

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

FINIS GERALD TUPPER,)	Case No. 03-3-0018
)	
Petitioner,)	
)	(Tupper)
v.)	
)	
CITY OF EDMONDS)	FINAL DECISION and ORDER
)	
Respondent.)	
)	
)	
)	

I. PROCEDURAL HISTORY

A. GENERAL

On September 24, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Finis Tupper (**Petitioner** or **Tupper**). Petitioner challenges the adoption by the City of Edmonds (the **City** or **Edmonds**) of Ordinance No. 3465. The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA or Act**). The matter was assigned Case No. 03-3-0018, and captioned as *Tupper vs. Edmonds*. Board member Joseph W. Tovar was assigned as the Presiding Officer for this matter.

On September 29, 2003, the Board received a “Notice of Appearance” from legal counsel for Edmonds.

On October 6, 2003 the Board issued a “Notice of Hearing” (the **Notice**) in the above-captioned case. The Notice set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On October 15, 2003, the Board received “Re-Statement of Legal Issues.”

On October 24, 2003, the Board received “Respondent City of Edmonds’ Index of the Record.” (the **Index**) The Index lists 509 items by Index number. Some Index numbers contain more than one item.

On October 24, 2003, the Board received “Amendment of Petition and Re-statement of Legal Issues.”

On October 27, 2003, the Board conducted the prehearing conference in this matter in the Training Room adjacent to Suite 2470, Bank of California Center, 900 4th Avenue, Seattle. Present for the Board were Bruce C. Laing and Joseph W. Tovar, presiding officer. Representing the petitioner *pro se* was Finis Tupper. Also present with Mr. Tupper was Roger Hertich. Representing the City was Scott Snyder. The City offered for discussion two proposed legal issues for Mr. Tupper to consider as alternative language. The presiding officer asked Mr. Tupper to submit a Final Re-Statement of Legal Issues to the Board by no later than 4:00 p.m. on Wednesday, October 29, 2004.

No pleading was received from Petitioner on October 29, 2004.

On October 30, 2003, the Board issued the Prehearing Order (the **PHO**) in this matter.¹

B. MOTIONS

On November 10, 2003, the Board received “Respondent City of Edmonds’ Motion to Supplement” (**City’s Motion to Supplement**). Attached to the motion were 18 proposed exhibits.

On November 10, 2003, the Board received “Respondent City of Edmonds’ Dispositive Motion” (**City’s Dispositive Motion**) requesting dismissal of Legal Issues 1 and 5. The City’s Dispositive Motion requests the Board to take official notice of City Ordinance 3387 and City Ordinance 3465, which were attached to the motion as exhibits.

On November 19, 2003, the Board received “Response of Petitioner to City of Edmonds Dispositive Motion” (**Response to Dispositive Motion**).

On November 24, 2003, the Board received “Respondent City of Edmonds’ Rebuttal – Dispositive Motions” (**City’s Rebuttal – Dispositive Motion**).

On December 3, 2003, the Board issued its “Order on Motions” which includes an Order on Motions to Supplement and an Order on Dispositive Motion. The Order on Motions to Supplement summarized the items comprising the record in this case. The Board did not hold a hearing on the dispositive motion. The Order on Dispositive Motion **granted in part** the City’s motion to dismiss Legal Issue 1, and **denied** City’s motion to dismiss Legal Issue 5. The Order stipulates the revised wording of Legal Issue 1.

C. BRIEFING AND HEARING ON THE MERITS

On December 19, 2003 the Board received correspondence from the petitioner transmitting four copies of the City of Edmonds Comprehensive Plan – 2002 (**Edmonds Comprehensive Plan – 2002**) and stating that the copies were intended to be included with the petitioners Prehearing Brief which was mailed under separate cover.

¹ Effective November 3, 2003, the Presiding Officer in this case is Board Member Bruce C. Laing.

On December 22, 2003, the Board received “Petitioner’s Prehearing Brief,” with six attached exhibits (one missing - #393 -as of 1/9/04) (**Petitioner’s PHB**).

On January 12, 2004 the Board received a letter from the Petitioner transmitting exhibit #393 which was referenced as an attachment in the Petitioner’s PHB but inadvertently omitted from the set of attachments submitted with Petitioner’s PHB.

On January 16, 2004, the Board received “Respondent’s Pre-Hearing Brief”, with five attached exhibits” (**City’s Response**).

On January 20, 2004, the Board received “Petitioner’s Motion to Supplement Record” (**Petitioner’s Motion to Supplement**).

On January 21, 2004, the Board received “Response to Motion to Supplement the Record” (**City’s Response to Petitioner’s Motion to Supplement**).

On January 22, 2004, the Board received “Petitioner’s Reply to City of Edmond’s Prehearing Brief” (**Petitioner’s Reply**).

