

**Summary of Recent Cases
Before Washington's Growth
Management Hearings Boards
June 1, 2004-December 31, 2004**

This report summarizes a few hearings board decisions released over a six-month period of time that hold some significant implications.

This review is not a complete list of the cases, nor does it constitute a legal opinion. For more information, consult the cases directly, or consult your legal counsel.

1000 Friends of Washington and Pro-Whatcom v. Whatcom County; WWGMHB Case 04-2-0010, August 2, 20041

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1000 Friends of Washington and Pro-Whatcom v. Whatcom County; WWGMHB Case 04-2-0010, August 2, 2004

This was one of the first decisions where the hearings boards were faced with a

interpreting the update requirements contained in RCW 36.70A.130(1)(a). The facts in this case required the board to distinguish between the seven-year update required under RCW 36.70A.130(1)(a) and the annual docketing process. This difference is significant because it is during the required seven-year update that portions of the plan that have not been changed may be challenged. In this case, the petitioners challenged portions of the rural element that were not amended and these challenges would only be timely within the context of the seven-year update.

Factual and Procedural Background

Whatcom County adopted an ordinance in early 2004 amending its comprehensive plan. The petitioners filed an appeal challenging unchanged portions of the county’s comprehensive plan, arguing that the county was acting to meet the seven-year compliance review requirements. The petitioners argued the county failed to adopt a comprehensive plan and development regulations incorporating the necessary revisions to comply with the GMA. Petitioners claimed that the update requirement subjected the entire plan to challenge for compliance with the GMA, rather than only the amended portions of the plan.

The county moved for dismissal, claiming the petitioners’ claims were prematurely raised and were not yet ripe for review because, under the GMA schedule for updates, the county had until December 1, 2004, to complete an update of its comprehensive plan and development regulations (citing RCW 36.70A.130(4)(a)). Because the deadline had not yet passed, the county argued it could not yet be found to have failed in its obligations to review and revise its comprehensive plan.

The Board found that the comprehensive plan amendments adopted by Whatcom County were not a result of required compliance review under RCW 36.70A.130(1) and dismissed the petitioners' attack on non-amended portions of the county's comprehensive plan.

Board's Decision

The threshold question before the Board was whether the challenged ordinance was an update of the county's comprehensive plan (or part of it) pursuant to RCW 36.70A.130(1)(a) and (2)(a). The Board looked to RCW 36.70A.130 to determine what is required for an update.

RCW 36.70A.130 contains two major kinds of revision requirements for comprehensive plans and development regulations. First, comprehensive plans and development regulations adopted pursuant to the GMA are subject to "continuing review and evaluation." While there is no express requirement that this be done every year, this type of review is usually done in an annual comprehensive amendment cycle, RCW 36.70A.130(2)(a). The amendments adopted under this process may be appealed to the boards to determine whether the adopted amendments comply with the GMA; but these types of amendments are not required to ensure that the local jurisdiction's entire comprehensive plan and development regulations comply with all the provisions of the GMA. Second, the GMA requires an "update," if needed, of both the comprehensive plan and development regulations to ensure their compliance with the GMA, according to a staggered schedule set out in RCW 36.70A.130(4) [for Whatcom County, the schedule imposed a deadline of December 1, 2004.]

The Board looked to RCW 36.70A.130(1)(a)'s requirement for

"legislative action" to determine if the challenged ordinance was an "update" or an annual amendment. "Legislative action" is defined as "the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefore."

The Board reviewed the challenged ordinance and concluded that no such finding was included. The Board also found that the record did not indicate what the public notice stated and so it could not determine whether the notice used the "update" language or merely stated that the county was considering particular amendments to its comprehensive plan. In effect, there was nothing in either the findings of the ordinance, or in the public hearing notice that would distinguish this action from the normal annual docket process. In the absence of such evidence, the Board ultimately concluded that the challenged ordinance did not constitute "legislative action" to comply with the GMA compliance review provisions.

