

Practice and Procedure Before the Growth Planning Hearings Boards

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INTRODUCTION

In 1990, the Washington State Legislature took the first significant step toward growth management when it enacted the Washington Growth Management Act (GMA).¹ The GMA directs cities and counties to protect natural features and to begin planning to accommodate anticipated population increases.²

In a perfect world each county and city required or opting to meet the requirements of the GMA would understand its provisions and would carry out its responsibilities on time, with the active participation and informed consent of its citizens and with the agreement of other local governments in the area. In 1991, however, the Washington State Legislature concluded that this was an unreasonable expectation. Many of the cities and counties required or choosing to plan under the GMA had never before undertaken comprehensive planning. Many local governments also had little experience with

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1. 1990 Wash. Laws 1972, 1st Ex., Sess., ch 17 (amended by 1991 Wash. Laws 2903, 1st Sp. Sess., ch. 32 and 1992 Wash. Laws 1050, ch. 227) (codified at WASH. REV. CODE ch. 3670A (1992), WASH. REV. CODE ch. 47.80 (1992), and WASH. REV. CODE ch. 82-02 (1992)).

2. WASH. REV. CODE §§ 36.70A.010-.020 (1992).

interjurisdictional consideration of land use matters. In addition, several provisions of the GMA were the product of painful and acrimonious debate and were less than models of clarity. The deadlines for complying with the requirements were very tight. The question, then, was how to provide a means to resolve the inevitable questions of interpretation, inconsistencies in the legislation, and border disputes among jurisdictions, while avoiding the lengthy delays likely to result from judicial resolution of disputes.

The legislature examined the recommendation of the Growth Strategies Commission³ to create an independent dispute resolution system to resolve conflicts under the GMA.⁴ The Commission recommended the use of a panel of independent arbitrators with mediation and binding arbitration.⁵ Appeals would be limited to the Washington State Court of Appeals only on constitutional and procedural issues.⁶ The legislature concluded, however, that the dispute resolution mechanism should instead be administered by an independent state agency, and, in its 1991 amendments to the GMA, directed the establishment of three Growth Planning Hearings Boards.⁷

Under this approach, the Boards are to carry out quasi-judicial functions within the framework of the Administrative Procedure Act (APA).⁸ Its members should have expertise in the law, planning, and local governance.⁹ Each Board is required to issue its orders within six months of the filing of the petition for review,¹⁰ and all appeals from the decisions of the three Boards are heard by the Thurston County Superior Court.¹¹ The establishment of these three Boards emphasizes the legislature's respect for regional diversity in how local governments will carry out their planning and regulatory responsibilities. The short period between the hearing and the decision is consistent with the tight deadlines imposed for local government compliance with the GMA.

3. *Id.* § 36.70A.800(3).

4. WASH. STATE GROWTH STRATEGIES COMMISSION, FINAL REPORT: A GROWTH STRATEGY FOR WASHINGTON STATE (Sept. 1990).

5. *Id.* at 16.

6. Examples of such constitutional and procedural issues would be notice, publication requirements, and the opportunity to participate in the hearing.

7. WASH. REV. CODE § 36.70A.250 (1991).

8. *Id.* § 36.70A.270(6); see generally WASH. REV. CODE ch. 34.05 (1988).

9. *Id.* § 36.70A.260(1).

10. *Id.* § 36.70A.300(1).

11. *Id.* § 36.70A.300(2).

The GMA also specifies the jurisdiction of each Board:¹² the Eastern Washington Board is responsible for all counties lying east of the Cascade Crest;¹³ the Central Puget Sound Board is responsible for King, Pierce, Snohomish, and Kitsap Counties;¹⁴ and the Western Washington Board is responsible for all other counties lying west of the Cascade Crest.¹⁵

In reviewing petitions within their jurisdictions, the Boards are directed to base their decisions on the record developed by the local government or state, with supplementation of the record according to the Board's discretion.¹⁶ The GMA presumes that comprehensive plans and development regulations are valid upon adoption; when a Board considers whether such enactments are in compliance with the GMA, it will find compliance unless it is persuaded by a preponderance of the evidence that the GMA was wrongly interpreted or applied.¹⁷

During the 1992 session, the legislature authorized funding for the three Boards.¹⁸ In April of that year, Governor Booth Gardner made three initial appointments to each of the Boards.¹⁹ On May 15, 1992, the Boards began operations. Prior to that date, several petitions for review had already been filed in superior courts or with the Governor's Office, the State Department of Community Development, or the State Environmental Hearings Office. Given the deadlines for hearing and deciding those petitions,²⁰ it was imperative for the Boards to move rapidly to adopt their joint rules of practice and procedure.²¹

The Boards' development and adoption of rules was governed by the provisions of the APA.²² In determining how to organize its hearings procedures and to develop the operating rules, the Boards' drafting committee looked to the state's Model Rules of Procedure and considered rules of state Boards carrying out similar responsibilities, including the Pollution

12. *Id.* § 36.70A.250(1).

