CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

Barry Shulman and Jan Shulman,	)	
	)	
Petitioners,	)	**Case No. 95-3-0076**
	)	
v.	)	FINAL DECISION AND ORDER
	)	
City of Bellevue,	)	
	)	
Respondent.	)	
	)	

I. Procedural Background

On November 14, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from Barry Shulman and Jan Shulman (the **Shulmans**). The Shulmans challenge the City of Bellevue's (the **City**) Ordinance No. 4803, which amended the City's Comprehensive Plan (the **Plan**) by designating the Shulmans' property "Single-Family Urban" (**SF-UR**). The Shulmans claim that this ordinance violates the Growth Management Act (**GMA** or the **Act**) because it fails to consider the economic impacts on their private property rights, and because it fails to reduce sprawl and promote a range of housing densities including multi-family as well as single-family.

On January 17, 1996, the Board issued a Prehearing Order that set forth three legal issues to be determined in this case.

On March 4, 1996, "Petitioners' Pre-Hearing Brief" was filed with the Board. On March 18, 1996, Petitioners' Corrected Pre-Hearing Brief" (**Shulmans' Brief**) and five exhibits (P-1 through P-5) were filed.

On March 18, 1996, the "City's Reply Memorandum" (**City's Brief**) and six exhibits (R-1 through R-6) with numerous attachments were filed with the Board.

On March 28, 1996, the "Petitioners' Reply Brief" (**Shulmans' Reply**) was filed with the Board.

The Board held a hearing on the merits at 9:30 a.m. on March 27, 1996, at its offices in Seattle,

Washington. M. Peter Philley, Presiding Officer in this matter, and Chris Smith Towne participated for the Board. Larry Martin represented Shulman and Lori Molander Riordan represented the City. Court reporting services were provided by Cynthia LaRose of Robert H. Lewis & Associates, Fife.

On April 3, 1996, the City filed additional exhibits, R-7 through R-9, as ordered by the Presiding Officer.

II. FINDINGS OF FACT

The Site

1) The Shulmans own a 4.3 acre property[1] located in the area of Bellevue known as Newport Hills. Newport Hills is 1,277 acres in size with a population of nearly 8,000. Exhibit (**Ex.**) R-2, at 1, and Ex. R-3, at 197. The Shulmans' property is specifically located in an area known as "West Ravine." R-1, at 1. The West Ravine comprises 48 acres of undeveloped land owned by six different persons. The area is characterized by steep, forested slopes, a riparian corridor and some areas of unstable soil including a small landfill. Surrounding land uses are residential with built densities ranging up to 5 units per acre. Ex. R-5, at 4 and 9-10; *see also* R-3, at 172. To the west of the property is Interstate 405; to the east is forested land and single family housing; to the south is the Newport Hills Park and Ride lot; and to the north is undeveloped forested land. The property abuts a public street (113th Place SE) and cul-de-sac. Ex. P-1. The predominant residential development pattern along I-405 through this portion of Bellevue is single family. Ex. P-3, at 145. The site is undeveloped and overgrown with blackberry vines and underbrush. In addition, numerous small to medium-sized deciduous and evergreen trees are scattered around the site. Ex. R-6, attached March 9, 1995, letter from Marc R. McGinnis, Geotech Consultants, Inc. (**Geotech Letter**) to the Shulmans.

2) The ground surface on the western approximate half of the property slopes gently to moderately down toward the west at an inclination that is generally less than 40 percent. The slopes on the eastern half of the property have a total height of about 50 feet, and they are steep with inclinations greater than 40 percent. The steepest area on the site occurs on the eastern half of the site, with ground surface inclination up to about 80 percent in isolated areas. Ex. R-6, Geotech Letter. There is a 118 foot elevation change from the street fronting the property to the east property line, with a significantly greater elevation difference to the nearest adjacent homes. Ex. R-4, at unnumbered 2.

3) The property was zoned RS 15,000 between 1958 and 1968, when the property was within unincorporated King County. Ex. R-6, September 7, 1994 letter from Larry C. Martin to Planning Commission, at 2.

