitioners have failed to meet their burden of proving any substantive deficiencies of Ordinance #99-030. However, we remand Ordinance #99-030 for two procedural shortcomings (1) failure to forward a copy of the Ordinance to the Department of Community, Trade, and Economic Development (DCTED) at least 60 days prior to the final adoption and (2) failure to prepare a State Environmental Policy Act (SEPA) threshold determination on the Ordinance.

**PROCEDURAL HISTORY**

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On November 24, 1999, we received a petition for review (PFR) from Michael L. and Catherine J. Achen. Petitioners challenged Ordinance #99-030, which adopted amendments to the capital facilities element of the City of Battle Ground’s comprehensive plan (CP); Ordinance #99-032, which adopted and imposed the fire protection facility impact fee; Ordinance #99-031, which adopted amendments to the traffic impact fee; and Resolution #99-033, which adopted the reallocation of traffic impact fees. These actions occurred on September 27, 1999.

A telephonic prehearing conference was held December 29, 1999. A prehearing order was entered December 30, 1999.

A motions hearing was held on February 11, 2000. An order denying the motion to dismiss was entered February 17, 2000. An order denying motion for consolidation with Case #99-2-0020 was entered February 17, 2000.

The hearing on the merits was held on April 26, 2000 at 9:00 a.m. in Battle Ground, Washington. Keith Hirokawa and Mark Erikson represented petitioners. Brian Wolfe and Dale Kamerrer represented the City of Battle Ground (City). All three board members of the Western Washington Growth Management Hearings Board (Board) were present.

### **BURDEN OF PROOF**

As in all cases before us, the burden is on petitioners to demonstrate that the actions taken by the City are not in compliance with the requirements of the Growth Management Act (GMA, Act) RCW 36.70A.320(2). Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the action by [the City] is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [the GMA].” For us to find the City’s action clearly erroneous, we must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

### **JURISDICTION TO REVIEW CITY’S IMPACT FEE ORDINANCES**

The City previously moved to dismiss this petition on the grounds that it sought Board review of local impact fee legislation, which the City argued are outside the Board’s jurisdiction. We denied the motion and reserved the issue for the hearing on the merits allowing further briefing and argument on the issue.

Petitioners’ opening brief gave many reasons why we should find jurisdiction over these impact fee ordinances focusing on two major arguments at p. 23:

“...the Board should reconsider its jurisdiction over Chapter 82.02 RCW and impact fees for two reasons: first, the statutory and regulatory structure of GMA suggest that impact fee planning, as part of the financial management requirement of GMA, is properly within the Board’s jurisdiction; second, because impact fees at issue *are* ‘development regulations’ subject to the Board’s jurisdiction.”

Petitioners reminded us of our decision in *Properties Four v. City of Olympia*, WWGMHB #95-2-0069, Order Granting Motion to Dismiss, (August 22, 1995) when, at page 2, we refused to promulgate a blanket rule regarding impact fee jurisdiction:

“We are not saying that an impact fee could never be a development regulation. We are saying that given the record in this case, Ordinance #5508 is not a development regulation.”

In that decision we adopted a case-by-case basis of jurisdiction to determine whether the regulation at issue served to “control” land use and development activities and therefore qualified as a “development regulation.”

Petitioners asked us to accept jurisdiction to review impact fees because the imposition of such fees furthers local planning under GMA. In the alternative, petitioners asked us to find that ordinances in this case warrant jurisdiction over impact fees because they are a condition to land use development.

The City responded at p. 13 and 14 of its April 12, 2000, response brief:

“The following arguments explain why impact fee legislation is not reviewable by the Board. Those measures are City of Battle Ground Ordinances 99-031, 99-032, and Resolution 99-033.

As is pertinent to this case, RCW 36.70A.280(1)(a) defines the Board’s jurisdiction as follows:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it

relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW;

(Emphasis added.) The Supreme Court of Washington has called the Board’s jurisdiction: ‘...a very limited power of review.’ *Citizens v. Mount Vernon*, 133 Wn.2d 861, 867, 947 P.2d 1208 (1997).

RCW 36.70A.280 first limits the scope of reviewable allegations with the phrase “in compliance with the requirements of this chapter”. Unless an action by a city is governed by mandatory provisions of chapter 36.70A RCW, it is not reviewable by the Board under the last-quoted part of RCW 36.70A.280(1).