13. *Id.* § 36.70A.250(1)(a).

14. *Id.* § 36.70A.250(1)(b).

15. *Id.* § 36.70A.250(1)(c).

16. *Id.* § 36.70A.290(4); *see* WASH. ADMIN. CODE § 242-02-520 (1992).

17. WASH. REV. CODE § 36.70A.320 (1991).

18. 1992 Wash. Laws 1133, ch. 232, § 222(11)(b).

19. WASH. REV. CODE § 36.70A.260 (1991).

20. *Id.* § 36.70A.300(1) (requiring Board to issue a final order within 180 days after it receives a petition for review).

21. *Id.* § 36.70A.270(6).

22. *Id.*

Control Hearings Board, Shorelines Hearings Board, and Board of Tax Appeals.

On June 17, 1992, one month after beginning operations, the Boards jointly adopted Emergency Rules, which took effect immediately.²³ While the Emergency Rules allowed the Boards to begin processing the pending cases and new petitions for review, the expedited adoption schedule did not allow sufficient time for public comment. Therefore, the Boards took care to provide ample opportunity for public comment when preparing the proposed Permanent Rules. After public hearings in the fall, the Boards adopted these proposed Permanent Rules as the official Rules of Practice and Procedure, effective October 15, 1992.²⁴

Our goal in the following commentary is to provide "how-to" assistance that clarifies the Boards' Rules of Practice and Procedure and that illustrates the appeals process. This Article reflects the opinions of the authors, who are Board members, and does not represent an official position of the Boards.

PETITION FOR REVIEW: WHO, WHAT, WHERE, WHEN AND WHY

The GMA makes the Boards responsible for hearing and deciding appeals of actions taken primarily by general-purpose local governments to comply with the GMA requirements. Generally, such actions are the adoption by a city or county of policies, plans, and regulations governing the protection and use of land and the provision of public facilities and services in a community. For instance, immediately after the passage of the GMA, all counties and cities in the state, whether planning under the GMA or not, were required to designate agricultural, forest and mineral resources lands, and critical areas.²⁵ Counties and cities planning under the GMA then had to adopt regulations to conserve and protect those lands and areas.²⁶

At the same time, the planning counties began meeting with cities within their boundaries to develop county-wide planning policies—a statement adopted by each county establishing a framework for the comprehensive plans of the county and those cities.²⁷ Those counties also began consulting with

23. Wash. State Reg. 92-14-001, in WSR 92-15, at 44.

24. *Id.* 92-21-034, at 25-26.

25. WASH. REV. CODE § 36.70A.170 (1991).

26. *Id.* § 36.70A.060.

27. *Id.* § 36.70A.210.

the cities on how to identify urban growth areas that would accommodate the projected population growth in the county over the next twenty years.²⁸

To illustrate the appeals process that may be used to challenge such actions, suppose your county, Urbana, is required to plan under the GMA. It has identified and adopted development regulations for natural resource lands and critical areas, drawn an urban growth boundary around your city, Metroville, and adopted county-wide planning policies. Those policies included the allocation of units of affordable housing and the identification of sites for transportation facilities in jurisdictions throughout the county. Metroville participated in the development of the county-wide planning policies, reached agreement with Urbana County on an urban growth boundary, and has recently adopted major modifications to its Comprehensive Plan in order to bring it into compliance with GMA requirements.

As a long-time resident of Metroville and frequent participant in neighborhood and community planning activities, you are unhappy about the comprehensive plan adopted by your city. You are convinced that the plan fails to give sufficient protection to the character of your neighborhood and unfairly assigns a major transportation facility near your home where the road system cannot handle the traffic that would be generated. What can you do about it?

First, you must determine whether you have *standing*,²⁹ which is the right to appeal Metroville's land use decision. If you participated in Metroville's development and adoption of the plan by attending a planning commission workshop or city council public hearing, writing a letter to the Planning Department, or testifying at a city-sponsored community meeting on the plan, then you are likely to qualify.³⁰ You may appeal as an individual, as the owner of a business, or as a representative of an organization.³¹

You have sixty days to file an appeal, starting from the date on which Metroville publishes a notice that it has adopted the Plan.³² You can file in person, by facsimile, or through the

28. *Id.* § 36.70A.110.

