IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SKAGIT D06, LLC, a Washington limited liability company, Appellant, v. GROWTH MANAGEMENT HEARINGS BOARD, an agency of the state of Washington; Respondent, and CITY OF MOUNT VERNON, a municipal corporation, Respondent/ Cross Appellant.	)	No. 67236-3-I DIVISION ONE UNPUBLISHED FILED: September 17, 2012

Cox, J. — Skagit D06, LLC, appeals the superior court's order affirming the Final Decision and Order of the Growth Management Hearings Board. The Board determined that the City of Mount Vernon's decision to enact two ordinances affecting connection to sewer service and amending the development regulations and the comprehensive plan was not clearly erroneous. The City cross appeals, arguing that the Board did not have subject matter

jurisdiction to consider Skagit D06's claims.

We hold that the Board had subject matter jurisdiction to consider the claims of Skagit D06. We also hold that the Board correctly decided the issues that Skagit D06 raises on appeal. Accordingly, we affirm.

Skagit D06 owns property in the unincorporated East Urban Growth Area (UGA) located southeast of the City of Mount Vernon. The property is not currently served by sewer service from the City.

In March 2009, Skagit D06 applied to the City for a determination that "adequate provision has been made for sewer service" so that it could develop the property. At that time, the municipal code, MVMC 13.08.060, gave property owners in the unincorporated UGA the right to connect to City sewers.

Also in the spring of 2009, the City considered how and when it could upgrade its century-old sewer system to protect water quality in the Skagit River, into which the City discharges treated sewage. As part of this process, the City considered both plans for improvements in the UGA and the area's development needs.

In December, after two public hearings, the City adopted Ordinances 3472 and 3473. Ordinance 3472 amended the Land Use Element of the City's comprehensive plan. Under the revised comprehensive plan, nine criteria must be met before unincorporated property may be annexed into the City. One of the requirements is that adequate sewer services must exist to serve the area.

Ordinance 3473 amended the City's development regulations (MVMC

13.08.060) to require annexation to the City before sewer service will be provided.

In February 2010, Skagit D06 filed a Petition for Review with the Board, alleging that Ordinances 3472 and 3473 did not comply with the Growth Management Act (GMA), chapter 36.70A RCW. The Board concluded that Skagit D06 did not meet its burden to show that the City's adoption of the ordinances violated the GMA.

Skagit D06 petitioned for judicial review of the Board's decision by the King County Superior Court. The superior court affirmed the Board's decision.

Skagit D06 appeals.

SUBJECT MATTER JURISDICTION

As a threshold matter, the City argues that the Board lacked subject matter jurisdiction to decide Skagit D06's claims. We disagree.

The GMA created three growth management hearings boards, which are responsible for hearing and reviewing challenges to county and city actions under the GMA.[1] The Boards are limited in the matters that they may review.[2] Pursuant to RCW 36.70A.280(1)(a), a Board has statutory authority to hear and determine petitions alleging that a "city planning under this chapter is not in compliance with the requirements of . . . chapter 43.21C RCW as it relates to

[1] Quadrant Corp. v. State Growth Mgmt. Hearings Bd., 154 Wn.2d 224, 232, 110 P.3d 1132 (2005) (citing RCW 36.70A.250-.340).

[2] Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 178, 4 P.3d 123 (2000).

plans, development regulations, or amendments, adopted under [the GMA] or chapter 90.58 RCW."[3]

Questions of statutory interpretation are questions of law that this court reviews de novo.[4]

Here, Ordinance 3472 clearly states that it proposes and adopts "additions to the Land Use Element of the Comprehensive Plan . . . ."[5] Similarly, Ordinance 3473 states that it amends MVMC 13.08.060, a development regulation, to "ensure that the City's development regulations are consistent with the City's Comprehensive Plan."[6] Because these ordinances were adopted as amendments to the City's comprehensive plan and development regulations under the GMA, the Board acted within its statutory authority to consider their compliance with the GMA.[7]

The City does not address the plain language of RCW 36.70A.280(1)(a) in either of its briefs. Rather, it argues that, in order for the Board to have subject matter jurisdiction over Skagit D06's claims, a GMA provision must govern the subject matter of the development regulation or plan policy at issue. And, it claims that Skagit D06 has failed to identify any GMA provisions that

---

[3] RCW 36.70A.280(1)(a); see Feil v. E. Wash. Growth Mgmt. Hearings Bd., 172 Wn.2d 367, 378, 259 P.3d 227 (2011).

[4] Bostain v. Food Exp., Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

[5] Certified Appeal Board Record (CABR) at 1670-71.

