

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

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| JOHN SERVAIS and C. "TIP" JOHNSON, |) |
| |) No. 00-2-0020 |
| Petitioners, |) |
| |) ORDER ON |
| v. |) DISPOSITIVE |
| |) MOTION |
| CITY OF BELLINGHAM, WHATCOM COUNTY and |) |
| WESTERN WASHINGTON UNIVERSITY, |) |
| |) |
| Respondents, |) |
| _____ |) |

On May 30, 2000, John Servais and C. "Tip" Johnson filed a petition for review (PFR) claiming that the City of Bellingham, Whatcom County and Western Washington University (WWU) had failed to comply with the requirements of the Growth Management Act (GMA, Act) with regard to essential public facilities (EPF). The PFR also claimed that on March 31, 2000, Bellingham and WWU entered into a memorandum of agreement (MOA) without adherence to the State Environmental Policy Act (SEPA) and without meeting GMA public participation goals and requirements. Violation of GMA's requirements for "siting and expansion of essential public facilities" was also claimed.

A prehearing order (PHO) was entered July 18, 2000. Three issues were identified in the PHO. The first two concerned petitioners' claims that the City and County had failed to "adequately address" EFPs in their comprehensive plans (CPs) and/or development regulations (DRs) and the City's failure to adopt a "comprehensive master plan for WWU with DRs that are consistent" with County and/or City CPs and/or DRs. The third issue dealt with the claim that the MOA failed to comply with SEPA, public participation and EFP requirements of the GMA. The PHO established a deadline of July 21, 2000, for filing of motions, all in accordance with previous notification to the parties. On July 21, 2000, WWU filed a "motion to dismiss all claims" in the PFR. The motion was

supported by an accompanying brief and exhibits. That same day, Whatcom County filed a

memorandum in support of the motion, as did the City.

On August 1, 2000, in accordance with the PHO requirements, petitioners filed a response to WWU's motion. Petitioners also requested a "cross-motion for summary judgment." Because petitioners had not filed their motion prior to the July 21, 2000 deadline, an order was entered on August 9, 2000, striking the cross motion. On August 15, 2000, a telephonic motions hearing was held. We treated WWU's motion to dismiss as a dispositive motion. Because of the approaching deadline for filing of petitioners' brief we notified the parties on August 17, 2000, that the dispositive motion as to Issues One and Two had been granted but was denied as to issue three. The parties were directed to restrict the briefing for the hearing on the merits (HOM) to Issue Three. This order sets forth our reasoning for that determination.

WWU specifically challenged our jurisdiction to entertain the issues presented in the PFR and PHO. Particularly as to Issues One and Two (lack of EFP policies and regulations), WWU pointed out that both the City and County had adopted a CP and DRs and that the 60 day limitation for appeal under RCW 36.70A.290 had expired. In their briefing and argument petitioners claimed that neither the City nor the County had addressed WWU in their CPs and/or DRs and thus had "failed to act" to implement the requirements of RCW 36.70A.200.

While there is some dispute between the parties as to whether either the City or the County adequately dealt with EFPs and specifically WWU in their CP and/or DRs, there is no dispute that EFPs were the subject of consideration for both the City and the County in their adopted CPs and/or DRs. While couched in a failure-to-act mode, petitioners' challenges are essentially ones to the adequacy of the manner in which either the City or the County dealt with EFPs in the WWU context. The time for those challenges expired 60 days after publication of the notice of adoption by the City and the County. The expiration of that deadline long predates the PFR in this case. WWU's motion is granted.

We specifically find that no jurisdiction exists to review petitioners' claims as to Issues One and Two.

An entirely different jurisdictional argument was presented by WWU as to Issue Three. The

MOA was entered into between Bellingham and WWU. There was no participation by, or claim against, Whatcom County as to Issue Three.

Recognizing the need to ultimately establish an “Institutional Master Plan” (IMP) the City reviewed a proposed WWU subarea plan in 1998. Extensive public hearings by both the City Planning Commission and City Council occurred both in 1997 and 1998. In September 1998, the City adopted a WWU subarea plan among other reasons to “provide a foundation for eventual adoption by the City and WWU” of the IMP. It is anticipated that the IMP will be adopted late this year or early 2001.

Also recognizing the need to provide some interim control over WWU’s current growth needs, the parties entered into an MOA on March 27, 1998. The MOA was adopted in recognition of CP land use section page 24 direction. The MOA contained an expiration date of 18 months from its signing.

The City and WWU executed a second MOA on March 31, 2000. While referring to the March 31, 2000, MOA as an “extension” in its brief, WWU conceded at the motions hearing that since approximately six months had passed after the expiration date of the 1998 MOA, the current MOA was a new document. WWU contended that no jurisdiction for review of the March 31, 2000 MOA existed because the MOA was “not intended to serve as a GMA plan or development regulation.” WWU specifically contended that the MOA did not fit within the definition of a DR found at RCW 36.70A.030(7). Petitioners claimed that the agreement was in fact a DR.

We recognize that a primary purpose of the MOA was to resolve a jurisdictional dispute between the City and WWU. By its own terms the agreement defines the standards upon which WWU will submit specific projects to the City and under which currently-existing DRs the City will approve or disapprove those interim projects. The MOA establishes a deadline for its existence - 12 months from the date of signing or the adoption of the IMP, whichever first occurs. The MOA specifically references various Bellingham Municipal Code (BMC) provisions relating to criteria for approval of building projects. In addition to specifically adopting some parts of the current BMC, the MOA exempts WWU from certain requirements contained in other BMC sections.

It is hard to envision how the MOA does not fit within the definition contained in RCW 36.70A.030(7):

“Development regulations” or “regulation” means the controls placed on development or land use activities by a...city,...

We specifically find that the MOA is a development regulation and that we have jurisdiction to review the claims set forth in the PFR as expressed in Issue Three of the PHO. We reserve for the HOM the issue of whether the MOA complies with GMA requirements for SEPA, public participation and/or essential public facilities.

So ORDERED this 31st day of August, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

