

On April 3, 1996, the Board issued a “Prehearing Order,” setting forth the legal issues, deadlines for filing dispositive motions and prehearing briefs, and the date for the hearing on the merits.

On April 8, 1996, the City filed “Respondent’s Amended Index to the Record.”

On April 12, 1996, the City filed two dispositive motions: “City of Seattle’s Motion to Dismiss Individual Petitioners for Lack of Standing” (**City’s Standing Motion**) and “City of Seattle’s Motion to Dismiss Review of Resolution for Lack of Jurisdiction” (**City’s Jurisdictional Motion**).

On April 17, 1996, HEAL filed “Petitioners’ Preliminary Exhibit List,” “Petitioners’ Preliminary Witness List,” and “Petitioners’ Motion to Supplement the Record.”

Also on April 17, the City filed “City of Seattle’s Preliminary Witness List” and “City of Seattle’s Motion and Memorandum to Supplement the Record by Witness Declaration and Testimony.”

On April 22, 1996, HEAL filed its “Petitioners’ Responses to Respondent’s Motion re: Standing” (**Petitioners’ Standing Response**) and “Petitioners’ Response to Respondent’s Motion re: Jurisdiction” (**Petitioners’ Jurisdictional Response**.)

On April 26, 1996, the City filed the “City of Seattle’s Reply on Its Motion to Dismiss Individual Petitioners for Lack of Standing” (**City’s Standing Reply**) and the “City of Seattle’s Reply re: Its Motion to Dismiss for Lack of Jurisdiction” (**City’s Jurisdictional Reply**). Also on April 26, the City filed “City of Seattle’s Response to Petitioners’ Preliminary Witness List and Motion to Supplement the Record” (**City’s Response to Motion to Supplement**).

On May 2, 1996, HEAL filed “Petitioners’ Reply to City’s Response to Petitioners’ Preliminary Witness List and Motion to Supplement the Record.”

On May 3, 1996, the City filed “City of Seattle’s Motion for Oral Argument on Allowing Expert Testimony.”

On May 8, 1996, the City filed “City of Seattle’s Motion for Judicial Notice.”

On May 10, 1996, HEAL filed “Petitioners’ Response to Seattle’s Motion for Judicial Notice” and “Petitioners’ Response to City of Seattle’s Motion for Oral Argument on Allowing Expert Testimony.”

Also on May 10, 1996, the City filed “City of Seattle’s Reply to Petitioners’ Response to City of Seattle’s Motion for Oral Argument on Allowing Expert Testimony.”

On May 22, 1996, HEAL filed “Petitioners’ Rebuttal Witness List.”

On May 23, 1996, the City filed “Seattle’s Motion for Extension of Time for Filing Rebuttal Exhibit and/or Witness List” and “City of Seattle’s Motion for Discovery of Petitioners’ Proposed Expert Witnesses.”

On May 24, 1996, HEAL filed “Stipulation to Amend Briefing Schedule.”

On May 28, 1996, the City filed “Parties’ Almost Stipulated Exhibit List.”

On June 4, 1996, Petitioners filed “Petitioners’ Prehearing Brief” (**Petitioners’ PHB**).

Also on June 4, the City filed “City of Seattle’s Objections to Petitioners’ Rebuttal Witness List.”

On June 19, 1996, the City filed “Respondent City of Seattle’s Prehearing Brief” (**City’s PHB**).

On June 20, 1996, the City filed “Respondent City of Seattle’s Motion to Supplement the Record.”

On June 24, 1996, Petitioners filed “Petitioners’ Reply Brief”(**Petitioners’ Reply**).

On June 25, 1996, the City filed “Respondent City of Seattle’s Motion to Strike Petitioners’ Unauthorized Documents Supplementing the Record.”

On Thursday, June 27, 1996, the Board held a hearing on the merits at the Chamber of Commerce Board Room at One Union Square in Seattle, Washington. Board Members Joseph W. Tovar and Chris Smith Towne, Presiding Officer, were present for the Board. John M. Groen was present for Petitioners. Eleanore S. Baxendale was present for the City. Court reporting services were provided by Robert H. Lewis, Robert H. Lewis & Associates, Tacoma.

II. FINDINGS OF FACT

1. On July 13, 1992, the Seattle City Council (**Council**) adopted Environmentally Critical Areas Policies (**Critical Areas Policies**) by Resolution 28559. Exhibit (**Ex.**) A, City’s Standing Motion. The Critical Areas Policies were developed to “address the shortcomings of the existing situation, as well as meet the requirements of the Growth Management Act.” Ex. 25, at 2. Resolution 28559 provides:

BE IT FURTHER RESOLVED:

That the Critical Areas Policies, Attachment A hereto, are hereby adopted, and will be implemented by the Environmentally Critical Areas Regulations set forth in Council Bill 109142 [which became Ordinance 116253 upon adoption], adopted concurrently, and further implemented by amendments to other ordinances as

necessary.

Ex. A, City's Standing Motion, at 5.

2. Also on July 13, 1992, pursuant to Resolution 28559, the City adopted Ordinance 116253, Regulations for Environmentally Critical Areas. The regulations were codified at Seattle Municipal Code (SMC) 25.09.24.

3. In 1995, the Washington Legislature amended RCW chapter 36.70A by adopting RCW 36.70A.172. Its provisions became effective on July 23, 1995. 1995 Wash. Laws, ch. 347, § 105.

4. On December 11, 1995, the Council adopted Resolution 29253. Resolution 29253 amended the Critical Areas Policies regarding development on steep slopes. Ex. A, PFR.

5. Resolution 29253 amended the Critical Areas Policies by adding that "the preferred method of preventing harm to the environment from development activity on steep slopes . . . is to minimize disturbance and enhance existing vegetative ground cover." In addition, the amendment added language describing possible negative off-site impacts of development on steep slopes. Ex. A, PFR.

