Summary of Recent Cases Before Washington's Growth Management Hearings Boards
June 1, 2005-June 30, 2005

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.

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Futurewise v. Snohomish County; CPSGMHB Case 05-3-0020, May 23, 2005

Factual and Procedural Background

In 2004 Snohomish County enacted amendments to its comprehensive plan to comply with the review and update required under RCW 36.70A.130(4). The county published a Notice of Action on December 6 and 13, 2004. The Notice of Action stated that Snohomish County was providing notice pursuant to RCW 36.70A.290 that it had taken certain actions to comply with the update requirement. The *Notice of Action* also stated the deadline to file an appeal was February 11, 2005. On December 23, 2004, the county published a *Notice of Enactment,* which is required (under the Snohomish County's Charter) following the enactment of all county ordinances, not just those related to growth management.

Futurewise filed a Petition for Review challenging certain amendments to the plan and claiming Snohomish County was out of compliance with various provisions of the Act. Futurewise filed its appeal within 60 days of the *Notice of Enactment*, but more than 60 days past the publication of the *Notice of Action.* Snohomish County moved to dismiss the Futurewise appeal as untimely.

Board's Decision

Futurewise claimed that two of its legal issues were "failure to act" claims, which are not subject to the 60-day appeal deadline. The Board noted that a "failure to act" challenge is appropriate when a city or county fails to take an action by a deadline specified in the Act. In this case, the statutory deadline for Snohomish County to review and update its plan was December 1, 2004. It was undisputed that Snohomish County adopted its ordinance on November 17, 2004. Therefore, the Board found that Snohomish County had acted within the statutory deadlines and that a "failure to act" challenge could not be brought.

Futurewise also claimed that the county did not properly complete its compliance review and that the adopted ordinance did not comply with the compliance review requirements of RCW 36.70A.130. The Board stated this type of claim is clearly a *failure to comply* challenge, not a *failure to act* challenge. Therefore, Futurewise was required to file a challenge within 60 days. Because the 60-day deadline is jurisdictional, the Board has no statutory authority to review an action if the challenge is filed past the 60-day deadline.

GMA Implications and Practice Tips

Cities and counties are required to publish a notice that they have adopted a

comprehensive plan or development regulations, or amendments thereto. The publication is required to be "promptly" published after adoption of the ordinance by the legislative body. Until the notice is published, the 60-day deadline does not commence. The notice should reference that it is being given pursuant to RCW 36.70A.290 and include the deadline for filing a petition for review.

When completing a statutory update, the notice should state that amendments have been made in "response to the compliance review required by RCW 36.70A.130(3)."

Local governments must be careful to comply with deadlines set forth in the Act. If a county or city fails to take action before a deadline established in the Act, a party can bring a challenge at any time following the deadline for the "failure to act." This type of challenge is not subject to a 60-day deadline.

In this case, the Board established a distinction between failure to act and alleged noncompliance in the context of the update. When reviewing and updating a comprehensive plan under RCW 36.70A.130(3), local governments must review their entire plan. As part of the update, a decision not to update certain plan provisions is challengeable. This case clarifies that, when a local government clearly states that it has taken action pursuant to the update requirements in RCW 36.70A.130(3), claims alleging that certain unamended portions should have been amended are compliance challenges, not a failure to act. Those challenges must be brought within 60-days of the legislative action declaring the update complete.

Harless III, et al. v. Kitsap County, et al.; CPSGMHB Case 04-3-0031c, June 28, 2005

Factual and Procedural Background

Kitsap County, like all Central Puget Sound counties and cities, was required under the original Act to adopt a comprehensive plan by July 1, 1993, and implementing regulations by July 1, 1994.

In 2004 Kitsap County adopted an ordinance that included both annual amendments to the comprehensive plan and the "update" or "compliance review" required by RCW 36.70A.130(1) and (4). Kitsap County had a December 1, 2004, deadline under RCW 36.70A.130(4). The ordinance did not include any changes to the urban growth areas (UGAs).

The petitioner challenged that Kitsap County "failed to act" because the county did not review its UGA designations and densities (required at least every ten years under RCW 36.70A.130(3)) as part of the "update." Kitsap County argued that the petition was not ripe and should be dismissed because the County was not required to review its UGA by December 1, 2004.

Board's Decision

The issue in this case was *when* Kitsap County was required to review its UGAs. Kitsap County argued that the requirement to review UGA designations every ten years should run from 1998, the date Kitsap County adopted a GMA compliant plan and urban growth areas, or from 1999, the year the Board lifted its Order of Invalidity for Kitsap County's plan. Kitsap County argued its UGA update was not due until 2008 or 2009.

Petitioner argued that measuring the UGA review period from the date of a tardy county's adoption or from the date when a non-compliant county finally brought its initial plan into GMA compliance would defeat an unambiguous legislative scheme and interfere with necessary city/county coordination.

The Board found that that Central Puget Sound counties and cities were required to adopt their county-wide planning policies, comprehensive plans, and development regulations, and establish their UGAs by July 1994 and to review their UGAs comprehensively "at least every ten years" thereafter. Therefore, the Board concluded that the Act required Kitsap County to conduct its RCW 36.70A.130(3) UGA review by no later than December 1, 2004.