4) The site has groundwater discharges and the potential for landslides. Ex. R-5, at 49, ¶9. Construction on any of the parcels within the West Ravine will substantially increase the probability of severe erosion. Ex. R-5, at 50, ¶10. Due to steep slopes, any development will have an adverse environmental impact. Ex. R-5, at 53, ¶7. Accordingly, Shulman contends that only 1.8 acres of the site is buildable. Ex. R-3, at 220.

The Process

5) In September 1986, a prior owner of the property filed a rezone application for 48 multi-family units in four buildings with King County. On September 26, 1986, King County staff recommended denying the application (referred to as the *Investco* Staff Report); the King County Council subsequently did deny it in January 1987. Ex. R-1, at unnumbered 3; R-3, at 169.

6) In March 1988, a public hearing was held for a planned unit development (**PUD**) application that had been filed with King County for twelve townhouse units contained in four buildings on the site. Ex. R-1, at unnumbered 3.

7) In July 1988, King County approved ten units, subject to 23 conditions on the site. Ex. R-1, at unnumbered 3; *see also* R-3, at 220-221 (testimony of Larry Martin).

8) In 1990, the Shulmans purchased the property at issue in this appeal.[2] City's Brief, at 2.

9) In November 1990, the Shulmans and another person, Sasonoff, filed an application for ten townhouses, Lakehurst Townhouses, with the County to revise the prior PUD application. Ex. R-1, at unnumbered 3.

10) In September 1992, the County stopped its formal review of the revisions proposed by the Shulmans. Ex. R-1, at unnumbered 3.

11) In January 1993, the Shulmans' 1988 PUD approval expired. Ex. R-1, at unnumbered 3.

12) In 1993, the City annexed the Newport Hills area. Ex. R-2, at 1. The Shulman property was zoned R-2.5 (2.5 dwelling units [**du**] per acre) and given a preliminary single-family, medium density (**SF-M**) designation, consistent with King County's prior designation and zoning. City's Brief, at 2-3. The City did not amend its comprehensive plan nor its land use map at the time. Ex. P-2, at 1.

13) In January 1994, the Mayor of the City appointed twenty-members to a Citizens Advisory

Committee (**CAC**) to study the zoning in the Newport Hills Subarea and to make recommendations to the City's Planning Commission (**Planning Commission**) for zoning changes. The CAC met twice a month beginning in February 1994. Ex. R-3, at 197 and 215; *see also* Ex. R-2, at 1.

14) On June 9, 1994, the CAC completed its work on the Newport Hills Subarea Plan. Ex. R-2, at 1. The CAC did not consider any specific proposal from the Shulmans for the property. Mr. Shulman had been out of town and did not decide to re-evaluate his property until after the CAC had completed its work. R-3, at 221.

15) At some point in July 1994, the Shulmans made a request to redesignate their property as multi-family high density (**MF-H**).[3] The Shulmans were proposing "... 50-60 moderate priced condominium homes." Ex. R-4, at unnumbered 2 and 3.

16) On July 6, 1994, the CAC presented its recommended comprehensive plan amendments to the Planning Commission, proposing that the Shulmans' property remain zoned as it had been under King County's jurisdiction, R-2.5, with a single-family medium (**SF-M**) designation. Ex. P-2, at 1; *see also* Ex. R-3, at 215.

17) On July 20, 1994, the Planning Commission conducted a study session on the Newport Hills Subarea Plan. Ex. P-2, at 1 and Ex. R-3, at 200.

18) On July 27, 1994, the Planning Commission conducted a public hearing on the Newport Hills Subarea Plan. The Shulmans indicated their desire to construct moderately priced condominiums on their property and raised concerns that the proposed land use designation of SF-M and corresponding zoning for their property would not allow an economically viable use of the property. They therefore requested that the designation be revised to MF-H. Ex. P-2, at 1 and Ex. R-3, at 197, 200, 214 and 220.

19) On August 15, 1994, the CAC sent a memorandum to the Planning Commission opposing the Shulmans' request to designate their property MF-H (i.e., 30 du/acre). Ex. P-4, at 163. Instead, the CAC again recommended that the land be designated single-family medium (SF-M) at 2.5 du/acre.

20) On September 1, 1994, the Bellevue Office of Policy Planning staff (**Staff**) issued a memorandum to the Planning Commission, evaluating the Shulmans' proposal with respect to existing City policies, utilizing the criteria for amending the Comprehensive Plan as required by the Bellevue Land Use Code. Ex. P-3, at 143. Staff recommended that the Shulmans' request to have their property redesignated to a higher density designation, multi-family high density (MF-H), be denied. Instead, Staff recommended that the site retain its single-family

medium (SF-M) density designation as proposed by the CAC. Ex. P-3, at 147.