6. On December 11, 1995, the Council adopted Ordinance 117945. Ordinance 117945 amends the City's regulations for environmentally critical areas, specifically, SMC 25.09.020 A, .180 D, and .300 D.

a) The City amended SMC 25.09.020 A by adding "This chapter is based on and implements the [Critical Areas Policies] as adopted by Resolution 28559, and as amended from time to time." Ex. C, PFR.

b) The City amended SMC 25.09.180 D by providing a new exemption from the steep slope regulations where application of the regulations would prevent necessary stabilization of a landslide-prone area. Ex. C, PFR.

c) The City amended SMC 25.09.300 D by replacing language describing the extent of waiver or modification of the development standards for critical areas. Previous language allowed reduction, waiver, or modification of development standards "only to the extent necessary to make the standard reasonable in light of all the facts and circumstances of a particular case." The new language defines this extent as "the minimum necessary to allow reasonable use of the property." Ex. C, PFR.

III. GENERAL DISCUSSION

The Growth Management Act (**GMA** or **Act**) requires local governments planning under the Act to develop critical areas development regulations. RCW 36.70A.060. The legislature has determined that counties and cities are to "include the best available science in developing policies and development regulations" for critical areas. RCW 36.70A.172(1). This case represents the first challenge of a local government action under RCW 36.70A.172, which provides:

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give

special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

(2) If it determines that advice from scientific or other experts is necessary or will be of substantial assistance in reaching its decision, a growth management hearings board may retain scientific or other expert advice to assist in reviewing a petition under RCW 36.70A.290 that involves critical areas.

Petitioners challenge the City's amendments to both its critical areas policies and critical areas development regulations, claiming that the City has not complied with RCW 36.70A.172.

Before addressing the specific legal issues raised by the parties, it is necessary to dispose of several preliminary matters:

1. Objection to Introduction of Exhibit 29

At the hearing on the merits, the City objected to Petitioners' introduction of Ex. 29, Alan W. Johnson and Diane M. Ryba, *A Literature Review of Recommended Buffer Widths to Maintain Various Functions of Stream Riparian Areas (Draft)*, because Petitioners did not include this exhibit in any prehearing briefing. Transcript of June 27, 1996 hearing, at 29-35.

WAC 242-02-554(2) provides that the presiding officer may order:

- (a) That all documentary evidence which is to be offered during the hearing be submitted to the board and to other parties sufficiently in advance to permit study and preparation of cross-examination and rebuttal evidence;
- (b) That documentary evidence not submitted as required in (a) of this subsection not be received in evidence in the absence of a clear showing that the offering party had good cause for the failure to produce the evidence sooner, unless it is submitted for impeachment or rebuttal purposes[.]

Consistent with the WAC, the Board's Prehearing Order in this matter provides:

Only exhibits referenced in motions and/or prehearing briefs, responses or replies may be filed with the Board. Prehearing Order, at 5.

While Ex. 29 was listed in the City's Index and appeared on the "Almost Stipulated Exhibit List," it was neither referenced in nor attached to any of the briefs received by the Board. Thus, the City could not have anticipated the need to respond to Petitioners' use of the document, and the Board did not have the opportunity to review the document before the hearing on the merits.

Because this exhibit was not referenced in the manner required by the Prehearing Order, it is excluded from the record. **The City's objection to admission of this exhibit is sustained.**

2. Request to Strike Portion of Petitioners' Brief and Attached Document

The City also requested that the Board strike from the record all references to *Pang v. City of Seattle*. Transcript of June 27, 1996 hearing, at 92-93. This is a renewal of the City's argument in City's Standing Reply, at 2. The City asserts that *Pang* has no precedential value because it is a trial court decision, and the regulation challenged by *Pang* has since been changed. City's Standing Reply, at 2.

Decisions of Washington state courts are subject to official notice by the Board. WAC 242-02-660 (2). Because *Pang* is subject to official notice, it is not inappropriate for Petitioners to include it in their argument. **The City's request to strike references to *Pang* is denied.** However, as discussed below at footnote 4, the Board does not agree with Petitioners regarding the value of *Pang* in furthering the case now before the Board.

3. Witness Testimony and Supplementation of the Record

Prior to the hearing on the merits, both HEAL and the City filed witness lists and motions to supplement the record. At the hearing on the merits, HEAL objected when the Board noted that witness testimony would not be allowed. Transcript of June 27, 1996 hearing, at 7. The Board's decision applies to witness testimony and supplementation of the record and is based on RCW 36.70A.290(4), which provides:

The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

Because the Board conducts its review on the record which was before the local government whose action is being challenged, it will not, as a general rule, allow witness testimony. The GMA makes specific provisions for public participation on the local government level, RCW 36.70A.020(11) and RCW 36.70A.140, and makes participation at that level a condition for achieving GMA standing.

Based on its review of the motions to supplement with witness testimony and the briefs in support of and opposition to the motions, **the Board holds that additional evidence by witness testimony is unnecessary and not of substantial assistance to the Board in deciding this case; such evidence will not be allowed.**

IV. DISCUSSION AND CONCLUSIONS

legal issue no. 1

Do the individually named petitioners have standing to bring an appeal in this matter?

Parties' Positions

HEAL's Position

HEAL first notes that the City has conceded that HEAL, as the organizational petitioner, has standing under the GMA. HEAL argues that the individual petitioners also have standing, because they satisfy all of the standing requirements of the Administrative Procedure Act (APA), chapter 34.05 RCW. Petitioners' Standing Response, at 1, 4.

HEAL directs the Board's attention to *Pang v. City of Seattle*, a King County Superior Court Order on Writ of Review, No. 94-2-28618-8 (October 30, 1995). HEAL argues that *Pang* stands for the proposition that the steep slope policies were not furthered by the development regulations in place prior to the adoption of Resolution 29253 and Ordinance 117945. Because the City has now expanded those policies, "the City has increased the burden on applicants for an exemption." Petitioners' Standing Response, at 2.

HEAL asserts that the individual petitioners are prejudiced by the burden imposed on them by the amended policies and regulations. PFR, at 4. HEAL argues that, because the amended policies are not based on "legitimate" science, "the new policies . . . are likely to prejudice the individually named petitioners by improperly increasing their burden in securing an exemption. Such improper burden is itself prejudicial." In addition, it argues that the individual petitioners are more likely to be prejudiced under the amended regulations, because by increasing the evidentiary proof required, an applicant is less likely to secure an exemption. Petitioners' Standing Response, at 3.

