

LAW SEMINARS INTERNATIONAL GMA CONFERENCE, November 15-16, 2007

TIPS FOR PRACTICE BEFORE THE HEARINGS BOARDS - PUBLIC SECTOR

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A. Familiarize Yourself with Board Websites and the Law

1. See July 2007 handbook, "Practicing Before the Growth Management Hearings Board for Washington State," available on the Boards' website, <http://www.gmhb.wa.gov>. It walks the reader through the boards' procedure in how a case goes from start to finish, and includes a glossary of terms and some sample forms. It is a helpful introduction to practice before the boards, primarily geared to pro se litigants and attorneys unfamiliar with board procedures.

2. Each of the three boards has a "Digest of Decisions," updated regularly, providing a summary of decisions on various GMA topics. The Digests are accessible through each of the three boards' websites. Practitioners should take care to assure that board "holdings," as summarized in the Digest, were not overruled by a later court decision. The Central Board's Digest contains a helpful synopsis of all board decisions by year, including a color-coded notation whether that decision was appealed to court and, if so, the outcome. Neither the Eastern nor Western Board Digests contain any update of court appeals of their respective decisions. All Digests have a summary of appellate court decisions, including unreported Court of Appeals decisions.

3. Familiarize yourself with the GMA and with the board's rules of practice in chapter 242-02 WAC. They contain some idiosyncrasies that you may not be familiar with. For example, a request for an extension of time to discuss settlement must be made at least seven (7) days before the date of the hearing on the merits. RCW 36.70A.300(2)(b).

4. Board decisions are posted on each board's website shortly after issuance.

B. Prehearing Practice Tips

1. Counties and cities should never lose a case for procedural reasons such as lack of an effective public participation process or inadequate legal notice. Ensure that public notices used to describe proposed enactments are detailed enough to outline the specific impacts the proposed changes would have on existing policies and/or development regulations (*see Orton Farms v. Pierce County*, CPSGMHB No. 04-3-0007c, Final Decision and Order, August 2, 2004). The notice should cover a range of options to avoid having to do a new round of hearings at a later date if the specific course of action eventually chosen isn't within the range of options that was noticed. If the legislative authority holds a hearing and decides to go in a direction that was not within the range of alternatives listed in the notice, a new hearing must be noticed. (*MBA/Brink v. Pierce County*, CPSGMHB No. 02-3-0010, Final Decision and Order, February 4, 2002). Otherwise, you will be wasting a lot of time arguing the merits of issues before the board when it won't matter because the enactment will be found noncompliant with GMA and remanded based on inadequate notice.

2. The county or city making the challenged decision is required to file with the board an index to the administrative record before the local body. Develop a good working relationship with the clerk of your legislative authority regarding indexing the record. Put on a mini-training session if necessary. The better job the legislative authority does of organizing and keeping track of the record, the easier it will be for you to compile and file the index to the record with the board.

3. Do your homework at the local level and show that you've done it! Have evidence in the record to support the decision, such as a staff report or a consultant's study. In particular, where a choice is based upon the balancing of GMA's goals and upon local circumstances, these factors should be discussed in a detailed written record developed at the county level. Then the ordinance should explicitly incorporate the written record, through detailed findings explaining how GMA's goals were balanced and/or how local circumstances led to the choice that was made. *See Appendix A*. Hearings boards are not impressed if these types of policy and/or factual arguments are raised for the first time in a brief before a board. They want to see that these issues are actually being thought about by the decision makers, not by the lawyers after an appeal has been filed. A recent decision from Division II held that a board may uphold a county decision as long as the rationale for the decision is in the record, even if it is not articulated in the adopting ordinance. *Futurewise v. CPSGMHB*, No. 35569-8-II, October 16, 2007. However, findings in an ordinance adopted by the county legislative body will be ineffective if there is no evidence in the record to support those findings.

