

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

KENNETH E. DOWNEY,)
) No. 01-2-0011
Petitioner,)
) FINAL DECISION
v.) AND ORDER
)
CITY OF FERNDALE,)
)
Respondent,)
)
and)
)
JADE MATTHEW KENNEDY TRUST, et al.,)
)
Intervenors,)
)
_____)

SYNOPSIS OF THE ORDER

In the following order we find that Petitioner has failed to meet his burden to overcome the presumption of validity and to demonstrate that the City’s adoption of Ordinance #1250 was clearly erroneous.

-
INTRODUCTION

On March 2, 2001, Petitioner Kenneth E. Downey filed a petition for review (PFR) challenging the City of Ferndale’s Comprehensive Plan (CP) amendment, Ordinance #1250. Specifically, Petitioner Downey challenged the City’s adoption of the Rawley Taplett CP amendment whereby the City redesignated approximately 85 acres within the city limits from residential to commercial.

On April 10, 2001, we received a motion for intervention from Jade Mathew Kennedy Trust, Casey Thomas Kennedy Trust, Joshua Jade Kennedy Trust, Sherwood Holdings, LLC, and 268

Holdings, LLC (all are landowners of property within the contested CP amendment).

Intervention was granted on April 20, 2001.

The Hearing on the Merits was held July 11, 2001 at the City of Ferndale Council Chambers.

At the hearing, we granted Intervenor's motion to strike Petitioner's briefing regarding Shoreline Area Designations and Exhibits 162, 168, 169, 187, and 188 related to Shorelines. Since there was no reference to shoreline concerns in Petitioner's PFR or the issues listed in the Prehearing Order, we have no authority to deal with Petitioner's Shoreline concerns in this decision.

We denied motions to strike exhibits relating to the adoption of the City's 1996 Comprehensive Plan.

-
-

PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(1), Ordinance #1250 is presumed valid upon adoption.

The burden is on Petitioner to demonstrate that the action taken by the City of Ferndale is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we "shall find compliance unless we determine that the action by [City of Ferndale] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." In order 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).

-
-

ISSUES

ISSUE 1

Did the City of Ferndale use a specific permitting process as a comprehensive planning process? If so, was this a failure to comply with RCW 36.70A.470?

RCW 36.70A.470 states:

1) Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, not land use planning decisions. If, during project review, a county or city planning under RCW 36.70A.040 identifies deficiencies in plans or regulations:

- (a) The permitting process shall not be used as a comprehensive planning process;
- (b) Project review shall continue; and
- (c) The identified deficiencies shall be docketed for possible future plan or development regulation amendments.

2) Each county and city planning under RCW 36.70A.040 shall include in its development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.

3) For purposes of this section, a deficiency in a comprehensive plan or development regulation refers to the absence of required or potentially desirable contents of a comprehensive plan or development regulation. It does not refer to whether a development regulation addresses a project's probable specific adverse environmental impacts which the permitting agency could mitigate in the normal project review process.

4) For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan or development regulations in a manner that will ensure such suggested changes will be considered by the county or city and will be available for review by the public.

Petitioner contended at pages 3 and 4 of the July 2, 2001 brief:

“A. A large scale commercial development project, named Pioneer Plaza was presented to the City Staff, and Planning Commission in April of 2000.

B. As a part of a six month project review under 36.70B, site plan, traffic impacts, storm water treatment, and other issues were addressed and resulted in a SEPA MDNS filed the same day as the scheduled October public meeting.

C. The only documented reason for the City to be considering a Comprehensive Plan change in this area is to facilitate the Pioneer Plaza development proposal.

D. Public notice of the scheduled hearing (INDEX 28) was mailed from the consulting firm for the owners Associated Project Consultants (APC) by Mr. Doug Campbell. This notice describes the applications ‘as submitted, include analysis and mitigation proposed to deal with the impacts in the area as a result of expanding the commercial land available for design and development of a modern commercial center.’ Attached to the notice was a map showing the Pioneer Plaza project site plan.