[6] Id. at 1684.

[7] RCW 36.70A.280(1)(a).

govern the conditioning of utility service on annexation or annexation policies.

The only authority it cites for this proposition is Thurston County v. Western Washington Growth Management Hearings Board.[8] There, the supreme court considered whether a party could challenge a county's failure to revise its comprehensive plan following its mandatory seven year review of the plan.[9] The court held that a party could only challenge the failure to amend provisions of the plan that were affected by GMA provisions added or amended after the last seven year review, since the original plan was deemed compliant with the GMA.[10] This holding does not support the City's argument that "[w]ithout a GMA requirement addressing a development regulation or plan policy, the Board lacks jurisdiction."[11] Among other things, it fails to address the plain words of the statute that we previously discussed.

The Board had subject matter jurisdiction to decide this case.

COMPLIANCE WITH THE GROWTH MANAGEMENT ACT

Skagit D06 argues the Board erred in deciding that Ordinances 3472 and 3473 comply with the GMA. We disagree.

The Board is charged with determining compliance with the GMA and, when necessary, invalidating non-complying comprehensive plans and

---

[8] 164 Wn.2d 329, 190 P.3d 38 (2008).

[9] Id. at 342.

[10] Id. at 344.

[11] Brief of Respondent/Cross-Appellant City of Mount Vernon at 42.

development regulations.[12] Under the GMA "comprehensive plans and development regulations, and amendments thereto . . . are presumed valid upon adoption."[13] But, the City's actions must be consistent with the goals and requirements of the GMA.[14] 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 [the GMA]."[15] A city's action is "clearly erroneous" if the Board is "'left with the firm and definite conviction that a mistake has been committed.'"[16] Generally, a petitioner challenging a GMA development regulation or comprehensive plan amendment must demonstrate to the Board that the regulation or amendment is not in compliance with the statute.[17]

This court reviews the Board's decisions pursuant to the Administrative Procedure Act (APA).[18] The decision must be supported by substantial

---

[12] Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wn.2d 415, 423, 166 P.3d 1198 (2007) (citing King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 552, 14 P.3d 133 (2000) (citing RCW 36.70A.280, .302)).

[13] RCW 36.70A.320(1).

[14] Swinomish Indian Tribal Cmty., 161 Wn.2d at 424 (citing King County, 142 Wn.2d at 561).

[15] RCW 36.70A.320(3).

[16] Swinomish Indian Tribal Cmty., 161 Wn.2d at 423-24 (quoting King County, 142 Wn.2d at 552 (quoting Dep't of Ecology v. Pub. Util. Dist. No. 1, 121 Wn.2d 179, 201, 849 P.2d 646 (1993))).

[17] RCW 36.70A.320(2).

[18] RCW 34.05.570(3).

evidence, meaning that there is a sufficient quantity of evidence to persuade a rational person of the correctness of the order.[19]

The Board's legal conclusions are reviewed de novo.[20] Although substantial weight is accorded to the Board's interpretation of the GMA, this court is not bound by those interpretations.[21]

For mixed questions of law and fact, this court determines the applicable law and then applies it to the facts found by the Board.[22] Under the APA, the party asserting the invalidity of the agency decision bears the burden of proof.[23]

Here, Skagit D06 argues that the ordinances violate the GMA in three ways. First, it claims that they impose a de facto moratorium. Second, it argues that they discourage growth and encourage sprawl. Third, it asserts that they prohibit the City from accommodating the population growth assigned to it. We reject each of these arguments.

De Facto Moratorium

Skagit D06 argues that the Board erred in deciding that Ordinances 3472

---

[19] Thurston County, 164 Wn.2d at 341 (citing City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)).

[20] Swinomish Indian Tribal Cmty., 161 Wn.2d at 424.

[21] Thurston County, 164 Wn.2d at 341 (citing City of Redmond, 136 Wn.2d at 46).

[22] Id. at 342.

[23] Torrance v. King County, 136 Wn.2d 783, 790, 966 P.2d 891 (1998) (citing RCW 36.70A; RCW 34.05.570(1)(a)).

and 3473 do not constitute a de facto moratorium. As a result, Skagit D06 also claims that the City failed to comply with RCW 36.70A.390, which governs moratoria. We disagree.

RCW 36.70A.390 states:

> A . . . city governing body that adopts a moratorium . . . without holding a public hearing on the proposed moratorium . . . shall hold a public hearing on the adopted moratorium . . . within at least sixty days of its adoption, whether or not the governing body received a recommendation on the matter from the planning commission or department. If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after this public hearing. A moratorium . . . adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium . . . may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

The threshold issue is whether the ordinances constitute a moratorium within the meaning of this statute.

