

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

| | | |
|----------------------------|---|---------------------------------|
| HOME BUILDERS ASSOCIATION |) | |
| OF KITSAP COUNTY, |) | Case No. 00-3-0014 |
| |) | |
| Petitioner(s), |) | (HBA) |
| |) | |
| v. |) | FINAL DECISION AND ORDER |
| |) | |
| CITY OF BAINBRIDGE ISLAND, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| |) | |
| |) | |
| |) | |
| |) | |

I. Background

On August 30, 2000, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Home Builders Association of Kitsap County (**Petitioner** or **HBA**). The matter was assigned Case No. 00-3-0014, and is hereafter referred to as ***HBA v. City of Bainbridge Island***. Petitioner challenges Ordinance No. 2000-13 (the **Ordinance**) of the City of Bainbridge Island which amends the Critical Areas Ordinance as to density calculations for flexible lot design and density transfers on parcels containing a regulated wetland. The grounds for the challenge is noncompliance with various sections of the Growth Management Act (**GMA** or **Act**).

On September 6, 2000, the Board received a Notice of Appearance from Dawn L. Findlay and Rod P. Kaseguma representing the Respondent, the City of Bainbridge Island.

On September 8, 2000, the Board issued a “Notice of Hearing” (the **Notice**) in this matter.

On September 29, 2000, the Board conducted the prehearing conference in this matter in Room 1022 of the Financial Center, 1215 Fourth Avenue, Seattle. Present for the Board were Joseph Tovar and Lois North, presiding officer . Representing the Petitioner was Dennis D. Reynolds. Representing the City was Dawn L. Findlay. Also in attendance was Alan Martin, Government Affairs Director for the Home Builders Association of Kitsap County.

On September 28, 2000, Mr. Reynolds filed with the Board an Amended Petition for Review. The City Council of Bainbridge Island adopted an amended version of Ordinance 2000-13, which clarified certain terms and conditions, but did not alter the substantive impact intent, or terms of the Ordinance. Amended Ordinance No. 2000-13 was published on September 16, 2000. A copy of Amended Ordinance No. 2000-13 has been included as part of the Amended Petition for Review. The Petitioner intends that the Board review the validity of Ordinance No. 2000-13. At the Prehearing Conference, the Board accepted the Amended Petition for Review as the official document in Case No. 00-3-0014.

At the Prehearing Conference, Dawn L. Findlay filed the Index for the City of Bainbridge Island.

The four legal issues presented by the Petitioner were discussed. It was agreed that Mr. Reynolds would refine the first two issues with specific citations from RCW 36.70A and submit them to the Board by Thursday, October 5, 2000.

The Prehearing Order was issued on Monday, October 9, 2000.

On November 27, 2000, the Board received the Petitioner's Prehearing Brief (**Petitioner's Brief**), Exhibit List, and Motion to Supplement the Record before the Board with six items.

On December 18, 2000, the Board received the City's Prehearing Brief (**City's Brief**), a Motion to Supplement the Record with four items, and the City's Response to Petitioner's Motion to Supplement the Record.

On December 27, 2000, the Board received the Petitioner's Reply Brief (**Petitioner's Reply**), the Petitioner's Reply and Response to the City's Motion to Supplement, and the Petitioner's Motion to Strike.

On Monday, January 8, 2001, beginning at 10:00 a.m., the Board conducted a Hearing on the Merits in room 1022 of the Financial Center, 1215 Fourth Avenue, Seattle. Present for the Board were Edward G. McGuire, Joseph W. Tovar, and Lois H. North, presiding officer. The Petitioner, Home Builders Association of Kitsap County, was represented by Dennis D. Reynolds. Representing the City was Dawn L. Findlay. Also in attendance was Brian Norkus, Legal Intern for the Board. Court reporting services were provided by Robert H. Lewis of Tacoma, Washington. No witnesses testified.

At the start of the Hearing, the presiding officer **granted** the Motions to Supplement the Record made by both the Petitioner and Respondent. Petitioner's Exhibits A, B, C, D, E, and F were accepted. Respondent's Exhibits A, B, C, and D were accepted.

The presiding officer next took up the Petitioner's Motion to Strike. Both the Petitioner and

Respondent were asked to make comments on the Motion. After hearing from both parties, the presiding officer ruled to **deny** the Petitioner's Motion to Strike.

The Hearing was concluded at 11:30 a.m. after both parties had been given equal time to present their case.