Finally, HEAL argues that a judgment in favor of the individual petitioners will substantially redress the prejudice because on remand "the best available science can be utilized in developing the policies and regulation." HEAL recognizes that it cannot predict what the City would do on remand, but HEAL presumes that the City would develop policies based on the best available science. Petitioners' Standing Response. at 4-5.

City's Position

The City asks the Board to dismiss the individual petitioners, alleging that they do not have standing to challenge Resolution 29253 or Ordinance 117945 under the standing provisions of the APA, one of the alternative methods of obtaining standing under the GMA. The City argues that (1) the individual petitioners have not presented sufficient evidence that the amendments to the Critical Areas Policies or the steep slope regulations have prejudiced or are likely to prejudice

them, and (2) a judgment in favor of the individual petitioners would not eliminate or solve their problem. City's Standing Motion, at 4.

First, the City argues that to have standing under the APA the individual petitioners must allege and prove "specific and perceptible harm." City's Standing Motion, at 5. The City then argues that the individual petitioners are not harmed by the Resolution, because "[i]t is not a 'land use regulation' and has no direct regulatory effect on petitioners." Even if the Resolution has a regulatory effect, the City asserts, the individual petitioners cannot show they are harmed by the amended resolution because the scope of the resolution is so broad. City's Standing Motion, at 7.

The City also argues that the individual petitioners are not harmed by the adoption of Ordinance 117945, because certain amendments either have no impact or have no harmful impact on petitioners, while others actually benefit petitioners.

Specifically, since the amendment to SMC 25.09.020 A merely states the purpose for adopting the critical areas regulations, this amendment has no substantive effect and cannot harm petitioners. City's Standing Motion, at 8-9.

Next the City argues that the amendment to SMC 25.09.180 D actually benefits the individual petitioners by providing a "new mechanism for modifying steep slope regulations on a case by case basis." The City asserts that this new provision offers more flexibility in developing property, and thus will benefit those developers who can demonstrate "by reliable scientific evidence that application of the regulations would prevent stabilization of a landslide-prone area." City's Standing Motion, at 8-9.

The City further argues that the amendment to SMC 25.09.300 D does not harm the individual petitioners, because the amendment to this subsection merely clarifies the existing regulation, and the amendment is neutral. Because the amendment is neutral in its impacts, the individual petitioners cannot be harmed. City's Standing Motion, at 9-10.

Finally, the City argues that a judgment in favor of the individual petitioners would not eliminate the asserted prejudice. Because there is no requirement in the GMA that these amendments be made, the City asserts that, on remand, the City Council could decide to repeal the amendments rather than rewrite them. Because some of the amendments have no substantive effect on petitioners and some of the amendments actually benefit petitioners, repeal of the amendments by the City would "not advance petitioners' interests in having 'non-prejudicial' regulations apply to their property." City's Standing Motion, at 10.

Discussion

RCW 36.70A.280(2) grants standing as follows:

A petition may be filed only by the state, a county or city that plans under this chapter, a person who has either appeared before the county or city regarding the matter on which a review is being requested or is certified by the governor within sixty days of filing the request with the board, or a person qualified pursuant to RCW 34.05.530 [the APA standing provision].(emphasis added).

The individual petitioners assert standing pursuant to the APA standing provision.PFR, at 4.RCW 34.05.530 provides:

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action.A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

- (1)The agency action has prejudiced or is likely to prejudice that person;
- (2)That person’s asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3)A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.(emphasis added). [\[2\]](#)

There is no dispute that petitioners’ interests are among those that the City was required to consider when it acted.RCW 34.05.530(2).However, petitioners must show that the City’s action “has prejudiced or is likely to prejudice” them, RCW 34.05.530(1), and that a judgment in their favor “would substantially eliminate or redress” that prejudice, RCW 34.05.530(3).

Petitioners must demonstrate sufficient evidentiary facts to show that they have been prejudiced or are likely to be prejudiced by the agency’s action.*FOTL I*, at 15 (citing *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992)).*See also*, *St. Joseph Hosp. v. Dep’t. of Health*, 125 Wn. 2d 733, 739 (1995).Further, “when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself.If the injury is merely conjectural or hypothetical, there can be no standing.”*FOTL I*, at 15 (emphasis in original).

In other words, to meet the evidentiary burden to show an injury-in-fact, the petitioner must show that the government action will cause “specific and perceptible harm” and that the injury will be “immediate, concrete, and specific.”*Hapsmith v. Auburn (Hapsmith I)*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996), at 15 (citing *Leavitt v. Jefferson County*, 74 Wn. App. 668, 679 (1994)).

HEAL states that because the individual petitioners own vacant steep slope property, they will be

required to seek an exemption under the amended steep slope development regulations, Petitioners' Standing Response, at 3, but it fails to offer any evidence showing why the petitioners will be required to seek an exemption, or how they will be injured by the requirement to seek such an exemption. The City's critical areas development regulations provide several exemptions from steep slope regulations. Certain properties located in highly developed areas may be exempted, SMC 25.09.180 D(1); previously developed sites may be exempted, .180 D(3); and certain other steep slopes may be exempted, .180 D(4). These exemptions are independent of the amendments the City adopted in approving Ordinance 117945. These pre-existing exemptions, which remain unchanged after adoption of the ordinance, show that certain steep slope properties may be developed without the "burden" created by the challenged amendments adopted by the City.

Rather than burdening the individual petitioners, the City, in adopting Ordinance 117945, may have actually benefited the individual petitioners by providing them with an alternative avenue to avoid the restrictions of the pre-existing steep slope development regulations. The City did not eliminate any existing exemptions in the critical areas regulations; the City added a new [\[3\]](#) exemption.

The individual petitioners have provided no evidence to show that they will be subject to the amendments adopted through Ordinance 117945. As the City observes, "absent any specific development proposals for each of the properties, it is impossible to know whether or how the regulations would affect development." City's Standing Reply, 1-2. The individual petitioners [\[4\]](#) have not shown that they have applied for an exemption and have been denied. Nor have the individual petitioners shown that they are planning or even considering development that will be subject to the newly adopted exemption provision.