Here, Ordinance 3472 amended the comprehensive plan to provide that annexation of residential property will not be allowed unless the City has the capacity to provide sewer services within the City limits and to the annexation area without major upgrades.[24] Ordinance 3473 amended MVMC 13.08.060 to prohibit sewer connections outside of the City limits unless the property is annexed into the City.[25] Skagit D06 argues that these ordinances create a de facto moratorium because the City denies it "the ability to submit an application

[24] CABR at 1670, 1672.

[25] Id. at 1683.

for an otherwise permissible use or activity under [] governing zoning even if other uses are not barred."[26] To support this argument, Skagit D06 cites Biggers v. City of Bainbridge Island.[27]

We first note that Skagit D06 does not expressly contest the City's right to limit providing its sewer service to properties within the City.[28] Doing so under the circumstances of this case is not an unreasonable condition. And Skagit D06 cites no authority to support the proposition that it has the present right to sewer service from the City, where the subject property is outside City limits and within the East UGA.

With these points in mind, we turn to the term "moratorium," which is not defined in the statute. When a statutory term is undefined, we may look to a dictionary for its ordinary meaning.[29] The American Heritage Dictionary defines "moratorium" as "a suspension of an ongoing or planned activity."[30] The question is how to apply this definition in the context of this statute.

---

[26] Appellant's Opening Brief at 21; see also CABR at 2256-58.

[27] 162 Wn.2d 683, 169 P.3d 14 (2007).

[28] See MT Development, LLC v. City of Renton, 140 Wn. App. 422, 428, 165 P.3d 427 (2007) ("An exclusive provider of sewer service may impose reasonable conditions upon its agreement to provide the service [such as requiring annexation as a condition of receiving service], and . . . these conditions are not limited to those relating to the capacity of the utility to provide such service.") (citing Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 382, 858 P.2d 245 (1993)).

[29] State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010).

[30] The American Heritage Dictionary 1174 (3d ed. 1992).

The Board concluded that there was no moratorium created by these ordinances.[31] It did so on the basis that there is no current right for anyone outside the City limits to submit an application for sewer service extensions, unless the applicant complies with the requirements of the ordinances. This is because the newly enacted ordinances now provide for sewer service only to those within the City limits. And those outside the City limits may apply only upon fulfilling the criteria for annexation.

Specifically, Ordinance 3472 does not deny outright annexation to areas without sewer service. Rather, it conditions annexation on whether the City has the capacity to provide sewer services. Former MVMC 13.08.060 required that sewer service be provided to properties in the UGA, without limiting the eligible properties to those inside City limits. This requirement was conditioned on matters not at issue in this case.[32] As amended by Ordinance 3473, MVMC 13.08.060 now disallows property owners outside of the city limits from connecting to sewer service before annexation.[33]

In sum, no current or ongoing right to sewer service exists for properties outside City limits. Accordingly, there is no moratorium under the statute because there is no right to submit applications for sewer service without first meeting the valid requirements of these ordinances.

---

[31] CABR at 2247-48.

[32] Id.

[33] Id. at 1683, 2248.

This is a reasonable interpretation of the statute by the Board and is consistent with the ordinary meaning of the word "moratorium." For these same reasons, we give deference to this interpretation by the Board and also conclude there is no moratorium created by these ordinances.

Skagit D06 relies on Biggers for its proposed definition of "moratorium." That case is not helpful because there the parties did not dispute that the ordinances at issue adopted a moratoria.[34] Rather, the main issue was whether the City had the authority to adopt the moratoria under constitutional and statutory provisions.[35]

Skagit D06 argues that the City violated RCW 36.70A.390 because it failed to complete a work plan, including a buildable lands analysis or treatment plant analysis. But, under the statute, a work plan is only required where a moratorium of six months to one year is adopted.[36] Because Ordinances 3472 and 3473 do not constitute a moratorium, there is no requirement for the City to do a work plan or otherwise comply with the statute.

---

[34] See Biggers, 162 Wn.2d at 688-90.

[35] Id. at 691.

[36] See RCW 36.70A.390 ("A moratorium . . . adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period.").

Urban Growth and Sprawl

Skagit D06 next argues that the Board erred in deciding that Ordinances 3472 and 3473 do not violate the goals of the GMA. Specifically, Skagit D06 contends they violate RCW 36.70A.020(1) and (2). We disagree.

