

NOV 24 2015

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____**

No. 33653-1

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III**

EDWARD COYNE AND WEST RICHLAND CITIZENS FOR SMART
GROWTH,

Appellants

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD;

CITY OF WEST RICHLAND;

And

CHARLES GRIGG,

Respondents.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT

CASE NO. 14-2-00880-2

Brief of Respondents

Bronson J. Brown
Attorney for City of West Richland
WSBA #33673
410 N. Neel Street
Suite A
Kennewick, WA 99336
(509) 628-4700

Brian G. Davis
Attorney for Charles Griggs
WSBA# 45321
2415 West Falls Avenue
Kennewick, WA 99336
(509) 736-1330

TABLE OF CONTENTS

I. STATEMENT OF THE CASE.....1

II. ARGUMENT.....4

 A. Standard of Review.....4

 B. The City was in compliance with RCW 36.70A.130 because deliberations for the 2012 Comprehensive Plan docket was extended beyond the calendar year.....6

 C. The City provided sufficient public notice and opportunities for continuous public participation, in compliance with the GMA.....9

 D. Petitioners failed to show the GMHB that the City committed an “illegal spot zone,” and therefore fail to show that the GMHB’s decision was not based on substantial evidence.....12

 E. Petitioners failed to show the GMHB that the City’s actions were inconsistent with the Comprehensive Plan, and therefore fail to show that the GMHB’s decision was not based on substantial evidence.....14

 F. The Petitioners are unclear as to how the GMHB’s Findings of Fact are inadequate or insufficient.....17

 G. Request for Attorney fees.....17

III. CONCLUSION.....18

TABLE OF AUTHORITIES

Cases

<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wash.2d 38, 959 P.2d 1091 (1998).....	6
<i>Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County</i> , 121 Wash.2d 179, 849 P.2d 646 (1993).....	5
<i>Five Mile Prarie Neighborhood Association v. Spokane County</i> , GMHB Case No. 12-1-0002, Final Decision and Order (August 23, 2012).....	14
<i>Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6</i> , 118 Wash.2d 1, 820 P.2d 497 (1991).....	6
<i>King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 142 Wash.2d 543, 14 P.3d 133 (2000).....	4
<i>Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 157 Wash.2d 488, 139 P.3d 1096 (2006).....	4, 5
<i>Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 154 Wash.2d 224, 110 P.3d 1132 (2005).....	4, 5
<i>Spokane County v. Eastern Washington Growth Management Hr'gs Board</i> , 188 Wn. App. 467, 353 P.3d 680 (2015).	8
<i>Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 164 Wash.2d 329, 190 P.3d 38 (2008).....	5, 6

Statutes

RCW 4.84.350(1).....17

RCW 34.05.570(3).....5,6

RCW 36.70A.035.....9, 10

RCW 36.70A.070.....14

RCW 36.70A.130.....6,7,9

RCW 36.70A.140.....10, 12

RCW 36.70A.320(2).....5, 12, 14

RCW 36.70A.320(3).....5, 12

RCW 36.70A.3201.....5, 12

Municipal Code

WRMC 17.78.020(A)(3).....7,8

I. STATEMENT OF THE CASE

On July 16, 2013 The City of West Richland (City) adopted Ordinance No. 25-13 which adopts the 2012 Comprehensive Plan Amendments into the Existing 2006 Comprehensive Plan with the 2008 and 2010 amendments. CP 33. The City also passed Ordinance 26-13 which reclassifies or rezones certain parcels within the City to conform with the 2012 Comprehensive Plan amendments. CP 36. Effectively, these ordinances rezoned four separate parcels of property.

Several actions were taken by City staff prior to the passage of Ordinances 25-13 and 26-13. On December 12, 2011 notice was published in the City's official newspaper to inform the public that applications for changes to the Comprehensive Plan 2012 Docket were due the last day of January, 2012. CP 555. The City received two complete private party applications by the deadline. On November 6, 2012 following a Council workshop, the City Council passed a motion authorizing the 2012 Comprehensive Plan Amendment Docket. CP 291.

On January 17, 2013 notice was sent out to property owners, whose properties may be affected by the potential comprehensive plan changes, to attend a roundtable meeting with the Mayor and City staff to discuss the potential comprehensive plan changes. CP 426.

On February 5, 2013 a City Council workshop was held to discuss the potential Comprehensive Plan changes. CP 428.

