CENTRAL PUGET SOUND
GROWTH PLANNING HEARINGS BOARD
STATE OF WASHINGTON

TWIN FALLS, INC., WEYERHAEUSER REAL ESTATE CO., and SNOHOMISH COUNTY PROPERTY RIGHTS ALLIANCE and DARRELL R. HARTING, Individually, Petitioners, v. SNOHOMISH COUNTY, Respondent.	)	Case No. 93-3-0003 ORDER ON DISPOSITIVE MOTIONS

I. INTRODUCTION

Following a prehearing conference on April 26, 1993, the Central Puget Sound Growth Planning Hearings Board (the Board) entered a Prehearing Order in the above-captioned case on April 28, 1993. The order included a separate schedule for briefing the question whether the Board had jurisdiction over forest land designations as applied to specific parcels of property. Subsequently, the parties briefed and argued this issue and the Board issued an "Order Accepting Board Jurisdiction over Forest Land Designations on Specific Parcels of Property" on May 17, 1993.

The Prehearing Order also contained, among other things, a deadline for filing Dispositive Motions (other than the jurisdictional issue discussed above) by May 12, 1993.

A. INITIAL FILINGS

Pursuant to the schedule established in the Prehearing Order, the following motions were filed with the Board:

1. On May 12, 1993, Snohomish County (the County) filed four "'Respondent's Motions and Argument in Support Thereof" [Legal Issues Nos. 9, 10, 11, 12, 18,20,21,22,23].

2. On May 12, 1993. Weyerhaeuser Real Estate Company (WRECO) filed "WRECO's Dispositive Motion on Issues 9 and l0 in Pre-hearing Order and Memorandum in Support" with the Board.[1] Attached to this motion was a "Declaration of Thomas J. Ehrlichman in Support of WRECO's Dispositive Motion on Issues 9 and 10" [Legal Issues Nos. 9 and 10].

3. On May 12, 1993, Twin Falls, Inc. (Twin Falls) filed "Twin Falls' Dispositive Motion #1" [Legal Issue No.3].

4. On May 12, 1993, "Twins Falls' Dispositive Motions #2" were filed with the Board [Legal Issue No.7].

5. On May 13, 1993, "Twin Falls' Dispositive Motions #3" were filed with the Board[2] but were subsequently withdrawn[3].

The Snohomish County Property Rights Alliance and Darrell R. Harting, individually (SNOCO PRA) did not file any dispositive motions with the Board.

B. RESPONSES

Pursuant to the schedule established in the Prehearing Order, the following responses to dispositive motions have been filed with the Board:

1. On May 19, 1993, "WRECO's Memorandum in Opposition to Snohomish County's Motion on Jurisdiction" was filed with the Board.

2. On May 19, 1993, "Twin Falls' Response to Dispositive Motions by Weyerhaeuser and Snohomish County" was filed with the Board.

3. On May 19, 1993, a "Response of PRA and Harting to Respondent's Motion" was filed with the Board.

1: On May 14. 1993. the Board received a letter. dated the same day, from one of WRECO's legal counsel, Thomas J. Ehrlichman withdrawing the final paragraph in Section IV of this motion (i.e., page 14, lines 3 through 9 of "WRECO's Dispositive Motion on Issues 9 and 10 in Pre-hearing Order and Memorandum in Support").

2: The Board issued a "Third Amended Prehearing Order and Order Granting Snohomish County's 'Motion for an Extension of Time to Respond to Motions'. Order Granting Twin Falls' 'Motion to Accept Twin Falls' Dispositive Motion 3 and Motion to Consider New and /or Supplemental Evidence' and Order Granting SNOCO PRA's 'Motion for Reconsideration of Order Denying SNOCO PRA and Halting's Objections to Pretrial Order'" on May 17. 1993 that permitted Twin Falls to file its Dispositive Motions #3 one day late.

3: Twin Falls withdrew Dispositive Motion #3 in its "Reply to County's Response to Twin Falls' Dispositive Motions I and 2", at page 27. filed on May 26. 1993.

4. On May 21, 1993, "Snohomish County's Response to Twin Falls' Dispositive Motions Nos. 1,2 and 3" was filed with the Board. A "Declaration of Deborah J. Flynn in Support of Snohomish County's Response to Twin Falls' Dispositive Motions 1, 2 and 3" was attached to the response.

5. On May 21, 1993, the County also filed a "Memorandum in Opposition to WRECO's Dispositive Motion on Issues 9 and 10".

C. REBUTTALS TO RESPONSES

1. On May 26, 1993, "Snohomish County's Rebuttal to Memoranda in Opposition to County's Motions" was filed with the Board.

2. On May 26, 1993, Twin Falls filed its "Reply to County's Response to Twin Falls' Dispositive Motions 1 and 2". Attached to the reply was a "Declaration of Scott E. Stafne in Support of Twin Falls' Reply to County's Response to Twin Falls' Dispositive Motions 1 and 2" and an "Objection to Declaration of Debra *Flynn".* In its reply, Twin Falls withdrew its Dispositive Motion 3.

3. On May 27, 1993, "WRECO's Reply Memorandum in Support of Its Dispositive Motion on Issues 9 and 10" was filed with the Board.