21) On September 7, 1994, the Planning Commission unanimously adopted the CAC recommendation that the Shulmans' property be designated SF-M, and transmitted the Newport Hills Subarea Plan to the City Council. Ex. P-2, at 1, and Ex. R-3, at 200.

22) On September 26, 1994, the City Council held a study session on the Newport Hills Subarea Plan. The City Council requested Staff to prepare a theoretical and practical land use capacity analysis on the West Ravine properties in general and the Shulmans' property in particular. *See* R-3, at 168.

23) On October 20, 1994, Staff sent a memorandum to the mayor and the Bellevue City Council (**City Council**) recommending that the City Council adopt the Newport Hills Subarea Plan but designate the Shulman site as single-family urban residential (SF-UR) on the land use plan map. An SF-UR designation allows a maximum of 7.5 du/acre.[4] Staff felt that with this recommended designation and considering site constraints and the City's Sensitive Areas regulations, the Shulmans would be able to develop 18 units on the site. Ex. R-3, at 171.

24) On October 21, 1994, the CAC Vice-Chair sent a letter to the City Council opposing the Shulmans' request. Ex. P-5.

25) On October, 24, 1994, the City Council accepted the recommendations of the Planning Commission and adopted the Newport Hills Subarea Plan. Accordingly, the Shulmans' property was designated SF-M. Ex. R-1, at 1 and Ex. R-5, at 6. A SF-M designation permitted a maximum density of 3.5 du/acre. The City Council also directed the Planning Commission and Staff to review the land use designations for the properties in the West Ravine in order to increase opportunities for additional housing development in that area. Ex. R-1, at 1 and Ex. R-5, at 6.

26) On February 1, 1995, Staff and about 75 interested Newport Hills residents met to discuss the West Ravine land use study. Ex. R-1, at unnumbered 6; *see also* Ex. R-5, at 15.

27) On February 9, 1995, Staff sent a memorandum to the Planning Commission recommending that the Shulman site designation be changed from single family medium (SF-M) to single-family urban (SF-UR). Ex. R-1, at 1; *see also* R-5, at 15. The Staff report indicated that, given known environmental constraints, the SF-UR designation would allow a theoretical maximum of 15 dwelling units on the site (7.5 du/acre) as opposed to 7 dwelling units under the existing SF-M designation (3.5 du/acre). Ex. R-1, at unnumbered 5.

28) On February 15, 1995, the Planning Commission held a study session on the West Ravine

area. Ex. P-2, at 1, and Ex. R-5, at 7.

29) On March 10, 1995, the Shulmans' representative submitted a letter containing a rationale to the Planning Commission in support of the proposal to designate the site multi-family medium (**MF-M**).[5] The letter contained a detailed discussion of the takings issue. Ex. R-6, March 10, 1995, letter from Larry C. Martin to Planning Commission.

30) On March 15, 1995, the Planning Commission conducted a public hearing on the West Ravine area at which 45 comments were received. Ex. P-2, at 1; Ex. R-5, at 7 and 14. The Shulmans submitted a concept site plan (*see* Ex. R-6, last unnumbered pages) for a 33-unit development on the property. Ex. R-5, at 10 and 16. In addition, Tim Fahey, a consultant, retained by the Shulmans, conducted an economic feasibility analysis of the site with a 16-unit development on it and concluded that 16 units on the site would not be financially feasible under any development scheme. Ex. R-5, at 17. The Shulmans' representatives took the position that zoning has to allow some reasonable profitable use and that development of the property would not be economically feasible if too low a density were established. This would result in a taking of their property. Ex. R-5, at 18. Numerous residents testified with concerns about development of the Shulmans property (e.g., access to the site, erosion of upland residential properties, overflowing an existing stormwater detention pond, necessity of pumping sewage uphill, traffic concerns). Ex. R-5, at 20-22.