II. FINDINGS OF FACT

1. The City of Bainbridge Island adopted a flexible lot design ordinance, No. 96-06(B), codified in Chapters 17.04 of the Bainbridge Island Municipal Code (BIMC, Chapter 17.04.080) to implement the Comprehensive Plan's goal for urban infilling.
2. This Ordinance No. 96-06(B) provided that if a property owner utilized flexible lot design to accommodate "innovation, creativity, and design flexibility" to achieve a level of environmental protection that would not be possible by a typical lot-by-lot development, then "some or all of the wetland area may be included in the density calculation." B.I. Comp Plan, p. 89, AR 137.
3. Ordinance No. 2000-13 was enacted by the Bainbridge Island City Council on June 28, 2000. This Ordinance was a modification to the City's Critical Areas Ordinance to change the method of calculating density on parcels with wetlands. The effect of the change was to eliminate the use of bonus densities (a form of flexible lot design) wherever wetlands occur except in the R-0.4 zone. *See*: PFR, at Exhibit 1.
4. The R-0.4 zone is defined as one unit per two and one-half acre on the City of Bainbridge Island Official Zoning Map. Exhibit "C" of Petitioner's Motion to Supplement, November 27, 2000. The zones range from R-14 (fourteen units per acre) to R-0.4 (one unit per 2.5 acres).
5. Ordinance No. 2000-13 amended the City's Development Regulations, but it did not amend the City's Comprehensive Plan.
6. In Adopting Ordinance No. 2000-13, the City used the City Council's procedure for the adoption of City Ordinances, which consists of three Readings and possible adoption at the time of the third Reading. The City's Resolution No. 96-48 specifies that the City Council "shall take public input" on a proposed ordinance at the second reading. Bainbridge Island Ordinance 96-48 at p. 4-5.
7. Four citizens testified in regards to the proposed Ordinance 2000-13 at the Second Reading on June 14, 2000.
8. Written comments from the Petitioner were accepted by the City Council on June 28, 2000, on

the occasion of the Third Reading and final passage of Ordinance 2000-13.

9. The City of Bainbridge Island did not involve its Planning Commission in the review of proposed Ordinance No. 2000-13, nor did the Planning Commission hold a public hearing on the matter.

10. The City posted “notices” of the proposed Ordinance No. 2000-13 (the City Council Agenda), which was posted at the Ferry Dock, the Public Library, at the Chamber of Commerce, at the City Hall, and in the Island’s newspaper.

11. The City’s description of Ordinance No. 2000-13, in its published City Council Agenda read: “Revision to the Critical Areas Ordinance.” Petitioner’s Reply at 5. The City’s Chapter of Law dealing with Critical Areas is 25 pages long and covers multiple subjects.

12. RCW 36.70A.106(1) requires that the Department of Community, Trade, and Economic Development be given **notice** of a city or county’s intent to amend its development regulations and/or its comprehensive plan at least 60 days prior to its final adoption.

13. The City adopted a Declaration of Non-Significance (DNS) as to Ordinance No. 2000-13 on May 25, 2000, which was sent to CTED. The City’s DNS carried the title: “Modification to Critical Area Ordinance (BIMC 16.20) to change method of calculating Density of Parcels with Wetlands.” The City Council adopted Ordinance No. 2000-13 on June 28, 2000.

14. Less than sixty days lapsed between the date the City sent CTED its DNS, and the date on which the City adopted the Ordinance.

III. STANDARD OF REVIEW

Pursuant to RCW 36.70A.320, comprehensive plans and development regulations, and amendments thereto, adopted pursuant to the Act, are **presumed valid** upon adoption.

The **burden is on the Petitioner** to demonstrate that any action taken by the Respondent jurisdiction is not in compliance with the Act.

The Board “shall find compliance with the Act, unless it determines that the [City’s] action[s are] **clearly erroneous** in view of the entire record before the Board and in light of the goals and requirements of the [GMA].” RCW 36.70A.320(3). For the Board to find the City’s actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn 2d 179, 201 (1993)

IV. PREFATORY NOTE

The Board will address the four Legal Issues of this petition in the following order: Issue No. 3, Issue No. 4, Issue No. 1, Issue No. 2, and Invalidity.