On January 26, 2004, Board held a hearing on the merits (HOM) in the Fifth Floor Conference Room, Bank of California Building, 900 4th Avenue, Seattle, Washington. Board members Bruce C. Laing, Presiding Officer, Edward G. McGuire, and Joseph W. Tovar were present for the Board. Petitioner Finis Gerald Tupper appeared *pro se*. Respondent City of Edmonds was represented by W. Scott Snyder. Court reporting services were provided by Scott Kindle of Mills Lessard Inc. The hearing convened at 10:00 a.m. and adjourned at approximately 11:45a.m.

On January 30, 2004, the Board received “City of Edmond’s Response to Comprehensive Plan Text” (**City’s Response to Comprehensive Plan Text**) as requested by the Board at the hearing on the merits.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Petitioner challenges Edmond’s adoption of Ordinance No. 3465 amending Planned Residential Development (PRD) provisions of the City’s development code. Pursuant to RCW 36.70A.320(1), Edmond’s Ordinance No. 3465 is presumed valid upon adoption.

The burden is on Petitioner Tupper to demonstrate that the actions taken by Edmonds are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the action taken by [the City] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find the County’s actions clearly erroneous, the Board must be “left with the firm and

definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.320(1) the Board will grant deference to the City in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified: “Consistent with *King County* and notwithstanding the ‘deference’ language of RCW 36.70A.320(1), the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 31 P.3d 28 (2001).

In affirming the *Cooper Point* court, the Supreme Court stated:

Although we review questions of law *de novo*, we give substantial weight to the Board’s interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed “[I]t is well settled that deference [to the Board] is appropriate where an administrative agency’s construction of statutes is within the agency’s field of expertise . . .

Thurston County v. Western Washington Growth Management Hearing Board, Docket No. 71746-0, November 21, 2002, at 7.

III. BOARD JURISDICTION, PRELIMINARY ITEMS, ABANDONED ISSUES.

A. BOARD JURISDICTION

The Board finds that the Tupper PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amends the City’s development regulations, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

The Petitioner’s Prehearing Brief refers to the **City of Edmonds Comprehensive Plan – 2002 (Plan-2002)** copies of which were submitted with the Petitioner’s Prehearing Brief. The City’s Response Brief asserts the Plan-2002 is not in the record and Petitioner should have moved to supplement the record in order to add the Plan-2002. On January 21, 2004, the Board received Petitioner’s Motion to Supplement the record with two attachments: Exhibit A - “City of Edmonds Comprehensive Plan - 2003” (**Plan-2003**); and Exhibit B - “Edmonds Land Use Project Permit Applications 2001/2002”. On January 21, 2004, the Board also received City’s Response to Petitioner’s Motion to Supplement. At the HOM, after hearing oral arguments, the Board **admitted the Plan-**

2002 as a Core Document (**HOM Exhibit #1**)². During the discussion of the Plan-2002, Petitioner explained that he submitted copies of Plan-2002 with his Prehearing Brief, as opposed to Plan-2003 which was named in his January 21, 2004 Motion to Supplement, because the Plan-2002 was the version available to him and the public at the City Clerk's Office. Petitioner stated that he believes there is a Plan-2003 and therefore he cited that version in his Motion to Supplement. The Board asked counsel for the City to determine whether any substantive changes had been made in the Plan-2002 when adopted for 2003, and to provide copies of such changes to the Board. On January 30, 2004, the Board received "City's Response to Comprehensive Plan Text" which states in part, "...the policies contained in the 2002 Comprehensive Plan presented by Mr. Tupper are a true and accurate version of the policies in effect during 2003 under the City of Edmonds 2003 Comprehensive Plan".

After hearing oral arguments during the HOM, the Board deferred decision on Exhibit B of Petitioner's Motion to Supplement until the Final Decision and Order (**FDO**) for this case. Petitioner's Motion to Supplement asserts that Exhibit B, "Edmonds Land Use Project Permit Applications 2001/2002", provides the Board a snapshot of the number and kind of development applications the city planning department processed during the two years reported. Petitioner argues the exhibit is an important element of his presentation which would assist the Board in its understanding of the issues presented. City's Response to Petitioner's Motion to Supplement asserts that Petitioner's Motion does not comply with the Board's Prehearing Order or with the Board's rules. The City argues that permitting Petitioner to supplement the record after submission of the prehearing briefs and just prior to the Hearing on the Merits is prejudicial and should be denied.

The Board finds it is not necessary for the Board to consider Exhibit B in making its decision in this case. **Petitioner's Motion to Supplement the Record with Exhibit B, "Edmonds Land Use Project Permit Applications 2001/2002," is denied.**

C. ABANDONED ISSUES

The Petitioner chose to abandon Legal Issues 1, 2 and 3.³ Petitioner's PHB at 1.