31) At the March 15, 1995 hearing, Planning Commission members questioned the Shulmans' representatives regarding their statements that multi-family medium development was economically feasible but that single family development on the site was neither practical nor feasible. Marc McGinnis acknowledged that if development were not allowed within 40 feet of the steep slopes, no catchment wall would be necessary and that without a wall, a more shallow under-slab drain could be required. Ex. R-5, at 18-19. Steve Cox testified that a retaining wall would be necessary regardless of the size of the development but then acknowledged that a one unit structure or two or three stacked units could proceed without a retaining wall. Ex. R-5, at 20. Tim Fahey acknowledged that without retaining wall expenses, or if fewer units were constructed, costs would be lower. However, he concluded by stating that with fewer than 33 units there would be even more of a loss for the developer. Ex. R-5, at 20.

32) At the Planning Commission's March 15, 1995, public hearing, Staff stated that they had consulted with the City Legal Department as to possible takings issues related to denial of the Shulmans' proposal. Ex. R-5, at 22. The minutes of that portion of the Planning Commission's meeting state:

> Chairman Mosher asked if staff followed up on the issue of taking. Mr. Matz said the

Legal Department reviewed the documentation submitted by Mr. Martin and concluded that while under GMA the City is required to consider the impacts of development on property rights, amongst other goals, the GMA does not dictate any particular goal with respect to private property. The action pending is legislative and not regulatory, and it is the latter which triggers a taking analysis. The economic hardship argument does not have a legal basis, and a property owner has no right to any particular Comprehensive Plan designation. Furthermore, the recommendation of staff increases the economic viability of the property and cannot be considered a taking simply because it does not go far enough in the eyes of the applicant. Ex. R-5, at 22.

33) On March 29, 1995, the Planning Commission voted four-to-three to grant the Shulmans' request to redesignate their property from single-family medium (SF-M) to multi-family medium (MF-M). Ex. R-5, at 4, 7, 9, 11 and 30. The February 9, 1995 Staff report (Ex. R-1, at unnumbered 5) indicated the following information regarding various possible designations of the Shulmans' property that were under consideration:

Designation	Status	Maximum Density	Staff Estimate of # of DU's
SF-M	Existing designation	3.5 du/acre	7
SF-UR	Staff recommendation	7.5 du/acre	15
MF-M	Shulmans & Planning Commission recommendation	20.0 du/acre	40

34) On May 1, 1995, the City Council considered the Planning Commission's March 29, 1995, recommendation and referred it back to the Planning Commission for clarification. Ex. P-2, at 1.

35) On May 10, 1995, the Planning Commission revised the language of its recommended comprehensive plan amendment to clarify a gross as opposed to net acreage issue. Ex. P-2, at 2.

36) On August 29, 1995, the Planning Commission's recommendation that the Shulmans' property be designated MF-M, while all other properties in the West Ravine be designated SF-H, was transmitted to the City Council. Ex. R-5, at 6-7.

37) On September 18, 1995, the City Council conducted a study session on the West Ravine recommendations from the Planning Commission. Ex. P-2, at 2.

38) On September 25, 1995, the City Council took a "straw vote" in favor of the Staff

recommendation to designate the Shulman property single-family urban (SF-UR) and against the Planning Commission recommendation for a multi-family medium (MF-M) designation. Ex. P-2, at 2, and R-8, at 4.

39) On October 16, 1995, the City Council passed Bellevue Ordinance No. 4803 (Ex. R-7) by a 6-1 vote (*see* Ex. R-9, at 5), officially redesignating the Shulmans' property to its current status of SF-UR and designating three other properties in the West Ravine as single-family high density (SF-H).[6] Ex. R-7, attached West Ravine map. The other two properties that comprise the West Ravine were also designated SF-H pursuant to Ordinance No 4804. Ex. R-9, at 6.

40) According to the Staff's February 9, 1995, report, by designating the Shulmans' property as SF-UR, it was estimated that the City will allow a maximum of fifteen dwelling units on the Shulman parcel. The report indicated that approximately 60% of the property contains protected area slopes (having 40% or greater grades), based on information available at the time. Ex. R-1, at unnumbered 5. In comparison, a May 8, 1995, report regarding amendments to the environmental checklist prepared by the City's Development Services Division of the Department of Community Development, indicates that the Shulman property can hold a maximum of 36 dwelling units and probably 33 dwelling units under a SF-UR designation. Ex. R-5, at 35. This report referenced that Staff had estimated a range of constraining development factors based on site features and current development regulations.

