

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 ARTHUR WEST,

4
5 Petitioner,

6 v.

7 CITY OF OLYMPIA,

8
9 Respondent.

Case No. 06-2-0026

ORDER ON DISPOSITIVE MOTIONS

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12 **This Matter** comes before the Board upon motion of the City of Olympia's (City) Dispositive
13 Motions.¹ The City filed its Motion on October 17, 2006. Pursuant to the Prehearing Order
14 in this matter, Petitioner Arthur West (Petitioner) had until October 27, 2006 to file a
15 response. No response was filed.

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17 Having reviewed the pleadings filed by the parties, the Amended Petition for Review, and
18 this case's files and records, the Board grants the City's dispositive motion.

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21 The City argues three bases for dismissal of this petition: lack of subject-matter jurisdiction;
22 timeliness and standing.² The Board finds that Petitioner has not established a basis upon
23 which the Board would have jurisdiction to hear this case and therefore does not reach the
24 issue of standing.

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27 **I. PROCEDURAL BACKGROUND**

28 The Petition for Review in this case was filed on September 20, 2006. The Petition for
29 Review did not include a copy of the challenged ordinance, as required by WAC 242-02-
30 210(3). The Board noted the absence of a copy of the challenged ordinance on October 2,
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¹ City of Olympia's Dispositive Motion, October 17, 2006.

² *Ibid* at 2-8.

1 2006 in the Notice of Hearing and Preliminary Schedule and on October 9, 2006, Petitioner
2 filed a First Amended Petition for Review citing to the City of Olympia comprehensive plan.³
3 The parties held a telephonic Prehearing Conference on October 10, 2006 and the
4 Prehearing Order was issued on October 13, 2006. On October 17, 2006, Petitioner filed a
5 motion to extend the briefing schedule.⁴ This motion was denied on October 30, 2006.⁵ On
6 October 17, 2006 the City filed its Dispositive Motions. Petitioner did not file a response.
7

8 9 **II. ISSUES PRESENTED IN CASE**

- 10 1. Does the City of Olympia Amended Comprehensive Plan fail to incorporate those
11 elements of a comprehensive plan mandated by the Growth Management Act, as it
12 relates to property in the Port of Olympia?
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14 2. Does the City of Olympia's Amended Comprehensive Plan impermissibly delegate
15 the City's authority under the Growth Management Act to the Port of Olympia?
16
17 3. Does the City of Olympia's Amended Comprehensive Plan fail to conform to the
18 actual development approved and/or under construction in the Admiral District; if so,
19 is such development in violation of the State Environmental Policy Act and the
20 Growth Management Act?
21

22 **III. ISSUES PRESENTED IN MOTION**

23 The City raised the following issues in its dispositive motions:

- 24 1. Does this Board have jurisdiction to consider the Petition where the City is not
25 scheduled to adopt its Comprehensive Plan amendments until December 2006?
26
27 2. Does this Board have jurisdiction over issues 1 and 3 where those issues relate to
28 activities of the Port of Olympia?
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31 ³ First Amended Petition for Review of City of Olympia Amendments to the Comprehensive Plan and Motion
32 for Stay Pending Review, October 9, 2006.

⁴ Motion to Extend Briefing Schedule Due to Conflicting Representations, October 17, 2006.

⁵ Order on Motion to Extend Briefing Schedule, October 30, 2006.

1 3. Does Petitioner lack standing to challenge the City's amended Comprehensive Plan
2 and development regulations?
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4 **IV. BURDEN OF PROOF**

5 For purposes of board review of the comprehensive plans and development regulations
6 adopted by local government, the GMA establishes three major precepts: a presumption of
7 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
8 decisions of local government.
9

10 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
11 amendments to them are presumed valid upon adoption:
12

13 Except as provided in subsection (5) of this section, comprehensive plans and
14 development regulations, and amendments thereto, adopted under this chapter are
15 presumed valid upon adoption.
16 RCW 36.70A.320(1).
17

18 The statute further provides that the standard of review shall be whether the challenged
19 enactments are clearly erroneous:
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21 The board shall find compliance unless it determines that the action by the state
22 agency, county, or city is clearly erroneous in view of the entire record before the
23 board and in light of the goals and requirements of this chapter.
24 RCW 36.70A.320(3).