Every one of these facts, supports my position that a ‘development project’ called Pioneer Plaza was being reviewed by the City, and is actually sole justification for this amendment. Per 36.70A.470, and 36.70B.030 this is not permitted. The Board must recognize these as facts and rule according the provisions of the Act to reverse the City’s decision.”

The City and Intervenor responded that the Petitioner had totally misconstrued both the mandate of RCW 36.70A.470 and the nature of the proceeding by which the City adopted the contested CP amendment. No project permit has yet been filed to consider. The CP amendment was docketed and considered along with two other CP proposed amendments during the CP amendment process just as the Act requires.

After studying the entire record provided, we find the City’s argument to be persuasive. The Petitioner has failed to show that the City was clearly erroneous as to Issue 1.

ISSUE 2

In changing the land use designation did the City fail to comply with RCW 36.70A.020(4)?

Petitioner claimed that:

- 1) The City violated RCW 36.70A.020(4) by changing the land use designation of an existing residential neighborhood and creating a hostile environment for residential land owners.
- 2) As the City annexed this area, it was with the understanding that this neighborhood would remain residential as evidenced in the 1996 CP designations and permitted developments since its adoption.
- 3) Since the 1996 Comprehensive Plan was not contested, it must be accepted as

“complete, accurate and legitimate.” Therefore, we must conclude that the 1996 Plan provided a “healthy balance” of land uses in the City.

- 4) No shortage of commercial property existed in Ferndale prior to the amendment, and no evidence was ever presented to identify a deficiency in the 1996 Plan.
- 5) There are seventy-two existing single-family homes along both sides of Main Street near I-5 and these constitute a “neighborhood.”
- 6) The City refused to provide any protection to existing housing stocks.
- 7) The City should have focused on the goals of “preserving existing housing stocks” and “protecting existing residential neighborhoods from incompatible use,” but refused to do so.

The Petitioner concluded that, for the above reasons, the City had failed to comply with the Housing goal of the Act (RCW 36.70A.020(4)).

The City responded that:

- 1) Petitioner’s main contention is that the City should remain a bedroom community to Bellingham, an outcome which the City cannot afford.
- 2) The property that is the subject of the amendment is mostly vacant with only 14 single-family homes on the entire 85 acres. Therefore, the amendment’s impact on existing housing stock will be minimal.
- 3) The deficiency in the 1996 Plan was the absence of the desired outcome for the City as a whole and was carefully considered at the staff, planning commission and City Council levels.
- 4) Consistent with the GMA, the City’s CP includes a housing element and nothing in the amendment is inconsistent with the housing element. The current low-density residential sprawl that exists on the 85 acres is contrary to the intent of the Act. Mixed used commercial adjacent to residential complies with the Act. The City fully considered the impacts of the designation change on surrounding land uses.
- 5) Petitioner mistakenly argues that the housing goal and housing element must be applied to specific pieces of property. The housing goal and housing element apply community-wide and do not require a specific outcome on any given parcel.
- 6) Petitioner fails to demonstrate that the amendment will negatively affect the

existing housing stock citywide. Petitioner also fails to demonstrate any inconsistencies between the amendment and the housing element of the City's CP.

Intervenors contended that Petitioner was incorrect in its claim that the 1996 Plan provided a "healthy balance" of land uses in the City and that no shortage of commercial property existed prior to the amendment. Intervenors pointed out that the October 11, 2000 staff report fully addressed Petitioner's housing issue. Regarding housing, the staff report stated:

"The Comp Plan Overall Land Use Goal is to 'provide a healthy balance of residential, commercial, and industrial land uses to ensure the sustainability, financial well-being, and quality of life enjoyed by the residents of Ferndale.'