The individual petitioners have not demonstrated sufficient evidentiary facts to show that they have been prejudiced or are likely to be prejudiced by the City's adoption of Resolution 29253 or Ordinance 117945. The individual petitioners have not shown that the City's actions will cause specific and perceptible harm, and they have not shown that they will suffer an immediate, concrete, and specific injury.

The Board holds that, contrary to showing an immediate, concrete and specific injury as required by RCW 34.05.530(1), individual petitioners have shown only conjectural and hypothetical injury. Such a showing is not sufficient to establish that the City's actions, adopting Resolution 29253 and Ordinance 117945, have prejudiced or are likely to prejudice the individual petitioners. Because all three of the tests set forth in RCW 34.05.530 must be met in order to establish standing, and the individual petitioners have failed to do so, they lack standing to bring this appeal.

Because the Board finds that individual petitioners have not established an injury-in-fact, we need not decide whether a judgment in favor of petitioners would substantially eliminate or redress the alleged prejudice caused or likely to be caused by the City's action.

Conclusion

The Board concludes that the individual petitioners lack standing to challenge the City's adoption of Resolution 29253 and Ordinance 117945.

Because the Board has answered this question in the negative, it need not address the City's Standing Motion.

[5]

legal issue no. 2

Does the Board have jurisdiction to hear that portion of the appeal concerning Resolution 29253?

Parties' Positions

HEAL's Position

HEAL argues that the City misreads RCW 36.70A.280 when it claims that the Board lacks jurisdiction to consider the challenged Resolution. HEAL asserts that the statutory language does not limit the Board's jurisdiction to review of comprehensive plans, development regulations, and OFM population projections. HEAL interprets RCW 36.70A.280 as imposing no restrictions on the Board's authority over petitions alleging lack of compliance with other requirements of the GMA. Petitioners' Jurisdictional Response, at 2.

HEAL argues that the Board has jurisdiction to review Resolution 29253 because the petition alleges lack of compliance with the requirements of the GMA. Since the petition for review challenges adoption of Resolution 29253 for failure to include "the best available science" in developing policies, as required by RCW 36.70A.172, the Board has jurisdiction. Petitioners' Jurisdictional Response, at 3.

HEAL next argues that the City's interpretation of RCW 36.70A.280 should be rejected because "it would deprive the Board of jurisdiction to review county-wide planning policies." According to HEAL, the City's interpretation confines the Board's jurisdiction to comprehensive plans, development regulations, and OFM population projections; the Board would be prohibited from reviewing county-wide planning policies because such policies are not comprehensive plans, development regulations, or OFM population projections. HEAL notes that, since the Board clearly has jurisdiction over county-wide planning policies, the City's interpretation must be

rejected. Petitioners' Jurisdictional Response, at 3.

HEAL states that the City "admits" that the resolution was adopted to satisfy both SEPA and the GMA, and argues that because the policies adopted through Resolution 29253 were adopted in furtherance of the GMA, Resolution 29253 is subject to the Board's jurisdiction. ^[6] Petitioners' Jurisdictional Response, at 4.

HEAL argues that, even if some of the policies amended by Resolution 29253 and regulations amended by Ordinance 117945 were adopted pursuant to SEPA and the City's general police powers, at least "the steep slopes regulations are mandated by the GMA." Since geologically hazardous areas are required to be regulated as critical areas under the GMA, and since the City includes steep slopes as a geologically hazardous type of critical area, "the policies and regulations are clearly included to meet the GMA mandate and are subject to this Board's review." Petitioners' Jurisdictional Response, at 4-5.

Finally, HEAL claims that, although adopting policies for critical areas is not required by the GMA, by choosing to adopt such policies, the City is required to comply with the GMA by including the best available science. Petitioners' Jurisdictional Response, at 5.

City's Position

The City asks the Board to dismiss "the Petition for Review of Resolution 29253 because the Board lacks jurisdiction to review a resolution that is not a comprehensive plan, a development regulation, nor an OFM population projection." City's Jurisdictional Motion, at 1.

In petitions alleging noncompliance with the GMA, the City interprets RCW 36.70A.280 as granting the Board jurisdiction only over actions relating to comprehensive plans, development regulations, or OFM population projections. The City contends that the Resolution is a policy statement, not a comprehensive plan or development regulation, and thus not one of the actions described in RCW 36.70A.280. Therefore, it is not subject to the Board's jurisdiction. City's Jurisdictional Motion, at 4.

The City observes that its interpretation of RCW 36.70A.280 does not deprive the Board of reviewing county-wide planning policies, because a separate statutory provision expressly provides that authority. City's Jurisdictional Reply, at 4.

The City argues that the Board has jurisdiction to review petitions alleging a local government is not "in compliance with requirements of [the GMA]." City's Jurisdictional Reply, at 1. Since the Resolution is a policy statement identifying the policy reasons for adopting the City's critical areas regulations, and since such policy statements are recommended but not required by the Act, the Board lacks jurisdiction to review Petitioners' challenge of the Resolution. City's

Jurisdictional Motion, at 4.

The City asserts that a policy statement is not a comprehensive plan or a development regulation unless the City Council “chooses to make it so by adopting it by ordinance rather than by resolution.” Since the policy statement of Resolution 29253 was adopted as a resolution, not an ordinance, it is not a comprehensive plan or development regulation. Therefore, the City argues, Resolution 29253 is not subject to the Board’s jurisdiction. City’s Jurisdictional Motion, at 4.

The City further argues that Resolution 29253 does not function as an ordinance or regulation. The resolution “is what it purports to be, a policy statement, not a law or an ordinance.” Consequently, it is not reviewable by the Board as either a comprehensive plan or a development regulation. City’s Jurisdictional Motion, at 6-7.

Finally, the City argues that Resolution 29253 is not a “GMA document.” Since the policies of Resolution 29253 apply to areas beyond the scope of critical areas identified in the GMA, the policy statement as applied to these additional areas was “adopted pursuant to the City’s general police powers, in conjunction with SEPA.” Consequently, the City asserts that Resolution 29253, although authorized by the GMA, is not reviewable under the GMA. City’s Jurisdictional Motion, at 7-8.