RCW 36.70A.020 outlines the planning goals of the GMA, including two specific goals related to urban growth and sprawl:

> The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:
>
> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

Based on the plain language of the statute, these goals are for guidance in planning. They are not mandatory when cities adopt development regulations and amend comprehensive plans.

Ordinances 3472 and 3473 are presumed valid upon adoption under the GMA.[37] Skagit D06 has the burden to show that the City was clearly erroneous in adopting them.[38] It fails to do so on this record.

Here, the Board determined that the City's adoption of the ordinances was

[37] RCW 36.70A.320(1).

[38] RCW 36.70A.320(2).

not "clearly erroneous" because they promoted orderly development within the UGA, consistent with goals (1) and (2).[39] We agree.

In response to Skagit D06's request for sewer service, the City of Mount Vernon issued a staff report from the Community and Economic Development Department.[40] In the report, the City states that there is a 20-year plan to extend sewer service inside of the East UGA.[41] The report further explained that the City currently has treatment capacity to provide for development within the City, but that it has no funding allocated to install sewer lines or pump stations within the East UGA areas.[42]

Ordinance 3472 amends the comprehensive plan to require that the City first be able to provide sewer service within its own limits. It then may proceed to provide service to the unincorporated property in the UGA. In adopting Ordinance 3472, the City has prioritized the availability of sewer services to those areas that it can currently serve over those that it cannot yet serve without additional facilities. Consistent with the comprehensive plan amendment, Ordinance 3473 amended the development regulations to require annexation to the City before sewer service will be provided. Together, these ordinances work to promote orderly development and phase the introduction of sewer service to

[39] CABR at 2249-53; see RCW 36.70A.320(3).

[40] CABR at 207.

[41] See id. at 231.

[42] Id. at 238-39.

the UGAs, consistent with the staff report. Therefore, the City's decision to limit sewer service to those properties where sewer service is available does not violate the goals stated in RCW 36.70A.020(1) and (2). Skagit D06 has not met its burden to show that the ordinances are clearly erroneous under the GMA.

Skagit D06 argues that the ordinances, taken together, "act as a complete bar to any meaningful urban development in the UGA" because they require annexation before sewer connection, "yet prohibit such annexations indefinitely and permanently." It argues that this violates RCW 36.70A.020(1)'s goal of urban growth and forces property owners in the UGA to engage in low-density development, in violation of RCW 36.70A.020(2)'s goal of reducing sprawl. For the reasons we have explained, we disagree. The City may prioritize providing sewer services in the manner it has chosen to do so in this case.

Next, Skagit D06 argues that the Board's conclusion that the ordinances efficiently "phase" development is not supported by substantial evidence. It claims that the Board did not describe the phasing process or document what it relied on to find that there was a "phasing plan." The Board decision clearly indicated that it relied on the staff report to support its decision.[43] That is sufficient.

In its reply brief, Skagit D06 claims that the staff report cannot be relied upon because it "cites to no document, adopted or informal," that supports the assertion that Skagit D06's property will be serviced at the end of the 20-year

[43] CABR at 2252-53.

plan. But, it fails to cite to any authority that such a document is required for the staff report to be relied upon as substantial evidence. Therefore, this argument is not persuasive.[44]

Skagit D06 also argues that the Board's decision creates a bright line rule that RCW 36.70A.020(1) and (2) are satisfied if "there is any remote or theoretical chance that property in the UGA could develop at an urban density within the twenty-year growth target[.]"[45] As a result, it argues that the Board will no longer consider whether challenged regulations are consistent with the GMA. Nowhere in the decision does the Board either state or imply such a rule. Rather, the Board specifically concluded that both the "orderly development" and "efficient phasing" established by the ordinances are consistent with goals (1) and (2).[46]

Finally, Skagit D06 argues that the Board's decision creates "directly conflicting obligations and duties" when evaluating challenges under RCW 36.70A.020 and .110. This argument relies on its previous claim that the Board has established a bright line rule for analyzing RCW 36.70A.020, refusing to review a challenged regulation if there is a chance the City could meet its 20-

---

[44] State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) ("'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'") (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

[45] Appellant's Opening Brief at 32.

[46] CABR at 2251-53.

year growth target. Because the Board did not establish such a rule, this related argument is also not persuasive.

Obligation to Permit Urban Growth

Skagit D06 argues that the Board erred in deciding that Ordinances 3472 and 3473 do not prevent the City from complying with its obligation to permit urban growth within the city by the end of the 20-year planning period. We disagree.

