

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

)	
TAHOMA AUDUBON SOCIETY,)	Case No. 06-3-0001
CITIZENS FOR A HEALTHY BAY,)	
PEOPLE FOR PUGET SOUND, and)	<i>(Citizens for a Healthy Bay)</i>
FUTUREWISE,)	
)	
Petitioners,)	
)	ORDER OF COMPLIANCE
v.)	[Re: Ordinance No. 27728]
)	
THE CITY OF TACOMA,)	
)	
Respondent.)	
)	

BACKGROUND

On November 1, 2007, the Board issued its Final Decision and Order (**FDO**) in this case. The Board ruled that City of Tacoma Ordinance No. 27431 failed to comply with the Growth Management Act. The FDO provided, in relevant part:

The Board finds and concludes that the City of Tacoma, in adopting Substitute Ordinance 27431, **failed to comply** with the GMA mandate to adopt development regulations that protect critical areas, specifically, the Fish and Wildlife Habitat Conservation Areas designated along Tacoma’s marine shorelines. The City’s action is **clearly erroneous**: the Board is left with a definite and firm conviction that a mistake has been made.

The City’s action **does not comply** with RCW 36.70A.130, which requires a timely update and revision of critical areas regulations [.130(4)(a) and (8)(a)]; **does not comply** with RCW 36.70A.020(9) and (10), which articulate planning goals protective of fish and wildlife habitat and of the environment; **does not comply** with RCW 36.70A.060, which requires enactment of development regulations to protect critical areas; and **does not comply** with RCW 36.70A.172, which mandates the application of best available science in enacting critical areas protections, and calls for special consideration to the measures necessary to preserve salmon. ...

FDO, at 14. The Board ordered:

1. The City of Tacoma's adoption of Substitute Ordinance No. 27431, the City's critical areas ordinance – specifically the provision concerning marine shorelines in TMC 13.11.510 and .520 - was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.130, .060, and .172, and **is not guided** by GMA Goals RCW 36.70A.020(9), and (10).
2. Therefore the Board **remands** Ordinance No. 27431 to the City of Tacoma with direction to the City to take legislative action to comply with the requirements of the GMA as set forth in this Order [setting May 1, 2008, as the deadline for enacting compliant legislation].

FDO, at 15.

Despite good faith efforts, the City was not able to complete the public process for adoption of responsive legislation within the time allowed by statute [RCW 36.70A.300(3)(b)]. On April 9, 2008, the Board held an expedited compliance hearing, telephonically, for the purpose of issuing an Order of Continuing Noncompliance and Amending Compliance Schedule.

On July 14, 2008, the Board received City of Tacoma's Statement of Actions Taken to Achieve Compliance [**SATC**], attaching Ordinance No. 27728, and City of Tacoma Compliance Index [**Index**], listing 124 items.

On July 23, 2008, the Board received Tahoma Audubon Society's, Citizens for a Healthy Bay's, People for Puget Sound's, and Futurewise's Comments on the City of Tacoma's Statement of Actions Taken to Achieve Compliance [**Petitioners' Response**]. The Petitioners "express no objections to a finding of compliance" but indicated that the City created narrower buffers in some instances than best available science (**BAS**) would suggest.

On July 25, 2008, the Board received City's Reply to Petitioners' Response to City's Statement of Actions Taken – and – Request for Telephonic Compliance Hearing. The City asked the Board to enter an Order of Compliance "by agreement of the parties."

On July 28, 2008, the Board issued an Order Requesting BAS and Setting Telephonic Hearing. Noting that in the underlying case the City had not created a best-available-science record for protection of fish and wildlife habitat on marine shorelines, the Board requested "copies of key exhibits from its Index that constitute the best-available-science on which the City relies." The Board permitted the BAS to be submitted on a CD and supported by additional briefing.

On August 1, 2008, the City submitted City's Response to Board's Order Requesting BAS Dated July 28, 2008, accompanied with a filing on CD of five documents comprising best available science considered by the City. The City also submitted City's Motion to Supplement the Record, and Declaration of Teresa Vandenburg in Support of City's Motion to Supplement the Record. The motion to supplement requested inclusion of three exhibits as part of the City's record of best available science:

- Proposed Exhibit 125: *Tacoma Shoreline Inventory and Characterization*, by ESA Adolfson, December 2007.
- Proposed Exhibit 126: *Best Available Science Review*, for City of Tacoma Critical Areas Preservation Ordinance, by GeoEngineers, June 15, 2004.
- Proposed Exhibit 127: *Biological Review Tri-County Model 4(d) Rule Response Proposal*, for Tri-County Salmon Conservation Coalition, by Parametrix, April 2002.