GMA Implications and Practice Tips

This case lays out what the record should contain to show that the required update has actually been completed. "The public should not be left to guess whether the county has undertaken its update or not. The statutory requirement for minimum legislative findings ensures that the public is on notice that the update is taking place"

"At a minimum, the ordinance or resolution must contain a finding that a review and evaluation has occurred, identifying the revisions made or that revision was not needed and the reasons therefore."
(RCW 36.70A(1)(b))

Because this finding must occur after notice and public hearing, it is essential that the notice and hearing also explicitly mention that it is part of this process. In determining whether or not a particular legislative action meets the requirements, a Hearings Board may look not only at the findings of the ordinance, but also to the public notices on the hearings to determine if the public had adequate notice that the update was underway.

The Board explained that the public needs to understand what is occurring and to participate in a meaningful way. When beginning an update under RCW 36.70A.130(1)(a), planners should include language in the notices of public workshops, hearings, and all public participation materials that the actions under consideration are part of the update process.

Otherwise, inadequate notice may curtail public participation in the update process. To create an adequate record for Board review, planners should retain copies of all notices and include them as part of the record.

Significantly, statements by the Board suggest that the seven-year compliance review opens up the entire plan and development regulations to challenge. It is advisable that planners conduct a thorough review of the plan and development regulations during the update process in order to “show their work.” Planners should document that each element of the comprehensive plan and the development regulations have been reviewed, and make findings why revisions were or were not needed to the comprehensive plan and/or development regulations.

Finally, when preparing the resolution or ordinance adopting the final revisions,

planners should include language that the revisions constitute the update under RCW 36.70A.130(1)(a) and that the amendments therein are made for the purpose of meeting the jurisdiction’s update obligations. Language such as “Seven-Year Update” could be used in the resolution or ordinance. Conversely, when adopting annual amendments, the resolution or ordinance could state “2006 Annual Comprehensive Plan Amendments.” (However, CTED does not recommend amending your comprehensive plan more often than once per year, even during the update process.) The resolution or ordinance must also contain specific findings that the jurisdiction has undertaken a review and evaluation of its comprehensive plan and state that the amendments are revisions to the plan to meet the update requirements; or, if the jurisdiction finds that a revision was not needed, the ordinance or resolution must give the reasons for that.

Orton Farms, et al. v. Pierce County, et al.; CPSGMHB Case 04-3-0007c, August 2, 2004

This case is significant because of its extensive treatment of what constitutes sufficient notice for the purpose of public participation. This case also clarifies the two-pronged test to determine when agricultural resource lands have long-term commercial significance.

Factual and Procedural Background

During its 2003 annual comprehensive plan amendment cycle, Pierce County adopted amendments relating to agricultural resource lands, which included both text and map amendments. Orton Farms challenged the public notice and public participation process for the amendments and substantively challenged the revised criteria adopted by Pierce County for the

designation of agricultural resource lands (the text amendment) and whether the application of those criteria to approximately 5,000 acres of land owned by Orton Farms (the map amendment) complied with the Act. Orton Farms argued that Pierce County's designation process relied solely on soil characteristics and did not consider commercial viability. 1000 Friends also challenged several individual map amendments which de-designated agricultural lands of long-term commercial significance (LTCS).

Board's Decision

Public Participation

Orton Farms claimed the county failed to provide adequate notice of the proposed changes to the text and map and that the "general notice" provided by Pierce County was not reasonably calculated to provide notice to the public, including property owners, of the proposed amendments to the comprehensive plan.

The challenged amendments came at the end of a lengthy process involving an advisory council and several public workshops related to preservation of agriculture in the valley between Puyallup and Orting. The text amendments made numerous changes to the policy language in the agricultural section of county's plan, including changes to the criteria used for identifying and designating agricultural lands of LTCS. The map amendment changed 5,000 acres to an agricultural resource land designation. The county argued that the process was legislative, not quasi-judicial; therefore, it was not required to meet a more rigorous notice requirement.