V. LEGAL ISSUES

A. Legal Issue No. 3: CTED Notice

The Petition for Review sets forth Legal Issue No. 3 as:

Has the City of Bainbridge Island complied with the requirements of RCW 36.70A.106(3) as to notifying the Department of Commerce, Trade, and Economic Development of its intent to amend its development regulations and, having failed to notify CTED^[1] whether this failure renders Ordinance No. 2000-13 noncompliant and invalid under the GMA?

The GMA describes the role of CTED and other state agencies in reviewing and commenting upon plan and development regulations.

RCW 36.70A.106 Comprehensive plans – Development Regulations – Transmitted to state. (1) Each county and city proposing adoption of a comprehensive plan or development regulations under this chapter shall notify the department^[2] of its intent to adopt such plan or regulation at least sixty days prior to final adoption. State agencies including the department may provide comments to the county or city on the proposed comprehensive plan, or proposed development regulations, during the public review process prior to adoption.

(2)...

(3) Any amendments for permanent changes to a comprehensive plan or development regulations that are proposed by a county or city to its adopted plan or regulation shall be submitted to the department in the same manner as initial plans and development regulations under this section...

(Emphasis added).

1. Discussion

a. **Position of the Parties**

As noted above, RCW 36.70A.106(3) provides that “any amendments for permanent changes to a comprehensive plan or development regulation that are proposed by a county or city to its adopted plan or regulations shall be submitted to CTED at least sixty days prior to its final adoption”. [3] The Petitioner argues that the City failed to notify CTED of its intentions to adopt Ordinance 2000-13 and amend its development regulations, violating this GMA requirement. Petitioner’s Brief, at 19.

The City states that it sent notice of its intent to amend its critical area regulations to CTED when it mailed notice of the Declaration of Non-Significance issued on Ordinance No. 2000-13. City’s Brief, at 18.

The Petitioner notes that the City adopted the DNS on May 25, 2000 indicating that the proposed ordinance would modify its existing Critical Areas Ordinance (AR 1163). Finding of Fact No. 13. The City Council adopted Ordinance No. 2000-13 on June 28, 2000 (AR 1216-17, 1226, 1235). *Id.* “Even assuming that CTED received the DNS the same day it was adopted, no more than 35 days could have elapsed between the City providing CTED with its ‘notice’ and final adoption of the ordinance.” Petitioner’s Reply, at 12.

b. Analysis

RCW 36.70A.106 says that notice of any proposed amendments for permanent changes to a county or city’s development regulation shall be submitted to CTED “at least sixty days prior to final adoption” so that the department or other state agencies may provide comments.

The Board has interpreted this requirement in the case of *Children’s Alliance and Low Income Housing Institute v. City of Bellevue*, CPSGMHB Case No. 95-3-0011, Final Decision Order, (Jul. 25, 1995). In that decision, the Board did not elaborate on what a jurisdiction must actually submit to CTED as “notice of it’s intent”, but the Board recognizes that CTED must be fully apprised and fully aware of the substance of any proposed amendment. A city or county notice must describe *what* it is proposing to do.

The Board sees two aspects to the issue of notification of the Department of Community, Trade, and Economic Development (See Footnote 1); timeliness and sufficiency.

The City’s Prehearing Brief makes no mention of the 60-day requirement but simply acknowledges that the City did send notice of the intent to amend and described the notice as “Modification to Critical Area Ordinance (16.20) to change method of calculating density on parcels with wetlands.” At the Hearing on the Merits on January 12, 2001, a Board member asked the City if the City had notified CTED in September when the City published a second revised edition of Ordinance No. 2000-13. The City indicated that it had not.

The GMA stipulates that notice of any amendments for permanent changes to a comprehensive plan or development regulation “shall” be submitted “at least sixty days” prior to its final adoption. The record shows that only thirty-five days could have elapsed in this case between notice and formal adoption by the City Council. This is an error on the part of the City and is noncompliant with the timeliness provisions of section .106.

As to the sufficiency of the notice, the City elected to use a SEPA document for notice instead of a GMA document. The DNS stated on the cover sheet that the proposed ordinance was a “Modification to Critical Areas Ordinance (16.20) to change method of calculating density of parcels with wetlands”. Respondent’s Brief, Exhibit 15. While this title was more illuminating than what was stated on the Council Agenda for notice to the general public, a SEPA Notice is not the proper form to give .106 notice of a proposed GMA action. Local governments cannot give CTED proper notice of a proposed amendment to a comprehensive plan or development regulation simply by sending a copy of an environmental notice as embodied in a Declaration of Non-Significance. The DNS Notice is a creature of SEPA, and would typically only be sent to the Department of Ecology. The Board finds that the City’s notice to CTED was inappropriate and insufficient and therefore noncompliant with RCW 36.70A.106.