4. On May 27, 1993, "WRECO's Memorandum Re: Twin Falls' Dispositive Motions" was filed with the Board.

A hearing on these motions was held at 10:00 a.m. on June 1, 1993 in the Office of the Administrator for the Courts conference room at One Union Square in Seattle. Scott E. Stafne represented Twin Falls. Jerome L. Hillis and Mark C. McPherson appeared on behalf of WRECO. Douglas J. Smith represented SNOCO PRA. The County was represented by Carol J. Weibel. The parties' oral arguments were' heard by the Board's three members: M. Peter Philley, presiding, Joseph W. Tovar and Chris Smith Towne. Court reporting services were provided by Janet Neer, CSR, of Robert H. Lewis & Associates, Tacoma.

II. DISCUSSION OF SPECIFIC MOTIONS

A. WRECO'S MOTION AND SNOHOMISH COUNTY'S MOTION #2

"WRECO's Dispositive Motion on Issues #9 and 10..." requests affirmative rulings from the Board that:

> A. The Board has jurisdiction to determine whether Snohomish County was required to comply with "statutory and local processes already in place governing land use decisions" when it adopted Motion 92-283 and Ordinance

Nos. 92-101 and 92-102 (collectively referred to as "Motion and Ordinances").

B. The County was required to comply with "statutory and local processes already in place" at the time it adopted the Motion and Ordinances.

In its second dispositive motion, Snohomish County asks the Board to dismiss these Issues:

> Snohomish County moves to dismiss Issues Nos. 9 and 10 as stated in the Prehearing Order of April 28, 1993 as moot since the Board does not have jurisdiction to consider the essentially relevant Issues Nos. 11 and 12, in that order .

Legal Issue 9 asks:

> Does the Board have jurisdiction to determine whether Snohomish County was required to comply with statutory and local processes already in place governing land use decisions when it adopted the Motion and Ordinances?

Legal Issue 10 inquires:

> Was the County required to comply with the statutory and local processes already in place at the time it adopted the Motion and Ordinances?

Reducing the dispositive motions on these two legal issues to their essentials, WRECO claims that this Board does have jurisdiction to determine whether the County complied with statutory and local processes already in place outside the Growth Management Act (GMA or the Act) and the State Environmental Policy Act (SEPA), while the County maintains that the Board lacks such jurisdiction.

Whether the Board has jurisdiction over" statutory and local processes already in place" became an issue because of earlier rulings by the Board. In *Gutschmidt v. Mercer Island*, CPSGPHB Case No.92-3-0006, the Board held that:

> Paraphrased, RCW 36. 70A.280(1) indicates that the Board has jurisdiction to make decisions only on issues claiming that the GMA, or SEPAas it relates to GMA requirements, was not complied with when plans and regulations were adopted.
>
> This Board has jurisdiction *only* over matters specified in RCW 36.70A.280. Therefore, when a petition for review alleges that a local jurisdiction failed to comply with a statute other than one named in RCW 36.70A.280(1), the Board does not have jurisdiction to make a decision on the issue of compliance.

> This does not mean that the Board will not take official notice of " other" statutes besides those specified in RCW 36.70A.280.... The key distinction is that the Board has jurisdiction to decide only whether adopted GMA documents are in compliance with the GMA or SEP A: the Board does not have jurisdiction to determine whether "other" statutes have been violated. *Gutschmidt,* Final Decision and Order, at 8.

Minimum Guidelines

A portion of the wording in Legal Issue 9 is taken from W AC 365-190-040(2)(b), entitled "Adoption process", which provides:

> Statutory and local processes already in place governing land use decisions are the minimum processes required for designation and regulation pursuant to RCW 36.70A.060 and 36.70A.170... (emphasis added).

WRECO contends that this language mandates that the County comply with existing requirements for enacting land use legislation, whether those requirements exist in the Planning Enabling Act (Chapter 36.70 RCW), the Snohomish County Charter or specific provisions of the Snohomish County Code. Furthermore, WRECO maintains that the Board has subject matter jurisdiction to review these other statutory and local processes to determine whether they were violated when the County adopted its forest lands Motion and Ordinances pursuant to the GMA.

As the Board has previously indicated, RCW 36.70A.280, entitled "Matters subject to board review", is the controlling statute for determining the extent of the Board's subject matter jurisdiction. Subsection (1) provides:

> (1) A growth planning hearings board shall hear and determine only those petitions alleging either: (a) That a state agency, county, or city is not in compliance with the requirements of this chapter. or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto- adopted under RCW 36.70A.040; or (b) that the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62. 035 should be adjusted. (emphasis added).

WRECO claims that because RCW 36.70A.050 requires the Washington State Department of Community Development (DCD) to adopt guidelines, the County must comply with those guidelines. More importantly for purposes of the dispositive motions, WRECO alleges that since the guidelines were mandated by the GMA, this Board has jurisdiction over them.

WRECO's argument is somewhat misplaced. DCD's obligation to adopt guidelines is found at RCW 36.70A.OSO(I), which states:

> Subject to the definitions provided in RCW 36.70A.030, the department [of community development] shall adopt guidelines under chapter 34.05 RCW no later than September 1, 1990, to guide the classification of: (a) Agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. . . .

DCD complied with this directive by adopting "Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas" (the Minimum Guidelines) that became effective on Apri115, 1991.

In addition to guiding the classification of the specified natural resource lands, as indicated above, the purpose of the Minimum Guidelines is described at RCW 36.70A.050(3) as follows:

> . . . The intent of these guidelines is to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170.