29. *Id.* § 36.70A.280(2),(3).

30. *Id.*

31. *Id.*

32. *Id.* § 36.70A.290(2); WASH. ADMIN. CODE § 242-02-220(1) (1992).

mail.³³ Note that the appeal must be received by the Board not later than the sixtieth day.³⁴

Next, having determined that the actions taken by your city must be appealed to the Central Puget Sound Hearings Board, you must prepare a *petition for review*, which is a written statement of your appeal.³⁵ You believe that the housing element of the Comprehensive Plan fails to recognize the character of your established residential neighborhood, as required by the GMA.³⁶ The plan unfairly burdens the neighborhood by identifying it as the future location for a transit center and one hundred units of low-income housing. In addition, you are convinced that the siting of the transit center is contrary to the siting criteria in Urbana County's County-wide Planning Policies.³⁷

Having identified why you believe that Metroville's action does not comply with the specific provisions of the GMA governing the adoption of Metroville's Comprehensive Plan, you must present this information in the format set forth in the Board's rules.³⁸ These rules require you to make a detailed list of the issues that you, the Petitioner, are asking the Board to decide.³⁹ The purpose of the issue statement is to put the Board and the Respondent on notice as to why you believe that Metroville is not in compliance with the GMA. You will have an opportunity to modify this initial list of issues to correct mistakes or to clarify the issues later in the appeal process.⁴⁰

You must also tell the Board what remedy you seek; in other words, how you want the Plan to be changed.⁴¹ A Board can only affirm the action being challenged or send it back to the city for corrective action if it determines that it is necessary to achieve compliance with the GMA.⁴² It cannot, itself, implement the changes that you seek.

Next, you must *serve* the petition; that is, provide an original and three copies of the appeal to the Board, as well as give

33. WASH. ADMIN. CODE § 242-02-230 (1992).

34. *Id.* § 242-02-220(1).

35. WASH. REV. CODE. § 36.70A.290(1) (1991).

36. *Id.* § 36.70A.070(2).

37. *Id.* § 36.70A.210(3)(c), (d).

38. WASH. ADMIN. CODE § 242-02-210 (1992).

39. *Id.*

40. *Id.* § 242-02-260.

41. *Id.* § 242-02-210(2)(f).

42. WASH. REV. CODE § 36.70A.300(1) (1991).

a copy to the Respondent, in this case, Metroville.⁴³ Cities must be served through their mayor, city manager, or city clerk, as determined by their local charters or codes.⁴⁴ Call the city to find out the appropriate office in your case.⁴⁵ The most important aspect of the service requirement is to ensure that prompt notice is given to the affected government.⁴⁶

Once your petition has been filed with the Board and a copy has been served on the city, the city may, at its option, file an *answer to the petition*.⁴⁷ This is simply the challenged government's response to the petition. And once it is known that you have filed a petition, other local governments or citizens who believe that they may be affected by the Board's decision in the matter may ask the Board to become part of the appeal as *intervenors*,⁴⁸ or as *amicus*,⁴⁹ friends of the Board.

At this point in the appeals process you may ask yourself if it is simply too complicated for you to handle without an attorney. You do not need to be an attorney or hire one to represent you, but, admittedly, you may find legal assistance helpful. The Board rules are very detailed and replete with terms that you may not have encountered before. This is the unavoidable result of the Board's being required to comply with numerous provisions required by state law.

Within ten days of receiving your petition for review, the Board must set a date for its final hearing⁵⁰ and send notice to the *parties*,⁵¹ in this case, you and the city. The final hearing will be approximately four months from the filing date so that the Board can meet its duty to issue its *final order*⁵² within one hundred and eighty days of receiving your petition.⁵³ The Board will also choose a location for the hearing, usually in or

43. WASH. ADMIN. CODE § 242-02-230 (1992).

44. *Id.*

45. If you were challenging the action of a county, you would serve the county auditor, or in a charter county, whoever the county has designated. *Id.* When challenging a state action, the office of the Attorney General in Olympia is served, unless there is a specific statute requiring service on a different agency or at a different location. *Id.*

46. *Id.*

47. *Id.* § 242-02-260(2).

48. *Id.* § 242-02-270(1).

49. *Id.* § 242-02-280(1).