On March 14, 2013 the City Planning Commission hosted a workshop regarding the potential Comprehensive Plan amendments where the 2012 Comprehensive Plan Amendment docket was expanded from 2 lots to 3 lots. CP 432.

A public hearing before the Planning Commission on April 11, 2013 was held. Prior to the public hearing notice of the public hearing was mailed to affected parcels and those neighboring properties within 600-feet of parcels under consideration. CP 436. A notice of the public hearing was published in the Tri-City Herald and posted at City Hall, the Library and Fire Station. CP 436-40; CP 293. Public hearing notices were also posted at the property and on the City's website. CP 293.

On May 21, 2013 the City Council held a workshop on the 2012 Comprehensive Plan Amendment. At the workshop the City Council provided input and feedback to staff on the proposed plan amendments. CP 293.

On June 4, 2013 the City Council held another workshop on the 2012 Comprehensive Plan amendments. CP 293-94.

On June 7, 2013 City staff mailed notices of a June 17, 2013 public hearing on the 2012 Comprehensive Plan Amendments to all property owners of parcels located within a 600' buffer of parcels which are proposed for changes and to any person who had provided testimony or attended a meeting on the 2012 Comprehensive Plan docket. Furthermore, new written notices were posted at the property, Library, City Hall, and the Fire Station. A legal notice was also published in the City's official newspaper. CP 294.

On July 16th the City of West Richland passed ordinances adopting the 2012 Comprehensive Plan Amendments and the associated Area-Wide Rezone. CP 33-37.

The Petitioner's filed a petition for review with the Growth Management Hearings Board (GMHB) on September 10, 2013 contesting the passage of the City of West Richland's ordinances 25-13 and 26-13 pertaining to the 2012 Comprehensive Plan Amendments and Area Wide Rezone. CP 27-32.

On March 5, 2014 the GMHB ruled that the City of West Richland's actions adopting Ordinances 25-13 and 26-13 complied with the requirements of the Growth Management Act. CP 7-22.

On April 1, 2014, the Petitioners filed a petition for review of the GMHB's ruling in Benton County Superior Court. CP 1-6. The court dismissed the Petitioners' petition for review. CP 952-53. The Petitioners subsequently appealed to this Court for review of the GMHB's ruling. CP 954-55.

II. ARGUMENT

A. Standard of Review.

In reviewing growth management hearings board (board) decisions, courts give "substantial weight" to a board's interpretation of the GMA. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wash.2d 488, 498, 139 P.3d 1096 (2006) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 553, 14 P.3d 133 (2000)). The court's deference to the board is superseded by the GMA's statutory requirement that the board give deference to county planning processes. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wash.2d 224, 238, 110 P.3d 1132 (2005) ("a board's ruling that fails to apply this 'more deferential standard of review' to a county's action is not entitled to deference from this court"). To make a finding of noncompliance with the GMA, a board must find that a local

government's actions are "clearly erroneous," RCW 36.70A.320(3), meaning the board has a "firm and definite conviction that a mistake has been committed." *Lewis County*, 157 Wash.2d at 497, 139 P.3d 1096 (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wash.2d 179, 201, 849 P.2d 646 (1993), *aff'd*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994)). The GMA "is not to be liberally construed." *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wash.2d 329, 342, 190 P.3d 38 (2008). The board must grant deference to local governments on how they plan for growth. RCW 36.70A.3201. It is Petitioners' burden to overcome the presumption of validity and demonstrate that the action taken by the City is clearly erroneous in light of the goals and requirements of the GMA (Chapter 36.70A RCW). RCW 36.70A.320(2).

Courts apply the standards of the Administrative Procedure Act, chapter 34.05 RCW, and look directly to the record before the board. *Lewis County*, 157 Wash.2d at 497, 139 P.3d 1096; *Quadrant Corp.*, 154 Wash.2d at 233, 110 P.3d 1132. Specifically, courts review errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) de novo. *Thurston County*, 164 Wash.2d at 341, 190 P.3d 38. Courts review challenges under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence by determining whether there is "a sufficient quantity of

evidence to persuade a fair-minded person of the truth or correctness of the order.’” *Thurston County*, 164 Wash.2d at 341, 190 P.3d 38 (*internal quotation marks omitted*) (*quoting City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 46, 959 P.2d 1091 (1998)). Finally, courts review challenges that an order is arbitrary and capricious under RCW 34.05.570(3)(i) by determining whether the order represents “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.” *City of Redmond*, 136 Wash.2d at 46-47, 959 P.2d 1091 (*internal quotation marks omitted*) (*quoting Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wash.2d 1, 14, 820 P.2d 497 (1991)).