Regarding consistency with the Comp Plan, the central question in considering this proposed amendment would seem to be whether or not the redesignation of this 85 acres of land from Residential to Commercial adversely affects the 'Healthy balance' of planned land uses in the city. That would be the case if the action would create an overabundance of commercially-designated land, or conversely, create a shortage of residentially-designated land. Language in the Comp Plan would indicate otherwise.

While the Comp Plan (as of 1996) states that the amount of land designated as Commercial 'is anticipated to accommodate the demands for commercial property for the next 20 years', the Comp Plan also states that the amount of land designated for commercial and industrial development may be inadequate in light of the City's projected population growth. The Comp Plan notes that a State economic study recommended that Ferndale include at least 1,014 acres of commercial and industrial land in its Comp Plan, but the Comp Plan includes only 653 acres of land so designated. Because of this, the Comp Plan states that 'it is recognized that the City may need to action (sic) to adjust its Urban Growth Areas in the future in order to maintain an adequate commercial and industrial land supply.' Additionally, in describing the changing balance of land uses that will occur by 2015, the Plan notes that while the percentage of Residential land will increase substantially (from 47% to 58.4%), and Industrial land will increase moderately (from 13% to 18.6%), in (sic) notes that the percentage of Commercial land will actually decrease substantially (from 34% to 19.8%).

Considering this information from the Comp Plan, it would appear that the proposed Comp Plan amendment would not create an overabundance of commercial land or a shortage of residential land. As such, the proposal would seem to be consistent with the stated goals and intent of the Comp Plan."

Again, the City and Intervenor's arguments are persuasive. The Petitioner has failed to show that the City was clearly erroneous as to compliance with the housing goal of the Act.

ISSUE 3

Was the City's challenged action an arbitrary and discriminatory land use decision in violation of RCW 36.70A.020(6)?

Petitioner contended that the City was in violation of Goal 6 because its action did not protect the rights of the homeowners along Main Street. Instead of adhering to its 1996 CP, the City arbitrarily favored a specific commercial project rather than protecting the interests of the existing residential landowners who were counting on their area to remain low density residential.

The City responded:

- 1) Petitioner has no standing to argue the violation of any property rights since he does not live within the area affected by the amendment and has suffered no impact from the City's decision.
- 2) The Board has stated in *Abenroth, et al., v. Skagit County, 97-2-0060c*, that the property rights goal seeks to protect landowners from being singled out for unreasoned, ill-conceived action. Here, none of the landowners of property within the affected area have challenged the City's adoption of the amendment.
- 3) Public testimony regarding impacts on the affected area was considered by the Planning Commission at two public meetings and was further considered by the City Council at two separate meetings.

Intervenors added that:

- 1) Goal 6 only requires that the impacts on private property rights of the proposed action be considered. The City carefully considered those impacts before making its decision.
- 2) The Washington Supreme Court has held on numerous occasions that where there

is room for two opinions, a decision is not arbitrary. In this case, Petitioner simply disagreed with the result. He made no showing that the action was arbitrary.

Board Discussion

We have discussed the requirements of Goal 6 in several previous cases. In *Achen v. Clark County*, 95-2-0067, we found that:

- 1) RCW 36.70A.020(6) contains two separate and distinct goals: (1) takings and (2) protection of property from arbitrary and discriminatory actions.
- 2) The takings prong of Goal 6 is reviewed to determine if adequate consideration of impacts on private property was given during the decision making process.
- 3) The protection prong of Goal 6 involves a requirement for protection of a legally recognized right of a landowner from being singled out for unreasoned and ill-conceived action.
- 4) A Growth Management Hearings Board has no jurisdiction to determine whether a constitutional taking has occurred. That issue is to be determined by the courts.

The record shows that the City adequately considered the takings impacts of the amendment before adopting it. Whether or not he has standing, Petitioner has provided no evidence that any landowner was singled out for unreasoned and ill-conceived action. Petitioner has failed to show that the City violated Goal 6 of the Act.

ISSUE 4

Did the City adopt a change of land use that conflicts with Whatcom County's land use plan without coordinating with the County? If so, has the City failed to comply with RCW 36.70A.100?