The Minimum Guidelines themselves reinforce the legislature's intent. DCD describes how it contemplates the Minimum Guidelines will be used. W AC 365-190-020 states:

> Purpose. The intent of this chapter is to establish minimum guidelines to assist all counties and cities state-wide in classifying agricultural lands, forest lands, mineral resource lands, and critical areas. These guidelines shall be considered by counties and cities designating these lands.

DCD's interpretation is consistent with RCW 36.70A.170(2) which requires counties and cities designating natural resource lands and critical areas, pursuant to RCW 36. 70A.170(1), to "consider" DCD's Minimum Guidelines.

In a prior decision, the Board has indicated in a footnote that:

> DCD's Minimum Guidelines are advisory only -- they are not mandatory. RCW 36.70A.170(2) directs that cities and counties "consider" the guidelines; they are not bound to follow them. *Tracy v. Mercer Island,* CPSGPHB Case No. 92-3-0001, Final Decision and Order, at 11, n. 3.

WRECO, in attempting to distinguish this case from *Tracy,* accurately points out that the quote immediately above came from a footnote and not a Board conclusion. More importantly, WRECO claims that in *Tracy,* the Board was referring to WAC 365-190-040(2)(a), which uses the auxiliary verb "should" when referring to what public participation should require. WRECO agrees that the use of the auxiliary verb "should"

xxxxxxxxxxxxxxxxxxxxxxx

> Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication. *Chaussee v. Snohomish County Council,* 38 Wn. App. 630,636, 689 P.2d 1084 (1984). *State v. Munson,* 23 Wn. App. 522, 524, 597 P.2d 440 (1979); see *Human Rights Comm'n v. Cheney Sch. Dist.* 30, 97 Wn.2d 118, 125, 641 P.2d 163 (1982). (emphasis added).

Although this Board is not technically an administrative agency, it is a creature of statute, charged with interpreting certain specified statutes. *Nichols v. Snohomish County*, 47 Wn. App. 550, 736 P.2d 670 (1987) further provides:

> The Snohomish County Civil Service Commission is a creature of statute and is necessarily limited to the powers and duties authorized by the Legislature. *Human Rights Comm'n* v. *Cheney Sch. Dist.* 30, 97 Wn.2d 118,641 P.2d 163 (1982); *Cole v. Utilities* & *Transp. Comm'n,* 79 Wn.2d 302,485 P.2d 71 (1971). *Nichols,* at 553 (emphasis added).

Finally, *Cole v, Washington State Utilities and Transportation Commission,* 79 Wn. 2d 302,306,485 P.2d 71 (1971), held:

> An administrative agency must be strictly limited in its operation to those powers granted by the legislature. *State ex. rei. Pun* 1 v. *Department of Public Ser.,* 21 Wn.2d 201, 150 P.2d 709 (1944) (emphasis added).

Gutschmidt, Order on Prehearing Motions, at 10 - 11. Nothing stated by WRECO during oral argument convinced the Board that its decision in *Gutschmidt* quoted above should be reversed.

WRECO's June 9, 1993 letter, however, cites to a more recent case, *Municipality of Metropolitan Seattle v. Public Employment Relations Comm'n (Metro v. PERC),* 118 Wn. 2d 621, 826 P.2d 158 (1992). In that case, the Washington State Supreme Court declared:

> When interpreting the Public Employees' Collective Bargaining Act, we will liberally construe the act in order to accomplish its purpose.
>
> The purpose of the act "is to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right.

> With that purpose in mind, we interpret the statutory phrase "appropriate remedial orders" to be those necessary to effectuate the purposes of the collective bargaining statute and to make PERC's lawful orders effective. *Metro v. PERC,* at 633 (emphasis added; footnotes and citations omitted).

WRECO argues that this Board's implied power to determine compliance with local procedure is "necessary to effectuate the purposes" of the GMA. Furthermore, citing *Sisley v. San Juan County,* 89 Wn.2d 78, 83, 569 P.2d 712 (1977), WRECO contends that compliance with the GMA is "inextricably interrelated with and supplemented by the requirements *of*' local procedure.

The Board is cognizant of the *Metro v. P ERC* decision. The court indicated that:

> PERC derives its power from RCW 41.58, the statute that creates the Commission, and from RCW 41.56, the Public Employees' Collective Bargaining Act. *Metro v. PERC,* at 633.

RCW 41.56.905 provides:

> The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose.... (emphasis added).

The Washington State Supreme Court has acknowledged this legislative request by indicating:

> In interpreting the Public Employees' Collective Bargaining Act we are guided by the legislative directive that the Act is remedial in nature and is to be liberally construed in order to effect its purposes. *Yakima v. International Ass'n of Fire Fighters, Local* 469, 117 Wn.2d 655,669-670, 818 P.2d 1076 (1991).

Unlike the Public Employees' Collective Bargaining Act, the GMA does not contain a liberal construction clause. In effect, WRECO is now asking to Board to impose precisely such a clause. The Board cannot comply with such a request. Instead, the Board is limited by the language in the Act. RCW 36.70A.280(1) indicates that:

> A growth planning hearings board shall hear and determine only those petitions alleging either: (a) That a state agency, county, or city is not in compliance with the requirements of this chapter, or chapter *43.21C* RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040; or (b) that the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted. (emphasis added).