B. The City was in compliance with RCW 36.70A.130 because deliberations for the 2012 Comprehensive Plan docket was extended beyond the calendar year.

RCW 36.70A.130(2)(a) provides in part:

Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city **no more frequently** than once every year . . .

(Emphasis added).

Petitioners argue in their brief that the City violated RCW 36.70A.130(2)(a) by expanding the number of lots to be considered in the 2012 Comprehensive Plan Amendment docket to three, thus resulting in an Area Wide rezone. What Petitioners fail to realize is that the statute requires the City to consider changes to the Comprehensive Plan “no more frequently” than once a year, which, in this case, the City actually did by extending the deliberation process for the 2012 Comprehensive Plan docket into 2013. Thus, consideration for the docket was actually less frequent than once a year, which is in compliance with the statute. As explained by the City under its’ Next Steps Required for Processing:

The city is not required to approve/disapprove the proposed 2012 amendments *in the same calendar year* and the staff study, deliberation and hearing(s) has rolled into the year 2013 *as past Comprehensive Plan dockets have also taken an extensive period of time to process*. As many workshops and hearings may be held as necessary to sufficiently review the amendments, and to allow for ample public process.

CP 327 (*Emphasis added*).

The requirements to initiate an Area Wide rezone are listed in WRMC 17.78.020(A)(3) which states:

Amendments to the text of this title or the reclassification of zoning or boundaries of zones may be initiated by the following methods:

A. Amendments to the text of this title are considered legislative in nature, and may be initiated by the following methods:

3. By recommendation of the city planning director following consideration by the planning commission.

The language in the WRMC is permissive as to who can initiate an Area Wide rezone. In this case, the City Planning Director initiated the action following consideration by the planning commission by bringing it to the Planning Commission on April 11, 2013 for a public hearing, (CP 292; 331-35) and then setting it before the City Council for a public hearing on June 17, 2013 (CP 504), and for adoption on June 18, 2013. (CP 490-99). This is precisely the type of action allowed in the WRMC to process an Area Wide rezone.

Petitioners attempt to equate the present case to *Spokane County v. Eastern Washington Growth Management Hr 'gs Board*, 188 Wn. App. 467, 472, 353 P.3d 680 (2015). This equation does not work, however, because the fundamental problem in *Spokane County* was that the County adopted an increased population projection without public review and comment, which the court found to be a violation of the GMA's public participation requirements. *Spokane County* 188 Wn. App. at 473. In the present situation, the public had ample opportunities to review and comment on the Area Wide rezone, most notably at the June 17, 2013 public hearing.

Therefore, contrary to the assertions of the Petitioners, the City was in compliance with RCW 36.70A.130(2)(a), and the GMA's public participation requirements were met.

C. The City provided sufficient public notice and opportunities for continuous public participation, in compliance with the GMA.

State law per RCW 36.70A.035 provides the following requirements on public participation:

The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include:

- (a) Posting the property for site-specific proposals;
- (b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
- (c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
- (d) Placing notices in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

Furthermore, even if the City erred or failed in some part to follow some of the procedures listed above for the public participation requirements, that error would not render the City's comprehensive land

use plan amendments or area wide rezone invalid per RCW 36.70A.140, which provides:

Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

In addition, the GMA does not require a particular type of notice at the earlier stages of process for amending a comprehensive plan. RCW 36.70A.035.

Petitioners contend that the City provided insufficient notice, in large part because of the alleged error in the docketing process. Nonetheless, the City provided many of examples of reasonable notice as outlined in the above RCW 36.70A.035. First, on January 23rd the City met with several private property owners to discuss options and changes proposed under the 2012 Comprehensive plan amendments. CP 305-07. Included in this meeting were Petitioner Coyne and his wife. CP 565. Notice to private land owners in the area to be potentially affected by the Comprehensive plan amendment were sent from the Mayor via a personal letter to attend. CP 420-22; 426.

Then, City Council conducted a work session on February 5, 2013 regarding the 2012 Comprehensive Plan amendments. CP 428-30. Notice

of the meeting was sent to the local media and newspaper and published on the City's website.

