FILED
SEPTEMBER 5, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SPOKANE COUNTY, a Washington municipal corporation, Appellant, v. GROWTH MANAGEMENT HEARINGS BOARD, Respondent.	)	No. 38971-5-III OPINION PUBLISHED IN PART

STAAB, J. — Four separate administrative actions were originally brought against Spokane County (the County) between 2005 and 2014 by the various respondents (collectively referred to as Futurewise) in this appeal under the Growth Management Act (GMA), ch. 36.70A RCW. The cases were consolidated in 2015. After the Growth Management Hearings Board (GMHB) found that the County was not compliant with the GMA, the parties entered into settlement negotiations and eventually agreed to file stipulated motions to dismiss under WAC 242-03-720(1)(b). The GMHB granted the first stipulated dismissal but refused to grant subsequent dismissals, after concluding that RCW 36.70A.330, which requires the GMHB to hold a compliance hearing after a

finding of non-compliance, precluded the GMHB from dismissing the complaint. The County appealed the GMHB's refusal to enter the stipulated order of dismissal.

In the published portion of our opinion, we hold that the statute, RCW 36.70A.330, does not require the GMHB to hold a compliance hearing after a finding of noncompliance when the parties settle their dispute and agree to dismiss the action. In the unpublished portion of our decision we also hold that former WAC 242-03-720(1)(b) (2021) applied to the stipulations for dismissal that were presented, that the former rule did not conflict with RCW 36.70A.330, and the rule required the GMHB to dismiss the petition.

BACKGROUND

Four separate administrative actions were originally brought against the County between 2005 and 2014 by the various respondents in this appeal under the GMA: 05-1-0007, 08-1-0002, 13-1-0006c (comprised of consolidated cases 13-1-0004 and 13-1-0006), and 14-1-0002.[1] The four matters were consolidated in 2015 but retained their distinct case numbers.

Following a hearing, the GMHB found the County's actions noncompliant with the GMA. The GMHB then set compliance schedules providing the County with 180

[1] The final order in 13-0006c is not titled a "Final Decision and Order" because it was instead resolved by a dispositive motion finding noncompliance and invalidating the offending provision in that case. That order found the County in noncompliance.

days to comply with the GMA. These compliance hearings were continued to allow the parties time to negotiate settlements.

In 2016, the parties to all four matters entered into a settlement agreement, and the GMHB again continued the compliance hearings to allow the County time to comply with the settlement agreement. In 2021, the parties to case number 08-1-0002 jointly moved to dismiss that case pursuant to WAC 242-03-720(1)(b) and the settlement agreement. The GMHB granted the stipulated dismissal and entered an order of dismissal.

Thereafter, the parties to 05-1-0007 and 14-1-0002 also filed stipulated motions to dismiss pursuant to former WAC 242-03-720 and the negotiated settlement agreements. The GMHB did not dismiss these actions but instead issued a letter to the parties stating that the GMHB wanted to hold a status conference where it "would like the parties to address whether, having issued an Order Finding Noncompliance . . . the [GMHB] can simply dismiss a case where it seems that a compliance hearing is required to determine if the County is now in compliance with the GMA." Admin. Rec. (AR) at 489-90.

At the subsequent status conference on March 29, 2022, the parties argued in favor of dismissal. Following the status conference, the GMHB issued a decision concluding that it was statutorily precluded from entering a dismissal after a finding of noncompliance. The GMHB reasoned:

> These cases have a long history of continuing non-compliance and stay for the purpose of settlement action which, as noted above, resulted in

> the Agreement. However, the Agreement is not before this Board, and the Board has no authority to enforce its terms. Neither does the presence of an Agreement impact the Board's prior finding of noncompliance or statutory responsibility to determine compliance pursuant to Chapter 36.70A RCW.
>
> . . . .
>
> The Board is not persuaded that the parties' arguments supersede the clear statutory direction of RCW 36.70A.330 that the Board "*shall* set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of this chapter[.]" (Emphasis added.) Accordingly, the Board now sets a compliance hearing and defers its decision as to the motions to dismiss until after the compliance hearing.

AR at 495.

The County moved for reconsideration, arguing the Board's order was a de facto denial of the stipulated dismissal and summary disposition of the appeal, which was an error of procedure based on the Board's misinterpretation of the law. Contrary to its earlier position, Futurewise, on behalf of two of the petitioners, argued against the stipulated motion to dismiss and the Board's authority to enter a dismissal order pursuant to WAC 242-03-720(1)(b). The Board denied the motion for reconsideration.

