CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

KELLY AND SALLY SAMSON and ROBERT AND JO ANNE HACKER Petitioners, and BAINBRIDGE CITIZENS UNITED Intervenor, v. CITY OF BAINBRIDGE ISLAND and STATE OF WASHINGTON DEPARTMENT OF ECOLOGY Respondents.	)	**CPSGMHB Case No. 04-3-0013** ***(Samson)*** **ORDER ON MOTIONS**

I. BACKGROUND

On April 23, 2004 the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Kelly and Sally Samson and Robert and Jo Anne Hacker (**Petitioners** or **Samson**). The matter was assigned Case No. 04-3-0013. Petitioners challenge the City of Bainbridge Island's (the **City**) adoption of Ordinance No. 2003-30 (the **Ordinance**), amending the City's Shoreline Master Program. Petitioners also challenge the Department of Ecology's (the **DOE** or **Ecology**) approval of the City's amendments to the Shoreline Master Program .The bases for the challenges are noncompliance with the Growth Management Act (**GMA**) and the State Shoreline Management Act (**SMA**). Petitioners request the Board find the Ordinance noncompliant under the GMA and SMA. Petitioners also request that the Board enter a determination of invalidity. The PFR set forth 19 Issues to be resolved.

On June 3, 2004, the Board issued its "Prehearing Order and Order on Intervention" (**PHO**) in this matter. The PHO set forth the schedule and listed 15[1] Legal Issues to be resolved by the Board. The Board received several timely motions from the parties: 1)

[1] The PFR acknowledged that Legal Issues 16 through 19 "are constitutional issues beyond Board purview but stated herein to preserve them for appeal." PFR, at 5. At the prehearing conference, the parties and the Board agreed that they would not be included in the PHO, since they were issues outside the Board's subject matter jurisdiction. For all intents and purposes they were **dismissed** for lack of jurisdiction.

Petitioners' Motion to Clarify; and 2) Motions to Dismiss certain issues filed by the City and Ecology.

On June 10, 2004, the Board received: 1) Petitioners' "Motion for Order Clarifying Issues on Appeal" (**Samson Motion – Clarify**); 2) "Dep't of Ecology's Motion to Dismiss (**DOE Motion – Dismiss**), with an attached "Declaration of Thomas J. Young in Support of Ecology's Motion to Dismiss;" 3) "City's Motion to Dismiss Issues" (**City Motion – Dismiss**), with an attached "Declaration of Rosemary Larson in Support of City's Motion to Dismiss Issues."

On June 24, 2004, the Board received: 1) "City's Response to Petitioners' Motion for Order Clarifying Issues on Appeal" (**City Response – Clarify**); 2) "Ecology's Objection to Petitioners' Motion for Order Clarifying Issues on Appeal" (**DOE Response – Clarify**); and 3) Petitioners' Response to Respondent's Motions to Dismiss" (**Samson Response – Dismiss**).

On July 1, 2004, the Board received: 1) "Petitioners' Reply to Respondents' Response to Petitioners' Motion for Order Clarifying Issues on Appeal" (**Samson Reply – Clarify**); 2) "Dep't of Ecology's Reply to Petitioners' Response to Ecology's Motion to Dismiss" (**DOE Reply – Dismiss**); and 3) "City's Reply to Petitioners' Response to Respondents' Motions to Dismiss" (**City Reply – Dismiss**).

II. DISCUSSION OF MOTIONS

A. Prefatory Note for Both Motions (Clarify and Dismiss)

Both Petitioner's and Respondents' Motions stem from review of a recent amendment to RCW 36.70A.480 which clarified the Board's jurisdiction to review amendments to shoreline master programs (**SMPs**) in relation to both the GMA and SMA. These revisions are found in Chapter 321, Laws of 2003 [ESHB 1933]. Specifically, Section 5 of this law, amends RCW 36.70A.480[2] governing the Board's jurisdiction over review of

[2] ESHB 1933 amended RCW 36.70A.480 [the GMA] to read as follows [underlined language is new amendatory language], only the relevant provisions to the pending matter are quoted:

> (1) For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals to this chapter as set forth in RCW 36.70A.020 <u>without creating an order of priority among the fourteen goals</u>. The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered part of the county or city's development regulations.
> (2) *The shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW rather than the* <u>goals, policies, and</u> *procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations.*
> (3) <u>The policies, goals, and provisions of chapter 90.58 RCW and applicable guidelines shall be the sole basis for determining compliance of a shoreline master program</u>

SMPs. Consequently, the Boards review of these motions occurs in the context of RCW 36.70A.480.