4. Be helpful to the board on procedural and technical matters like scheduling hearings, having a complete but concise index to the record, and supplying exhibits and well-organized, tabbed briefs. Encourage the board to make other parties share the cost of supplying core documents. Consider submitting an electronic version of your brief, not as a formality but as a courtesy so that the board can, at its discretion, “cut and paste” portions of your document into its Final Decision and Order.

5. Try to limit the number of legal issues through motions practice. File dispositive motions, if appropriate, to dismiss petitions for review or legal issues based on lack of standing, and legal issues alleging noncompliance with GMA requirements for public participation. WAC 242-02-530(4) and (6).

6. The board’s schedule is accelerated. Things move very quickly. Get your brief done early. Don’t begin writing it a few days before it’s due, especially if you are not familiar with your county’s official record below.

7. Double-check the petitioner’s brief against the statement of legal issues in the prehearing order. The subheadings of a petitioner’s brief may not track the legal issues in the prehearing order. Make sure the petitioner has not attempted to “add” issues to the case. If he has, move to strike those portions of the brief. If the petitioner has not briefed issues, or parts of issues, or briefed them inadequately, point out to the board early in your brief that the petitioner has abandoned those issues or portions thereof. The board will not consider unbriefed or inadequately briefed issues. (*Sky Valley, et al. v. Snohomish County*, CPSGMHB No. 95-3-0068c, Final Decision and Order, March 12, 1996).

8. Tell the board a story in your briefing. Let the board know “the facts.” The easiest and most comprehensive way to do this is to include a chronological history of the key events in your brief, with attached evidence from the record.

9. Avoid putting words in your briefs like "frivolous," "ludicrous," "egregious" or "ridiculous." The board does not like mudslinging or cheap shots. Remember that most board members are non-attorneys and have high expectations for the conduct of attorneys.

10. Make sure that you answer the question (the precise legal issue) before the board. Surprisingly, your opponent may not. Your job is to focus the board’s attention on the legal issue before it by explaining why the action your county or city took complies with the GMA. Don’t fall into the trap of responding to a legal argument in a petitioner’s brief, if it is not what the legal issue in the case is.

C. Oral Argument

1. Know your audience. Present your argument in a way that will help make it easier for the board to rule in your favor. Don't spend any more time on oral argument than you need to make your points, no matter how much time you are allotted.

2. You are not arguing to a jury but to well-educated experts on the topic. Oral argument before the board is more like arguing before the Court of Appeals albeit less formal. Be professional but personable; have a sense of humor, not an attitude.

3. Have your planner or other expert consultant with you at the counsel table to assist in helping you answer board questions. Although that consultant will not be allowed to address the board, he or she can assist you in formulating answers to board questions during the hearing.

4. Strive to maintain your credibility with the board. Don't exaggerate or mislead the board. The board will value your opinion more highly and be more likely to take your side on a close call if it trusts you.

5. Take the high road. Don't make faces or get overly passionate. Remember that due to factors beyond your control (such as fluctuating political winds), you may be back before the board in the future defending a different position than the one in the present case. The board members will remember that.

D. Post Hearing

1. Do not ask for reconsideration on key substantive legal issues. That simply gives the board an opportunity to clean up infirmities in its decision, which in turn will likely make your job harder on appeal. In general, use reconsideration for clarifying and/or correcting factual misstatements or obvious editing errors.

2. Be careful in perfecting your record for appeal. Do not assume that every document included with briefing for earlier hearings in the same case will automatically be part of the record the board certifies in a new court appeal of its most recent decision in that case. Also, despite the more informal and relaxed nature of a board case, don't forget that, if the matter goes up on appeal, the appellate courts will be reviewing your record. Be sure to clearly identify exhibits. A court reporter is present at every hearing on the merits. Don't be lazy in perfecting your record.

3. Remember that, more than likely, YOU are in this for the long haul. With appeals, remands, and compliance hearings, one case can drag on for years. Chances are that you will outlast the board members' terms of offices. Maintain your professionalism throughout the process despite any frustrations you may have with it.