50. WASH. REV. CODE § 36.70A.290(3) (1991).

51. WASH. ADMIN. CODE § 242-02-510 (1992).

52. WASH. REV. CODE § 36.70A.300 (1991). The final order is the document that informs the parties of a Board's decision and the reasons for the decision. *Id.*

53. *Id.*

near your city.⁵⁴ Most other Board activities, such as prehearing conferences, will be held at the Board's office.⁵⁵

At the same time, the Board will designate one of its members or a hearing examiner employed by the Board as the *presiding officer* for the matter.⁵⁶ That individual will be the main contact person for you and the city and will be responsible for making sure that the Board meets its responsibilities as described in the GMA and in the Board's rules.⁵⁷ The presiding officer will conduct the prehearing conference, any hearings on motions, and the final hearing, and will have lead responsibility for preparation and timely issuance of the Board's order.⁵⁸

PREPARING FOR THE HEARING

The GMA generally requires the Board to base its decisions on the *record*.⁵⁹ The record includes the documents—printed public notices of hearings, staff reports, recommendations from the Planning Commission, testimony of citizens at the public hearings when the proposed Comprehensive Plan was considered, the ordinance being challenged, related city ordinances, and so forth—used or produced by the city council in making its decision to adopt the Comprehensive Plan that you are challenging.⁶⁰

How will you and the Board know what is in the record? The Board's rules require the city to prepare a list of all documents, including tapes of hearings, that were used by the city staff, distributed at public hearings and meetings, or relied on by the city council, and to file the list within thirty days of the date your petition for review was filed.⁶¹ Next, both you and the city are required to identify those and *only* those documents on the list that you believe are relevant and necessary for the Board to consider, and you must offer them as *exhibits*.⁶² The Board will encourage you, or your attorney if you have one, to meet with the city's attorney and agree on a single

54. WASH. ADMIN. CODE § 242-02-510(2) (1992).

55. *Id.* § 242-02-072.

56. *Id.* § 242-02-552.

57. *Id.*

58. *Id.*

59. WASH. REV. CODE § 36.70A.290(4) (1991).

60. *See* WASH. ADMIN. CODE § 242-02-520(1) (1992).

61. *Id.*

62. *Id.* § 242-02-520(2).

list of exhibits. If you cannot agree, the Board will accept separate lists.⁶³

Although the GMA generally requires the Board to base its decision on the record, the Board may supplement the record with additional evidence if it believes such materials or testimony will be necessary or helpful in making its decision.⁶⁴ If you want the Board to see or hear such additional evidence, you must file a *motion to supplement the record*, which is a written request to the Board that describes the proposed evidence and tells the Board why you believe it would be necessary or helpful.⁶⁵ The city has a right to protest your motion,⁶⁶ and the Board may choose to hold a hearing to help it decide whether to *admit* the evidence or, in other words, to let it become part of the record.⁶⁷ How will the Board make its decision? The GMA provides the general rule: the Board is to consider the same information that the city considered. The Board's hearing is *not* intended to start from the beginning. It cannot hear testimony or review documents not heard or read by the city council before making its decision.⁶⁸ In addition, much of the written material and testimony considered by the city council involves issues not being appealed to the Board, and need not be offered to the Board as evidence.⁶⁹

Only when you can (1) persuade the Board that it cannot make a good decision without such information, (2) show how each item relates to one of your issues, and (3) successfully address the city's objections, will the Board admit the evidence. Once the Board has decided on the contents of the record, you and the city must provide copies of your exhibits to the Board and the other party.⁷⁰

There is one way to be sure that the record considered by the Board contains all of the information that you consider necessary. You must take responsibility, at the time the City Council adopts the Comprehensive Plan, for making that information part of the record it considers. You can then be

63. See *id.* § 242-02-522(13).

64. WASH. REV. CODE § 36.70A.290(4) (1991).

65. WASH. ADMIN. CODE § 242-02-540 (1992).

66. *Id.* § 242-02-534.

67. *Id.* § 242-02-532(3).

68. WASH. REV. CODE § 36.70A.290(4) (1991).

69. *Id.*

70. WASH. ADMIN. CODE § 242-02-520(3) (1992).

assured that it will appear on the City's Index, and you may identify it as an exhibit.

MOTIONS

The Board's rules require that if you ask the Board to make a ruling, such as whether a document should be admitted into evidence or whether the hearing should be rescheduled, you do so by making a *motion*.⁷¹ You must make the motion in writing, telling the Board in detail why it should grant your motion.⁷² You must file an original and three copies of the motion with the Board and provide a copy to the city and any other parties.⁷³ The city or other party has ten days from the receipt of the motion to file a statement in opposition to the motion.⁷⁴

When the Board receives a motion, the presiding officer will decide whether it can be handled through *briefs*,⁷⁵ which are written statements from you and the city presenting your arguments for and against the motion, or whether a hearing, in person or by telephone, is needed.⁷⁶

PREHEARING CONFERENCE

In almost every case, the Board will hold a *prehearing conference*, which is a meeting of the parties run by the presiding officer and usually with Board members in attendance.⁷⁷ In most cases, the prehearing conference will be held at least thirty days, and not more than ninety days, after the petition is filed.⁷⁸ The purpose of the conference is, first, to find out if the parties can agree to a settlement,⁷⁹ and, if not, whether they are interested in mediation of the dispute before or instead of going ahead with the hearing.⁸⁰ If there is to be a hearing, then the presiding officer will work with the parties to determine exactly what the issues are and what exhibits will be admitted or offered and will set deadlines for the filing of

71. *Id.* § 242-02-530.