Petitioner's Motion to Clarify appears to be a good faith attempt to restate the Legal Issues in light of the Legislature's 2003 amendments. Likewise, Respondents' Motions to Dismiss are based upon these same amendments.

Review of the Motions and associated briefing reveals agreement among the parties on the following: Legal Issues 3, 4, 6 and 10 as stated in the PHO should be dismissed. Either Petitioner has withdrawn these issues or the City and DOE have moved for their dismissal. Consequently, the Board will **dismiss** Legal Issues 3, 4, 6 and 10 from this proceeding.

Additionally, Petitioner has not restated nor clarified Legal Issues 9 or 15 and neither the City nor DOE have objected to or moved to dismiss these issues. Consequently, these two issues shall remain as stated in the PHO.

Therefore, the Legal Issues still in dispute as to whether the Board should permit clarification of the issue or dismiss them, in whole or in part are: Legal Issues 1, 2, 5, 7, 8, 11, 12, 13 and 14. The Board will address these issues in three groupings: first, Legal Issues 1, 2 and 5; second, Legal Issues 7, 8 and 11; and finally, Legal Issues 12, 13 and 14. The Legal Issues to be briefed in this matter, as a result of the Order, are stated in section C, *infra*.

B. Motions to Clarify and Dismiss

Legal Issues 1, 2 and 5:

Both the City and DOE move to *limit* these legal issues to the scope of review authorized in RCW 36.70A.480(3). *See* footnote 2, *supra*. Both Respondents' offer proposed restatements of the issues to reflect this concern. DOE Motion – Dismiss, at 5; City Motion – Dismiss, at 14. Likewise, Petitioner' restatement of these issues limits the issues to the specific provisions set forth in RCW 36.70A.480(3), namely, compliance with the internal consistency provisions of RCW 36.70A.040 and .070. Samson Motion – Clarify, attachment A, at 1. Therefore, the Board will **grant** the Petitioner's Motion to Clarify and **grant** the Respondents' Motion to "Limit" these issues. The Board accepts Petitioners restatement of these issues and these will be the issues briefed and resolved by the Board.

> with this chapter except as *the shoreline master program is required to comply with the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4),* 35.63.125, and 35A.63.105.

. . . (*Italicized* emphasis added).

Legal Issues 7, 8 and 11:

Petitioner does not move to clarify Legal Issues 7, 8 or 11; Petitioner leaves these issues as stated in the PFR and PHO. Samson Motion – Clarify, attachment A, at 2. DOE does not move to limit, alter or dismiss these Legal Issues. However, the City of Bainbridge Island moves to dismiss each of these issues as either duplicative of Legal Issues 1, 2 and 5, or because they do not reference the section of the GMA that is allegedly being violated, as required by the Board's Rules of Practice and Procedure – WAC 242-02-210(2)(c).[3] City Motion – Dismiss, at 15-16. Petitioner acknowledges that the Legal Issues do not specify statutory sections of the GMA that are being violated, but contends that the PFR itself references SMA and WAC provisions that are violated. Samson Response – Dismiss, at 9-10.

The Board's review of the PFR and Legal Issues 7, 8 and 11,[4] leads the Board to conclude that the City is correct. Legal Issues 7, 8 or 11 do not "specif[y] the provision of the act or other statute allegedly being violated. . ." [Per WAC 242-02-210(2)(c)]. These Legal Issues are general assertions and arguments that do not stand on their own as violations of specific GMA [or SMA] requirements. Therefore, the City's Motion to Dismiss these issues is **granted**; Legal Issues 7, 8 and 11 are **dismissed**.

However, as the City suggests, these issues may be duplicative of *arguments* that fall within the parameters of Legal Issues 1, 2 or 5. Consequently, if Petitioner can demonstrate that either the City or DOE had a statutory duty [as framed in Legal Issues 1, 2 or 5] to do something related to the assertions in Legal Issue 7, 8 or 11, that the City or DOE failed to comply with, they may be argued in the context of those Legal Issues (*i.e.*, Legal Issues 1, 2 or 5).

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[3] WAC 242-02-210(2)(c) provides:

> A petition for review shall substantially contain: . . . (2) Numbered paragraphs stating: . . . (c) A detailed statement of *the issues presented for resolution by the board that specifies the provision of the act or other statute allegedly being violated* and, if applicable, the provision of the document that is being appealed;

(Emphasis supplied).

