

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

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

John Servais and C. "Tip" Johnson filed a petition for review (PFR) against the City of Bellingham, Whatcom County, and Western Washington University (WWU) on May 30, 2000. Three issues were established in the July 18, 2000, prehearing order, all of which were challenged by WWU's subsequent dispositive motion. After briefing and a hearing, we entered an order on August 31, 2000, granting the motion as to two of the issues and denying the motion as to issue #3. Our August 31, 2000, order provides more detail of the procedural background, the reasons for the decisions on the motions, and is incorporated herein by reference. As a result of that order, the parties stipulated to Whatcom County's removal from further participation.

In accordance with the prehearing order the parties filed briefing for the hearing on the merits which was held September 21, 2000. In its response brief dated September 8, 2000, WWU requested that we reconsider our August 31, 2000, holding that the March 31, 2000, memorandum of agreement (MOA) (Ex. 237) constituted a development regulation (DR) under the Growth Management Act (GMA, Act). Petitioner's reply brief, filed September 14, 2000, objected to such reconsideration, pointing out that WAC 242-02-832 allows for motions for reconsideration "only after issuance of a final decision." At the hearing on the merits we allowed the parties to present oral argument on the issue regarding the MOA.

Petitioners' objection is well founded. Nonetheless, we have acceded to WWU's request by once again reviewing the record, the briefing, and the arguments, in particular once again reviewing

the Central Puget Sound Growth Management Hearings Board's (CPSGMHB) case of *Burien, et al., v. SeaTac and Port of Seattle*, #98-3-0010 (FDO 8-10-98) (*Burien*). We did so as an accommodation to Respondents to be totally fair to them, to ensure that our decision is compatible, if possible, with the decision in *Burien* and because this issue is one of first impression. After another thorough review of this record, the *Burien* case and the arguments of the parties, we still conclude that the March 31, 2000, MOA is a DR under the definition found in RCW 36.70A.030(7). A recitation of the facts established by this record is foundational to understanding the reasons for that conclusion.

On September 19, 1998, Bellingham approved the WWU Neighborhood Plan (Plan) (Ex. 488). The Plan consists of a review of the neighborhood/campus "character" including historical planning activities. The Plan notes that as a result of the GMA "...WWU is also required to comply with local comprehensive plans and development regulations." Other sections of the Plan deal with city/university/neighborhood relationships, traffic circulation, parking, transportation management, open space, property acquisition areas, drainage and water quality, and the later development of an "institutional master plan" (IMP) required by Bellingham Municipal Code (BMC) 20.40. A series of recommendations is contained throughout the Plan. The Plan specifically authorizes the use of a MOA for "campus development" until approval of an IMP.

The Plan noted that in 1974 the City approved a WWU Facilities Development Plan (FDP) that was to be later updated to become a master plan for campus development. WWU submitted a 1981 updated FDP and a 1987 "South Campus Master Plan." Bellingham never formally reviewed or adopted either document. No WWU plan after the 1974 FDP was approved by Bellingham until the 1998 Neighborhood Plan.

On March 27, 1998, six months before approval of the Neighborhood Plan, Bellingham and WWU entered into their first MOA (Ex. 474). *By its terms* the 1998 MOA expired within 18 months of signing or upon completion of the IMP, whichever first occurred. It was anticipated the IMP would be completed prior to or at that 18-month deadline. Two years later, WWU and the City entered into the 2000 MOA (Ex. 237) which recognized that the IMP had not yet been completed and that, although the new MOA was often referred to in this record as an "extension",

the 1998 MOA had expired. The WWU brief chided Petitioners for not challenging the 1998 MOA. Since that agreement had expired there was nothing about the 1998 MOA for Petitioners to challenge. Rather, the Petitioners challenged the execution of Ex. 237 as being without compliance with GMA public participation goals and requirements and without compliance with the State Environmental Policy Act (SEPA).

Ex. 237 is similar to the expired 1998 MOA. The 2000 MOA provides a one year expiration or completion of the IMP, whichever comes first. An IMP is required under BMC 20.40 as a precondition to any development. The MOA provides that Bellingham will waive that requirement and the MOA will “...clarify the manner in which the City will process the permits for those [WWU] projects....”