41) A comparison of the two reports follows:

		Staff Estimate[7]	DCD Estimate[8]
Designation	Maximum Density	Max. # DU's	Max. # DU
SF-M	3.5 du/acre	7	15
SF-UR	7.5 du/acre	15	36
MF-M	20.0 du/acre	40	86

LEGAL ISSUE NO. 1

Did the City comply with RCW 36.70A.020(6) and .370 in designating the Shulman property SF-UR in Ordinance No. 4803?

Positions of the Parties

Shulmans' Position

The Shulmans contend that City failed to consider planning goal RCW 36.70A.020(6) ("Property rights") when it amended the comprehensive plan with respect to their property. Specifically, the Shulmans allege that Staff eliminated any reasonable possibility of fair consideration of their property rights in two ways: first, by advising the decision-makers that the question of whether the proposed land use designation amounted to a taking of property was not a proper consideration and second, by failing to provide any analysis of the Shulmans' economic impact claim that unless the property was redesignated multi-family, with its resulting higher permissible densities, development of the site was not economically feasible. The Shulmans claim that under an SF-UR designation, "... a developer would lose money even if he was given the land for free." Shulmans' Brief, at 2.

City's Position

The City contends that it did in fact properly consider all thirteen planning goals of the GMA in adopting the zoning designation for the Shulmans' property, including the property rights goal. The City points out that while it is required by law to consider these goals, the GMA does not require local governments to reach a particular conclusion with respect to them, and that the Shulmans' arguments require elevating this one planning goal over all others contained in RCW 36.70A.020. The City also contends that the alleged failure of Staff to provide analysis to decision-makers of the Shulmans' economic impact argument was actually a permissible exercise of attorney-client privilege pursuant to RCW 36.70A.370(4). City's Brief, at 7-16.

Discussion

RCW 36.70A.020(6)

RCW 36.70A.020 provides in relevant part:

> 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:...
>
> (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.

Planning goal six is comprised of two independent sentences. The first is a paraphrase of the

Washington State Constitution. In *Gutschmidt v. Mercer Island*, CPSGPHB Case No. 92-3-0006, Order on Prehearing Motions (December 31, 1992) at 10-13, the Board first held that it did not have jurisdiction to adjudicate allegations that a GMA ordinance is unconstitutional because it allegedly violates the rights of private property owners. Instead, the Board determined that it had jurisdiction only to determine whether a local government appropriately *considered* the potential of unconstitutional takings before adopting a regulation or plan under the Act. The Shulmans acknowledge this, and point out that they have filed a takings claim in superior court. Shulmans' Brief, at 2.

In *Gutschmidt*, the Board also interpreted the use of the word "guide" or its derivative in the preamble to RCW 36.70A.020, to mean that jurisdictions must "consider" the planning goals. *Gutschmidt*, Final Decision and Order, at 14. Subsequently, the Board held that consideration of the planning goals has a procedural and substantive component. The procedural prong is simply a mental process of considering the goal -- although explicit written acknowledgement of a goal is recommended, it is not required. *Association of Rural Residents v. Kitsap County*, CPSGPHB Case No. 93-3-0010 Final Decision and Order (June 3, 1994), at 24.

The Shulmans rely heavily upon the content of certain remarks made by Staff member Nicholas Matz in response to a question posed by Planning Commission Chairman Mosher during the Planning Commission's March 15, 1995 public meeting. Finding of Fact No. 32. The Shulmans cite this statement as evidence of City's failure to properly consider their property rights. The actual tape recording of Mr. Matz's comments was unavailable to the Board due to an undisclosed mechanical problem at the meeting. Therefore, the Board must rely on the minutes of that meeting. The Shulmans maintain that the Staff member's statement was flatly incorrect because it instructs the Planning Commission to merely concern itself with the objections of area residents to the Shulmans' proposed development, but not to consider their takings claim itself. Shulmans' Brief, at 8.