Furthermore. if the legislature's use of the word "only" in RCW 36.70A.280(1) is not convincing, the following language in RCW 36.70A.300(1) is conclusive:

> The board shall issue a final order within one hundred eighty days of receipt of the petition for review, or, when multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated. Such a final order shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.O40.... (emphasis added).

The Board also notes that the GMA is not totally silent as to procedural requirements. For example, RCW 36.70A.140 requires the establishment of enhanced public participation procedures; RCW 36.70A.210(2)(e) mandates that counties hold a public hearing; and RCW 36.70A.290(2) designates publication requirements. The Board clearly has jurisdiction over these procedural matters since they fall within the auspices of GMA "requirements." However, the Legislature elected to limit the Board to reviewing the GMA and SEPA as it relates to the Act. Therefore, this Board simply does not have inherent or implicit authority to review other statutes and processes. Although it makes perfect practical sense for the Board to determine whether other procedural statutes and processes outside the GMA (but utilized in taking a GMA action, such as notice and publication requirements) have been violated, only the legislature can expand the Board's jurisdiction to encompass such "other" statutes and processes.[5] The Board has twice before pointed out this practical problem (see *Snoqualmie,* at 16, n 15; *Gutschmidt,* at 8, n 2); furthermore, it was a legal issue in this Board's first case (see *Tracy,* at 20). Nonetheless, the legislature has not subsequently amended RCW 36.70A280 or .300. The Board presumes that this *silence* reveals the legislature's intent not to expand the Board's jurisdiction.

Conclusion

The County's second dispositive motion, asking the Board to dismiss Legal Issues 9 and 10 is granted; conversely, WRECO's motion seeking affirmative answers from the Board on Legal Issues 9 and 10 is denied. The Board does not have jurisdiction to determine whether Snohomish County was required to comply with statutory and local processes already in place governing land use decisions when it adopted the Motion and Ordinances. Although the County may be required to comply with the statutory and local processes already in place at the time it adopted the Motion and Ordinance, this Board does not have jurisdiction to determine whether those "other" statutes and processes were violated. WRECO will have to proceed in superior court to resolve that issue.

---

5 The Board takes exception to the County's position that making determinations whether "other" procedural statutes and local processes were violated in enacting a GMA-required ordinance is "far beyond its [the Boards'] expertise". (See "Respondent's Motions and Argument in Support Thereof. at 6, line 15).

B. SNOHOMISH COUNTY'S MOTION #1

In its first dispositive motion:

> Snohomish County moves to dismiss Issue Nos. 11 and 12 as stated in the Prehearing Order entered herein on April 28, 1993 for lack of subject matter jurisdiction.

Legal Issue 11 provides:

> What are the applicable statutory and local processes in Snohomish County?

Legal Issue 12 asks:

> If the County is required to comply with the statutory and local processes already in place at the time it adopted the Motion and Ordinances, did the County comply with those statutory and local processes?

Conclusion

Legal Issue 12 relies on the language of W AC 365-190-040(2)(b) (i.e., "statutory and local processes already in place"). The County's motion on this issue is granted and Legal Issue 12 is dismissed. As the Board already held in its ruling on Legal Issues 9 and 10, cities and counties need not comply with DCD's Minimum Guidelines. The Minimum Guidelines are advisory only. Cities and counties must only consider them when making designations and adopting regulations. However, the threshold question is not whether the County is required to comply with requirements external to the GMA in taking an action required by the GMA, but whether the Board is empowered to make the determination that these external requirements have been violated. As indicated above, this Board does not have jurisdiction to make this determination -- only the superior courts do.

The county's motion regarding Legal Issue No.11 is also granted and that issue dismissed. As previously indicated, the Board does not have jurisdiction to determine whether statutes and local processes external to the GMA have been violated. In so ruling the Board is not stating that these other statutes and local processes are unimportant; indeed, the Board may have to review these "other" statutes and enactments in order to reach a decision whether the County complied with the GMA. The Board is simply, precluded from determining whether they have been violated.

C. SNOHOMISH COUNTY'S MOTION #3

In its third dispositive motion:

> Snohomish County moves to dismiss Issue No.18 as stated in the Prehearing Order dated April 28, 1993 for the reason that the Board does not have jurisdiction to consider this issue.

Legal Issue 18 asks:

> Does the Board have jurisdiction to determine whether Snohomish County violated Chapter 64.40 RCW, 42 U.S.C. 1983, the 5th and 14th Amendments to the Federal Constitution, Article I at Section 3 and 16 of the Washington State Constitution and Chapter 4.96 RCW or whether the County's conduct constituted tortious interference with contractual relations (as fully described in WRECO's Petition for Writs of Review and Prohibition and Complaint for Damages filed in Snohomish County Superior Court, Cause of Actions Nos. 3 through 8)?

Conclusion

The Board agrees that it lacks the requisite subject matter jurisdiction over the statutes listed in Legal Issue 18 and grants the motion; Legal Issue 18 is dismissed. For the reasons stated in the discussion of Legal Issues 9 and 10 above, the Board does not have jurisdiction over Chapter 64.40 RCW, 42 U.S.C. 1983, and Chapter 4.96 RCW or whether the County's conduct constituted tortious interference with contractual relations. As for the constitutional claims raised by the Petitioners, the Board reaffirms its ruling in *Gutschmidt* (see Order on Prehearing Motions, at 11 -13) where it denied similar claims regarding constitutional jurisdiction. This Board simply does not have authority to declare unconstitutional an action taken by local governments. This conclusion does not mean that the County has or has not violated the federal or state constitutions; it simply means that the judiciary must resolve the question, not this quasi-judicial state agency.