25 In order to find the City's action clearly erroneous, the Board must be "left with the firm and
26 definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121
27 Wn.2d 179, 201, 849 P.2d 646 (1993).
28

29 Within the framework of state goals and requirements, the boards must grant deference to
30 local government in how they plan for growth:
31

32 In recognition of the broad range of discretion that may be exercised by counties and
cities in how they plan for growth, consistent with the requirements and goals of this

1 chapter, the legislature intends for the boards to grant deference to the counties and
2 cities in how they plan for growth, consistent with the requirements and goals of this
3 chapter. Local comprehensive plans and development regulations require counties
4 and cities to balance priorities and options for action in full consideration of local
5 circumstances. The legislature finds that while this chapter requires local planning to
6 take place within a framework of state goals and requirements, the ultimate burden
7 and responsibility for planning, harmonizing the planning goals of this chapter, and
8 implementing a county's or city's future rests with that community.
9 RCW 36.70A.3201 (in part).

10 In sum, the burden is on the Petitioner to overcome the presumption of validity and
11 demonstrate that any action taken by the City is clearly erroneous in light of the goals and
12 requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
13 Where not clearly erroneous and thus within the framework of state goals and requirements,
14 the planning choices of local government must be granted deference.

15 V. DISCUSSION

16 Issues No. 1 and 2: Timeliness and Jurisdiction

17 Positions of the Parties:

18 In his amended petition for review, Petitioner bases his challenge on an ordinance he
19 alleges the City adopted on October 3, 2006 which amended its comprehensive plan. The
20 City responds that it adopted no comprehensive plan amendment on October 3, 2006.⁶ The
21 City further asserts that the comprehensive plan has not been amended since 2005.⁷
22 Petitioner has not responded to the City's claims.
23
24
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26 Board Discussion:

27 Petitions for review to the growth boards must be brought within 60 days of the date of
28 publication of the legislative enactment. RCW 36.70A.290 (2).
29
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32 ⁶ City of Olympia's Dispositive Motion at 2, and Exhibit 7 (Weydemeyer Declaration) at ¶3.

⁷ Id. at 5.

1 2) All petitions relating to whether or not an adopted comprehensive plan,
2 development regulation, or permanent amendment thereto, is in compliance with the
3 goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be
4 filed within sixty days after publication by the legislative bodies of the county or city.
5

6
7 Further, the jurisdiction of the boards is limited to comprehensive plans, development
8 regulations and amendments to them or to other GMA-required actions. RCW
9 36.70A.280(1)

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

12 (a) That a state agency, county, or city planning under this chapter is not in
13 compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to
14 the adoption of shoreline master programs or amendments thereto, or chapter
15 43.21C RCW as it relates to plans, development regulations, or amendments,
16 adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

17 (b) That the twenty-year growth management planning population projections
18 adopted by the office of financial management pursuant to RCW 43.62.035 should be
19 adjusted.

20 See also RCW 36.70A.210 (countywide planning policies)

21 In this case, Petitioner does not contest the assertion of the City that no ordinance was
22 adopted on October 3, 2006 amending the comprehensive plan. Further, Petitioner fails to
23 respond to the City's assertion that its comprehensive plan has not been amended since
24 2005.
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26
27 In his First Amended Petition for Review, Petitioner seeks to challenge "Ordinance
28 _____, (*sic*) of October 3, 2006, amending the City of Olympia comprehensive
29 plan".⁸ The Petition for Review did not include a copy of the challenged ordinance, as
30 required by WAC 242-02-210(3). Petitioner alleges that the City's supposed amended
31 _____
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⁸ First Amended Petition for Review, at 2.

1 Comprehensive Plan failed to include mandatory elements related to the construction of a
2 cargo yard and related developments at the Port of Olympia, failed to assess cumulative
3 and regional impacts, failed to reflect the current and projected land use, and failed to reflect
4 an agreement by which land use power is delegated to the Port of Olympia.⁹
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7 In support of its dispositive motions the City has submitted the Declaration of Jan
8 Weydemeyer, lead long range planner for the City of Olympia. The Weydemeyer
9 Declaration states in no uncertain terms that "The annual 2006 Comprehensive Plan and
10 development regulation amendments have not been adopted by the Olympia City
11 Council."¹⁰ Petitioner has not submitted any evidence in rebuttal of that statement.
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13
14 Petitioner therefore fails to establish a basis upon which this Board may assert jurisdiction.
15 Petitioner has failed to provide a copy of the ordinance he seeks to challenge and fails to
16 respond to the City's assertion that there was no ordinance passed amending the City's
17 comprehensive plan on October 3, 2006.
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20 Consequently, the Board finds no basis to dispute the City's assertion that it has not yet
21 adopted its 2006 Comprehensive Plan amendment and development regulations. That
22 being the case, our course is clear. Until such time as the City amends its Comprehensive
23 Plan or development regulations, an appeal is premature.
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26 The City suggests that, since it has not recently adopted amendments to its Comprehensive
27 Plan and development regulations, Petitioner's Amended Petition for Review might be
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30 ⁹ Since we have determined that the City has established that it has not recently amended its Comprehensive
31 Plan and thereby subjected itself to this Board's jurisdiction, our analysis must end there. It is not appropriate
32 at this time to discuss the extent of the Board's jurisdiction over the City as it relates to activities at the Port of
Olympia. The Board shall forbear to rule on matters not properly before it.

