BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

LAUREL PARK COMMUNITY LLC, MANUFACTURED HOUSING COMMUNITIES OF WASHINGTON, AND TUMWATER ESTATES INVESTORS, Petitioners, v. CITY OF TUMWATER , Respondent.	WWGMHB Case No. 09-2-0010 **ORDER ON APPLICATION FOR CERTIFICATE OF APPEALABILITY** Thurston County Superior Court Case Nos. 09-2-02931-5 and 09-2-02687-1

I. REQUEST FOR CERTIFICATE OF APPEALABILITY

This Matter has come before the Board upon an application for a Certificate of Appealability filed by Petitioners in *Laurel Park Community LLC, et al. v. City of Tumwater and Western Washington Growth Management Hearings Board*, Thurston County Superior Court Case Nos. 09-2-02931-5 and 09-2-02687-1.

The Board issued a Final Decision and Order in Case No. 09-2-0010 on October 13, 2009 (FDO). On November 12, 2009, the Board issued an Order on Petitioners' and City's Motions for Reconsideration ("Reconsideration Order"). In the FDO the Board concluded that:

- Petitioners had not demonstrated that the adoption of Ordinance Nos. O2008-09 and O2008-027, by which the City created a zoning district for manufactured housing parks (MHPs), violated RCW 36.70A.020(4), the affordable housing goal of the GMA.[1]

[1] FDO at 9.

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- In that Petitioners had not demonstrated the City failed to consider whether the MHP amendments might constitute a takings nor that there is a property right entitled to be protected from a change in zoning, the Board concluded that the Petitioners had not proved a violation of RCW 36.70A.020(6).[2]
- Petitioners' challenges based on RCW 36.70A.070(2) were an untimely challenge of the City's Land Capacity Analysis.[3]
- Petitioners had not demonstrated that the designation of six specific locations for MHP zoning was a violation of RCW 36.70A.070(1).[4]
- In adopting the ordinances under appeal the City failed to comply with the process set out in RCW 36.70A.370(2).[5]
- Petitioners could not raise a challenge based on RCW 36.70A.040 when their issue statement as contained in the Petition for Review and as stated in the Prehearing Order states a claim based on RCW 36.70A.120. Petitioners did not argue or demonstrate that the City had failed to perform its activities and make capital budget decisions in conformity with itscomprehensive plan, as required by RCW 36.70A.120.[6]
- RCW 36.70A.035(1)(a). This provision of the GMA is merely an example of a potential method a jurisdiction can utilize to provide notice; it does not mandate its use. Thus, Tumwater did not violate RCW 36.70A.035(1)(a) when it failed to post impacted properties. In addition, because Petitioners had not properly raised the issue of individualized notice in their PFR, that issue was not properly before the Board.[7]

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[2] Id. at 12.
[3] Id. at 15.
[4] Id. at 16.
[5] Id. at 20.
[6] Id. at 22.
[7] Id. at 24.

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- Petitioners failed to demonstrate a violation of the GMA by proving that the Manufactured Home Park Amendments were inconsistent with or contrary to Thurston County countywide planning policies.[8]

The FDO was subsequently modified by the Reconsideration Order to recognize that in analyzing the first prong of a Goal 6 (RCW 36.70A.020(6)) property rights claim, it is appropriate to consider whether the local jurisdiction complied with RCW 36.70A.370 in evaluating the proposed action.[9]

Petitioners appealed the Board's decisions to Thurston County Superior Court and now seek direct review by the Court of Appeals[10].

II. DISCUSSION

The Board's authority regarding certificates of appealability is set forth in RCW 34.05.518(3), which provides in relevant part: (Emphasis added)

> (a) For the purposes of direct review of final decisions of environmental boards, environmental boards include those boards identified in RCW 43.12B.005 and growth management hearings boards identified in RCW 36.70A.250.
>
> (b) An environmental board may issue a Certificate of Appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest **and either**:
>
> (i) Fundamental and urgent state-wide or regional issues are raised; **or**
>
> (ii) The proceeding is likely to have significant precedential value.