Discussion

The Board has limited jurisdiction. The Board’s authority “must be strictly limited in its operations to those powers granted by the legislature.” *South Bellevue Partners Limited Partnership v. City of Bellevue*, CPSGMHB Case No. 95-3-0055, Order of Dismissal (September 20, 1995), at 4 (citation omitted).

The Board’s subject matter jurisdiction is set forth in RCW 36.70A.280, Matters Subject to Board Review:

- (1) A growth management hearings board shall hear and determine only those petitions alleging either:
 - (a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; 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.

In RCW 36.70A.280, the legislature has identified three types of petitions: (1) petitions alleging

lack of compliance with the requirements of chapter 36.70A RCW [GMA]^[7]; (2) petitions alleging lack of compliance with chapter 90.58 RCW [Shoreline Management Act (SMA)], but only as it relates to the adoption of shoreline master programs or amendments to those plans; and (3) petitions alleging lack of compliance with chapter 43.21C RCW (SEPA), but only as it relates to plans, development regulations, or amendments adopted under RCW 36.70A.040 or the SMA.

Only the first type is relevant in this case. **The Board holds that the plain language of RCW 36.70A.280 grants the Board jurisdiction over petitions alleging lack of compliance with the requirements of the GMA.**

The Board's ability to decide an issue is also restricted by RCW 36.70A.300, which requires that the Board's final orders be based exclusively on whether a county or city is in compliance with the requirements of the Act. RCW 36.70A.300(1). If there is no GMA requirement to adopt policies, the Board is without authority to review Resolution 29253.^[8]

Therefore, to determine whether the Board has jurisdiction over Resolution 29253, it must determine whether any provision in the Act creates a GMA duty that cities adopt policies to protect critical areas.

RCW 36.70A.172 is titled "Critical areas -- Designation and protection -- Best available science to be used." It provides:

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.

Unfortunately, the phrase "best available science" is not defined and, taken as a whole, the remaining language of RCW 36.70A.172 is less than clear. The Board concludes that the legislature's intent is to require counties and cities to be informed by the "best available science" as to critical areas protection. Had a period been placed after "best available science," the language of the statute would clearly reflect solely that intent. However, absent that punctuation, the Board is now forced to determine the meaning of the additional language.

RCW 36.70A.172 arguably does one of two things. It either merely instructs counties and cities in how to designate critical areas as required by RCW 36.70A.170, and how to develop critical areas regulations as required by RCW 36.70A.060(2), or RCW 36.70A.172 also creates a new requirement -- that counties and cities develop policies for the designation and protection of critical areas.

RCW 36.70A.172(1) uses the phrase "designating and protecting critical areas." (emphasis added).

RCW 36.70A.170 states that each city “shall designate . . . critical areas.” Likewise, RCW 36.70A.060(2) requires that each city “shall adopt development regulations that protect critical areas.” Neither section mentions, or even alludes to, policies. Neither of these two sections explicitly or implicitly requires cities to adopt policies. ^[9] Without clear legislative intent, the Board will not find a requirement that counties and cities develop policies for critical areas. *See, Alberg v. King County*, CPSGMHB Case No. 95-3-0041, Final Decision and Order (September 13, 1995), at 33 (stating that where the Act is silent on the application of the indispensable party rule in GMA cases, the Board does not have the power to create such a requirement).

The Board **holds that RCW 36.70A.172 does not impose a requirement that cities and counties adopt policies to protect critical areas; therefore, the Board does not have jurisdiction to hear an appeal of the City’s Resolution adopting such policies.** However, since cities and counties planning under the GMA are required to adopt development regulations to protect critical areas, a local government’s critical areas development regulations are subject to Board review. Such is the case in this petition.

Conclusion

The Board concludes that it has no jurisdiction over Resolution 29253. Since RCW 36.70A.172 does not establish a requirement that the City adopt policies for the designation and protection of critical areas, and such a requirement cannot be implied by RCW 36.70A.170 or RCW 36.70A.060, the Resolution amending critical areas policies is not subject to Board review under RCW 36.70A.280(1)(a).

legal issue no. 3

Are SMC 25.09.020 A, 25.09.180 D 5, and 25.09.300 D, as amended by Ordinance 117945, subject to the “Best Available Science” requirement of RCW 36.70A.172?

Parties’ Positions

HEAL’s Position

HEAL contends that the Washington State Legislature’s adoption of RCW 36.70A.172 requires the City to include the best available science in developing critical areas policies and regulations. Petitioners’ PHB, at 5.

City’s Position

In response, the City argues that HEAL failed to explicitly brief Legal Issue No. 3, and thus HEAL has abandoned its challenge of the amendments to the City’s critical areas ordinance. City

Discussion

Subsequent to the Prehearing Order, HEAL abandoned its challenge of SMC 25.09.180 D. Transcript of June 27, 1996, Hearing, at 103-04. As a general rule, the Board will not consider issues which have been abandoned by a party, and will dismiss such issues with prejudice. *See, Twin Falls v. Snohomish County*, CPSGPHB Case No. 93-3-0003, Final Decision and Order (September 7, 1993), at 17-18. **Therefore, the Board holds that HEAL's challenge of SMC 25.09.180 D is abandoned and is dismissed with prejudice.**

The City adopted its Critical Areas Ordinance on July 13, 1992, prior to the Legislature's adoption of RCW 36.70A.172. Finding of Fact 2. Thus, the original adoption of the Ordinance was not subject to the "best available science" requirement. However, the amendments to the Ordinance that HEAL has challenged in this case were adopted on December 11, 1995. Finding of Fact 6.

To the extent that the City's arguments can be construed as contending that the amendments adopted pursuant to Ordinance 117945 are not amendments of the City's GMA critical areas regulations, the Board finds these arguments unpersuasive for the following reasons.

As the Board determined in Findings of Fact 1 and 2, the City's purpose in adopting its original environmentally critical areas regulations was in part to satisfy the requirements of the GMA. This action is consistent with the Board's interpretation of the requirements of the Act, as discussed below.