Additionally, the statutory authority to adopt impact fees is not located in the “chapter” of the Code which is referred to in RCW 36.70A.280(1). Instead, the authority is found in the excise tax title of the Code at RCW 82.02.050 through .090. The legislature deliberately distinguished the authority for adoption of impact fees from other provisions of the Growth Management Act, as the Court of Appeals recognized in *City of LaCenter v. New Castle Investments*, 98 Wn. App. 224, at 235-36, \_\_\_ P.2d\_\_\_ (1999), where the Court said:

The placement of TIFs [traffic impact fees] among tax statutes, rather than land use regulations, indicates that they are in a different category from other land use statutes. RCW 82.02.050 through RCW 82.02.090 (the “GMA Impact Fee Statutes”) was adopted as part of the GMA in 1990. But it was not placed in the RCW chapters governing land use control or development regulation; instead, it was codified among excise taxes in RCW 82.

(emphasis added); and

By their nature, TIFs are fees that augment tax dollars; they are another source of revenue for improvements that benefit the public in general, and they are not intended to regulate the particular development. Thus, we are satisfied through our analysis of the *Covell* factors and *Hillis Homes* that TIFs have characteristics that distinguish them from regulations.

98 Wn. App. at 236 (emphasis added).

Since impact fees are not development regulations, and are not part of the “requirements” of chapter 36.70A.RCW, local enactments are not within the scope of

the definition of reviewable matters set forth in RCW 36.70A.280.”

In its reply brief petitioners pointed out that a petition for review was pending on the *La Center* decision. On May 2, 2000, the Supreme Court denied review of that case.

Given the *La Center* decision, we will no longer adhere to our previous case-by-case basis for determining impact fee jurisdiction by determining whether the regulation at issue serves to “control” land use and development activities. That question has now been answered by the Court. Impact fees are not development regulations, are not part of the requirements of RCW 36.70A, and therefore local impact fee enactments are not within the scope of the definition of reviewable matters set forth in RCW 36.70A.280.

**We do not have jurisdiction to review the validity of the City’s impact fee enactments (Ordinances #99-031, #99-032, and Resolution #99-033). Therefore, the remainder of this decision will be limited to the challenges to the compliance of the adoption of Ordinance #99-030, the fire capital facilities section (FCFP) of the capital facilities element (CFP) of the CP.**

### **CHALLENGES TO COMPLIANCE OF ORDINANCE #99-030**

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Petitioners made six challenges to the adoption of the FCFP in Ordinance #99-030:

- A. The FCFP violates GMA frequency requirements.
- B. The FCFP violates GMA consistency requirements.
- C. The FCFP violates the planning requirements of RCW 36.70A.070.
- D. The FCFP violates GMA procedural limitations.
- E. The FCFP fails to identify fire capital facilities.
- F. The City failed to comply with GMA reporting requirements.

#### A. GMA Frequency Requirements

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Petitioners claimed that in adopting Ordinance #99-030 the City failed to comply with RCW 36.70A.130(2) and failed to adhere to procedures which ensure consideration of CP revisions no

more than once per year.

The City responded that RCW 36.70A.130(2)(b) provides for certain exceptions to the restriction of reviewing CPs no more frequently than once a year. Specifically, it allows additional considerations to resolve an appeal of a CP filed with a Growth Management Hearings Board or with a Court. The City amended the FCFP on September 27, 1999, in response to the petitioners' filing of their initial PFR of the City's first FCFP in Case #99-2-0020.

Petitioner replied that since no Board or Court had found the original FCFP to be deficient, this exception did not apply.

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It seems rather disingenuous that petitioners would appeal the City's CP, enter into settlement conversations with the City which led to the City making changes to its CP to rectify some of petitioners' concerns in the PFR, and then fault the City for making such changes separate from other yearly CP amendments.

**Ordinance #99-030 was adopted in an attempt to settle an appeal of a CP filed with this Board. Therefore adoption of Ordinance #99-030 does come under the exception of RCW 36.70A.130(2)(b) and complies with the Act.**

#### B. GMA Consistency Requirements

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Many of petitioners' consistency challenges dealt with inconsistency between the FCFP and the impact fee ordinances. We have already determined that we have no jurisdiction to review those potential inconsistencies. **Petitioners have not shown persuasive evidence in the record that the FCFP is inconsistent with the CP.**

#### C. RCW 36.70A.070 Planning Requirements

Petitioners cited RCW 36.70A.070 and claimed inadequacies of the inventory, needs assessment, cost analysis, funding sources, and vagueness of proposed location for fire facilities in the FCFP.