¹⁰ Declaration of Jan Weydemeyer, at 1. Exhibit 7 to Olympia's Dispositive Motions.

1 construed as an attempt to appeal the City's *existing* Comprehensive plan.¹¹ The Board is
2 reluctant to make such an assumption. The Amended Petition for Review, while it fails to
3 specify by ordinance number the City ordinance it seeks to appeal, does specify a date of
4 October 3, 2006 as the relevant date. Thus, it is unlikely that Petitioner seeks to appeal the
5 existing plan which the City adopted in December of 2005.¹² In any event, an appeal of the
6 City's 2005 amended comprehensive plan would likewise be untimely, as more than 60
7 days have passed since adoption. RCW 36.70A.290(2).
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10 **Conclusion:** Petitioner has the burden of establishing a basis for the Board to assert
11 jurisdiction over his petition for review. Here, he has failed to show that the ordinance he
12 appeals was adopted on the date alleged in his amended petition for review or that, in fact,
13 the City has amended its comprehensive plan at all within the statutory filing period.
14

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16 **Issue No. 3 Standing**

17 **Positions of the Parties:**

18 The City asks this Board to find that Petitioner lacks standing to challenge its
19 Comprehensive Plan amendments, development regulations, and amendments.
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22 **Board Discussion:**

23 In light of the fact that the Board finds that Petitioner's appeal of the City's Comprehensive
24 Plan amendments is premature, it would likewise be premature to rule on whether Petitioner
25 will have standing when those amendments are adopted in the future. It is simply the case
26 that those amendments have yet to be adopted and are not before the Board. At such time
27 as the amendments are adopted, and if an appeal is filed, a motion on the issue of standing
28 could then be brought.
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¹¹City of Olympia's Dispositive Motion, at 5.

¹²Olympia Resolution M-1620, pages 6-7. Exhibit 1 to Olympia's Dispositive Motions.

1 **VI. ORDER**

2 Based on the foregoing, Petitioner has failed to establish a basis for Board jurisdiction over
3 his petition for review and it is therefore hereby DISMISSED. The Petition for Review, as
4 amended by the First Amended Petition for Review is premature as the City has not yet
5 adopted its 2006 Comprehensive Plan amendments. It is hereby DISMISSED.
6

7 Entered this 6th day of November 2006.
8

9
10 _____
11 James McNamara, Board Member

12
13 _____
14 Margery Hite, Board Member

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16 _____
17 Holly Gadbaw, Board Member

18 Pursuant to RCW 36.70A.300 this is a final order of the Board.
19

20 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
21 of mailing of this Order to file a petition for reconsideration. The original and three
22 copies of a motion for reconsideration, together with any argument in support
23 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
24 original and three copies of the motion for reconsideration directly to the Board, with
25 a copy to all other parties of record. **Filing means actual receipt of the document at**
26 **the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing
of a motion for reconsideration is not a prerequisite for filing a petition for judicial
review.

27 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
28 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
29 judicial review may be instituted by filing a petition in superior court according to the
30 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
31 Enforcement. The petition for judicial review of this Order shall be filed with the
32 appropriate court and served on the Board, the Office of the Attorney General, and all
parties within thirty days after service of the final order, as provided in RCW
34.05.542. Service on the Board may be accomplished in person or by mail, but

1 service on the Board means actual receipt of the document at the Board office within
2 thirty days after service of the final order. A petition for judicial review may not be
3 served on the Board by fax or by electronic mail.

4 Service. This Order was served on you the day it was deposited in the United States
5 mail. RCW 34.05.010(19)

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