Edmonds asserts that the Petitioner has waived his arguments on Legal Issue 6. The City argues that Tupper presents a list of comprehensive plan policies which are not in the record. The City also argues that the Petitioner has not offered any reasoning, rationale or citation to support his statement that the ordinances do not comply with GMA. Respondent's PHB, at 9.

² The Board noted the City's objection to the Board's decision to admit the City Comprehensive Plan.

³ Tupper's Legal Issues are set forth in the PHO at 5/6.

Board Discussion

The Edmonds Comprehensive Plan is in the record as HOM Exhibit #1. *Supra*, at 5. Therefore the Board rejects that portion of City's argument regarding Petitioner's abandonment of Issue 6. The discussion below addresses the City's assertion that the Petitioner has not provide any reasoning, rationale or citation to support his statement that the ordinances do not comply with GMA.

The Board's Rules of Practice and Procedure provide:

A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbrieffed issues.* Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied).

Additionally, the Board's 10/30/03 PHO in this matter states, "The parties are reminded that their briefs and arguments must be confined to the Legal Issues set forth below, and that issues not briefed will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits." PHO, at 5.

The Board has in past decisions provided the following guidance related to inadequately briefed issues:

In addition to the issues that were not briefed, other legal issues have received inadequate briefing. Inadequate briefing presents a challenge to the Board not found in disposing of unbrieffed issues. With an unbrieffed issue, there is nothing of substance to review in the documents before the Board. However, with an inadequately briefed issue, a petitioner may have identified an issue in the brief filed, but the Board is left with determining if it has crossed the threshold of providing sufficient material to evaluate the issue. In *Robison*, the Board identified two factors that limit or preclude evaluation of a matter: 1) failure to meet a burden of proof, and 2) insufficient supporting facts and legal arguments. *Robison, et al., v. City of Bainbridge Island [Robison]*, CPSGMHB Case No. 94-03-0025 (1995), at 4-5. If a party is unable to muster a sufficient legal or factual argument to meet the standards required by the Act, or has not been able to assemble all the components necessary to meet a burden of proof, the Board can not decide in its favor. Therefore, inadequately briefed issues must be considered similar to unbrieffed issues.

Sky Valley, et al., v. Snohomish County [Sky Valley], CPSGMHB Case No 95-3-0068c, FDO at 24.

The Petitioner's Prehearing Brief on Issue 6 asserts that Ordinance 3465, by precluding Accessory Dwelling Units and Home Occupation Permits from Planned Residential Developments (**PRD's**) and by reducing density in PRD's, fails to implement a list of twelve goals and purposes of the Plan-2002, and therefore fails to implement RCW 36.70A.130(1)(b). Petitioner's PHB, at 4-6. Petitioner does not provide facts and argument sufficient to enable the Board to determine that the City's action in adopting Ordinance 3465 fails to comply with RCW 36.70A.130(1)(b).

Conclusion

The Board deems Legal Issue 6 to be inadequately briefed and therefore **abandoned**.

IV. LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUE NO. 4

The Board's PHO set forth Legal Issue No. 4

Does Ordinance No. 3465 and ECDC 16.20.030, Table of site development standards reducing the allowed number of housing units and maximum allowed density, comply with RCW 36.70A.020(1) and (2)?

Applicable Law

RCW 36.70A.020. Planning goals. 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.

Position of the Parties

The Petitioner argues that City of Edmonds, by amending its PRD regulations to prescribe a density calculation requiring fractional dwelling unit calculations to be rounded down to the nearest whole number, violates the Growth Management Act by being inconsistent with the GMA goals for urban growth and sprawl reduction, RCW 36.70A.020 (1) and (2). The petitioner further argues that the City must "show its work"

by determining how the changed density calculation methodology will effect the City's ability to meet future housing goals. Petitioner's PHB, at 2-3.

The Respondent argues that the GMA imposes no affirmative duty on the part of jurisdictions to update land capacity calculations every time a development regulation is amended. *Master Builders Assn., et al. v. Snohomish County*, CPSGMHB No. 01-03-0016, Final Decision and Order (2001). Additionally, the Respondent notes that the City is aware of the need to provide for development at urban densities and while the Council has recently taken measures to promote density it has elected to defer planning and implementation for urban densities to the next periodic comprehensive plan review. City's Response, at 4-6.

Board Discussion

Ordinance No. 3465 changed the method of calculating the number of dwelling units in a PRD, from rounding fractional units up to a whole number to rounding down to a whole number. This change has the potential of reducing the total number of units in a proposed PRD by one unit. However, developments under the PRD provisions also have the potential of achieving greater numbers of dwelling units than standard subdivision techniques when internal road systems are utilized and when homes are clustered on tracts subject to critical area restrictions. Exhibit 459, at 5-6.