The City responded that petitioners may not like some of the conclusions drawn by the FCFP, but the plan addressed every element required in .070.

**Petitioners have failed their burden of showing that the City did not comply with the requirements of RCW 36.70A.070.**

#### D. GMA Procedural Limitations

Petitioners claimed that the City violated the express GMA procedural limitations by combining consideration of the proposed amendments to the FCFP (#99-030) with the adoption of the fire impact fee (#99-032) at the same legislative hearing. Petitioners cited RCW 36.70A.130(1) and WAC 365-195-850(3) to support this claim. The City responded that, contrary to petitioners' assertions, neither citation "requires" the adoption of the CP element before imposition of the impact fee and at different legislative sessions.

**Battle Ground complied with the Act in adopting #99-030 and #99-032 at the same legislative session.**

#### E. Identification of Fire Capital Facilities

Petitioners asserted that the FCFP violated RCW 36.70A.070 by failing to identify fire capital facility needs, as distinct from emergency medical needs, thereby artificially raising fire facility cost estimates in the FCFP. Petitioners further asserted that even if emergency medical costs were properly included in a FCFP, the failure to attribute such extra costs to the proper sources was arbitrary and capricious and failed to effectuate the planning requirements of GMA.

**We have carefully read the FCFP and supporting exhibits and are not persuaded by petitioners that the City was clearly erroneous in identifying its fire capital facilities needs in the FCFP.**

#### F. GMA Reporting Requirements

RCW 36.70A.106 requires local governments to forward proposed amendments to their CPs to DCTED at least 60 days prior to final adoption. Petitioners contended that since the City failed to do so, Ordinance #99-030 should be found invalid. The City responded that even though the record did not show that the disputed amendment was timely sent to DCTED, the City did later send a copy of the amendment, got no response, and therefore the failure could not be seen as a fatal flaw subject to invalidity.

**Given the record and the content of the Ordinance, we would not remand Ordinance #99-030 if the sole reason for remand was failure to timely comply with RCW 36.70A.106(3). If the Ordinance is remanded for other reasons, the City must be able to show that the plan was submitted to DCTED at least 60 days before readoption of the Ordinance.**

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**STATE ENVIRONMENTAL POLICY ACT (SEPA)**  
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Petitioners challenged the City’s failure to follow the requirements of SEPA (RCW 43.21C and WAC 197-11) in the adoption of Ordinance 99-030.

The City responded in part at pp. 5-7 of response brief:

“Respondent submits that the addition of a capital facilities plan amendment, consisting solely of projected fire protection needs, has absolutely no effect on the quality of the environment, much less a significant effect. A subsequent adoption of impact fees to implement the capital facilities plan component is likewise neutral on environmental impact.

The Hearings Board will recall that all of the small cities in Clark County, Washington, adopted by reference the environmental impact statement produced by Clark County when their overall comprehensive plan was accomplished in 1994 and 1995. Fire capital facilities were a part of the EIS. The adoption of the FCFP and the implementing impact fees are merely an accomplishment of that earlier procedure and EIS. There was no need for a new SEPA procedure.

Respondent raises the issue that petitioners have no standing to raise SEPA compliance at this point in time. There is no reference in any materials produced by petitioners or their attorney or in argument that the SEPA procedure was being raised during the planning and adoption process...

At best, an act of the legislative body amending the comprehensive plan is defined as a “non-project action” by WAC 197-11-704(2)(b).

While there are suggestions that a city or county should at least do a non-project environmental assessment or checklist, there is also considerable latitude for finding that the action is “categorically exempt” under SEPA and therefore no environmental issue is raised at all. Categorical exemptions are found in Part 9 of the WAC SEPA rules at WAC 197-11-800. Among other things, subsection (20) defines procedural actions as:

The proposal or adoption of legislation, rules, regulations, resolutions or ordinances, or of any plan or program relating solely to governmental procedures and containing no substantive standards respecting use or modification of the environment shall be exempt. Agency SEPA procedures shall be exempt.

In order to adopt impact fees pursuant to RCW 82.02, a city must first adopt a capital facilities component of the affected capital facility. In this case, the City of Battle Ground had to adopt a capital facilities plan regarding fire protection as defined in RCW 82.02.090 (7). In adopting such a component, there is absolutely no substantive standards contained within that component that affects the use or modification of the environment. This is not a land use component. This is not a zone change or adoption of a comprehensive plan amendment which leads to rezone, prohibits a zone, or leads to construction. In fact, one of the things complained about by petitioners is that the actual location and design of the proposed fire station is not a part of the plan....