Quite obviously, being forced to rely upon the minutes of a meeting rather than a verbatim transcript or tape recording of that meeting is not an ideal record for the Board to review in a situation such as this, when the actual words spoken are so crucial. Minutes often may lack the certainty of a precise reproduction of events. Nonetheless, taking the statement as a whole, the Board is not convinced that the Shulmans' interpretation of the statement is necessarily correct. It seems just as valid to interpret Mr. Matz's statement as instructing the Planning Commission that the Act required it to consider the property rights planning goal generally, and the effect of the designation of the Shulman property specifically, but that this requirement did not dictate a specific substantive result.[9]

However, the Board need not determine the precise import of this statement. Even assuming the statement clearly and erroneously stated the law, as the Shulmans contend, the issue is not

determinative. First, the Board notes that the statements were made to the Planning Commission and not the City Council. Even though the Planning Commission record was before the City Council when it took its final actions, the Board presumes that the ultimate decision-maker will comply with the Act's requirement to consider the planning goals -- independent of what Staff may have said. Whether the Planning Commission did consider the goal or whether it was misled by Mr. Matz's statement is irrelevant. Second, the Board notes that Mr. Matz is an associate planner (*see* Ex. R-5, at 16) and not the City Council's legal advisor. Thus, his testimony regarding this specific subject matter is given less weight than if the City Attorney had made the statement regarding the constitutional issue of takings.

Third, the Board notes that pursuant to RCW 36.70A.370(2), local jurisdictions planning under the Act are required to utilize the Washington State Attorney General's process "... to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property." This is a mandatory obligation. However, pursuant to RCW 36.70A.370(4), the process used by government agencies is protected by an attorney-client privilege. Fourth, Mr. Matz's statement indicates that the City at least did in fact internally address the Shulmans' contentions that the City was committing a taking on their property. Although part of the statement indicates that, in the City's opinion, no "taking" of Shulmans' property was involved ("[t]he action pending is legislative and not regulatory, and it is the latter which triggers a taking analysis") it shows that the Shulmans' property rights were actually considered.

Fifth, the Shulmans on several occasions raised explicit concerns that the City might be violating their constitutional rights. Findings of Fact Nos. 18, 29, 30 and 31. These concerns are a part of the record. The Board presumes that the elected officials charged with making the ultimate GMA decision, members of the City Council, were aware of this record and certainly acutely aware of the takings issue in general, and therefore made the necessary inquiries of legal counsel to insure that their actions did not constitute an unconstitutional taking. **Accordingly, the Board holds that the City considered the Act's sixth planning goal**.

In addition to procedurally complying with the planning goals, cities and counties must also comply with the substantive portion of RCW 36.70A.020. This requires a determination by the Board whether an enactment complies with the actual language of the planning goal in question. *Association of Rural Residents,* at 24.

Therefore, the Board does have jurisdiction over the second sentence of RCW 36.70A.020(6). The Shulmans contend that by failing to consider the economic impact of the SF-UR final designation on their property, the City acted in an arbitrary and discriminatory manner. It is important to note that, in order for petitioners to prevail in this type of challenge, they must prove that the action taken by a city or county is both arbitrary <u>and</u> discriminatory**.** Showing either an arbitrary <u>or</u> discriminatory action is insufficient to overcome the presumption of validity that

actions of cities and counties are granted by the Act. *See* RCW 36.70A.320. **The Board holds that the Shulmans have not met their burden of proving that the City acted in an <u>arbitrary and discriminatory</u> manner against them in adopting the Plan amendments**.

The record reflects a lengthy and detailed process which the City utilized to finally arrive at the current land use designation of the Shulmans' property. Initially, the CAC made its recommendation for designations within the Newport Hills Subarea that included the Shulmans property, before the Shulmans had submitted a formal designation request. Findings of Fact Nos. 14 and 16. The Planning Commission then conducted its own meetings and held a public hearing before it adopted the CAC recommendation. Findings of Fact Nos. 18 and 21. Next, the City Council reviewed the proposed designations recommended by the CAC and Planning Commission. Before taking action, the City Council directed Staff to prepare a land use capacity analysis on the West Ravine. Finding of Fact No. 22. The City Council subsequently adopted the CAC/Planning Commission recommendation (i.e., retaining a comparable designation as under King County's jurisdiction). However, the Council directed that even *more* study be conducted on expanding the opportunities for additional housing in the West Ravine area that includes the Shulmans' property. Finding of Fact No. 25.