Detrimental Delay in Obtaining a Final and Prompt Determination

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[8] Id. at 28.

[9] Reconsideration Order at 4.

[10] The City argues that Petitioners' application for direct review is untimely as to the first of two petitions for review filed with Thurston County Superior Court. As the City appears to concede that the application is timely as to Petitioners' later appeal of the Board's decision on reconsideration, the Board will address the application for direct review.

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Petitioners argue that delay is harming them and the public interest.[11] They claim that because the Board upheld the City of Tumwater's (Tumwater's) restriction on uses in the six Manufactured Home Parks (MHPs) they are limited in their use of the property, including a limitation on the conversion of those properties to any use other than MHP. Petitioners note that other municipalities in Washington including Snohomish County, the cities of Marysville and Olympia and Thurston County, are examining MHP zoning and have adopted or are considering adopting exclusive land use zones for MHPs.[12] More generally, Petitioners argue that it harms the public interest to have any delay in appellate court review of the legal issues in this proceeding and that unless the issues are definitely and promptly reviewed in appellate court, Washington municipalities will continue to target MHPs for restrictive zoning.[13]

In response, the City points out that delay in obtaining a final and prompt determination of the issues would not be detrimental to the Petitioners because they have no intention to redevelop their properties to uses other than those allowed in the Tumwater zoning code.

The City argues that owners of the MHPs located in the City have stated their intent to continue the present use of their property and therefore suffer no harm from continuing that use during the pendency of an appeal.[14]

The Board notes that in briefing for the Hearing on the Merits, Petitioners stated:

> There is no evidence in the Record that any MHPs in Tumwater are up for sale for conversion to other uses. The MHP Owners and counsel for MHCW[15] repeatedly told this to the Council, the GGC, and the Planning Commission, stated that they had been MHP owners for many years, and intended to remain in the MHP business."[16]

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[11] Application for Direct Review at 4.

[12] Id. at 4-5.

[13] Id. at 5.

[14] City Response at 3.

[15] "Manufactured Housing Communities of Washington"

[16] Petitioners' Opening Brief [Revised] at 5.

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> The owner [of Eagles Landing MHP] advised that he had "**absolutely no intention** of changing the use of my property"[17] (emphasis in the original)

In testimony to the Tumwater General Government Committee, which became part of the record in this case, the attorney for the Manufactured Housing Communities of Washington stated that the association he represents has 525 manufactured housing communities, one third of the manufactured housing parks in the State of Washington, and that according to the Council minutes "He said he knows of no mobile park communities that are at risk of converting to other uses".[18] In light of such prior testimony from the MHP owners and their representatives that they intend to maintain their MHPs for the time being, the Board does not find that delay in obtaining a final and prompt determination of the issues would be harmful to them.

Further, Petitioners have not demonstrated there is harm to the general public caused by a delay in a final and prompt decision. Petitioners point to no such harm except to speculate that, unless the issues are promptly resolved in the appellate court, the number of disputes and lawsuits over these issues will increase, harming more and more MHCW members.[19] The Board agrees instead with the City that there is no harm to the public interest in the continued operation of a legal use.

Under RCW 34.05.518(3) the Board need not consider whether fundamental and urgent statewide or regional issues are raised or whether the proceeding is likely to have significant precedential value unless it first finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest. Because the Board does not find that the first part of the test is met, it need not consider the remaining portions of the test.

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[17] Id. at 8.
[18] April 25, 2008 Tumwater General Government Committee Minutes, at 5.
[19] Application for Direct Review at 5.

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ORDER

After considering the requirements for a Certificate of Appealability as set forth in RCW 34.05.518, the Board finds that the criteria of the statute has not been met with respect to the Board's Final Decision and Order and Order on Motion for Reconsideration in *Laurel Park Community LLC v. Tumwater,* WWGMHB Case No. 09-2-0010 and declines to issue a Certificate of Appealability:

Dated this 8th day of February, 2010.

_____
James McNamara, Board Member

_____
William Roehl, Board Member

_____
Nina Carter, Board Member

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