D. SNOHOMISH COUNTY'S MOTION #4

In its fourth dispositive motion:

> Snohomish County moves for dismissal of Issues Nos. 20 through 23 as stated in the Prehearing Order dated April 28, 1993 insofar as those issues require determination of whether Snohomish County complied with statutory, constitutional, and common law requirements other than Chapter 36.70A RCW and Chapter 43.21C because the Board does not have jurisdiction over such matters.

Legal Issue No.20 asks:

> Whether proper notice was given to affected property owners of the public hearings to consider adoption of the Motion and Ordinances?

Legal Issue No.21 asks:

> If Snohomish County was required to notify property owners of the public hearing to consider adopting the Motion and Ordinances, did the Snohomish County Council provide such notice'?

Legal Issue No.22 asks:

> Did Snohomish County conduct adequate public hearings on the Motion and Ordinances?

Legal Issue No.23 asks:

> Was the Snohomish County Council required to and. did it properly take into account the public input received prior to enacting the Motion and Ordinances?

Conclusion

Legal Issues 20 through 23 as presently written are not limited to the GMA, or SEPA as it relates to the Act. For the reasons stated in the discussion of Legal Issues 9 and 10, the County's motion is granted and Legal Issues 20 through 23 will be rewritten so that each issue is limited to the requirements of the GMA and SEPA.

E. TWIN FALLS' MOTION # 1

Twin Falls dispositive motion 1 requests:

> Twin Falls respectfully moves that this Board declare that Motion 92-283 and Ordinances 92-101 and 92-102 are not in compliance with the GMA because they: (1) designate only Forest Land pursuant to RCW 36.70A.070 rather than Agricultural Land. Forest Land. Mineral Land. and Critical Areas; and (2) impose development regulations applicable to only Forest Land pursuant to RCW 36.70A.060. rather than coordinated development regulations on Agricultural Land. Forest Land, Mineral Land. and Critical Areas.

Twin Falls' Dispositive Motion #1 addresses the matters framed in Legal Issue 3 of the Board's Prehearing Order as follows:

Are the legislative scheme and goals of the GMA frustrated when the County adopts development regulations for only one natural resource rather than all.. within the appropriate time limit for designating all natural resources?

Positions of the Parties

a. Twin Falls

Twin Falls, in its brief on Dispositive Motion #1, presents two basic theories as to why Snohomish County's Motion and Ordinances are not in compliance with the GMA. Twin Falls argues that the GMA requires "coordinated development regulations" and that this is not achieved by Snohomish County's enactments. Twin Falls states that Snohomish County's Motion and Ordinances:

> impose development regulations applicable to only Forest Land pursuant to RCW 36.70A.O60, rather than coordinated development regulations on Agricultural Land, Forest Land, Mineral Land, and Critical Areas. (emphasis added). Twin Falls' Dispositive Motion #1, at I.

In making its argument, Twin Falls cites to the goals of the Act, specifically RCW 36.70A.020(8):

> Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

Twin Falls goes on to argue that the GMA, while it does not state a priority among the thirteen goals:

> . . .makes clear that the process of planning starts with municipalities taking into account Natural Resource Lands. This intent is obvious from RCW 36.70A.060 (which requires counties and cities to prepare interim development regulations to conserve natural resource lands and critical areas prior to the adoption of comprehensive plans);... (emphasis added). Twin Falls' Dispositive Motion #1, at 4.

Twin falls further argues that, by establishing the same deadline date for adoption of all the resource lands regulations, the GMA in effect requires the simultaneous adoption of resource lands regulations for forest lands, agricultural lands, mineral resource lands and critical areas. While not explicitly stated, Twin Falls' simultaneous adoption argument suggests that the result would be "coordinated development regulations".

Second, Twin Falls argues that potential conflicts between various resource lands and critical areas regulations may need to be reconciled at the stage of enactment of the regulations. In its brief, Twin Falls argues that adopting only forest land regulations frustrates the direction in the Minimum Guidelines that multiple designations must be reconciled. Movant cites to WAC 365-190-040(1) which states.. in part:

> These guidelines may result in critical areas designations that overlay other critical area or natural resource land classifications. That is, if two or more critical area designations apply to a given parcel, or portion of a given parcel, both or all designations apply. For counties and cities required or opting to plan under Chapter 36.70A RCW, reconciling these multiple designations will be the subject of local. development regulations adopted pursuant to RCW 36.70A (emphasis added).

In essence, Twin Falls argues that, in order for forest land regulations adopted pursuant to RCW 36.70A.O60 to be in compliance with the GMA., they must be the product of "reconciliation planning" that presumably resolves any problems created by overlapping resource lands designations.

b. Snohomish County

Snohomish County argues that Twin Falls' brief contains an admission that there is no explicit statutory requirement for simultaneous adoption of regulations addressing all manner of resource lands:

> In support of its argument, Twin Falls does not rely on any specific statutory language which requires simultaneous designations and regulations because there is none. Instead, Twin FaI1s argues: "The imposition of a common deadline... strongly suggests that the legislature intended such designations to be done at the same time." (Snohomish County's Response to Twin Falls' Dispositive Motions Nos. 1, 2 and 3 at 2; emphasis supplied).