Under the GMA, the Washington Legislature defined critical areas to include geologically hazardous areas. RCW 36.70A.030(5)(e). Furthermore, under the Act, geologically hazardous areas are defined as:

areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns. RCW 36.70A.030(9).

In addition, the Department of Community, Trade, and Economic Development (**CTED**) guidelines for classifying lands as geologically hazardous areas provide:

Areas that are susceptible to one or more of the following types of hazards shall be classified as a geologically hazardous area: (i) Erosion hazard; (ii) Landslide hazard;
WAC 365-190-080(4)(a).

In this case, the original regulations, codified at SMC 25.09, as well as the challenged amendments adopted by Ordinance 117945, regulate development of critical areas, including

steep slopes.

The City concedes that the GMA requires regulation of steep slopes. Transcript of June 27, 1996 hearing, at 66. In addition, the City itself has classified steep slopes as a subset of landslide-prone areas under its critical areas regulations. SMC 25.09.020 B.1.a(2)(b). Therefore, the City's steep slope regulations are indeed critical areas regulations, and RCW 36.70A.172 applies to the amendments adopted pursuant to Ordinance 117945, as has been determined above.

Because Ordinance 117945 was adopted after the provisions of RCW 36.70A.172 became effective, and amended sections of the City's critical areas regulations, **the Board holds that the amendments to SMC 25.09.020 A and 25.09.300 D adopted pursuant to Ordinance 117945 are subject to the best available science requirement of RCW 36.70A.172(1).**

Conclusion

The amendments adopted in Ordinance 117945 are critical areas development regulations, and are subject to the best available science requirement of RCW 36.70A.172.

legal issue no. 4

If the answer to Legal Issue No. 2 is yes, is Resolution 29253, including Exhibit A, subject to the Best Available Science Requirement of RCW 36.70A.172?

Conclusion

Because the Board has determined in Legal Issue No. 2 that it does not have jurisdiction over the challenged resolution, the Board need not address this issue.

[\[10\]](#)

legal issue no. 5

If the answer to Legal Issue No. 2 and/or No. 4 is yes, did the City violate RCW 36.70A.172 by failing to include the Best Available Science when it developed policies and regulations for critical areas, specifically amendments to its critical area policies contained in Resolution 29253 and/or amendments to its regulations for environmentally critical areas contained in Ordinance 117945?

Parties' Positions

HEAL's Position

HEAL contends that the City has violated RCW 36.70A.172 by failing to include the best

available science in its development of the amendments of the critical areas regulations adopted pursuant to Ordinance 117945. Petitioners' PHB, at 5. In addition, HEAL dedicates the bulk of its argument to its contention that the City violated RCW 36.70A.172 because the amendments of the critical areas regulations *are not supported by* the best available science. *Id.* at 6-29. Much of HEAL's argument is spent either discrediting the expert opinions and information upon which the City based its decision, or establishing its own version of the best available science through expert opinion and information that support its view on steep slope development. *Id.*

City's Position

In response, the City contends that it has included the best available science in its development of the amendments adopted pursuant to Ordinance 117945. *See* City's PHB, at 2. However, similar to HEAL, the City dedicates most of its argument to its contention that the amendments of its critical areas regulations *are supported by* the best available science. *See Id.* at 6-32. Much of the City's argument is spent establishing the expert opinion and information upon which it relied when it developed the amendments to its critical areas regulations. *See Id.* In addition, the City argues that the Board is limited to determining whether the City "considered the best science available to the [City] in the record." City's Response to Motion to Supplement, at 4.

Discussion

HEAL's argument on Legal Issue No. 5 can be construed as not only challenging the amendments adopted in Ordinance 117945, but also challenging the City's original enactment of its critical areas regulations, adopted pursuant to Ordinance 116253 on July 13, 1992, because those regulations were not developed using best available science. HEAL PHB, at 5. To the extent that HEAL challenges the critical areas regulations adopted pursuant to Ordinance 116253, the Board held, in Legal Issue No. 3 above, that the City's original critical areas regulations enacted in 1992 are not subject to the provisions of RCW 36.70A.172; only those amendments in Ordinance 117945 are. The act of amending the 1992 ordinance does not retroactively subject the ordinance as a whole to a later legislative requirement. As discussed under Legal Issue No. 3 above, RCW 36.70A.172 was enacted in 1995, subsequent to the City's enactment of Ordinance 116253, and therefore is not applicable to the City's original critical areas regulations, absent a retroactivity clause.

HEAL's challenge that the City's adoption of Ordinance 117945 is violative of the best available science requirement of RCW 36.70A.172 is a case of first impression. For that reason, the Board analyzes RCW 36.70A.172 below, basing that analysis upon (1) the language of that particular section of the Act and (2) other provisions of the Act.

RCW 36.70A.172

The Washington Legislature enacted RCW 36.70A.172 as part of the Regulatory Reform Act of 1995. 1995 Wash. Laws, ch. 347, § 105. The relevant portion of this section of the Act is set forth under Legal Issue No. 3 above. The following discussion presents a detailed analysis of the language of RCW 36.70A.172 to assist in understanding what the Legislature has required of counties and cities with respect to this section.

“In designating and protecting critical areas under this chapter . . .”

This phrase specifically limits application of the requirement in RCW 36.70A.172 to local government actions that involve the designation and protection of critical areas as required under the GMA. This section does not include a retroactivity provision. Therefore, it is applicable only to local government actions taken subsequent to the effective date of the section.

“Counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.”

This is actually several phrases that interact to form the heart of section 172. The language in these phrases is drafted so as to require counties and cities to “include the best available science in developing policies and development regulations.” “Include” is defined as “to have or take in as a part or member.” *Webster’s II New Riverside University Dictionary* 619 (1988). “Include the best available science in developing policies and development regulations” instructs counties and cities that they must “have” best available science “as a part of” their development of policies and development regulations.

The key portion of the section in dispute in this issue is “in developing.” By using this language the Legislature clearly has not mandated any substantive outcome, or product, when counties and cities take actions that are subject to the provisions of this section. Rather, the Legislature has required counties and cities to make the best available science a part of their process of “developing policies and development regulations to protect the functions and values of critical areas.”