Accordingly, respondent submits that the adoption of a capital facilities component involving fire protection facilities and the subsequent adoption of fire impact fees was at best “procedural” and had absolutely no impact on the environment. No compliance with SEPA was required, either by submitting it to DCTED or by issuing a threshold determination.”

Petitioners responded in part at pp. 5-7 of its April 19, 2000, reply brief:

“As quoted in the *Opening Brief*, the State Environmental Policy Act (SEPA) requires local governments to consider environmental impacts prior to adopting legislation. RCW §43.21C.030(b). Failure to comply with the procedural requirements of SEPA is a jurisdictional defect that results in vacation of the legislative action in violation of the Act. *Lassila v. City of Wenatchee*, 89 Wash.2d 804, 817, 576 P.2d 54 (1978) (“...we cannot tell whether the environmental significance of the Plan was even considered by the commissioners...Finding serious noncompliance with SEPA’s mandate, we must vacate the City’s amendment of its comprehensive plan.”). Respondent attempts to avoid vacation of legislation challenged in this appeal for reasons offensive to SEPA.

Respondent asserts an exemption from the requirements of SEPA due to its *post hoc* determination that (i) the FCFP “has absolutely no effect on the quality of the environment,” and (ii) because 5 years ago an EIS was performed by a different local government, on a different Comprehensive Plan that did not include the respondent’s FCFP. *Respondent’s Brief* at 5. Obviously, respondent is unable to cite precedent for this proposition. The threshold determination is the document by which an action can be declared insignificant, and the threshold determination requirement ensures “actual consideration of environmental factors.” *Gardner v. Pierce County Bd. of Com’rs*, 27 Wash.App. 241, 245, 617 P.2d 743 (1980). A threshold determination is always required. WAC 197-11-055(2)....

Respondent suggests that petitioners do not have “participation standing” to raise the issue of SEPA compliance in the present proceeding. *Respondent’s Brief* at 5. Respondent argues that petitioners should have raised SEPA issues below in order to afford the City of Battle Ground opportunity to respond to petitioners’ objection. Respondent’s standing argument is a logical anomaly; petitioners could not participate in a SEPA process because the City of Battle Ground did not engage in a SEPA process. Surely respondents are not suggesting that it is petitioners’ duty to initiate SEPA review of this proposal. See also, *Gardner v. Pierce County Bd. of Com’rs*, 27 Wash.App. 241, 243, 617 P.2d 743 (1980) (Lack of notice of plaintiff of SEPA determination relieves plaintiff of duty to participate in administrative SEPA process.....

Third, *Respondent’s Brief* attempts to fabricate a new categorical exemption from SEPA. *Respondent’s Brief* argues that the challenged Comprehensive Plan amendment and impact fee legislation are “at best ‘procedural.’” *Respondent’s Brief* at 6. Once again, respondent’s interpretation offends black letter law of SEPA. This issue was decided in *Pellet v. Skagit County*, WWGMHB No. 96-2-0036, *Final Decision and Order* (June 2, 1997). In *Pellet*, this Board held that an amendment to a natural resource lands map did not

require a threshold determination. *Id.*, at 2-4. The Board in *Pellet* established that “a SEPA threshold determination was not necessary if [the subsequent ordinance] did not change the meaning of [the prior ordinance].” *Id.* at 2. However, “[i]f the new language substantively amended [the prior ordinance], then the County was required to make a SEPA threshold determination.” *Id.* Although the rule of law in *Pellet* is clear, respondent does not suggest how to apply *Pellet* to the case at hand. Ordinance 99-030 constitutes a significant Comprehensive Plan amendment and contains new standards, calculations and rules. Ordinances 99-031, 99-032 and Resolution 99-033 established or altered the substance of the capital facilities impact fees. A SEPA threshold determination was required for each of these legislative acts.