The Board noted that there are important policy reasons for a consistent time line for UGA review. Cities and counties need to coordinate their planning for urban growth, and allowing the dates for review cycles to begin when plans are brought into GMA compliance would quickly result in the kind of "uncoordinated and unplanned" land use that GMA was enacted to prevent. Allowing tardy or noncompliant plans to "reset the clock" undermines that coordination.
The Board found that Kitsap County was required to review its urban growth areas, pursuant to RCW 36.70A.130(3), within ten years after 1994, which was the original statutory deadline for adopting its plan and UGAs. Because Kitsap County had not conducted the UGA analysis in 2004, the Board found that Kitsap County had "failed to act" and found the County out of compliance with RCW 36.70A.130(3).

GMA Implications and Practice Tips

The Board's decision clarifies that the ten-year review of UGAs must occur within ten years after the deadline contained in the Act for adopting a comprehensive plan and development regulations. For those counties that were required to adopt a plan and development regulations by 1994, the first ten-year UGA review is due in 2004 and every ten years thereafter.

This case also reinforces the importance of clearly defining the purpose and scope of review that are part of the proposed actions (e.g., annual amendments, ten-year review). The GMA includes annual dockets, the seven-year review, and update requirement and the ten-year review of urban growth boundaries. Each of these actions had distinct timelines and a distinct scope of review. When conducting these reviews, it is important to clearly delineate which action is being considered so as to define the scope of the review and to define what statutory requirement the local government is fulfilling with this action. All legal notices, public participation plans, hearings, ordinances, etc., should clearly define the actions to be considered.

1000 Friends of Washington v. Thurston County, et al.;
WWGMHB Case 05-2-0002, July 20, 2005

Factual and Procedural Background

In 2004 Thurston County completed its compliance review and update to its comprehensive plan and development regulations, as required under RCW 36.70A.130. Petitioners argued that the UGA boundaries established in the 2004 update continued to provide excess lands within the UGA boundaries beyond the demand calculated on the basis of the state Office of Financial Management (OFM) population projection chosen by the county.

In 2002 Thurston County had prepared its buildable lands analysis, which showed

there was significant excess available residential land in the urban areas over the projected demand for such lands through 2025.

Board's Decision

The petitioners argued that Thurston County UGA was "over-sized" and was larger than necessary to accommodate the county's growth target using the OFM population projections. In response, the County argued that it had allowed for 38 percent excess capacity, which it claimed was a statutorily permissible market factor and was not excessive. The Board found the amount of land in the UGA significantly exceeded demand and found the County out of compliance.

The Board concluded that use of a "land market supply factor" when designating UGAs is permissible under the Act to account for the vagaries of the real estate market supply. The market supply factor accounts for the fact that not all vacant land will be built or all redevelopment property redeveloped, because the property owners simply will not take the necessary actions during the planning period.

However, in this case, the Board found that the county failed to demonstrate how it used the market supply factor in developing its comprehensive plan. Although a county may enlarge a UGA to account for a reasonable land market supply factor, it must explain why this market factor is required and how it was reached. The county's plan did not indicate that a 38 percent market factor was used to increase the amount of land for the UGA. While the comprehensive plan acknowledged that 38 percent of urban land may remain unconsumed at the end of the 20-year planning horizon, the plan failed to state that the reason for this was a market factor. The Board stated that there must be an analysis demonstrating the reason for the market factor. Local jurisdictions must explain why this market factor is required and how it was reached.

The Board reiterated that any UGA must be based upon the projected population growth allocated to that UGA. If the supply of urban residential lands significantly exceeds the projected demand for such lands over the course of the 20-year planning horizon, the UGA fails to comply with RCW 36.70A.110.

This case was appealed to the Court of Appeals, which mostly affirmed the Board's decision. (*Thurston Cy. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, No. 34172-7-II, (Wash. Ct. App. April 3, 2007)) The decision was subsequently appealed to the Washington Supreme Court.

GMA Implications and Practice Tips

The Board made it clear that the requirement to update a plan under RCW 36.70A.130 requires local governments to bring its plans and development regulations into compliance with the GMA, including any changes enacted to the GMA since the initial adoption of the comprehensive plan and development regulations. The Board also noted that even though some provisions of the plan or development regulations may not have been subjected to a timely challenge when originally adopted, these matters are open for challenge as part of the update and review under RCW 36.70A.130. In the case of rural land use designations, if a county chooses to allow rural land use designations at greater than rural densities (1 unit per 5 acres), it must comply with the GMA requirements for limited areas of more intense rural development (LAMIRDs) under RCW 36.70A.070(5)(d) – even if it had enacted its Rural Element prior to 1995.

The OFM population allocations establish both a ceiling and a floor on the amount of land that can be included in a UGA. Although a county may use a reasonable market factor in sizing the UGA, it is important that the record show how this factor was chosen. The Board, in this case, faulted the county for essentially backing into their market factor. The use of 38 percent was not the result of a fact based choice, but was "an unavoidable consequence of the urban growth boundaries chosen by the county."