On August 5, 2008, the Board received City's Alternative Request for Finding of Compliance [**City Alternative Request**], attaching the July 31, 2008, decision of the Supreme Court in *Futurewise v. Western Washington Growth Management Hearings Board*, No. 80396-0. On the same day the Board received Petitioners' Brief in Opposition to City of Tacoma's Alternative Request for Finding of Compliance [**Petitioners' Opposition to Alternative Request**].

The Compliance Hearing was held by telephonic conference call on August 7, 2008, at 10:00 a.m., Board member Margaret Pageler presiding. Also present for the Board were Board members Edward G. McGuire and David O. Earling and Board staff attorney Julie Ainsworth-Taylor. Robert Beatty and Tim Trohimovich represented Petitioners, with intern Jeff McClain. Jay Derr of GordonDerr LLP represented Respondent, accompanied by Molly Harris and Steve Atkinson of the City staff. The City presented how it had responded to the Board's FDO in regard to compliance. The parties then presented brief arguments concerning the City's Alternative Request. The hearing was recorded by tape recorder and was adjourned at 10:30 a.m.

II. DISCUSSION

Motion to Supplement the Record

The City moves to supplement the record in this compliance proceeding with three documents that are part of its Best Available Science record in this matter. The Board notes that these materials were cited and used in the City's consideration of Ordinance No. 27728. *See*, Declaration of Teresa Vandenburg. There being no objection from Petitioners, the Motion to Supplement is **granted**. Proposed Exhibits 125, 126, and 127 are added to the Index as Index Nos. 125, 126, and 127.

The City's Action

The FDO summarized the Board's finding of non-compliance with respect to protection of critical areas along marine shorelines. Ordinance No. 27431 designated all of Tacoma's marine shorelines as Fish and Wildlife Habitat Critical Area because of the presence of anadromous fish, but did not provide protection measures for these habitat areas. The Board ruled that Tacoma Ordinance No. 27431:

- **does not comply** with RCW 36.70A.130, which requires a timely update and revision of critical areas regulations [.130(4)(a) and (8)(a)];

- **does not comply** with RCW 36.70A.020(9) and (10), which articulate planning goals protective of fish and wildlife habitat and of the environment;
- **does not comply** with RCW 36.70A.060, which requires enactment of development regulations to protect critical areas; and
- **does not comply** with RCW 36.70A.172, which mandates the application of best available science in enacting critical areas protections, and calls for special consideration to the measures necessary to preserve salmon.

By adopting Ordinance No. 27728, the City has now completed the update and revision of its Critical Areas regulation. The Critical Areas Preservation Ordinance (**CAPO**) has been updated to include marine buffer zones along Tacoma's 44 miles of marine shorelines and to provide a regulatory process for development within these buffer zones.

At the outset of its critical areas regulations update, the City commissioned a Best Available Science Review from GeoEngineers. Index 126. Subsequently the City commissioned a shoreline inventory and characterization from ESA Adolphson. Index 125. The inventory specifically identified and provided GIS analyses for (a) fifteen priority habitats and species¹; (2) tidelands and bedlands suitable for shellfish harvest, and (3) kelp, eelgrass and forage fish habitats. Additional science in the City's consideration includes the Tri-County Salmon Coalition Biological Review (Index 127) and the host of studies referenced in the summary reports.

Relying on Best Available Science in its record and on its shoreline habitat inventory, the City amended its critical areas regulations for marine shorelines. Ordinance 27728 requires preparation of habitat management plans, and provides for mitigation of impacts to critical fish and wildlife habitat areas. The Ordinance establishes requirements for vegetated buffers in varying widths along its marine shorelines. The City chose the general site potential tree height of native species in the area – 115 feet – as its marine buffer average width. Buffers were increased to 200 feet to encompass coastal feeder bluffs on north Tacoma Narrows and Point Defiance Park. Buffers were decreased in Thea Foss Waterway, Port properties, Point Ruston and Narrows Marina based on existing industrialization, lack of vegetation, or existing degraded condition. Scientific support for the buffer decreases is provided in Index 99, with site-specific analysis. The Supreme Court recently clarified that the GMA does not mandate restoration of previously degraded critical areas, but that regulations must protect the critical areas by preventing new harm. *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 166 P.3d 1198 (2007).