[4] The PFR and PHO state these Legal Issues as follows:

> 7. May a local jurisdiction and/or the Department of Ecology, presume maximum build out of all waterfront properties unrelated to actual experience or reasonable probabilities as to project development, when enacting use regulations intended to preserve and protect shorelines?
> 8. Are perceived navigation and visual impacts valid elements to take into consideration in a cumulative impacts analysis prepared to justify a prohibition of use of the shorelines?
>
> . . .
>
> 11. Did the City impermissibly rely upon policies not part of its Comprehensive Plan and Shoreline Master Program when enacting the Ordinance?

Legal Issues 12, 13 and 14:

Legal Issues 12, 13 and 14 as stated in the PFR and reiterated in the PHO challenge the City's compliance with the notice and public participation provisions of the GMA. Noncompliance with RCW 36.70A.035, 130, and .140 are alleged. *See* PFR, at 4-5; and PHO, at 9-10. The notice and public participation procedures for the development of SMPs has been governed by RCW 36.70A.480(2) since 1995. Thus the SMA, not the GMA's notice and public participation procedures, have governed the procedures for adoption of SMPs for almost a decade. The 2003 amendments did not revise, alter or modify this longstanding requirement.

The law has been clear. Petitioner should have known whether the notice and public participation requirements of the GMA or SMA governed the adoption of SMPs. Petitioner's Motion to Clarify changes the basis for the PFR/PHO challenge from a failure to comply with notice and public participation procedures of the GMA, to a challenge to comply with the notice and public participation procedures of the SMA. The restatement introduces a new issue that was not stated in the PFR; the basis of which, Petitioner should have known. The Board does not allow new issues, not stated in the original PFR, to be introduced in any restatement of issues. Therefore, the Board will **deny** the Petitioner's Motion to Clarify and **grant** the Respondent City and DOE's motion to dismiss Legal Issues 12, 13 and 14.

C. Restated and Remaining Legal Issues in CPSGMHB Case No. 04-300013

Based upon the Board's determination in this Order on Motions, the following are the restated Legal Issues remaining in this matter:

1. Does Ordinance No 2003-02 (the **Ordinance**) violate the Growth Management Act (**GMA**), specifically, RCW 36.70A.040 and RCW 36.70A.070, because it is not consistent with and fails to implement the City's Comprehensive Land Use Plan (**Plan**) goals and policies, including its shoreline Master Program polices which are part of the Plan per RCW 36.70A.480(1)? [*Restated per Petitioner*]

2. Does the Ordinance violate the GMA, RCW 36.70A.480(2) and (3), because it is inconsistent with and fails to implement the goals and policies of the Bainbridge Island Shoreline Master Program? [*Restated per Petitioner*]

3. ***Dismissed***

4. ***Dismissed***

5. Is the Ordinance noncompliant with GMA requirements mandating consistency and predictability in the land use decision-making process, including internal inconsistency among development regulations, by imposing different requirements

for siting and construction of private residential docks on parcels with the same zoning and shoreline land use designations? [*Restated per Petitioner*]

6. Dismissed

7. Dismissed

8. Dismissed

9. Does the administrative record demonstrate sufficient "changing local circumstances, new information or improved data" pursuant to WAC 173-26-090 to justify an amendment to the City's Shoreline Master Program banning docks in Blakely Harbor?

10. Dismissed

11. Dismissed

12. Dismissed

13. Dismissed

14. Dismissed

15. If the Board finds the City has not complied with the goals or requirements of the GMA when addressing issues [remaining Legal Issues 1, 2, 5 or 9] does such noncompliance substantially interfere with the fulfillment of the goals of the Act, such as to merit a determination of invalidity?

III. ORDER

Based upon review of the Petition for Review, the briefs and materials submitted by the parties, the GMA, the Board's Rules of Practice and Procedure, prior decisions of this Board and other Growth Management Hearings Boards, case law, and having deliberated and considered the matter, the Board enters the following ORDER:

- Petitioners have **withdrawn** Legal Issues 3, 4, 6 and 10. Legal Issues 3, 4, 6 and 10 are **dismissed with prejudice**.

- Petitioner's Motion to Clarify and Respondents' Motion to Limit Legal Issues 1, 2 and 5 are **granted**. Legal Issues 1, 2 and 5 in this matter are as stated *supra*.

- The City of Bainbridge Island's Motion to Dismiss Legal Issues 7, 8 and 11 is **granted**. Legal Issues 7, 8 and 11 **are dismissed with prejudice**.

- Petitioner's Motion to Clarify Legal Issues 12, 13 and 14 is **denied**. Respondent's Motion to Dismiss Legal Issues 12, 13 and 13 is **granted**. Legal Issues 12, 13 and 14 are **dismissed with prejudice**.

So ORDERED this 6th day of July 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

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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 RCW 242-02-832.