The County timely appealed the GMHB's denial of the motion for reconsideration and the dismissal to the Superior Court who then certified directly to this court.[2]

[2] The County only challenges the GMHB's decision with respect to the motions to dismiss and to reconsider on 05-1-0007 and 14-1-0002. However, because the four matters were consolidated, the County captioned the appeal with all four cases. The County clarified that it does not challenge any of the orders/actions with respect to 08-1-0002 or 13-1-0006c, and in fact, 08-1-0002 has been dismissed.

ANALYSIS

The primary issue on appeal is whether RCW 36.70A.330 requires the GMHB to hold a compliance hearing after a finding of noncompliance even if the parties have settled and agree to dismiss the action.

1. STANDARD OF REVIEW

Our review is governed by the Washington Administrative Procedure Act (APA), ch. 34.05 RCW. *Whatcom County v. Hirst*, 186 Wn.2d 648, 666, 381 P.3d 1 (2016) (citing *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005)). Under the APA, "a court shall grant relief from an agency's adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3)." *Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006). At issue here are RCW 34.05.570(3)(c) and (d) which provide relief when an agency has engaged in an unlawful procedure or erroneously interpreted the law. As the party asserting an invalid action, the County has the burden of demonstrating that the GMHB's decision was invalid. *Thurston County v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7-8, 57 P.3d 1156 (2002). Courts review errors alleged under RCW 34.05.570(3)(c) and (d) de novo. *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011).

The question presented requires us to interpret the statute and the procedural rule. "The purpose of statutory interpretation is 'to determine and give effect to the intent of

the legislature.'" *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) (quoting *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)). We grant substantial weight to the GMHB's interpretation of the GMA so long as "the Board's interpretation of substantial compliance is plausible and consistent with legislative intent." *Kenmore MHP LLC v. City of Kenmore*, 1 Wn.3d 513, 522, 528 P.3d 815 (2023). "When possible, we derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Evans*, 177 Wn.2d at 192 (citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)).

2. BACKGROUND OF THE GMA AND GMHB

Washington's GMA, was enacted to provide a mechanism for citizens, communities, local governments, and the private sector to "coordinate with one another in comprehensive land use planning." RCW 36.70A.010. The GMA requires certain counties and cities to adopt comprehensive planning goals that focus growth in certain areas while protecting farmland, forests, and critical environmental areas. Former RCW 36.70A.020 (2021).

Under the GMA, qualifying municipalities must create and maintain a comprehensive plan to guide development regulations. RCW 36.70A.040. A comprehensive plan and its amendments are presumed valid upon adoption. Former RCW 36.70A.320 (1997). There is no separate government entity that enforces the

GMA. Instead, compliance with the GMA depends on citizens and non-government public interest organizations with standing. *See* Henry W. McGee, Jr., *Washington's Way: Dispersed Enforcement of Growth Management Controls and the Crucial Role of NGOs*, 31 SEATTLE U. L. REV. 1, 5 (2007). The presumption of validity afforded to comprehensive plans can be overcome only when a citizen or public interest group proves noncompliance after filing a petition with the GMHB "that includes a detailed statement of issues presented for resolution by the board." RCW 36.70A.290(1).

After a petition is filed, the procedures that must be followed are set forth by statute and regulation. The GMHB must, within 10 days of its receipt of the petition, set a time to hear the matter. RCW 36.70A.290(3). The GMHB typically has 180 days after the petition is filed to issue a final decision and order determining whether or not the alleged offending state agency, county, or city is in compliance with the GMA. RCW 36.70A.300(1)-(2). This period of time may be extended to enable the parties to settle the dispute. RCW 36.70A.300(2)(b).

If the GMHB finds the county's action is compliant with the GMA, that is the end of the action. RCW 36.70A.300(3)(a). If the GMHB finds that the county's action is not in compliance with the GMA, then the GMHB must issue a final decision and order remanding the matter back to the county to come into compliance. RCW 36.70A.300(3)(b). Within 180 days of its finding of noncompliance, "the board shall set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements

of this chapter." RCW 36.70A.330(1). The next subsection provides that "[t]he board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter and with any compliance schedule established by the board in its final order." RCW 36.70A.330(2).