Petitioner contended:

- 1) The language of RCW 36.70A.100 uses the word "shall" when describing the requirement to coordinate with adjoining jurisdictions on comprehensive planning.
- 2) Coordination requires input and feedback from all parties involved in a discussion.
- 3) There is no evidence that the City and County discussed or coordinated in any

manner on the Rawley Taplett amendment.

4) The City's decision to change the land use without any coordination with the County has created an inconsistent land use pattern that will adversely affect County residents adjoining this project. The worst adverse impact will be traffic.

The City and Intervenor responded:

- 1) Petitioner failed to demonstrate any inconsistency between the amendment and Whatcom County's CP or county-wide planning policies.
- 2) The City informed the County of the amendment at the earliest SEPA review stage. The County made no comment and raised no objections to the amendment.
- 3) The County has filed no petition with the Board contesting the amendment or claiming inconsistencies with its CP.

Board Discussion

Even though a dialog would have been much preferable to mere notification, Petitioner has failed to show any inconsistency between the amendment and the County CP. Since the County made no objection during the local process nor filed an appeal with the Board, we must assume that it sees no conflict between the amended City CP and the County CP.

Petitioner has failed to show that the City was clearly erroneous as to Issue 4.

Issue 5

Was the City's action inconsistent with its comprehensive plan goals, Chapter 1 at paragraphs 1(c), (f), (i); 2(e)(ii); 3(a), (b) and (c); 4(a); and 6(e)? If so, has the City failed to comply with the consistency requirements of the Act?

Petitioner contended the City has:

- 1) In an attempt to promote an increased commercial tax base, facilitated the eventual destruction of his residential neighborhood, contrary to Goal 1(c).
- 2) Adopted a Plan change that was not based on the documented 20-year population forecast, but rather on a commercial development proposal, contrary to Goal 1(f).
- 3) Approved a Plan change that is incompatible with the existing residential neighborhood, contrary to Goal 1(i).
- 4) Approved a Plan change that will not maintain or improve the character of the existing residential neighborhood, contrary to Goal 2(e)(ii).
- 5) Approved a Plan change that will create a severe increase in traffic at the I-5/Main Street interchange during peak hour traffic flows and failed to coordinate traffic impacts beyond the City limits with the County, contrary to Goals 3(a)(b) and (c).
- 6) Eliminated or jeopardized existing housing opportunities near existing public transportation facilities, contrary to Goal 4(a).
- 7) Failed to protect the existing neighboring residential property owners' rights in favor of granting new property rights to allow for commercial development, contrary to Goal 6(e).

The City and Intervenor responded:

- 1) Petitioner alleged that the amendment violated some of the general goals of the City's CP, but alleged no violation of the CP's more specific land use goals and policies that were used by the City in evaluating the amendment. The City's demonstrated compliance with the more specific land use goals and policies contained in the CP's Land Use Element necessarily means that the City complied with the more general goals of the Plan.
- 2) The amendment is consistent with the character of the community as a whole. An established neighborhood does not exist on the subject property. The area is mostly undeveloped with a scattering of a few homes, some of which are vacant. The location of the property along a major freeway interchange actually argues against maintaining this as a residential area. The existing public facilities and transportation infrastructure indicate that the area would be better utilized for commercial development.