The County goes on to further argue that there is nothing in the DCD Guidelines that suggests that simultaneous adoption is required, and that, even if there were such direction, the Guidelines are advisory rather than mandatory .

Discussion

RCW 36. 70A.170(1) requires cities and counties to designate where appropriate agricultural lands.. forest lands, mineral resource lands and critical areas by September 1, 1991. RCW 36.70A.060(1) requires cities and counties to adopt development regulations that assure the conservation of such designated lands and areas by the same date.

Twin Falls has presented interesting argument as to the desirability and advisability of preparing all the resource lands and critical areas designations and regulations simultaneously. Nothing in the Act precludes a jurisdiction from doing so; however, the Board rejects the argument that the forest lands regulations do not comply with the GMA simply because the other resource lands regulations have not yet been adopted.

While it may be good public policy to designate and regulate such lands simultaneously, there is no explicit direction in the Act requiring a linkage of forest land regulations and other resource land and critical area regulations, nor is the Board persuaded that it is implicitly required. The petitioner's speculation that subsequent adoption of those other resource land and critical areas regulations could result in overlapping regulations was not refuted. However, the Board heard no persuasive argument that this would *result* in chaos or otherwise thwart the objectives of the Act. The Board also notes that, absent the county's adoption of other resource land and critical areas regulations, the forest land regulations create no ambiguities or conflicts that presently must be reconciled.

Even if petitioners had cited a credible example of dire consequences due to overlapping regulations, it is difficult to overcome the Act's clear direction that forest lands are to be conserved and regulations are to be adopted to do *so,* regardless of actions taken or not taken with regard to agricultural lands, mineral resource lands or critical areas.

By reaching this conclusion, the Board does not dismiss the importance that all jurisdictions planning under the Act should give to the mandate to designate and regulate all resource lands and critical areas. If Snohomish County has failed to adopt interim regulations for critical areas, mineral resource lands and agricultural lands, that fact will enable a person with standing to file a separate petition for review with the Board or otherwise pursue sanctions for non-compliance[6]. However, the failure of the County to

---

6: The Board notes that ESHB 1761 was passed by the Legislature and was effective June l, 1993. Section 5 of that legislation states:

> NEW SECTION. Sec. 5. A new section is added to chapter 36.70A RCW to read as follows:
>
> The governor may impose a sanction or sanctions specified under RCW 36.70A340 on: (1) A county or city that fails to designate critical areas, agricultural lands, forest lands, or mineral resource lands under RCW 36.70A.170 by the date such action was required to have been taken; (2) a county or city that fails to adopt development regulations under RCW 36.70A.O60 protecting critical areas and conserving agricultural lands, forest lands, or mineral resource lands by the date such action was required to have been taken; (3) a county that fails to designate urban growth areas under RCW 36.70A.110 by the date such action was required to have been taken: and (4) a county or city that fails to adopt its comprehensive plan or development regulations when such actions are required to be taken.
>
> Imposition of a sanction or sanctions under this section shall be preceded by written findings by the governor, that either the county or city is not proceeding in good faith to meet the requirements of the act; or that the county or city has unreasonably delayed taking the required action. The governor shall consult with and communicate his or her findings to the appropriate growth planning hearings board prior to imposing the sanction or sanctions. For those counties or cities that are not required to plan or have not opted in, the governor in imposing sanctions.

act on other natural resource lands and critical areas designations and regulations is not an issue before the Board in this case, nor would such a finding, prima facie, invalidate the County's forest lands regulations.

While the Board wi1l deny the motion, the Board notes that Twin Fa1ls' brief does make a number of legitimate points. Among these is the observation that the Act requires resource lands and critical areas to be designated, protected and conserved before the adoption of the comprehensive plans. Clearly, the legislature determined that these major lands and areas were so important that their conservation and protection mandated adoption of interim regulations prior to the adoption of comprehensive plans and subsequent implementing regulations (RCW 36. 70A.170).

Further, when it comes to planning and growth management, to paraphrase Twin Falls, "...planning starts with .. taking into account resource lands." In determining where growth is to occur, the first order of business is determining where growth should not occur and/or where growth would be subject to natural resource use considerations or critical areas constraints.

The Board notes that the Act, at RCW 36.70A.060(1), requires the question of resource lands and critical areas regulations to be revisited after adoption of the comprehensive plans. Only after the thorough consideration of alternatives, resources (fiscal as well as natural) and priorities will it be possible to put these regulations into final and complete form as a part of the regulations implementing the comprehensive plan (RCW :'6.70A.120). Thus, Snohomish County and others planning pursuant to RCW 36.70A.040 should expect to follow both of the Act's mandates: designate and regulate to protect/conserve prior to plan adoption, as directed by RCW 36.70A.170 and RCW 36.70A.060(1), and then review those regulations and alter them if and as appropriate when they adopt comprehensive plans and implementing regulations as directed by RCW 36.70A.060(3).

The Board notes that competing values and priorities permeate the comprehensive planning process and the regulations to implement adopted plans. The reconciliation that must take place among these competing and sometimes conflicting values will occur within comprehensive plans after public analysis and debate. Likewise, RCW 36.70A.120, which requires that regulations be consistent with and implement adopted plans, will further reconcile any apparent conflicts or inconsistencies among critical areas and natural resource lands regulations. Thus, the adoption of regulations that are consistent with and implement comprehensive plans will result in the 'coordinated development regulations' that Twin Falls correctly identifies as an ultimate goal of the Act.