The Board found that the language contained in the notices was too general and was therefore insufficient. Language such as the following did not provide the public

with a clear understanding of what the county was actually proposing and how it might affect them: "[t]his proposal would add policies to the Land Use Element of the Comprehensive Plan to address issues relating to agriculture, and concerns raised by the Farm Advisory Commission . . . The proposed amendment would put forward policies that would be of benefit to efforts to preserve and encourage agriculture"; and "amendments to the Comprehensive Plan can include: Text Amendments (changes in policies or text), Area-wide Map Amendments (changes in the Land Use Map resulting in changing zoning), Urban Growth Area/Urban Service Area Amendments (changes in designated Urban Growth Areas/Urban Service Areas); and Capital Facilities Plan Amendments." The county never stated in its notices that it was not only proposing to change the criteria it used for identifying and designating agricultural lands of LTCS, but that it was also considering the designation of approximately 5,000 acres from rural to an agricultural resource land designation. The notice merely indicated there were some proposed amendments to the plan; it was not reasonably calculated to provide notice to the public of the plan amendments being considered, thus violating the public participation requirements in RCW 36.70A.035(1).

Identifying and Designating Agricultural Lands of Long-Term Significance

Orton Farms challenged the amendments to the criteria to designate agricultural lands because the criteria relied primarily on soils data and did not include the two required components for determining long-term commercial significance – proximity to population areas and possibility of more intensive use.

The boards have adopted a two-part test for identifying and designating agricultural resource lands: (1) that the land is “devoted to” agricultural useage; and (2) that the land must have “long-term commercial significance” for agriculture.

In *Lewis County vs. Western Washington Growth Management Hearings Board*, the Supreme Court clarified that the test is a three-part test. These three prongs are found in the statute, RCW 36.70A.170(1)(a) and RCW 36.70A.030(2), and (10). The three parts of the question can be summarized as follows:

- 1.) Is the land already characterized by urban growth.
- 2.) Based on soils capability is it used or capable of being used for farming.
3. Is it of long-term commercial significance based on the criteria contained WAC 365-190-050.

For the first prong, the Board restated the state Supreme Court’s finding in *City of Redmond v CPSGMHB*, 136 Wn.2d 38 (1998) that land is devoted to agricultural use “if it is in an area where the land is *actually used or capable of being used* for agricultural production.” This first component of the test uses the USDA, SCS, and NRCS soil surveys, land capability, and soil classifications maps as a starting point. Two other factors – landowner intent and current use – may be used in evaluating whether lands are “devoted to” agricultural use. However, these two factors are not conclusive. It was undisputed in this case that the lands under consideration met this test; the dispute arose from application of the second part of the test.

The Board ruled, with respect to the second part of the test, that the county erred in that its record contained no analysis as to whether or not its designations considered

the long-term commercial significance of the land. The county’s original designation criteria addressed two criteria related to this issue. However, the county’s amendments deleted those criteria and they were not replaced by any other criteria or by analysis relevant to the question of long-term commercial significance.

In addition to factors considering the productivity of the land itself, the GMA’s definition of long-term commercial significance (RCW 36.70A.030(10)) includes two other factors to be considered: 1) the land’s proximity to population areas; and 2) the possibility of more intense use of the land. These two factors are locational factors requiring that the intrinsic attributes of the land be evaluated in the context of the land’s location and surroundings.

The Board typically looks to CTED’s minimum guidelines, WAC 365-190-050(1)(a) through (j), as a starting point for evaluating LTCS determinations. However, there is no requirement to rely upon these indicators.

These guidelines remain advisory. But, if a county does not use the CTED indicators to evaluate LTCS, it must explicitly identify the factors it did use to satisfy the statutory analysis requirements. The record must show that analysis and how it addressed the state supreme court’s test and the statutory definition of long-term commercial significance. The Board noted that “commercial viability” may be considered, but it is not conclusive in determining LTCS.

The Board ruled the county did not comply with the Act because the county’s designation criteria relied primarily on soils data, addressing only the first part of the two-prong test. The county did not address

the questions of (1) proximity to population areas and (2) possibility of more intense use, which are contained in the statutory definition of long-term commercial significance.

De-Designation of Agricultural Lands of Long-Term Significance

The Board found the county's de-designation of 291 acres (map amendment) of agricultural resource land to rural did not comply with the Act, because the county ignored the statutory criteria for designating agricultural resource lands and erroneously based its decision to de-designate on the landowner's intent to no longer farm the land. The Board repeated the holding of the *Redmond* court that landowner intent or current use is not conclusive in the designation process.

GMA Implications and Practice Tips

Public Participation.