During the noncompliant period, the GMHB retains jurisdiction over the matter and has a follow-up compliance hearing after the expiration of the time set for compliance, typically 180 days. RCW 36.70A.300; WAC 242-03-820(2)(c). If, after the time set for compliance, the municipality continues to be noncompliant, the GMHB transmits its findings to the governor who may elect to sanction the municipality. RCW 36.70A.330(3)(b), .340, .345; WAC 242-03-960.

3. APPLICATION

In this case, following a finding of noncompliance, the County and Futurewise continued the compliance hearing, with the approval of the GMHB, to allow the parties to negotiate a settlement. After the parties reached a settlement, the GMHB continued the compliance hearings several more times to allow the County to comply with the settlement agreement. The GMHB subsequently granted a stipulated order of dismissal in one of the cases. A year later, the GMHB refused to sign a similar stipulation for dismissal presented in two of the other cases. Ultimately, the GMHB determined that once noncompliance was found, the Board was statutorily required to conduct a

compliance hearing and determine if the County was in compliance even if the parties agreed to dismiss the action.

We disagree with the GMHB's interpretation of the statute. Although the GMA was adopted to promote the public interest in coordinated land use planning, compliance is enforced by citizens and public interest organizations. The statutory procedure that mandates a compliance hearing after a finding of noncompliance is applicable when the parties dispute the government's compliance with the GMA. If the parties settle their dispute, there is no longer a controversy for the GMHB to resolve. To require a compliance hearing after the parties have settled their dispute would be pointless.

RCW 36.70A.330 provides the procedures following a finding of noncompliance. The statute indicates that the GMHB "shall" conduct a hearing and issue findings of compliance or noncompliance. RCW 36.70A.330(2). The term "shall" in a statute "is presumptively imperative and operates to create a duty. . . . unless a contrary legislative intent is apparent." *Erection Co. v. Dep't of Lab. & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). "'Shall' is interpreted as directory, rather than mandatory, when a literal reading would frustrate the legislative intent." *Frank v. Dep't of Licensing*, 94 Wn. App. 306, 311, 972 P.2d 491 (1999).

In this case, reading "shall" in RCW 36.70A.330 to require the GMHB to conduct a compliance hearing after the parties have settled their dispute would frustrate the legislative intent of encouraging parties to coordinate planning efforts, settle their disputes,

and avoid pointless hearings. As the County points out, other statutes in the GMA also use the term "shall" to require certain procedures notwithstanding directives that require the summary disposition of appeals. For instance, RCW 36.70A.260(1) provides that "each petition for review that is filed with the growth management hearings board shall be heard and decided" by the GMHB. Under RCW 36.70A.300(1), "[t]he board shall issue a final order that shall be based exclusively on whether or not a . . . county . . . is in compliance with the requirements of [the GMA]." Despite language indicating that the GMHB shall issue a final order on the merits for each petition, the GMHB is required to dismiss an action upon the petitioner's withdrawal of its petition before a final decision. *See* WAC 242-03-720(1)(a).

Interpreting the word "shall" as a mandate would require the GMHB to hold a compliance hearing even when such a hearing would be pointless. While there are no cases construing this provision of the GMA, a similar statutory argument was rejected in *In re Det. of Cherry*, 166 Wn. App. 70, 76, 271 P.3d 259 (2011). In *Cherry*, the petitioner filed a petition for unconditional release as a sexually violent predator (SVP) under chapter 71.09 RCW. By statute, once a petition is received, the court "shall" order a hearing within 45 days. RCW 71.09.090(1). The SVP chapter did not provide for the possibility of an agreed dismissal. Nevertheless, in Cherry's case the prosecutor agreed with his petition and presented the court with a stipulated order of dismissal. The court refused to accept the stipulation, and our court granted review. Ultimately, we held that

there was no conflict between the requirement to enter a dismissal under CR 41 and language mandating a hearing under RCW 71.09.090. While our decision was based on concepts of due process and a prosecutor's ethical obligations, we recognized that statutory language mandating a hearing was not inconsistent with a parallel process for agreed dismissals. *Cherry*, 166 Wn. App. at 76-77.

Reading the statute to require a compliance hearing even after the parties have settled their dispute raises concerns of impartiality, justiciability, and mootness. Similar to trial courts, the GMHB is an "independent quasi-judicial agency" created by statute. RCW 36.70A.250; WAC 242-03-010. The GMHB is not an enforcement board. Instead, its authority is limited to determining petitions brought by persons with standing alleging that a state agency, county, or city action is not in compliance with the requirements of the GMA. RCW 36.70A.280. The GMHB cannot raise issues sua sponte and can only consider issues raised in a petition. The Board does not consider and evaluate the entire comprehensive plan. McGee, *supra*, at 20.