The MOA provides that the “planned development process” provided in BMC 20.38.040 will be used for “significant” projects listed in Attachment A. The 2000 MOA includes a different “significant” projects list than the list contained in the 1998 MOA. The rather confusing provisions of the 2000 MOA provides that BMC 20.38.050A will generally apply to permit requests, except that BMC 20.42.050D will apply, except for certain exceptions, instead of BMC 20.38. The MOA also provides that BMC 20.12.010A and B will not apply, BMC 20.12.010C(4) and (9) will not apply, BMC 20.12.010E(1) may or may not apply, and BMC 20.12.010E(8) will not apply. The MOA further provides that the parties (not involving the public) would negotiate as to which new projects are “significant” and which are not. The nonsignificant projects will not use the “planned development process” but would use the normal permitting requirements of BMC 20.40.

Thus, we are left with a record that reveals the adoption of a Plan specifically referencing a MOA, which by its terms directs and *amends* the adopted zoning code of the City of Bellingham, specifying the permit application and approval process for development projects on the WWU campus within the city limits of Bellingham. The MOA *implements* the Plan through a variety of zoning code applications and exceptions from BMC 20.12, 20.38, 20.40, and 20.42. It is hard to envision how this agreement does not fall within RCW 36.70A.030(7) which defines DRs as “... the controls placed on development or land use activities by a county or city...”

Special counsel for WWU was also counsel in the *Burien* case. He adamantly contended that the MOA was not *intended* to be a GMA document and that it was exactly the same as the interlocal agreement (ILA) that was found by CPSGMHB not to be a GMA action. WWU contended that the sole intent of the MOA was to “resolve a jurisdictional dispute” between Bellingham and WWU.

While there is some serious question as to what this “jurisdictional dispute” would be in light of RCW 36.70A.103 requiring state agencies to comply with local CPs and DRs, as well as the recognition in the 1998 Plan that such a requirement exists under the GMA, we look to the contention that the parties intent was not to establish a DR and to the CPSGMHB’s reasoning in the *Burien* case.

Nowhere in the GMA definition of a DR has the Legislature incorporated the concept of intent of the parties to determine whether an action is or is not a DR. Nor is the holding in *Burien* inconsistent with our conclusion here.

The significant facts of the *Burien* case involved a dispute between the City of SeaTac and the Port of Seattle as to the third runway issues at SeaTac Airport. The ILA was an agreement between the parties to avoid future litigation as to jurisdiction over the third runway issues. As part of that agreement, the City of SeaTac proposed amendments to its CP and DRs. Prior to execution of the ILA, a period of almost one year of public hearings discussing the terms of the ILA and the proposed amendments occurred. As noted at p. 11 of the FDO, the public was provided a “reasonable opportunity to comment.” Although the CPSGMHB gratuitously noted the ILA was “not a GMA action,” at p. 10 it stated the key question was whether the ILA dictated the amendments to the city’s CP and/or DRs. *Burien* specifically held that “the ILA did influence *but did not dictate* the form, substance, and timing of some of the proposed....amendments.” (Emphasis supplied). A finding at p. 12 and a conclusion at p. 13 of the FDO both held the ILA did not amend either the plan or the zoning code.

An entirely different situation exists under the record in this case. The MOA directs not only the application of the zoning code to different areas of the WWU campus, but modifies the provisions of BMC 20.40 and exempts provisions of BMC 20.12 and 20.38. Different projects

and different areas of the campus have different modifications of the zoning code. The legal effect of those modifications is an amendment to the zoning code within the confines of the WWU campus.

We turn then to the issues of public participation and SEPA compliance.

Respondents somewhat vaguely argue that, at least as to “significant” projects, a public process and hearing is allowed under the zoning code conglomeration found in the MOA. It is clear that providing a later public hearing does not comply with the GMA. The Legislature specifically excluded such “permit approval” from the definition of a DR found in RCW 36.70A.030(7). GMA focuses on the process under which a permit application is processed and the previously adopted standards used for approval or denial decisions.

The City and WWU contended compliance with GMA public participation goals and requirements was achieved because a notice for a worksession (Ex. 229) was widely distributed and specifically sent to Petitioners here. The notice provided that in the “afternoon” of February 28, 2000, the City Council would hold a “worksession” to discuss the proposed MOA. That worksession apparently occurred between 2:10 p.m. and 3:30 p.m. (Ex. 236). A transcript of that worksession (Ex. 558) revealed that the Council and Senior Planner Greg Aucutt, but not the public, discussed the new MOA. Mr. Aucutt noted that the Plan “suggested” that “campus development” was to be governed by an IMP. He noted that the “main campus area is zoned institutional,” and that the development of the IMP was “likely to take some time; maybe months, perhaps years.” A motion to authorize execution of the MOA was approved 6 to 0. The minutes of the regular meeting of the Council (Ex. 236) is unclear whether the original or another worksession took place after 7:00 p.m. on February 28, 2000, or whether any further discussion and/or vote occurred during the regular Council meeting. In any event, the mere noting of and holding a worksession does not comply with GMA public participation goals and requirements.