Additionally, several other meetings regarding the 2012 Comprehensive Plan Amendment and Area Wide Rezone were conducted over several months with the required notices issued to the necessary parties including: March 14, 2013 planning commission meeting, (CP 312), April 11, 2013 Planning Commission meeting with a public hearing, (CP 325-30; CP 314-16), May 21 2013 (CP 266), June 4, 2013 council workshops (CP 293; CP 486), June 17, 2013 public hearing before the City Council (CP 488, CP 490-94), and June 18, 2013 City Council meeting to consider approval of the 2012 Comprehensive Plan amendments and Area Wide rezone. *Id.*

It was the Petitioners' burden of proof to show the GMHB that the City's actions were clearly erroneous. In its Final Decision and Order, the GMHB noted that the City provided many examples of reasonable notice and that several meetings regarding the Comprehensive Plan Amendment and Area Wide Rezone were conducted, with notice issued to the necessary parties. CP 13. Petitioners, however, did not allege that the City failed to adopt a public participation program and notice procedures as required by the GMA. *Id.* Likewise, the GMHB also found again a lack of legal argument in Petitioners' briefing on exactly how the GMA

was violated with regard to this issue. *Id.* As an example, the GMHB in its Final Decision and Order discussed how Petitioners failed to show that the GMA required a particular form of notice to be given prior to a meeting by the City on the Area-Wide Rezone. *Id.* The Petitioners failed, however, to assert any legal argument in any of their pre-hearing briefs before the GMHB of any error committed by the City. This lack of legal argument sufficient to carry the burden of proof, combined with the flexibility on exact compliance that is provided in RCW 36.70A.140, show that the GMHB's decision was not arbitrary and capricious, and no error was committed.

D. Petitioners failed to show the GMHB that the City committed an “illegal spot zone,” and therefore fail to show that the GMHB’s decision was not based on substantial evidence.

“The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.” RCW 36.70A.320(3). The board must grant deference to local governments on how they plan for growth. RCW 36.70A.3201. It is Petitioners’ burden to overcome the presumption of validity and demonstrate that the action taken by the City is clearly erroneous in light of the goals and requirements of the GMA (Chapter 36.70A RCW). RCW 36.70A.320(2).

The GMHB addressed this issue in its Final Decision and Order under the category of “C. Lack of Findings.” CP 16. The GMHB specifically noted in their Final Decision that “Petitioners’ briefing and oral argument failed to cite any section of the Revised Code of Washington, failed to quote any specific language from the GMA, and failed to argue that the alleged lack of findings constituted non-compliance with a specific ‘requirement’ of the Growth Management Act.” CP 17. Indeed, Petitioners’ briefs before the GMHB’s hearing showed an absence of any substantive legal argument as to how the City had committed an error in violation of the GMA.

Even now, on appeal, Petitioners still fail to point to exactly which statute the City violated with regard to the GMA on this issue. Instead, Petitioners on appeal attempt to argue that the rezone serves a discriminatory benefit to one owner and a detriment to all others. This argument loses its potency, however, when one considers the many non-residential uses that already take place in Austin Drive. CP 332-33. Notably, Lots 28 and 29 are currently vacant, while Lot 1 consists of a home and shop. CP 332. The City notes that the close proximity of Lots 28 and 29 to Bombing Range Road may be a significant factor as to why the two lots remained undeveloped *for decades* since the land was platted. CP 333. Considering that Bombing Range Road is a major transportation

route in West Richland, it makes sense that the city-wide survey conducted by the City found that 67% of respondents were supportive of economic development at this location. CP 334.

The burden of proof for showing that the City's action was clearly erroneous under the GMA lies with the Petitioners. RCW 36.70A.320(2). Petitioners clearly failed to carry this burden of proof, and continue to fail on this appeal.

E. Petitioners failed to show the GMHB that the City's actions were inconsistent with the Comprehensive Plan, and therefore fail to show that the GMHB's decision was not based on substantial evidence.