72. *Id.*

73. *Id.*

74. *Id.* § 242-02-534(1).

75. *See id.* § 242-02-570.

76. *Id.* § 242-02-532(3).

77. *Id.* § 242-02-550.

78. *See id.* § 242-02-552.

79. *Id.* § 242-02-550(1).

80. *Id.*

motions, briefs, and other documents.⁸¹

Shortly after the prehearing conference, the presiding officer will issue a prehearing order that will direct the conduct of the formal hearing, fix deadlines for actions prior to the hearing, establish the issues, and resolve other matters as necessary to ensure that the hearing runs smoothly.⁸²

THE HEARING

The hearing will be run by the presiding officer.⁸³ That individual will usually meet with you and the city's attorney immediately before the beginning of the hearing and go through the procedures that will be followed.⁸⁴ Although the exact sequence varies with the case, you will first *offer* any other exhibits you would like to make part of the record that have not already been admitted; that is, you will ask the Board to admit them, stating your reasons why the Board needs the information to make its decision.⁸⁵ The city will tell the Board if she or he disagrees and why.⁸⁶ The Board or presiding officer will then rule on admission.⁸⁷ You will show the Board which portions of the Comprehensive Plan you believe to be in conflict with the GMA, pointing out specific sections of the GMA, and refer to the portions of the record or testimony that you believe support your position. Next, if the Board has decided to allow live testimony and you have called a witness, you will ask the initial questions.⁸⁸ The opposing party will then have an opportunity to *cross examine* or ask questions of the witness. The Board members may also ask questions of the witness. Then the city will present its argument as to why the city's action should be upheld and your position rejected. Any witnesses called by the city would testify at this point. Next, if there are other parties, they will have an opportunity to be heard. Finally, you will present your *rebuttal*, which is your argument in response to the city's argument and to any other opposing parties.⁸⁹

81. *Id.* § 242-02-550.

82. *Id.* § 242-02-558.

83. *Id.* § 242-02-522.

84. *Id.* § 242-02-522(15).

85. *Id.* § 242-02-640(2).

86. *Id.* § 242-02-640(4).

87. *Id.* § 242-02-640(5).

88. *Id.* § 242-02-610(1).

89. *Id.* §§ 242-02-610 to -680.

THE BOARD'S DECISION

After the hearing is concluded, the Board will begin consideration of the matters presented and issue a decision not later than one hundred eighty days after you filed your petition for review.⁹⁰ The Board may decide to issue an *initial decision*, which provides the parties an opportunity to challenge the Board's findings and conclusions prior to final adoption.⁹¹ More likely, the Board will issue a final decision from which any party may request reconsideration. You must present such a request by petition, specifying the relief you seek and why you believe the Board made the wrong decision.⁹²

APPEALING THE BOARD'S ORDER

After the Board has issued a final decision or denied your motion for reconsideration, you have the right to appeal the decision to the Thurston County Superior Court within thirty days of issuance.⁹³ You will be responsible for ordering and paying for a transcript of the hearing.⁹⁴

AFTERWORD

Without downplaying the complexity of the GMA and the Boards' Rules of Practice and Procedure, and admitting that the information presented in this Article is only a brief summary of the process, we want to reassure you that you can negotiate the course without the assistance of an attorney and that you can count on your Board to hear your petition for review and decide the case with full consideration of the evidence, your arguments, and, above all, the requirements of the Growth Management Act. All of us—petitioners, local governments, state government, and members of the three Growth Planning Hearings Boards—are embarked on a new enterprise, one that holds great risks and promise for our state. Can we manage growth or will growth manage us? The resolution of growth and development and natural resource issues by the Boards is one of the key elements to the answer.

90. WASH. REV. CODE § 36.70A.300(1) (1991).

91. WASH. ADMIN. CODE § 242-02-840 (1992).

92. *Id.* § 242-02-830(2).

93. WASH. REV. CODE § 36.70A.300(2) (1991).

94. WASH. ADMIN. CODE § 242-02-880 (1992).