---

shall consider the size of the jurisdiction relative to the requirements of this chapter and the degree of technical and financial assistance provided.

Conclusion

For the foregoing reasons, the Board does not agree that Snohomish County's adoption of the Forest Lands regulations alone 'frustrates the GMA' and therefore denies Twin Falls' Dispositive Motion # I. Because this dispositive motion answers the question posed by Legal Issue 3, that issue is dismissed.

F. TWIN FALLS' MOTION #2

Twin Falls' Dispositive Motion #2 states:

> Twin Falls respectfully moves this Board to declare that Snohomish County's classification and designation of Forest Land is not in compliance with the GMA's definition of Forest Land.

In oral argument during the June I, 1993 hearing on the dispositive motions in this case, the Board was advised that the motion quoted above addresses Legal Issue 7 as outlined in the Prehearing Order and subsequent amendments. Legal Issue 7 provides:

> Do the Motion and Ordinances classify , designate and assure the conservation of forest land in compliance with the requirements of RCW 36.70A.170, RCW 36.70A.O60 and Chapter 365-190 WAC, and the definitions contained in RCW 36.70A.O30?7
>
> A. Did the County improperly add an additional criterion to the minimum GMA criteria by using the identity of the landowner as the determining criterion in designating forest land?
>
> B. Did the County fail to comply with DCD's minimum guidelines at W AC 365-190-040(1) by changing the landowner's "right to use his or her land under current law"?
>
> C. Did the County fail to comply with the GMA by using its designation of the landowner's property to create new commercial land rather than to preserve continued use of the property for the commercial production of timber?

7 The Board's Prehearing Order used the verb "classify" as the active verb for Legal Issue 7. Legal Issue 7 was amended by the Board's "Order Amending Prehearing Order": the verb "classify" was deleted and replaced with the phrase: "designate and assure conservation or'. Subsequently, the Board entered a "Second Amended Prehearing Order" that again modified Legal Issue 7: the phrase "designate and assure conservation of' was replaced by the verb "classify"

In answering the questions posed in Legal Issue 7, the Board must review the County's action to determine whether it complies with the Growth Management Act as it relates to designating forest lands and then adopting development regulations that assure the conservation of such lands (i.e., RCW 36.70A.170(1)(b) and .060(1) respectively). Twin Falls has asked the Board to determine Legal Issue 7 now by granting its dispositive motion on the issue rather than waiting until the hearing on the merits.[8]

W AC 242-02-530(4) is the Board's rule dealing with dispositive motions. It provides:

> Dispositive motions on a limited record, similar to a motion for summary judgment in superior court or a motion on the merits in the appellate courts, are permitted. Time frames for making and responding to such a motion shall be established by the presiding officer .

This Board has never addressed the purpose of dispositive motions or limits upon this type of motion. In drafting WAC 242-02-530(4), the members of the three growth planning hearings boards debated the merits of having a "summary judgment" process available to the parties. The joint boards specifically rejected calling such a motion a "summary judgment" and, instead, merely referred to the existence of the Superior Court Civil Rules (CR). Thus, although a dispositive motion before a board and a motion for summary judgment before a superior court may be similar, the Board is not constrained by CR 56 time limits or case law interpretation of that rule.

When a petitioner files a petition for review, the legal issues to be determined by the Board mayor may not be clearly specified, despite the provision in W AC 242-02-210(2)(c) requiring a "detailed statement of issues". Once the specific legal issues have been framed at the prehearing conference, deadlines for filing dispositive motions are routinely established and a hearing on dispositive motions scheduled by the presiding officer. If the moving party ultimately prevails on its dispositive motion, at least a portion of a case can be resolved prior to the hearing on the merits of the petition for review. Therefore, the purpose of a dispositive motion is to expedite the process of having a legal issue considered by the Board. However, such review can only occur in the appropriate circumstances.

Ideally, the "perfect" dispositive motion is one that requires consideration of purely legal issues without reference to any exhibit (i.e., facts) whatsoever. Motions questioning the Board's subject matter jurisdiction are excellent examples of such a dispositive motion. They are dispositive because, if the Board does not have jurisdiction, portions of the case or the entire case goes away. However, few things are perfect -- nor does the Board's rule

8 The hearing on the merits in this case is scheduled for July 12, 1993.

about such motions require that only purely legal questions be raised by dispositive motions.

As the rule itself indicates, a dispositive motion must be based on a liumited record. Strictly interpreted, the "limited record" referred to in WAC 242-02-530(4) could mean "no reliance on the record below", i.e., no reference to exhibits as discussed above other than a stipulation that an ordinance has been adopted pursuant to some GMA requirement, or it could mean "only the specific ordinance(s) adopted by a local jurisdiction that is the subject of the appeal to the Board". While this Board will not yet adopt such a strict interpretation of the rule, the more exhibits that a motion refers to beyond the ordinance(s) in question, the less likely it is that the Board will grant the motion.

Second, much like a CR 56 motion, dispositive motions must be based on uncontested material facts. If there is a dispute as to any material facts, the Board will not grant the motion. Instead, the motion will be denied and the Board will await the final hearing on the merits of all issues and its review of all the exhibits from the record below before issuing its ultimate decision.