RCW 36.70A.070 requires the Comprehensive Plan to be an internally consistent document and all elements to be consistent with the future land use map. "Consistency means comprehensive plan provisions are compatible with each other. One provision may not thwart another." *Five Mile Prarie Neighborhood Association v. Spokane County*, GMHB Case No. 12-1-0002, Final Decision and Order (August 23, 2012), at 10. Once again, the GMHB addressed Petitioners' allegations of inconsistency with the Comprehensive Plan by finding that Petitioners could not point to any specific language in the Ordinances that was "incompatible with or thwarts specific language in the existing Comprehensive Plan." CP 20-21.

Indeed, the Petitioners made several allegations, but no substantive legal argument that specifically point to how the language of the Ordinances thwart or are incompatible with the Comprehensive Plan. *Id.* Faced with such dearth in specificity, the GMHB correctly found that Petitioners failed to show that the Ordinances were clearly erroneous, and properly dismissed Petitioners' petition.

The City conducted more than nine public meetings to gather public input, staff input and Council input on the Comprehensive Plan Amendments and Area Wide Rezone. Based on all of that input the City Council adopted the 2012 Comprehensive Plan amendments and included in Council findings that state the Amendments are consistent with many of the goals, policies and objectives of the Comprehensive Plan. CP 288-90. Specifically, finding #3 states

The proposed amendment is consistent with many goals, policies and objectives of the comprehensive plan such as:

“Encourage the use of previously passed-over parcels within areas characterized by urban growth”

“Encourage a walkable community by supporting small commercial nodes located within walking distance of residential development”

“Plan adequate commercial and industrial land use to provide a sufficient tax base to support City services and facilities”

“Promote commercial and industrial development that creates economic diversification in a sustainable economy. Provide adequate appropriately zoned land to accommodate the City's projected commercial and industrial needs”

CP 289.

Furthermore, the findings indicate that the City conducted a recent survey regarding development for the corner of Bombing Range and Van Giesen which resulted in 67% of those surveyed supportive of economic development projects this location. *Id.* This is evidence that the 2012 Comprehensive Plan Amendment was made in consideration of what is in the best interests of the public.

Petitioners attempt to argue that the rezoning of the three lots to commercial is incompatible with existing land uses. Appellant Br. 46. The City's Staff Analysis, however, identifies clusters of non-residential uses already taking place on Austin Drive along the canal, as well as seven active business licenses, thus establishing "an existing pattern and precedent for commercial activity and land use, to various scales and extents." CP 332-33. Furthermore, the staff noted:

Another factor to consider is the lack of development on Lots 28 and 29. The close proximity of the parcels to Bombing Range Road may explain why they have not been developed for residential uses, in the many decades since the land was platted. The consideration of the 'highest and best use' at this location is warranted.

CP. 333.

The City took considerable care in its deliberations over this amendment, and the GMHB properly found that the Petitioners failed to show an inconsistency with the Comprehensive Plan.

F. The Petitioners are unclear as to how the GMHB's Findings of Fact are inadequate or insufficient.

The GMHB's Final Decision and Order explains in great detail the analysis conducted and the findings reached with regard to the issues raised by the Petitioners. CP 7-22. It is unclear as to how the Petitioners find the findings lacking or insufficient for appellate review, or how this supposed error would prevent this court from conducting its review.

G. Request for Attorney Fees.

Respondent City of West Richland requests an award of attorney fees upon determination that it is the prevailing party in this action, pursuant to RCW 4.84.350(1). Respondent requests an award of fees for time spent in this court and in Superior Court.

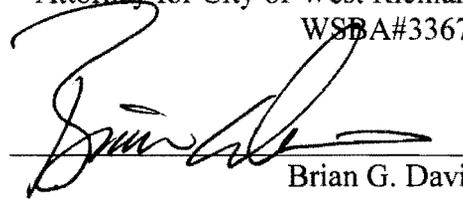
III. CONCLUSION

For the above reasons, this court should affirm the decision of the Eastern Washington Growth Management Hearings Board.

RESPECTFULLY SUBMITTED this 23 day of November, 2015.



Bronson J. Brown
Attorney for City of West Richland
WSBA#33673



Brian G. Davis
Attorney for Charles Grigg
WSBA#33673

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on November 23rd, 2015, I served a copy of the brief of respondents by email and first class mail, postage prepaid, to William Edelblute, Attorney for Appellants at 1030 N. Center Parkway, Kennewick WA 99336; and by email, as agreed by counsel to Dionne Padilla-Huddleston, AAG dionnep@atg.wa.gov and amyp4@atg.wa.gov



Bronson J. Brown