Under RCW 36.70A.140 a city is required to provide a process “for early and continuous public participation in the development and *amendment of* comprehensive land use plans and *development regulations* implementing such plans.” (Emphasis supplied). While Bellingham

contended that worksessions would always allow public comment, that argument is mere bootstrapping. There was no requirement for the Council to accept comments from the public, in fact a worksession is most often not for public input. The City did not provide for or encourage early and continuous public participation for this DR. Again, the record in this case is substantially different than the facts set forth in *Burien*.

Even with the presumption of validity found in RCW 36.70A.320(1) and the increased deference afforded to local governments under RCW 36.70A.3201, we find under the clearly erroneous standard that Petitioners have sustained their burden of proving that the 2000 MOA did not comply with GMA public participation goals and requirements.

We further find that Petitioners have not sustained their burden with regard to the claim of failure to comply with SEPA requirements. In 1993 WWU issued a draft environmental impact statement (Ex. 30) and a final environmental impact statement (Ex. 33) for its campus master plan (which was never reviewed or adopted by the City). In 1996 WWU issued an addendum to these documents (Ex. 77) as an update to proposed campus projects. The exhibits show that an environmental evaluation on all of the projects listed under Attachment A at a non-project level was made. More specific environmental review was reserved for the later permit application process. This phased environmental review process complied with the requirements of WAC 197-11-060(5)(b). As noted in WAC 197-11-600(4)(a), agencies which act on the same proposal for which environmental documents have already been prepared are not required to readopt such documents. While Petitioners claimed that the environmental review was “dated,” they did not present sufficient evidence that further and more current environmental review was necessary to comply with the Act.

Petitioners also failed to show that the public participation noncompliance substantially interferes with the goals of the Act. No finding of invalidity is appropriate in this case.

Petitioners’ other contentions with regard to essential public facilities requirements were dealt with in the August 31, 2000, dispositive motion order.

Parenthetically, we note that the planning process for the IMP has taken on a excruciating life of

its own, dating back as far as 1974. While we do not ascribe any “evil motives” to either the City or WWU in entering the MOA and not recognizing that it was a DR, we certainly encourage the parties to complete the IMP process with a greater vigor and a higher priority than has been shown thus far.

We find that Bellingham has complied with SEPA requirements, but has not complied with GMA public participation goals and requirements in the adoption of the March 31, 2000, MOA.

IN ORDER TO COMPLY with the Act, the City must provide a public participation process for adoption of the MOA within 120 days of the date of this order.

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.

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So ORDERED this 26<sup>th</sup> day of October, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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William H. Nielsen  
Board Member

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Les Eldridge  
Board Member

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Nan A. Henriksen  
Board Member

**Findings of Fact**  
**Appendix I**

1. On September 19, 1998, the City of Bellingham approved the WWU Neighborhood Plan (Ex. 488). The Plan involved a series of recommendations and recognized that an IMP was required but would take some period of time to complete.
2. The Plan specifically authorized use of an MOA for “campus development” until completion and approval of an IMP.
3. The first MOA (Ex. 474) was entered into between Bellingham and WWU on March 27, 1998 prior to adoption of the Plan (Ex. 488). The MOA expired 18 months thereafter.
4. A second MOA (Ex. 237) was executed March 31, 2000.
5. Prior to execution of Ex. 237, Bellingham sent a notice of a worksession to the public and particularly to Petitioners. A worksession does not provide for public comments.
6. Ex. 237 provides for use and exclusions of various sections of BMC Chapter 20. The agreement also provides that WWU and Bellingham will negotiate (without public involvement) as to which projects become significant or nonsignificant.
7. The MOA implements the WWU Plan through a variety of zoning code uses and exemptions, both as to location on the WWU campus and the type of development proposed.
8. Ex. 237 constitutes a DR under the definition contained in RCW 36.70A.030(7).
9. The intent of the parties in executing the MOA is not relevant to determining whether it is a DR.
10. The MOA was adopted without compliance with GMA goals and requirements for public participation.
11. The MOA was adopted in compliance with SEPA requirements.

12. Petitioners have not sustained their burden of showing substantial interference with the goals of the Act.