A third related Board consideration in deciding whether to grant or deny a dispositive motion is necessitated by practical concerns. If a motion goes to the heart of the issue(s) before the Board and it is one of first impression and/or complex in nature, the Board generally cannot compress making its decision on the motion into the short period of time allotted to decide dispositive motions. Unlike other quasi-judicial bodies, growth planning hearings boards must issue a final decision and order relatively promptly.

RCW 36.70A.300(1) provides:

> The board shall issue a final order within one hundred and eighty days of receipt of the petition for review, or when multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated....

Because of this requirement, the Board usually schedules its ultimate hearing on the legal issues approximately 100 days from the date of filing of the petition for review. Dispositive motions are usually heard on approximately the seventieth day in the life of a Board's case. Between the hearing on the motions and the main hearing on the remaining issues, the parties are required to submit prehearing briefs pursuant to a sequential filing schedule. A self-imposed deadline for issuing the Board's order on the dispositive motions is also established in order to provide the parties adequate notice of remaining issues so that they can sufficiently brief those issues. The Board is afforded very little time between the time the hearing on the motions takes place and the first prehearing briefs are due. The Board cannot rush making difficult decisions when it has only a limited time for review to begin with. Instead, to some extent, the Board must protect the short time it is given for deliberations and decision making.

Conclusion

Turning then to "Twin Falls' Dispositive Motions #2", the Board denies the motion for several reasons outlined *below*. However, in denying the motion, the Board is not taking a position on the merits of Twin Falls' arguments; the Board must still answer the question raised by Legal Issue 7 when it enters its Final Decision and Order in this case.

The first reason for denying the motion is because it is based on more than a "limited record". In deciding the motion, the Board would have to review a lengthy portion of the relevant exhibits from the record. Although the Board ultimately must review all exhibits from the record below, time constraints preclude such a review now, especially in light of the technical complexity of some of the documents that were attached to the response and rebuttal.

Closely related to this rationale is the fact that Twin Falls is presenting the portion of the record it feels is necessary for its motion to prevail, yet it has not declared that it has reviewed the entire record in this case. Although Twin Falls mayor may not ultimately prevail on the substantive merits of Legal Issue 7, this Board will not review less than all exhibits from the record without a declaration or affidavit from the moving party stating that it has indeed reviewed the entire record.

Second, the subject matter of the motion is both complex and one of first impression for the Board. The Board simply will not rush its decision on such an important issue. Nonetheless, the Board must still enter its ultimate decision on the issue within 180 days of the date that the last petition for review was filed in this consolidated case. Therefore, although Twin Falls wi11 not get a decision on the substantive merits of this issue as promptly as it desires, it is still protected by the mandate of RCW 36.70A.300 for the Board to issue an expeditious decision.

Third, in reviewing Twin Falls' motion and the County's response to it, material facts are in dispute. In particular , the parties disagree as to the appropriateness of the 40 acre parcel criterion contained in the Interim Forest Land Conservation Plan, attached to Motion 92-283. The Board wi11 not grant a dispositive motion when material facts are disputed. Denying a dispositive motion when material facts are in dispute is even more appropriate in this instance where the Board has permitted the parties to submit supplemental evidence pertaining to how the forest land designation is applied to specific parcels of property. Allowing supplemental evidence may cause even more dispute as to key facts.

Finally, Legal Issue 7 was raised by both Twin Falls and WRECO. Although these two petitioners may seek similar remedies, one of the main reasons the Board consolidated the three cases in this matter was to enable it to hear the perspective from more than one petitioner before deciding an issue. By deciding this issue as a dispositive motion, the Board would not hear argument from WRECO on one of its issues since WRECO did not file a dispositive motion on Legal Issue No.7 nor join Twin Falls in its argument.

III. ORDER

A. Snohomish County's four dispositive motions, as specified in "Respondent's Motions and Argument in Support Thereof", are granted:

1. Legal Issues 9, 10, 11 and l2 are dismissed in their entirety.

2. Legal Issue 18 is dismissed in its entirety.

3. Legal Issues 20 through 23 are dismissed as far as they address whether the County complied with constitutional requirements or statutory requirements other than the GMA or SEPA. The following underlined language is added to Legal Issues 20 through 23 as specified in the Prehearing Order and Third Amended Prehearing Order, and the issues as modified control for the duration of this case:

Legal Issue No.20:

> Whether proper notice pursuant to the GMA and SEPA was given to affected property owners of the public hearings to consider adoption of the Motion and Ordinances?

Legal Issue No.21:

> If Snohomish County was required, pursuant to the GMA and SEPA, to notify property owners of the public hearing to consider adopting the Motion and Ordinances, did the Snohomish County Council provide such notice?

Legal Issue No.22:

> Pursuant to the GMA and SEPA, did Snohomish County conduct adequate public hearings on the Motion and Ordinances?

Legal Issue No.23 :

> Pursuant to the GMA and SEPA, was the Snohomish County Council required to and did it properly take into account the public input received prior to enacting the Motion and Ordinances?

B. WRECO's motion, as specified in "WRECO's Dispositive Motion on Issues 9 and 10 in Pre-Hearing Order and Memorandum In Support" is denied.

C. Twin Falls' Dispositive Motion # 1 is denied; therefore Legal Issue 3 is dismissed.

D. Twin Falls' Dispositive Motion #2 is denied.

So ORDERED this 11th day of June, 1993.

CENTRAL PUGET SOUND GROWTH PLANNING HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar
Board Member

Chris Smith Towne
Board Member

\