The Board is mindful that in the year 2002 all local government jurisdictions in the Central Puget Sound region must review their comprehensive plans and regulations, including critical areas ordinances. RCW 36.70A.130 and .215. CTED will need to coordinate these notices with other state agencies who may be affected and to properly review the substance of all proposed amendments submitted by local government entities. The Board would in no way undermine the statutorily mandated 60-day timeframe that CTED needs to carry out its duty under the GMA.

2. Conclusion re: Legal Issue 3

Petitioner has carried the burden of showing that the City of Bainbridge Island failed to comply with the requirements of RCW 36.70A.106(3) as to notifying the Department of Community, Trade, and Economic Development of its intent to amend its development regulations, both as to timeliness and sufficiency. Ordinance No. 2000-13 **does not comply** under the GMA.

B. Legal Issue No. 4: Public Participation

The Petition for Review sets forth Legal Issue No. 4 as:

Has the City of Bainbridge Island complied with the public participation

requirements of the GMA (RCW 36.70A.140, .035) in adopting Ordinance No. 2000-13, in particular, since the Ordinance acts as a *de facto* amendment of its GMA Comprehensive Plan?

1. Discussion

a. Positions of the Parties:

The Petitioner has set out the following sequence of events leading up to the enactment of Ordinance 2000-13. At a meeting on May 16, 2000, the Land Use Committee (LUC) of the Bainbridge Island City Council directed one of the City Natural Resource Planners to draft an ordinance to modify the City's Critical Areas Ordinance to be first presented on May 24, 2000. Petitioner's Brief, at 5. On the 24th the City Council referred the proposed Ordinance to the LUC. For the May 24, 2000 City Council meeting the agenda described the proposed legislation as "revision of Critical Area Ordinance." *Id.* The City did not issue any public notice regarding proposed amendments to development regulations or state the nature of the proposed "revision." *Id.* After review of the proposed Ordinance, the LUC referred back to the City Council for a second reading, which occurred on June 14, 2000, where the City council received comments from four citizens. *Id.* at 6. On June 20, 2000, the LUC made several changes to the proposed ordinance, with consideration of the public comment from June 14, 2000, and sent it back to the City Council for a third reading. Without a "public hearing" the Council adopted Ordinance 2000-13 on June 28, 2000. *Id.* The meeting agendas referenced the Ordinance as "revision of Critical Area Ordinance." *Id.*

Petitioner notes, "...while the requirement to consider public comment does not require elected officials to agree with or obey such comment, local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning enactments." Petitioner's Brief, at 21, citing *West Seattle Defense Fund v. Seattle*, CPSGMHB Case No. 94-3-0016, Final Decision and Order (Apr. 4, 1995), at 71.

"The City relied only on its system of three readings... and failed to refer the matter to its planning commission or even hold a single public hearing." Petitioner's Brief, at 22. "The only notice provided to residents of the Island were the agendas." *Id.* The Petitioners complain that the City made no attempt to notify the public that they were considering amendments to the critical areas ordinance or that those amendments would prevent lot flexibility allowed under the comprehensive plan. *Id.*, at 23.

Andrus v. City of Bainbridge Island (Andrus), CPSGMHB Case No. 89-3-0030, Final Decision and Order (Mar. 31, 1999) noted that when the City was drafting its Winslow Master Plan they failed to ensure notice was provided in sufficient time for citizens to review documents and provide meaningful comments. Petitioner's Brief, at 24, citing *Andrus*, at 2. There is no

explanation contained in the Ordinance to assist an interested citizen in understanding its impact and reach. Petitioner’s Brief, at 24-25. The only notice is a reference to a “revision” with no explanation of the notice or intent of the revision. *Id.*, at 24-25.

Petitioner claims that the City failed to comply with mandates of RCW 36.70A.035, which requires “specific notice requirements when amending GMA plans or adoptions development regulations.” Petitioner’s Reply Brief, at 13. The City’s “City Council Procedures” give no reference regarding amendments to development regulations or to the GMA and its requirements for enhanced public participation. *Id.* The City’s only procedural requirements it followed was that it had to provide three “readings” of the proposed amendments. Petitioner’s Reply Brief, at 14.