All notices must be reasonably calculated to inform the public of potential changes in a plan or regulation. General notice of amendments, without describing the nature of the proposed changes, is insufficient. At a minimum, notice must clearly and concisely describe the nature and magnitude of the modifications been considered. If amendments are to add, delete, strengthen, or weaken existing policies that will affect existing designations, those facts should be noted. If proposals involve changes to criteria or standards that will increase or decrease the amount of land designated or the amount or type of development permitted, those aspects of the proposal should be noted. If existing land use designations potentially are being changed, this should also be noted.

During the planning process, the nature of the proposal can change, sometimes significantly. When conducting public

participation as part of an on-going process, it is helpful to review your public participation strategy to determine if your process and your notices are consistent with the proposal that is currently under consideration.

Designation and De-Designation of Agricultural Lands

When considering changes to agricultural resource lands designations, the record should contain an analysis of how the county's criteria reflect the criteria set forth in statute. These criteria should be followed when designating or de-designating lands. When de-designating, planners should perform an analysis of whether the GMA criteria and requirements are, or are not, still applicable to the lands being considered for change. The analysis should state the reasons for de-designation (i.e., mistakes when mapping was done, or circumstances have changed since the initial designation). When doing so, planners should not reject parcels exclusively based on landowner intent (not to farm) or current use. A set of criteria that relies exclusively on soils data and does not address the other two statutory criteria, proximity to population and possibility of more intensive uses of the land, is incomplete. Planners who are working on this issue should also consult the recently released Supreme Court decision in the appeal of Lewis County's agricultural resource lands designations. See the Spring 2004 Hearings Board Report.

1000 Friends of Washington v. Chelan County, et al.; EWGMHB Case 04-1-0002, September 2, 2004

This case is significant because of its treatment of the issue of appropriate rural densities. It is the first time the Eastern Washington Growth Management Hearings Board ruled on this issue after the *City of*

Redmond v. CPCGMHB, 116 Wn. App. 48 (2003).

Factual and Procedural Background

Petitioners filed a challenge to Chelan County’s adoption of a comprehensive plan amendment and a zoning change of approximately 24 acres of land from Agricultural Commercial to Rural Residential Resource 2.5. The Rural Residential Resource zone allows 1 dwelling unit per 2.5 acres.

Board’s Decision

The petitioners challenged the allowance of 2.5 dwelling units per acre in a rural designation. Petitioners attempted to meet their burden of proof by arguing that the hearings boards have consistently held that rural lots smaller than five acres are out of compliance with the GMA. In other words, the petitioners claimed that because the boards have held that any density greater than 1 unit per 5 acres is urban, the county action was a *per se* violation of the GMA. The Petitioners acknowledged that, while there have been exceptions to the five-acre “bright line” position asserted by the petitioners, the county must show why this area is exceptional and the general rule should not apply to this particular designation.

The Board found the petitioners’ argument to be an impermissible shifting of the burden of proof to the county, citing to *City of Redmond v. CPCGMHB*, 116 Wn. App. 48 (2003). A petitioner continues to have the burden of proving that a local government’s actions are out of compliance with the GMA, even when the challenge concerns rural lot sizes smaller than five acres. The Board noted that the courts have made it very clear that the burden of proof in proceedings before the boards is on the petitioners.

Applying the burden of proof, the Board found that petitioners had not shown for this particular 24-acre amendment that it would engender sprawl and cause the county to be out of compliance with the GMA. The Board noted that, under the GMA (RCW 36.70A.320), county action adopting or amending a comprehensive plan and development regulations is presumed to be valid.

GMA Implications

Although the Boards have held that densities of 1 dwelling unit per five acres or less are clearly rural, this decision clarifies that the Boards do not consider any particular rural density to be a *per se* violation of the GMA under all circumstances. Any petitioner must still prove the challenged density is clearly erroneous based on the facts and the record. Since this decision was released, the Eastern Board has addressed 2.5 acre rural densities in Pend Orielle County (Case No 05-1-0011). Read together, these two cases suggest that, when considering appropriate rural densities, a combination of factors should be considered. Among those factors are the base density, the amount of land in that density, and the amount of growth that would be channeled to rural areas as a result.