The GMHB does not have inherent or common law powers and may exercise only those powers conferred by statute, either expressly or by necessary implication. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). The Board cannot issue advisory opinions and cannot compel the county to come into compliance when a controversy has been rendered moot. WAC 242-03-810; *Clark*

County v. Growth Mgmt. Hr'gs Bd., 10 Wn. App. 2d 84, 108-09, 448 P.3d 81 (2019) (*Clark* II).

In *Clark County v. W. Wash. Growth Mgmt. Hr'gs Rev. Bd.*, 177 Wn.2d 136, 147, 298 P.3d 704 (2013) (*Clark* I), the Supreme Court held that the Court of Appeals erred when it raised a GMA issue sua sponte and decided claims that had been previously resolved by stipulation of the parties. The Court recognized that the policy of limiting review to those issues raised by the parties promotes the finality of stipulations, advances the predictability of adjudications, encourages private settlement of disputes, and recognizes the need for zealous advocacy in deciding a disputed issue. *Id*. at 143. In her concurring opinion, Justice Stephens indicated that she would reach the same conclusion on the basis of mootness. *Id*. at 148 (Stephens, J. concurring).

The GMA does not require the GMHB to hold a compliance hearing after a finding of noncompliance. Our court has already decided that a compliance hearing is not necessary when the issue of compliance is moot. In *Clark* II, one of the issues raised was whether the GMHB acted in a manner that was arbitrary and capricious when it required the County to act on the Board's earlier finding of noncompliance after the land in question had been annexed and was no longer within the County's control. *Clark* II, 10 Wn. App. 2d at 101. We noted that the issue of compliance was moot because the finding of noncompliance and invalidity was prospective only and the disputed land had been annexed before the finding of invalidity. *Id*. at 104. We then concluded that the

GMHB's attempt to compel the County to come into compliance on land the County no longer controlled was beyond the Board's quasi-judicial powers. *Id*. at 109.

The holding in *Clark* II makes clear that despite the statutory directive to hold a compliance hearing, when a controversy is moot, the GMHB cannot act to compel compliance. An issue is moot when "'there is no longer a controversy between the parties, or if a substantial question no longer exists.'" *Emmerson v. Weilep*, 126 Wn. App. 930, 937, 110 P.3d 214 (2005) (quoting *Pentagram v. City of Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981)) (citation omitted). In this case, it is undisputed that the parties have settled their dispute. Consequently, a compliance hearing, would be pointless. Without a controversy, the GMHB would be left to determine issues of compliance on its own initiative, raising concerns that the GMHB was acting beyond its quasi-judicial powers.

We hold that RCW 36.70A.330 does not require the GMHB to hold a compliance hearing after a finding of non-compliance when the parties have settled their dispute and agreed to dismiss the action. We therefore conclude that the GMHB engaged in an unlawful procedure and erroneously interpreted the law when it concluded that RCW 36.70A.330 required the Board to hold a compliance hearing even after the parties settled their dispute.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder,

having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

In the unpublished portion of our opinion, we hold that former WAC 242-03-720(1)(b) applied to the parties' stipulation for dismissal and required the GMHB to dismiss the actions.

Initially we note that while this appeal was pending, proposed amendments to WAC 242-03-720(1)(b) became effective. The rule now provides (with underlined language showing recent amendment):

> (1) Any action shall be dismissed by the board: (a) Upon petitioner's withdrawal of the petition for review before entry of a final decision and order; or (b) Upon stipulation for dismissal by petitioner(s) and respondent(s) <u>before entry of a final decision and order</u>.

To avoid retroactive application of a rule amendment, we consider the "triggering event" for the rule and amendment, which in this case is the stipulation for dismissal. *See State v. Jefferson*, 192 Wn.2d 225, 246, 429 P.3d 467 (2018). We apply the rule in effect at the time of the triggering event. *Id*. Since the former rule was in effect when the stipulation for dismissal was presented, the former rule applies to this case. *Id*. at 248-49 (since triggering event for amendment to GR 37 was voir dire, the court applied the rule in effect at the time of voir dire even though the case was pending on appeal when the rule amendment became effective).