The Board notes the detailed and site-specific analysis undertaken by the City of Tacoma in enacting the shoreline protections in Ordinance No. 27728. While this case was reviewed under the GMA standard of best available science – RCW 36.70A.172, the adopted regulations provide a strong foundation for shoreline master program provisions. RCW 36.70A.480(4) provides:

¹ Bald eagle, purple martin, peregrine falcon, great blue heron, mountain quail, wood duck, osprey, seabird colonies, waterfowl concentrations, pigeon guillemot, seals and sea lions, orca, reticulate sculpin, anadromous fish, and oak woodland.

Shoreline master programs shall provide a level of protection to critical areas located within shorelines of the state that is at least equal to the level of protection provided to critical areas by the local government's critical areas ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).

The Board finds and concludes that the City's action in adopting Ordinance No. 27728 **complies** with the requirement to review and update critical areas regulations - RCW 36.70A.130, **complies** with the GMA goals for protection of fish and wildlife habitat and of the environment - RCW 36.70A.020(9) and (11), **complies** with the requirement to enact critical areas protections - RCW 36.70A.060, and **complies** with the requirement to use best available science in developing critical areas protections, with special consideration for anadromous fish - RCW 36.70A.172.

City Alternative Request

Alternatively, the City requests that the Board find compliance based on the Supreme Court's ruling in *Futurewise v. Western Washington Growth Management Hearings Board [Futurewise]*, No. 80396-0 (Wash. July 31, 2008). The City requests that the Board "enter a finding of compliance because the City of Tacoma is not obligated to adopt GMA critical areas regulations for marine shorelines subject to SMA jurisdiction." City Alternative Request, at 3.

Petitioners respond that the *Futurewise* decision is not yet determinative because (1) the time for reconsideration has not run and the Court has not yet issued a mandate, and (2) the plurality opinion of the Court in *Futurewise* "has only limited precedential value and is not binding on the courts." Petitioners' Opposition to Alternative Request, at 2, 3 (citing RAP.2 and cases).

Judicial clarification of ESHB 1933 [RCW 36.70A.480] has been keenly awaited by GMA-planning cities, counties and the three Hearings Boards. Petitioners argue, and the City disputes, that reliance on *Futurewise* is premature until the Court issues its mandate. The Board does not need to sort out this question. If there were any doubt about the City's compliance in this case, the Board would be inclined to await the mandate in *Futurewise*, finalizing the Court's review of that case, before issuing a final order here. However, the Board has already determined to enter a finding of compliance for the City based on the City's action, after extensive public involvement, in adopting protections for its shoreline areas which incorporate up-to-date scientific analysis and reflect the City's particular shoreline characteristics. The Court's decision in *Futurewise* may provide an alternative basis for finding compliance, but having determined the City's compliance, it is unnecessary for the Board to find compliance on another basis.

III. FINDING OF COMPLIANCE

Based upon its review of the November 1, 2007 Final Decision and Order, the City of Tacoma Statement of Actions Taken to Achieve Compliance, the response and non-objection of Petitioners, the Board's review of Ordinance No. 27728 and the City's record of Best Available Science, the comments offered in the briefing and at the compliance hearing, the Board finds:

- By adopting Ordinance No. 27728, the City of Tacoma has **complied** with RCW 36.70A.130, which requires a timely update and revision of critical areas regulations [.130(4)(a) and (8)(a)].

- The City’s action **complies** with RCW 36.70A.020(9) and (10), which articulate planning goals protective of fish and wildlife habitat and of the environment.
- The City’s action **complies** with RCW 36.70A.060, which requires enactment of development regulations to protect critical areas.
- The City’s action **complies** with RCW 36.70A.172, which mandates the application of best available science in enacting critical areas protections, and calls for special consideration to the measures necessary to preserve salmon.

The Board therefore enters a **Finding of Compliance** for the City of Tacoma Re: Ordinance No. 27728.

IV. ORDER

Based upon its review of the November 1, 2007 Final Decision and Order, the City of Tacoma Statement of Actions Taken to Achieve Compliance, the response and non-objection of Petitioners, the Board’s review of Ordinance No. 27728 and the City’s record of Best Available Science, the comments offered in the briefing and at the compliance hearing, and having deliberated on the matter, the Board ORDERS:

- The City of Tacoma’s adoption of Ordinance No. 27728 corrects the deficiencies found in Ordinance No.27431 and **complies** with the goals and requirements of the GMA as set forth in the Board’s November 1, 2007, FDO. The Board therefore enters a **Finding of Compliance** for the City of Tacoma Re: Ordinance No. 27728.
- CPSGMHB Case No. 06-3-0001, *Tahoma Audubon Society, Citizens for a Healthy Bay, People for Puget Sound, and Futurewise v. City of Tacoma*, is **closed**.

So ORDERED this 7th day of August, 2008.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.²

² Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)