The City states that according to the Board in *Sky Valley v. Snohomish County*, the Act requires procedures that ensure that the public has a “reasonable opportunity to comment.” City’s Brief, at 19, citing *Sky Valley v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Final Decision and Order (Mar. 12, 1996), at 1653. The City argues that development regulation amendments fall under the procedures outlined in Resolution No. 96-48, as Development Regulation amendments are in the form of an “Ordinance.” City’s Brief, at 20. The second reading (after a committee review) is the first time that the City Council “shall” take public input. *Id.*, at 21. Under the resolution, notice is required through publishing of the agenda at various community locations and the City’s official newspaper. *Id.*

The City disagrees with Petitioner’s allegation that they failed to hold a public meeting (*See*: Petitioner’s Brief at 24), and the City points to the four citizens who gave testimony at the second reading. *Id.*

b. Analysis

RCW 36.70A.035 requires that procedures be “reasonable calculated to provide notice” to “property owners and other affected and interested individuals.”

RCW 36.70A.035 Public participation - Notice provisions. (1) “The public participation requirements of this chapter shall include notice procedures that are *reasonably calculated to provide notice* to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development

regulations. Examples of reasonable notice provisions include:

- (a) Posting the property for site-specific proposals;
- (b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
- (c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
- (d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journal; and
- (e) Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

...

(Emphasis supplied).

Although it is true that the Petitioner does not have a basis to scrutinize public process simply because of a feeling that their input was not influential or that they simply failed to comment, the relevant issue is whether the public notice and opportunity for citizen participation provided by the municipality was adequate and appropriate under the circumstances.

Public notice was provided through the City Council's Agenda, which described the proposed ordinance as a "Revision to the Critical Areas Ordinance." See Finding of Fact 10. The Ordinance itself, which was not published, was described in the title as relating to "density calculations and wetland areas." Petition for Review, at Exhibit 1.

The City has operated under the assumption that the only procedural requirements it had to follow were that it had to provide "readings" of the proposed amendments. The City Council Procedures give no reference to the GMA and its requirements of early and continuous public participation under sections .035 and .140. No formal public hearing with GMA public notice was held. The City's "City Council Procedures" only provide a minimal level of notice and public input.

The title of the agenda items was terse. It read, "An Amendment of the Critical Areas Ordinance." The Bainbridge Island Critical Areas Ordinance is 25 pages long and covers many subjects. It would be difficult for a potentially interested member of the public at large to ascertain what the pending Ordinance was proposing.

Although the amendments of the Ordinance do not in effect "prevent" lot flexibility, they do, however, put limitations on lot flexibility. As the Petitioner noted, "[T]he City failed to provide

for broad dissemination of proposals and alternatives, opportunity for written comments, public meeting after effective notice, provisions for open discussion, communication programs, information services, and consideration of and response to public comments as required by RCW 36.70A.140.” Petitioner’s Brief, at 24.

By publishing the Agenda of the Council in the local newspaper, and posting it at the ferry dock, and at the City Hall, the City did notify the public that an Amendment to the Critical Areas Ordinance was being considered. There is nothing in the record, however, to indicate that the notice to individuals, organizations, or other affected property owners informed them of the nature of the pending change. It is questionable that those citizens owning wetland properties, or otherwise interested individuals or groups, would be on notice of the change in density calculations for wetlands.

In *Andrus*, this Board noted that when the City of Bainbridge Island was drafting its Winslow Master Plan, the City failed to ensure notice was provided in sufficient time for citizens to review documents and provide meaningful comments. *Andrus*, at 2. Here, in the Notices for Proposed Ordinance 2000-13, there was no explanation to assist an interested citizen in understanding the impact and reach of these amendments.

Since the City has not fulfilled the requirements of .035, it follows without discussion that .140 has not been met. ^[4] The Board concludes that both the notice and the opportunity for enhanced citizen participation were inadequate to comply with RCW 36.70A.035 and .140.

2. Conclusion re: Legal Issue 4

The notice provided by the City of Bainbridge Island in relation to Ordinance No. 2000-13 **is not compliant** with the notice requirements of RCW 36.70A.035 and .140.