RCW 36.70A.110(2) regulates comprehensive plans and requires cities to designate enough UGAs so that their 20-year growth targets will be met:

> Based upon the growth management population projection made for the county by the office of financial management, ***the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period*** . . . .
>
> Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. . . . An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. ***Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.***[47]

By its plain terms, this statute deals with comprehensive plans. Thus, Ordinance 3473, which amended a development regulation, is not at issue, and we do not further address that law.

Ordinance 3472 amended the comprehensive plan to include the

[47] (Emphasis added.)

following policy regarding annexation:

> Policy LU-29.1.3 The City Council shall not initiate an ***annexation*** unless the following criteria can be met with a proposal. . . .
>
> . . . .
>
> D. The City finds that adequate municipal services exist to serve the area, and that the factors outlined within RCW 36.93.170(2) are complied with.
>
> E. The City finds that the boundaries of the proposed annexation are drawn in a manner that makes the provision of public services geographically and economically feasible.
>
> F. The City finds that it has the capacity to provide City services within the existing City limits; and, those services to annexation areas without major upgrades to these services.
>
> G. The City finds that there are not negative economic impacts to the City with the extension of services.
>
> H. The City finds that it can afford to provide City services without having to use funds that would otherwise be spent on already incorporated areas of the City.
>
> I. The City finds that the annexation will not create a financial stress on the City's ability to provide required services to the annexation area.[48]

The question is whether these annexation provisions are invalid. The Board determined that the City's enactment of Ordinance 3472 was not clearly erroneous.[49] It explained that the ordinance was consistent with subsection (3) of RCW 36.70A.110, which requires that growth be prioritized depending upon whether adequate public services exist or can be easily extended to a location.[50]

---

[48] CABR at 1668 (emphasis added).

[49] Id. at 2262.

[50] Id. at 2260-61.

We agree.

> RCW 36.70A.110(3) states that:
>
> > Urban growth should be located first in areas already characterized by urban growth ***that have adequate existing public facility and service capacities to serve such development***, second in areas already characterized by urban growth ***that will be served adequately by a combination of both existing public facilities and services*** and any additional needed public facilities and services that are provided by either public or private sources . . . .[51]

The requirements of Ordinance 3472 are consistent with this provision.

Moreover, under RCW 36.70A.110(2), outlined above, the City has discretion in accommodating growth in the comprehensive plan. For these reasons, Ordinance 3472 does not violate the GMA.

Skagit D06 argues that Ordinance 3472, in combination with Ordinance 3473, effectively stops residential development in the unincorporated UGA indefinitely. It claims that such development is necessary because the 20 year growth projection cannot otherwise be met. Specifically, it claims that the population target for 2025 is 19,568 additional residents or 7,115 new dwellings and the City can only absorb 2,800 new dwellings by 2025.[52] Therefore, Skagit D06 concludes that the City cannot reach its required growth target without allowing development in the UGA.

---

[51] (Emphasis added.)

[52] The City disagrees with the statistics used by Skagit D06.

We note that there are other data in the record concerning growth projections. According to the City's Buildable Lands Analysis, 30,816 additional people can be accommodated within the designated UGAs by 2025.[53] This is well in excess of the target 19,568 residents.

More importantly, Skagit D06 has not shown that the City's alleged inability to meet its population growth targets is a violation of RCW 36.70A.110(2). That statute permits a city to exercise "discretion in their comprehensive plans to make choices about accommodating growth." Skagit D06 fails to show that the City's exercise of its discretion in this case was clearly erroneous.

Skagit D06 also argues that the Board erred in concluding that the City is not the sole provider of sewer service to the unincorporated UGA. It claims that this erroneous conclusion allowed the Board to determine that Ordinance 3472 does not interfere with the City's obligation to meet its population growth targets. We disagree.

The Board discussed this point in the context of determining whether the City held itself out as the exclusive provider of sewer services.[54] But we do not read these observations as a determination of whether there was a violation of RCW 36.70A.110(2). Rather, the Board's discussion relates solely to whether the City may generally refrain from providing sewer services outside its borders.

---

[53] CABR at 819.

[54] See id. at 2261.

The Board then stated there was evidence in a staff report that another sewer district—Big Lake—is located in the area.[55]

To summarize, we conclude that the Board properly decided the issues that are now before us. There was no de facto moratorium, the ordinances comply with the goals of the GMA, and the ordinances do not prohibit the City from accommodating the population growth assigned to it.

We affirm the superior court, which affirmed the Board's decision.

Cox, J.

WE CONCUR:

Dwyer, J.

Grosse, J.

[55] See id. at 239, 2261-62.