Former WAC 242-03-720 provides procedures for the GMHB to dismiss an action. This procedural rule requires the GMHB to dismiss an action when presented with a stipulation for dismissal by the petitioner and respondent. Former WAC 242-03-720(1)(b).

In this case, the GMHB concluded that reading this rule to allow for dismissal after a finding of noncompliance would create a conflict with the statutory directive to hold a compliance hearing. Given our holding above, the GMHB's reasoning fails. A GMA action is a dispute between two parties. "The effect of a party's voluntary dismissal or withdrawal of an action renders the proceeding a nullity and leaves the parties in the same position as if the action had never occurred." *Spice v. Pierce County*, 149 Wn. App. 461, 467, 204 P.3d 254 (2009). Thus, a dismissal vitiates the need for a compliance hearing.

Futurewise urges us to adopt the GMHB's limited interpretation of former WAC 242-03-720(1)(b) and hold that the rule only authorizes dismissal before a final hearing. We disagree with this limited interpretation.

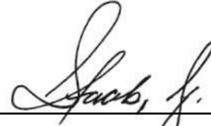
We apply the same rules of statutory construction to our interpretation of regulations. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51-52, 239 P.3d 1095 (2010). In this case, the procedural regulation clearly applies alternatively to cases pending before and after a final hearing. Under subsection (1)(a) (not at issue here), the GMHB is required to dismiss the action "[u]pon petitioner's withdrawal of the petition

for review *before entry of a final decision and order.*" WAC 242-03-720(1)(a) (emphasis added). In contrast, subsection (1)(b) requires entry of a dismissal upon stipulation of the parties and does not contain a temporal limitation. When interpreting a regulation, we construe different language to have different meaning. *See Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 353, 340 P.3d 849 (2015). Unlike subsection (1)(a), dismissals pursuant to the parties' stipulation is not limited to cases pending a final decision or order.

Nor do we agree with Futurewise's argument that the section heading of the regulation requires a different result. The rule is included in the administrative code under the section heading "DISPOSITION OF CASES PRIOR TO HEARING." We consider section headings to assist in determining legislative intent when the rule is ambiguous. *In re Estate of Ray*, 15 Wn. App. 2d 353, 362, 478 P.3d 1126 (2020). Here, the rule is not ambiguous and so the section headings are not relevant.

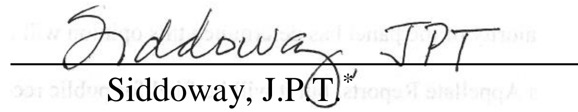
Former WAC 242-03-720(1)(b) applied to the parties stipulation for dismissal and required the GMHB to dismiss the action. The GMHB engaged in an unlawful procedure and erroneously interpreted the law when it concluded that former WAC 242-03-720(1)(b) did not apply to the parties' stipulation for dismissal.

We reverse and remand with instructions for the GMHB to enter the parties' stipulation for dismissal.



Staab, J.

I CONCUR:



Siddoway, J.P.T.[*]

---

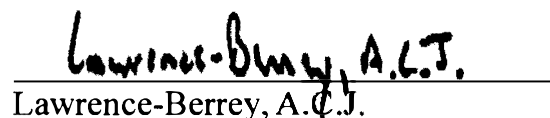
[*] Judge Laurel H. Siddoway was a member of the Court of Appeals at the time argument was held on this matter. She is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

LAWRENCE-BERREY, A.C.J. (concurring) — I agree with the majority in the published portion of the opinion, but write separately with respect to its unpublished portion. I would conclude that once the parties settle and there is no controversy, the Growth Management Hearings Board (Board) must dismiss the action, even if an administrative rule permitted the Board to retain it.

It is well established that a case is moot if the court can no longer provide a claimant with effective relief. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). Here, once the parties settled the case, the Board no longer could provide effective relief to Futurewise and the action became moot.

The majority correctly notes, "The Board cannot issue advisory opinions and cannot compel a county to come into compliance when a controversy has been rendered moot." Majority at 12. For this reason, the Board was without authority to do anything other than to enter an order of dismissal.

This result would not change even if an administrative rule clearly authorized the Board to retain an action that was settled after the Board issued its order. In that event, the Board still could not issue advisory opinions or compel the nonprevailing party into compliance with its earlier order. Because retaining the action would serve no purpose, it would be an abuse of discretion not to dismiss it.



Lawrence-Berrey, A.C.J.