C. Legal Issues No. 1 and No. 2: Consistency and GMA Goals

The Board, having found that the City of Bainbridge Island is noncompliant with the GMA as to Legal Issues No. 3 and No. 4, need not, and will not, make a determination as to the alleged noncompliance with the consistency requirements of RCW 36.70A.040(3)(d) as set forth in Legal Issue No. 1, and with the Goals under RCW 36.70A.020 as set forth in Legal Issue No. 2.

VI. Invalidity

The Board has found that the City of Bainbridge Island has failed to comply with the public participation requirements of the GMA (RCW 36.70A.035 and .140) in adopting Ordinance No. 2000-13. The Board has found that the City of Bainbridge Island has failed to comply with the requirements of RCW 36.70A.106(3) as to notifying the Department of Community, Trade, and Economic Development of its intent to amend its development regulations. The procedures used by the City of Bainbridge Island **do not comply** under the Growth Management Act.

RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
 - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
 - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

The Petitioner asks the Board to Invalidate the City's adoption of Ordinance No. 2000-13 because it substantially interferes with GMA Goals. The Board has found that the City's action **did not comply** with the GMA. Also, the Board is remanding this case for further proceedings. The Board's Order relates to the inadequacy of public participation and notice. Therefore, the Board's consideration of invalidity will focus on Goal 11. RCW 36.70A.020(11).

RCW 36.70A.020(11) Planning Goals, provides:

Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

Having found the notice and public participation provisions of Ordinance No. 2000-13 **do not comply** with the Act, the Board concludes that they did not encourage the involvement of

citizens in the planning process. Therefore, the Board determines that the continued validity of Ordinance No. 2000-13 would substantially interfere with the fulfillment of RCW 36.70A.020 (11). Therefore, pursuant to RCW 36.70A.300(3)(b), the Board Enters a **determination of invalidity** for Bainbridge Island's Ordinance No. 2000-13.

VII. 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. The notice procedures used by the City of Bainbridge Island in adopting Ordinance No. 2000-13, which adopted amendments to the City's Critical Areas Ordinance as to density calculations for flexible lot design and density transfers on parcels containing a regulated wetland, **do not comply** with the requirements of RCW 36.70A.020(11), .035, .140, and .106(3), as set forth in this Final Decision and Order (FDO), and are determined to be **invalid** because they substantially interfere with the fulfillment of Goal 11.
2. Bainbridge Island's Ordinance No. 2000-13 is **remanded** and the City is directed to provide proper notice and take the necessary legislative actions to comply with the Growth Management Act as set forth and interpreted by this Final Decision and Order by no later than **4:00 p.m. on June 22, 2001**.
3. By no later than **4:00 p.m. on June 29, 2001**, the City shall file with the Board an original and four copies of a Statement of Actions Taken to Comply with this Final Decision and Order (the **SATC**) and shall simultaneously serve a copy on the Petitioner.
4. By no later than **4:00 p.m. on July 6, 2001**, or seven calendar days after the City submits its SATC, whichever comes first, the Petitioner may file with the Board an original and four copies of its Memorandum in Response to the SATC, and shall simultaneously serve a copy on the City.

Pursuant to RCW 36.70A.330(1), the Board gives Notice of Compliance Hearing in this matter to be held at **10:00 a.m. on July 16, 2001** in Room 1022 of the Financial Center, 1215 Fourth Avenue, Seattle. In the event that the City files its SATC earlier than June 29, 2001, the Board will issue an Order amending the date for the Compliance Hearing.

So ORDERED this 26th day of February, 2001.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

Joseph W. Tovar, AICP
Board Member

-
-
-

BOARD MEMBER MCGUIRE’S CONCURRING OPINION

I concur with my colleagues in finding that the City’s adoption of Ordinance 2000-13 failed to comply with RCW 36.70A.035, .140 and .106 (Legal Issues 3 and 4); and that this failure substantially interfered with RCW 36.70A.020(11) [Goal 11 regarding public participation]. However, I would have also addressed Legal Issues 1 and 2 – regarding whether the changes in Ordinance 2000-13 were consistent with and implemented Plan Policy AQ 1.14; and whether the changes were guided by Goals 1, 2, 4, 6 and 9. Since the City is being directed to provide proper notice and conduct additional public hearings, I believe the Board’s view on the challenged substantive issues could provide guidance during its new deliberations. In my judgment, the elimination of wetland areas from the density calculations in certain areas is not inconsistent with Plan Policy AQ 1.14 and in fact implements that Policy. Further, I am not persuaded that the change accomplished in Ordinance 2000-13 was not guided by, or noncompliant with Goals 1, 2, 4, 6 and 9. The reasoning for my conclusions is briefly set out below.