Following this directive, Staff and the Planning Commission re-evaluated their recommendations for the appropriate designations of the Shulmans and other West Ravine properties. Findings of Fact Nos. 26 through 32. The Planning Commission then voted to increase density on the Shulmans' land by designating the property MF-M instead of SF-M. Finding of Fact No. 33. Finally, the City Council conducted yet another study session on the sites and ultimately voted to redesignate the Shulmans' property. Findings of Fact Nos. 37 through 39. It is important to note that the eventual designation was an upzone from that designation originally chosen, e.g., from SF-M to SF-UR. The redesignation resulted in an increase in the maximum permitted density on the Shulmans' property from 3.5 du/acre to 7.5 du/acre. Finding of Fact No. 41.

It is clear to the Board that the process summarized above does not constitute arbitrary consideration. Furthermore, the very fact that the City's final action represented an *increase* in the allowable density on the lot militates heavily against finding the process that arrived at that decision to be arbitrary. The Shulmans originally requested an MF-H designation (30 du/acre), Finding of Fact No. 15. Subsequently, they requested a lower density designation. MF-M (20 du/acre). Finding of Fact No. 29. In contrast, the City originally designated the property SF-M (3.5 du/acre). Findings of Fact Nos. 12 and 25. Ultimately, the City agreed that a higher density designation of SF-UR (7.5 du/acre) was appropriate for the Shulman property. Findings of Fact Nos. 39 and 41.

The record also reveals that the City did consider the economic impact of a less dense designation than the ones requested by the Shulmans. The City Council record (Ex. R-5, at 5) indicates that

the Planning Commission record was also before it. Members of the Planning Commission specifically questioned the Shulmans' assertion that any designation less that MF-M was not economically feasible. Finding of Fact No. 31. Although the Shulmans clearly do not concur with the City's ultimate designation of their property, they have not shown that the City failed to consider their economic feasibility arguments. *See also* Ex. R-5, at 6 indicating that the Planning Commission recommendation was sensitive to the needs of the community and the property owners; Ex. R-5, at 29, indicating a Planning Commissioner's opinion that the proposed designation of the West Ravine in general balanced environmental concerns with the desire for economic development; Ex. R-5, at 38, discussing the possible impact of the "Private Property Regulatory Fairness Act" (Initiative 164) and a subsequent referendum that at the time had not been voted on by the citizens of the State; Ex. R-8, at 3, summarizing Councilmember Smith's statement that increases in land value might make development more feasible in the future; Ex. R-1, at unnumbered 7, item 2, indicating a preference for greenbelt and open space as more valuable to the community as a whole than individual property values; Ex. R-3, at 170, indicating that higher density development could demonstrably overwhelm the Shulman site's environmental constraints; Ex. R-3, at 174, acknowledging the Shulmans' request for higher densities in order to obtain an economic return on their investment.

Finally, the Board holds that the City's redesignation of the Shulman property does not constitute a discriminatory action simply because the City focused its attention on the West Ravine area. As the Board recently held regarding special planning areas or subarea plans:

> ... Such planning approaches may more precisely reflect the unique history and circumstances of an area and provide for better policy guidance for future development or illustrate the need for further refinement....
>
> Jurisdictions are free to designate areas that are subject to additional or more detailed planning such as the "special planning areas" technique used by Auburn. Such localized planning does not automatically constitute discriminatory action. *Hapsmith, et al. v. Auburn*, CPSGMHB Case No. 95-3-0075, Final Decision and Order (May 10, 1996), at 46.

The record clearly reveals the unique history and circumstances of the West Ravine area within the Newport Hills Subarea. The City was justified in conducting the specialized planning it did for this area. As in *Hapsmith*, the Board notes that one lone property owner was not singled out for detailed planning. Here, the City examined six properties within the West Ravine, owned by six separate persons. The Shulmans were granted the most dense designation, SF-UR, as opposed to SF-H for the other three properties addressed in Ordinance No. 4803. The remaining two properties in the West Ravine area were also designated SF-H. Finding of Fact No. 39.

<u>RCW 36.70A.370</u>

RCW 36.70A.370, "Protection of private property," provides:

> (1) The state attorney general shall establish by October 1, 1991, an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. It is not the purpose of this section to expand or reduce the scope of private property protections provided in the state and federal Constitutions. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in case law.
> (2) Local governments that are required or choose to plan under RCW 36.70A.040 and state agencies shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property.
> (3) The attorney general, in consultation with the Washington state bar association, shall develop a continuing education course to implement this section.
> (4) The process used by government agencies shall be protected by attorney client privilege. Nothing in this section grants a private party the right to seek judicial relief requiring compliance with the provisions of this section. Emphasis added.