City of Bremerton, et al. v. Kitsap County, et al.; CPSGMHB Case 04-3-0009c, September 16, 2004

Factual and Procedural Background

In 2003 Kitsap County adopted three subarea plans that altered the boundaries of designated urban growth areas (UGAs) in three separate areas of Kitsap County.

The petitioners challenged the UGA expansions as failing to meet the locational criteria of RCW 36.70A.110. The petitioners claimed the UGA expansions

resulted in the inclusion of lands that were neither already characterized by urban growth nor adjacent to such lands, while lands that met these criteria were rejected. The petitioners also claimed that the county's Buildable Lands Report (BLR) showed that the existing UGAs had sufficient capacity to accommodate the population projection and that the county was required to identify and implement reasonable measures to increase densities and accommodate the projected growth within the existing UGAs rather than expanding the UGAs.

Board's Decision

The GMA requires cities and counties to accommodate the population growth projected for them by OFM. When determining the size of the UGA, a land capacity analysis must be developed and used to calculate the amount of urban land needed to accommodate the population allocation established through the county-wide process. The Board noted the GMA requires local governments to locate urban growth first in areas already characterized by urban growth that have existing public facilities and services to serve new development, second in areas where urban services can be provided efficiently, and third in the remaining areas of UGAs.

RCW 36.70A.215 was added to the GMA in 1997 and requires certain counties to adopt, in consultation with its cities, county-wide planning policies (CPP) to establishing a "buildable lands" review and evaluation program. The purpose of the BLR is twofold: (1) to determine whether a county and its cities are achieving urban densities within UGAs by comparing growth and development assumptions, targets, and objectives contained in the CPP and the county and city comprehensive plans with the actual growth and development that has

occurred in the county and its cities; and (2) to identify reasonable measures, other than adjusting UGAs, that will be taken to comply with the requirements of the GMA. If inconsistencies are identified through the review and evaluation process, the BLR must identify reasonable measures and the local government must take action to implement them as required under RCW 36.70A.215.

In this case, the Board found the county's BLR did not identify reasonable measures or actions that could be taken to avoid the need for UGA expansion. The Board found this required component of the BLR missing; therefore, the county "failed to act" and was out of compliance with the requirements of RCW 36.70A.215.

GMA Implications and Practice Tips

Jurisdictions Subject to BLR Evaluation:

The review and evaluation program required under RCW 36.70A.215 applies only to King, Snohomish, Pierce, Kitsap, Thurston, and Clark counties, and the cities within those counties. The review, evaluation, and amendment program under RCW 36.70A.215 is optional for all other counties.

UGA Expansions and BLR: The sizing requirements and locational criteria in RCW 36.70A.110 apply to UGA expansions as well as the initial UGA designation. UGA boundaries may expand over time to allow for additional urban development, but such expansions must meet the locational criteria of RCW 36.70A.110 (a UGA may include an area not in a city only if that area: (1) already is characterized by urban growth; (2) is adjacent to an area characterized by urban growth; or (3) is a designated fully-contained community). The Board reiterated that a *county-wide* land capacity analysis must accompany the GMA mandated periodic revisions of UGAs.

Planners must prepare a BLR and, if inconsistencies are identified between the development that has occurred and what was envisioned under comprehensive plans and CPP, the local government must identify measures to address these inconsistencies. Presumably, measures are required where there is an inconsistency that shows residential growth is not developing at the densities envisioned. Measures to correct these inconsistencies (rather than expanding the UGA) may include: establishing a minimum density requirement in certain zones; re-designating commercial or industrial land to residential; or re-designating certain lower density residential zones to a residential zone that allows higher densities. Other measures might include bonus density programs or other incentives to increase densities within UGAs.

***Jensen v. City of Bonney Lake;
CPSGMHB Case 04-3-0010, September 20,
2004***

Factual and Procedural Background

The City of Bonney Lake adopted a partial update to its comprehensive plan and future land use map (FLUM) (under RCW 36.70A.130) to reconcile inconsistencies between the FLUM and zoning designations. The FLUM showed that the city had 51 percent of its land designated either Very Low Density (up to 2 units per acre) or Low Density (up to 4 units per acre). Only 17 percent of the city was designated for Medium (5-9 units per acre) or High Density (up to 20 units per acre).