Legal Issue 1: Bainbridge Island’s Comprehensive Plan Policy AQ 1.14 provides:

Density calculations shall not include the area of regulated wetland. If an applicant utilizes a flexible lot design to accommodate innovation, creativity and design flexibility to achieve a level of environmental protection that would not be possible

by a typical lot-by-lot development, *some or all of the wetland areas may be included* in the density calculation. *If, in the TDR-Sending Areas, a property owner elects to transfer all development rights, then the owner may obtain all of the wetland density.*

(Emphasis supplied). This policy was not challenged when the City's Plan was adopted. Therefore, the City correctly relied on it for guidance in developing its development regulations.

Bainbridge Island, apparently to partially implement this policy, adopted Ordinance 96-06(B), establishing a flexible lot design procedure, applicable through the City (*i.e.* the entire island). (*See:* Findings of Fact 1 and 2). This development regulation was not challenged when it was adopted.

Finally, in the summer of 2000, the City adopted Ordinance 2000-13 that eliminated the possibility of wetlands being included in density calculations, except in the R-0.4 zone.^[5] This is the action that was challenged by Homebuilders.

The structure of Policy AQ 1.14 is cautious; first, it says wetlands *shall not* be included in density calculations; next it says, in certain circumstances, they *may* be included. The first sentence states a general rule – wetlands are not to be included in density calculations. This statement is unqualified and applies throughout the island. However, the second and third sentences create the *possibility* of including wetlands in the density calculations anywhere on the island, *if* the applicants or property owners undertake certain procedures.^[6] But even if these procedures are followed, there is no absolute right to have wetlands included in density calculations. The City retains discretion in deciding whether wetlands are included in density calculations. The operative language in the second and third sentences of Policy AQ 1.14 is “some or all of the wetland areas **may** [not *shall*] be included in the density calculation;” and “**may** [not *shall*] obtain all of the wetland density.” This unchallenged Policy and method of dealing with wetlands and density calculations, is, I believe, within the realm of discretion afforded to local governments.

The adoption of Ordinance 2000-13 merely limits *where* the possibilities allowed in Policy AQ 1.14 apply and removes some of the City's discretion. It codifies a decision of the City, to limit the land area^[7] where applicants and owners can pursue the option of including wetlands in density calculations. This change does not thwart the first sentence, nor does it contradict the second and third sentence of Policy AQ 1.14. This regulatory change is also within the realm of the City's discretion. Whether it is a wise choice for this island city is not for the Board to say in this case. More importantly, in my judgment, the limiting provisions of the Ordinance, as challenged in Legal Issue 1, are not inconsistent with Policy AQ 1.14 and continue to implement it.

Legal Issue 2: The Board has previously observed, “[t]he City of Bainbridge Island is an

anomaly among cities.”^[8] However, it is a city nonetheless and must comply with the GMA. However, I was not persuaded by the arguments presented, that the City’s action was not guided by RCW 36.70A.020(1), (2), (4), (6), and (9) [The *urban growth, reduce sprawl, housing, property rights and open space*, goals, respectively]. I would have concluded that Petitioner Homebuilders had failed to meet its burden of proof on Legal Issue 2.

^[1] The Department of Community, Trade, and Economic Development is now the Office of Community Development (OCD).

^[2] The GMA defines “department” as the Department of Community, Trade, and Economic Development. [RCW 36.70A.030(6)].

^[3] This notification requirement applies “each time any implementing regulation or amendment is proposed for adoption”. WAC 365-195-820(1)

^[4] The Board has stated: “It is axiomatic that without effective notice, the public does not have a reasonable opportunity to participate.” *Andrus*, at 6-7.

^[5] The R-0.4 zoning designation generally applies to larger lots outside the City’s more developed area, and encompasses a substantial portion of the island’s land area. City Response, at 2-3 and Ex. C (zoning map).

^[6] If an applicant or owner does not undertake the prescribed procedures, there is no possibility of the wetlands being included in the density calculations.

^[7] The possibility for including wetlands in density calculations now only exists in the R-0.4 zone. Prior to adoption of Ordinance No. 2000-13, the City had discretion to allow wetlands to be included in density calculations for other zones.

^[8] *Robison, et al., v. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025c, Final Decision and Order (May 3, 1995), at 5.