Subsections (1) and (2) indicate that the purpose of the attorney general's process is to assure that local government actions do not result in unconstitutional takings. As previously indicated, the Board does not have jurisdiction to determine whether the constitution has been violated.

Furthermore, the first sentence in subsection (4) indicates that the relevant governmental process is protected by the attorney-client privilege. Unless the privilege were waived, the Board could not examine the process. Most importantly, and presumably as a result of the first sentence in the subsection, the second sentence of RCW 36.70A.370(4) indicates that a private party is not granted the right to seek judicial relief for alleged noncompliance with this section. **As the Board held in a SEPA context that the word "judicial" applies to this quasi-judicial hearings board, (*see Association of Rural Residents*, Order Granting Dispositive Motions (February 16, 1994), at 6), the Board now holds that the word "judicial" in RCW 36.70A.370 (4) also refers to the growth management hearings boards**. Thus, even if a petitioner were able to somehow show noncompliance with this section (which the Shulmans have not), the Board would be unable to provide any relief or to allow a petitioner even to seek such relief. **Accordingly, the Board holds that it does not have jurisdiction to determine whether there has been a violation of RCW 36.70A.370.** *See also Alberg, et al. v King County*, CPSGMHB No. 95-3-0041, Final Decision and Order (September 13, 1995).

Legal Issue No . 2

Does the SF-UR designation of the Shulman property in Ordinance No. 4803 comply with RCW 36.70A.020(2) and (4)?

The Shulmans withdrew Legal Issue No. 2. Shulmans' Brief, at 9. The Board treats withdrawn legal issues as abandoned and therefore will not address this issue further.

Legal Issue No. 3

Is the SF-UR designation of the Shulman property in Ordinance No. 4803 consistent with the Bellevue Comprehensive Plan Policy LU-18 and Policy HO-12?

The Shulmans withdrew Legal Issue No. 3. Shulmans' Brief, at 9. The Board treats withdrawn legal issues as abandoned and therefore will not address this issue further.

IV. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board orders:

1) City of Bellevue Ordinance No. 4803 is in **compliance** with the goals and requirements of the Growth Management Act. Therefore, Legal Issue No. 1 is **dismissed with prejudice**.

2) Legal Issues Nos. 2 and 3 were withdrawn by the Shulmans and therefore not considered by the Board. Accordingly, Legal Issues Nos. 2 and 3 are **dismissed with prejudice**.

So ordered this 13th day of May, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____

M. Peter Philley
Board Member

[Did not participate in this case]
Joseph W. Tovar, AICP

Board Member

_____

Chris Smith Towne
Board Member

Note: This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

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[1] *Compare* Ex. R-1, at unnumbered 3 and 5, R-3, at 172 and 220 with R-4, at unnumbered 2.

[2] The Board is unable to ascertain from the record before it the exact date of purchase.

[3] A MF-H designation has a maximum density of 30 du/acre. Ex. R-1, at unnumbered 5 and R-3, at 172.

[4] *See also* Ex. R-1, at unnumbered 5 and Ex. R-3, at 172.

[5] An MF-M designation allowed a maximum density of 20 du/acre in comparison to 30 du/acre permitted under the Shulmans' original MF-H designation request. See Ex. R-1, at unnumbered 5 and R-3, at 172.

[6] A SF-H designation permits a maximum of 5 du/acre while a SF-UR designation permits a maximum density of 7.5 du/acre. Ex. R-1, at unnumbered 5 and R-3, at 172.

[7] Ex. R-1, at unnumbered 5. Prepared on February 9, 1995 by City's Office of Policy Planning.

[8] Ex. R-5, at 35. Prepared on May 8, 1995 by Development Services Division of the City's Dept. of Community Development.

[9] Such an interpretation is consistent with an Attorney General's Opinion (**AGO**) 1992 No. 23, at 276.

> RCW 36.70A.020(6) requires that local governments consider the goal of protecting private property. However, once this goal is considered, the GMA does not require that local governments reach a particular conclusion.