The Board has found in previous cases that "...the GMA created no duty to continuously update UGA land capacity analysis every time development regulations are amended." *Master Builders Assn., et al. v. Snohomish County (Master Builders)* CPSGMHB No. 01-03-0016, Final Decision and Order (2001). The Board notes that the PRD methodology in *Master Builders* was based upon a zoning density of four dwelling units per acre, whereas the zoning density in this matter is less than four dwelling units per acre. The City's Response states the City Council is aware that some existing zoning within the city does not allow urban densities. The Council has initiated review of the urban density issue in the 2004 Comprehensive Plan review process which is currently underway in accordance with RCW 36.78.130. City's Response, 4-6.

For the present challenge in this issue, the Board agrees with the City. However, as the City admits in its brief (City's Response at 4-7), and at the HOM, Edmonds presently allows development at less than "appropriate urban densities" in a significant portion of its area. To their credit, legal and planning staff have made the City Council aware that it must address this situation in its plan and development regulations update by December 1, 2004. See RCW 36.70A.130(4). The Board notes that following this update, the City must allow development at "appropriate urban densities" to withstand a subsequent challenge before the Board. The Board trusts the City will make the necessary revisions to its plan during the 2004 plan review to maintain (or achieve) compliance with the Act.

Conclusion

The Petitioner has **failed to meet the burden of proof** in demonstrating that the provisions of Ordinance No. 3465 providing the method of calculating the allowed number of housing units in PRD's fail to comply with RCW 36.70A.020(1) and (2).

B. LEGAL ISSUE NO. 5

The Board's PHO set forth Legal Issue No. 5

Does the prohibiting of Accessory Dwelling Units ECDC 20.21.010 and Home Occupation Permits ECDC 20.21.010 for all PRDs discriminate property rights allowed to other property owners and residents in the same zoning district and comply with RCW 36.70A.020(1),(2) and (6)?

Applicable Law

In addition to the two planning goals challenged in Legal Issue 4, *supra*, for this Legal Issue Petitioner presents a challenge to goal 6, which provides:

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

Position of the Parties

The Petitioner argues the City, by amending its development regulations to exclude accessory dwelling units (ADU's) and home based businesses from all new PRD, falls afoul of GMA goals for affordable housing and property rights protection. Specifically, Petitioner alleges that the prohibition on ADUs will limit the City's ability to meet future affordable housing goals and that the prohibition on ADUs and home based businesses in new PRDs will have a discriminatory effect against future PRD property owners. Petitioner's PHB, at 3-4

With respect to ADUs, the Respondent notes that Petitioner fails to cite to portions of the GMA dealing with affordable housing. Moreover, the Petitioner fails to point to anything in the record which establishes a link between affordable housing and the City's PRD provisions. With respect to property rights, the Respondent noted that jurisdictions have broad authority to allocate the benefits and burdens of urban living. *Alberg et al., v. King County*, CPSGMHB 95-03-0041c, Final Decision and Order (1995). Finally, the Respondent notes that persuasive authority from the Attorney General in interpreting the GMA indicates that the Act does not forbid adopting regulations which negatively effect particular properties. AGO 1992, No.23. City's Response, at 7-9.

Board Discussion

The Petitioner does not show a connection between affordable housing and the PRD provisions of the City's regulations. Nor does the Petitioner show a connection between affordable housing and the GMA goals cited in his legal issue. Petitioner's arguments regarding property rights do not demonstrate that the provisions of Ordinance 3465 fail to protect the property rights of landowners from arbitrary and discriminatory actions.

Conclusions

The Petitioner has **failed to meet the burden of proof** in demonstrating that the prohibiting of Accessory Dwelling Units and Home Occupation Permits for PRDs as provided in Ordinance 3465 fails to comply with RCW 36.70A.020(1),(2) and (6).

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

- Petitioner has **failed to meet the burden of proof** in demonstrating that Ordinance No. 3465 and ECDC 16.20.030, Table of site development standards reducing the allowed number of housing units and maximum allowed density, do not comply with RCW 36.70A.020(1) and (2).
- Petitioner has **failed to meet the burden of proof** in demonstrating that the prohibiting of Accessory Dwelling Units ECDC 20.21.010 and Home Occupation Permits ECDC 20.21.010 for all PRDs discriminate property rights allowed to other property owners and residents in the same zoning district and do not comply with RCW 36.70A.020(1),(2) and (6).
- The City of Edmond's adoption of Ordinance No. 3465 was **not clearly erroneous**. CPSGMHB Case No. 03-3-0018, *Tupper, v. City of Edmonds*, is **dismissed with prejudice**.

So ORDERED this 22nd day of March 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP.

Note: This order constitutes a final order as specified by RCW 36.70A.300. Any party wishing to file a motion for reconsideration of this final order must do so within ten days of service of this order. WAC 242-02-830(1). Any party wishing to appeal this final order to superior court must do so within thirty days of service of this order. WAC 242-02-898.