Based upon this analysis, the Board interprets the Legislature’s intent to be that counties and cities include the best available science in their process of developing critical areas regulations, so that this information can be considered before any legislative action is taken. This requirement is analogous to the environmental analysis required under the State Environmental Policy Act

[\[11\]](#)
(SEPA). A primary purpose of SEPA is to ensure that environmental information and analysis is considered by state agencies and local governments prior to taking an action. In this way, SEPA functions as a procedural statute that is intended to ensure that governments make better-informed decisions.

Additionally, the SEPA analogy is bolstered by the fact that the government entity faced with

taking some action is not limited to basing its decision solely upon the environmental information that has been developed during the review process (SEPA) or during development of critical areas regulations (GMA). Instead, both SEPA and the GMA provide for the consideration of several competing factors. *Cf.* RCW 43.21C.030(2)(b) and RCW 36.70A.020.

Although HEAL and the City initially state the requirement of RCW 36.70A.172 correctly (i.e., to include the best available science in developing critical areas regulations), neither party argues this point. *See* Petitioners' and City's PHBs. Rather, both parties almost exclusively argue the opposing sides of (1) what is the best available science and (2) whether Ordinance 117945 is supported by the best available science. *See Id.* However, based upon the following discussion, the Board concludes that its review is limited to whether the best available science was included by the City during the development of Ordinance 117945.

Did the City include the best available science in developing Ordinance 117945?

Both HEAL and the City acknowledge that neither the Legislature nor CTED has provided any guidance regarding the "best available science" requirement. *See* Petitioners' PHB, at 6-7 and City's PHB, at 6-8. Not surprisingly, both parties offer definitions that support their own arguments. Although the Board finds that either party's definition is plausible, it has sought guidance from sources more relevant to the policies and provisions of the GMA, and specifically to the protection of critical areas.

In searching for prior usage of the phrase "best available science," the Board has analyzed the entire database of Washington statutes, regulations, and case law. This search has revealed that the Washington Legislature and the Washington courts have not previously used or interpreted this phrase. Therefore, the search was expanded to include other jurisdictions, and in so doing the Board found an analogous usage of the phrase within the Federal Endangered Species Act (**ESA**).

Under section 7 of the ESA, Congress has mandated that "[i]n fulfilling the [consultation requirements of the ESA] each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536(2). This provision of the ESA is similar to that in RCW 36.70A.172, in that the provision itself does not mandate any substantive outcome. Additionally, the interpretation given to this section by the federal courts is also consistent with the policy considerations of the GMA. *See State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988). The court in *Louisiana* held that "where . . . the agency presents scientifically respectable conclusions which appellants are able to dispute with rival evidence of presumably equal dignity, we will not displace the administrative choice. Nor will we remand the matter to the agency in order that the discrepant conclusions be reconciled." *Louisiana*, at 329.

For policy reasons similar to the considerations cited by the court in *Louisiana*, the GMA requires the Board to give deference to a local government's choice of scientific data. These

policy considerations are evidenced in the GMA by the presumption of validity that local enactments enjoy, and by placing the burden of proof on those challenging the local government's action.^[12] RCW 36.70A.320(1).

Thus, considering the foregoing analysis, the City was required to include as part of the record of its development of the challenged enactments the scientific information that was developed by the City and presented to the City by others during its development of Ordinance 117945. Based upon the record and the arguments presented by HEAL and the City, it is clear that the City has fulfilled this requirement. In fact, much of HEAL's Prehearing and Reply Briefs is dedicated to explaining the extensive amount of scientific information and expert opinions that HEAL and others presented to the City. The Board must assume that the City included that information and those opinions in its development of the challenged amendments. HEAL's complaint is that the City failed to heed that externally supplied information, and instead based its decision upon its own data. However, there is no requirement that Ordinance 117945 reflect such scientific information from either or both sources. Where, as here, there is no requirement, such an assertion is not sufficient to sustain a challenge to the City's action. **The Board holds that the City included the best available science when it developed Ordinance 117945 amending its critical areas regulations, and that the City did not violate RCW 36.70A.172.**

Conclusion

RCW 36.70A.172 requires counties and cities to include the best available science in the process of developing critical areas policies and development regulations. The record shows that the City has included the best available science in the process of developing amendments to its critical areas regulations.

V. board's decisions on other motions

City's Motion for Extension of Time to File Index. This motion was not opposed and was **granted**.

City's Standing Motion. The substance of this motion was addressed in the Board's ruling on Legal Issue 1, *supra*.

City's Jurisdictional Motion. The substance of this motion was addressed in the Board's ruling on Legal Issue 2, *supra*.

City of Seattle's Motion and Memorandum to Supplement the Record by Witness Declaration and Testimony. This motion is **denied**; *see* discussion and ruling at section III, 3, *supra*.

Petitioners' Motion to Supplement the Record. The record developed by the City may be

“supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.”RCW 36.70A.290(4).This motion is **denied**; see discussion and ruling at section III, 3, *supra*.

City of Seattle’s Motion for Oral Argument on Allowing Expert Testimony.Since no expert testimony was allowed at the hearing on the merits, this motion is **denied**.

City of Seattle’s Motion for Judicial Notice.The Board may officially notice executive orders. WAC 242.02.660(2).The Governor’s Task Force on Regulatory Reform and its responsibilities were established by Executive Order 93-06.The Board may take official notice of the *Governor’s Task Force on Regulatory Reform Final Report*.This motion is **granted**.

Seattle’s Motion for Extension of Time for Filing Rebuttal Exhibit and/or Witness List.Because Petitioners’ request to supplement the record was denied and expert witness testimony was not permitted at the hearing on the merits, this motion is **denied**.

City of Seattle’s Motion for Discovery of Petitioners’ Proposed Expert Witnesses.Because expert witness testimony was not permitted at the hearing on the merits, this motion is **denied**.

City of Seattle’s Objections to Petitioners’ Rebuttal Witness List.Because expert witness testimony was not permitted at the hearing on the merits, this motion is **denied**.