As part of its review and evaluation, the city identified 65 inconsistencies between the plan and the development regulation designations. The city changed the zoning for 27 inconsistencies and changed the plan for 32 inconsistencies. The city did not

correct six of the identified inconsistencies, but instead determined that the property owners could submit a rezone application “if and when ripe for development.”

The petitioners challenge related to two aspects of the city’s update. First, the city’s re-designation of the petitioners’ property from high density to medium density. Second, the petitioners challenged the city’s compliance with the urban density requirement and the city’s continued use of the Very Low Density and Low Density (up to 4 units per acre) designations.

Board’s Decision

The compliance review under RCW 36.70A.30(1)(a) requires a local government to review and, if needed, revise its comprehensive plan and regulations *to ensure the plan and regulations comply with the GMA*. Compliance with the GMA is more than just reviewing the plan, FLUM, and development regulations for consistency. As part of the compliance review, local governments must review their plans and remove all of the inconsistencies identified in that review.

Petitioners argued the city’s plan and FLUM were inconsistent with the GMA because they permitted development at densities less than 4 units per acre. The plan assumed that land would be developed at between 4 and 6 units per acre. The Board relied upon the BLR prepared for Pierce County, which demonstrated that the city was achieving a density of only 3.35 units per acre (based on permits) and 2.98 units per acre (based on plats). The *Pierce County County-wide Planning Policies* called for development within urban areas to exceed at least an average net density of 4 units per acre. The Board found that the city was not achieving urban densities and that its Plan Update failed to include steps to cure this

deficiency. The Board found the Very Low Density and Low Density designations substantially interfered with Goals 1 and 2 of the GMA because they did not allow urban densities and compact urban growth. The Board found the designations noncompliant due to internal inconsistency between the Land Use Element. The Board further found these provisions out of compliance due to inconsistency with the county-wide planning policies governing urban densities and affordable housing.

The Board also found the city noncompliant where it required the property owner to apply for a rezone to achieve the higher density permitted in the plan and under the FLUM designations, because the unchanged zoning designations would not implement the plan and FLUM designations, as required by RCW 36.70A.040 and .130. The city has a duty to maintain consistency between its plan and regulations that implement its plan; it may not ignore or delay this requirement and shift the duty to the project proponents to “entertain a rezone if and when ripe for development.”

The Board found the city had the discretion to change the designation of the petitioners’ property from high density to medium density, so long as the resulting densities were appropriate densities (i.e., 4 units per acre or more). Because the medium density category allowed between 5 and 9 units per acre, the Board found that change compliant. However, the Board noted that only 2 percent of the city’s land is designated high density; therefore, the change to medium density would put a big “dent” in the amount of land available for higher density development.

GMA Implications and Practice Tips

Each city must also review and, if necessary, adjust the densities permitted within its

boundaries to ensure compliance with the Act under RCW 36.70A.130(3). This review can be combined with the buildable lands review under RCW 36.70A.215.

This is both a review for consistency with the Act and also a review for internal consistency. A city must review to ensure that the land and densities are sufficient to accommodate its projected population. It must also review the areas and densities allowed in the FLUM for consistency with what the development regulations allow. A major flaw found in Bonney Lake’s plan was that the plan FLUM assumed densities that were not allowed and were not typically being achieved under the city’s zoning code. When reviewing your plan, it is important to check the assumptions regarding densities and capacities against what your zoning code actually allows.

Some local governments must also prepare a BLR (required under RCW 36.70A.215) that includes a review of densities *actually being achieved* within each city compared to the assumptions contained in the plan. If the BLRs identify that cities are not achieving the densities envisioned in their plan, they need to take reasonable measures to address the inconsistencies. Typically, this will include the re-designation of lands to a category that allows greater densities or changes to their development regulations to allow development more consistent with what their plans envisioned and assumed.

Local governments should also ensure that they provide zoning for housing at a variety of densities, including duplex and multifamily units, rather than designating residential land only for single-family development. A variety of zones is also consistent with Goal 4 of the GMA, which encourages affordable housing and a variety of housing densities and housing types.