Respondent’s attempt to distinguish *Lassila* likewise demonstrates more fiction than fact. *Respondent’s Brief* misstates the facts and holding of *Lassila* in proposing that the “court distinguished several actions which had no significant impact and therefore the city of Wenatchee was not required to make a SEPA threshold determination.” *Respondent’s Brief* at 6. The reading of *Lassila* in Respondent’s Brief renders the case meaningless. The court in *Lassila* held, specifically, that although not every legislative action requires a full environmental impact statement:

[W]hen action is contemplated upon a recommendation or other major action, the responsible governmental body must make a threshold determination to ascertain whether the action or recommendation will significantly affect the quality of the environment. This threshold determination is critical for full implementation of SEPA’s mandate. It must precede governmental action....The policy of the act is thwarted when the governmental body fails to make any threshold determination whatsoever.

*Lassila*, 89 Wash.2d at 813-814, internal citation omitted. Neither SEPA, nor its enforcement in *Lassila*, implies an exemption for the ordinances challenged in this appeal.”

Petitioners concluded that since the City had not issued a SEPA threshold determination for the challenged legislative action, Ordinance #99-030 is procedurally deficient and void.

The non-lawyer presiding officer in this case finds the City’s common sense arguments regarding applicability of SEPA persuasive. However, the majority of the Board finds that even though we might agree with the City that requiring SEPA review makes little sense for this particular fire protection amendment to the CFP of the CP, we find no exemption in SEPA from the requirement to make a threshold determination for such ordinances. **Under RCW 43.21C and WAC 197-11, a threshold determination must be prepared. The City has failed to comply**

with the GMA by this failure.

**ORDER**

**Petitioners have failed to meet their burden of proving any substantive deficiencies of Ordinance #99-030. However, we remand Ordinance #99-030 for two procedural shortcomings. In order to achieve compliance with the Act and with RCW 43.21C as it relates to amendments adopted under RCW 36.70A.040, the City must within 90 days:**

- 1. Prepare a SEPA threshold determination for Ordinance #99-030; and**
- 2. Show that a copy of Ordinance #99-030 was sent to DCTED at least 60 days before the subsequent readoption of this Ordinance.**

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and attached as Appendix I and incorporated herein 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 16<sup>th</sup> day of May, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Nan A. Henriksen  
Board Member

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Les Eldridge

Board Member

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William H. Nielsen  
Board Member

## **APPENDIX I**

### **FINDINGS OF FACT**

1. RCW36.70A.280(1)(a) defines the Board’s jurisdiction as follows:
  - (1) A growth management hearings board shall hear and determine only those petitions alleging either: (a) That a state agency, county or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21CRCW as it relates to plans, development regulations, or amendments, adopted under RCW36.70A.040 or chapter 90.58 RCW.
2. Washington State Supreme Court has called the Board’s jurisdiction: “...a very limited power of review.” Citizens v. Mount Vernon, 133 Wn. 2d 861, 867, 947P.2d 1208 (1997).
3. The Court of Appeals found in City of La Center v. New Castle Investments, 98 Wn. App.224, at 235-36 – P.2d – (1999) that the legislature deliberately distinguished the authority of impact fees from other provisions of the GMA:

“The placement of TIFs [traffic impact fees] among tax statutes, rather than land use regulations, indicates they are in a different category from other land use statutes. RCW82.02.050 through RCW82.02.090 (the “GMA Impact Fee Statutes”) was adopted as part of the GMA in 1990. But it was not placed in the RCW chapter governing land use control or development regulation; instead, it was codified among

excise taxes in RCW82.....

By their nature, TIFs are fees that augment tax dollars; they are another source of revenue for improvements that benefit the public in general, and they are not intended to regulate the particular development. Thus, we are satisfied through our analysis of the Covell factors and Hillis Homes that

TIFs have characteristics that distinguish them from regulations.”

4. On May 2, 2000, the Washington State Supreme Court denied review of the La Center decision.
  
5. RCW36.70A.130(2)(b) provides for certain exceptions to the restriction of reviewing CPs no more frequently than once a year. Specifically, it allows additional considerations to resolve an appeal of a CP filed with a Growth Management Hearings Board. The City amended the CFP on September 27, 1999, in response to the petitioners' filing of their initial PFR of the City's first CFP in Case #99-2-0020.
  
6. The record contained no persuasive evidence that the FCFP is inconsistent with the CP.
  
7. The FCFP addressed every element required by RCW36.70A.070.
  
8. There is no evidence in the record that the City forwarded the contested amendments to the CFP to DCTED at least 60 days prior to final adoption, as required by RCW36.70A.106.
  
9. There is no evidence in the record that a SEPA threshold determination was issued by the City for the challenged amendment to the CFP.