Respondent City of Seattle’s Motion to Supplement the Record.This motion was filed in response to Petitioners’ Prehearing Brief.Because the Board denied Petitioners’ Motion to Supplement the Record, such additional evidence is unnecessary and of no assistance to the Board in deciding this case.This motion is **denied**.

Respondent City of Seattle’s Motion to Strike Petitioners’ Unauthorized Documents Supplementing the Record.Petitioners’ Prehearing Brief contains three attachments.Attachment A is an excerpt from Plaintiff’s Opening Brief on Writ of Review in *Pang v. City of Seattle*. Attachment B is Findings and Decision of the Hearing Examiner for the City of Seattle In the Matter of the Appeal of Henry Pang.

The Board may officially notice decisions of the state courts.WAC 242.02.660(2).Attachment A is not subject to official notice because it is not a decision of a state court; it is an excerpt from one party’s brief.The Board did not find Attachment A to be necessary or of substantial assistance in reaching its decision in this case.RCW 36.70A.290(4).Similarly, Attachment C is also not necessary for the Board to make its decision.Consequently, Attachments A and C will be excluded from the record.

Attachment B is a decision of a state court, and as such is subject to official notice.WAC 242.02.660(2).The Board takes such notice.However, as footnoted above, the *Pang* case is of no

value in the present controversy. This motion is **denied** as to Attachment B, and granted as to Attachments A and C.

Vi. ORDER

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

1. The City's Motion to Dismiss Individual Petitioners for Lack of Standing, Legal Issue No. 1, is **granted**. The Board has determined that the individual petitioners lack standing to challenge the City's adoption of Resolution 29253 and Ordinance 117945.

2. The City's Motion to Dismiss Review of Resolution for Lack of Jurisdiction, Legal Issues No. 2 and 4, is **granted**. The Board has determined that it lacks jurisdiction over Resolution 29253.

3. The City of Seattle's amendments to its critical areas regulations, Ordinance 117945, are **in compliance** with the requirements of the Growth Management Act.

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So ORDERED this 21 day of August, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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.

[1] See also City's Standing Motion.

[2] Although, historically, the APA has applied only to state, not local, government actions, the GMA's reference to the APA now subjects local legislative actions to the APA's standing requirements. See *Friends of the Law v. King County (FOTL I)*, CPSGMHB Case No. 94-3-0003, Order on Dispositive Motions (April 22, 1994), at 13.

[3] The new exemption adopted by the City states:

Stabilization of Landslide-prone Area. Certain steep slopes may be exempted from the steep slope regulations upon the Director's determination, based on geotechnical expertise, that application of the regulations would prevent necessary stabilization of a landslide-prone area, subject to the provisions of Section 25.09.080 C, Third-Party Review. SMC 25.09.180 D 5.

Although Petitioners have abandoned their challenge to .180 D 5, proper analysis of the effects of the City's action requires the Board to consider the whole of the amended regulations.

[4] In *Pang v. City of Seattle*, relied on by Petitioners, petitioner Pang applied for and was denied an exemption under the critical areas regulations before amendment. King County Superior Court Order on Writ of Review, No. 94-2-28618-8 (October 30, 1995). Petitioners in the instant case have not applied for an exemption. *Pang* is of no relevance in the present dispute. *Pang* stands only for the proposition that, under the facts of that case, the City's enforcement of its development regulations against Pang was improper. Order on Writ of Review, at 2.

[5] See also City's Jurisdictional Motion.

[6] HEAL states "the City here admits that Resolution 29253 was adopted 'expressly pursuant to both [SEPA] and the [GMA].'" Petitioners' Jurisdictional Response, at 4 (quoting City's Jurisdictional Motion, at 1-2). The full text of the City's statement reads "In 1992 the City of Seattle adopted Resolution 28559 adopting 'environmentally critical areas policies' expressly pursuant to both [SEPA] and the [GMA]." City's Jurisdictional Motion, at 1-2. The City was not expressly stating that Resolution 29253 was adopted pursuant to SEPA and the GMA; the City expressly stated that Resolution 28559 was adopted pursuant to SEPA and the GMA.

[7] Another provision of the GMA, RCW 36.70A.290(2), expresses that the scope of a petition filed with the Board "may include allegations of noncompliance with the goals, not simply the requirements, of [the GMA]." *Cole v. Pierce County [Cole]*, CPSGMHB Case No. 96-3-0009c, Final Decision and Order (July 31, 1996), at 12.

[8] RCW 36.70A.320 states that comprehensive plans, development regulations, and amendments thereto are presumed valid upon adoption. RCW 36.70A.320(1). This section directs the Board to "determine whether there is compliance with the requirements of this chapter." *Id.* This section is further evidence that, unless RCW 36.70A.172 creates a GMA requirement to adopt policies, the Board has no jurisdiction to review Resolution 29253.

[9] The Board also notes that the Act does not include among the mandatory comprehensive plan elements listed at RCW 36.70A.070 or optional elements listed at RCW 36.70A.080 any "critical areas," "resource lands," or "natural environment" element. If it did so, it would lend credence to the notion that RCW 36.70A.172 is making reference to the "policies" adopted in such a chapter.

[10] Because the Board has determined that it does not have jurisdiction over Resolution 29253, the Board's analysis of Legal Issue No. 5 is limited to the amendments to the critical areas regulations adopted pursuant to Ordinance 117945.

[11] The Board is not interpreting RCW 36.70A.172 as requiring the depth and scope of analysis required in a SEPA EIS. The Board is merely noting a common purpose with respect to RCW 36.70A.172 and SEPA generally -- to produce informed decisions.

[12]

This reasoning is supported further by practical considerations. If the Board were to interpret the Act to require local governments' actions to be supported by the best available science, then local governments could be faced with a paradox. On the one hand, the county or city would be required to enact regulations designating and protecting critical areas, but on the other hand, where competing scientific information of comparable credibility has been presented, it would be unable to enact legislation that is supported by scientific data which has been determined to be the "best available" of that competing information. When parties present conflicting expert opinions and scientific information which is included in the record that has been developed during the amendment process, the local government must have discretion to rely on the reasonable opinions of its own qualified experts and its own scientific information, even if the Board might be persuaded by contrary views. *See Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1576 (9th Cir. 1993).