- 3) The amendment complies with the City's goal of adopting a land use plan for the UGA based upon the 20-year planning period. Staff work demonstrated that the amendment does not create a shortage of residential land to accommodate the 20-year population projection.
- 4) The amendment is consistent with the existing residential neighborhoods in the City. No established residential neighborhood exists on the property affected by the amendment. The allowance of commercial uses in proximity to residential uses does not conflict with City goals. One of the primary goals the Act and the City's CP is to prevent urban sprawl and to densify urban uses.
- 5) The amendment does not violate the City's goal of encouraging infill. In fact, the amendment actually fulfills this goal by encouraging urban type development in an area that currently has very low density residential development.
- 6) The amendment complies with the City's Transportation Goals, by locating commercial development near the city center, along the freeway, and close to the public transit corridor. The City considered transportation impacts of the amendment and required appropriate mitigation. The October 11, 2000 Staff Report indicated that further traffic mitigation will be required for any specific development proposal.
- 7) The amendment is consistent with the City's housing goals since it will only minimally reduce the residential housing stock and will not affect the variety of housing stock within the City. Further, it will have no appreciable impact on the amount of higher density residential land uses near major transit corridors since high density residential does not exist in, and was not planned for, the contested area.
- 8) The amendment is consistent with the City's goal to protect property rights. The impact of the amendment on others' property was considered by staff, Planning Commission, and City Council. Petitioner's desire for development not to occur on the subject property cannot outweigh the City's discretion to make land use decisions that suit the overall planning goals of the City.
- 9) Expansion of an existing commercial area near freeway, transit, water and sewer and within current City limits is what the Act and City goals encourage.

Board Discussion

We concur with Petitioner's belief that the CP should drive acceptable development rather than a

potential development project driving the Plan. However, in this case, the City and Intervenors' arguments are convincing. We find no evidence that the City disregarded its CP goals or that there is an inconsistency between the amendment and the CP goals. The record clearly shows that the City carefully considered the impacts of this amendment on the neighboring landowners and on the City as a whole.

The amendment replaced low density residential with mixed use commercial, thereby encouraging urban type development in an area that currently is characterized by very low density residential development. Proximity to an existing major transit facility and freeway interchange will encourage efficient use of existing infrastructure. Locating mixed use commercial and light industrial near residential is also encouraged by the goals of the City CP and the GMA. Further, the City's decision to infill needed mixed use commercial within its existing City limits, rather than asking to increase the size of its already generously-sized UGA to accommodate the needed commercial industry development, is in harmony with the anti-sprawl goals of the CP and the Act.

Petitioner has failed to show that the City was clearly erroneous as to Issue 5.

ORDER

Petitioner has not met his burden of showing clear error on the part of the City in adopting Ordinance #1250. We do not have a firm and definite conviction that the City has erred.

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and appended as Appendix I.

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 17th day of August, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

William H. Nielsen
Board Member

Les Eldridge
Board Member

Appendix I

Findings of Fact pursuant to RCW 36.70A.270(6)

1. The contested CP amendment is the Rawley Taplett amendment whereby the City redesignated approximately 85 acres within the City limits from residential to commercial.
2. There are currently 14 single-family homes in the 85 acres.
3. No project permit has yet been filed for the Rawlet Taplett CP amendment area.
4. The contested CP amendment was docketed and considered along with two other CP proposed amendments during the annual CP amendment process.
5. The City's 1996 CP stated that the amount of land designated for commercial and industrial development might be inadequate in light of the City's projected population growth. The CP noted that a State economic study recommended that Ferndale include at least 1,014 acres of commercial and industrial land in its CP, but the CP included only 653 acres of land so designated. Because of this the CP states "it is recognized that

the City may need to take action to adjust its Urban Growth Areas in the future in order to maintain an adequate commercial and industrial land supply.”

6. In describing the changing balance of land use during the CP’s 20-year planning period, the 1996 CP noted that while the percentage of Residential land would increase substantially (from 47% to 58.4%), and Industrial land would increase moderately (from 13% to 18.6%), it noted that the percentage of Commercial land would actually decrease substantially (from 34% to 19.8%).

7. The record shows that the City carefully considered impacts on private property rights before making its decision.

8. The record contains no evidence that any landowner was singled out for unreasoned and ill-conceived action.

9. Whatcom County made no objection to the amendment during the local process and has filed no appeal of this action with our Board.

10. The record contains no evidence that the City disregarded its CP goals or that an inconsistency exists between the amendment and the CP goals.