

constitutional issues arising from a jurisdiction's implementation of the GMA. The City cites to the Board's holdings in *Tracy v. City of Mercer Island*, CPSGMPB Case No. 92-3-0001, Final Decision and Order, (Jan. 5, 1993) and *Gutschmidt v. City of Mercer Island*, CPSGMPB Case No. 92-3-0006, (Mar. 16, 1993). In these cases the Board concluded that it did not have jurisdiction to determine constitutional issues arising from a city's implementation of the GMA. Consequently, the City argues, to the extent Petitioners are asking the Board to determine whether the federal or state constitutions have been violated, the City asks the Board to dismiss Legal Issue 4 as being beyond the Board's jurisdiction. BI Motion, at 1-3.

Homebuilders' ask the Board to deny the City's motion. Homebuilders' do not dispute the Board's authority and prior holdings regarding its lack of jurisdiction to resolve constitutional issues. However, they contend that the Board does have jurisdiction to determine whether a city enactment complies with the Goals of the GMA, and RCW 36.70A.020(6), dealing with property rights, does refer to "arbitrary and discriminatory" actions. Because resolution of the Goal 6 challenge involves a determination of whether the City's action was arbitrary and discriminatory, Petitioner contends that such a determination "will necessarily entail a determination on whether the action is constitutional, albeit, the Board order will be framed in terms of non-compliance with the GMA goals." Therefore, Homebuilders' urge the Board to deny the City's motion. HBA Response, at 1-3.

In reply the City notes that Homebuilders' cite to no authority for its "necessary linkage" between a Board determination regarding compliance with a GMA goal and constitutional provisions. Additionally, the City argues that "Contrary to Respondent's assertion, the Board does not have to 'necessarily' determine the constitutionality of a city's action when reviewing a challenge under Goal 6. Under Goal 6, the requirement to find both arbitrary and discriminatory action is not the same as finding a violation of a constitutional provision. Regardless of how much Respondent would like the Board to make such a determination, the Legislature did not grant such authority under RCW 36.70A.280. BI Reply, at 1-2. The Board agrees with the City of Bainbridge Island.

Legal Issue 4 states as follows:

Does Ordinance No. 2001-14 violate the Property Rights Goal of RCW 36.70A.020 (6) because it is arbitrary, discriminatory, and unduly onerous in violation of Constitutional protections for private property ownership and use and/or the substantive process clause?

September 13, 2001, PHO, at 6.

Legal Issue 2 provides as follows:

Does Ordinance No. 2001-14 violate the goals of the Growth Management Act, RCW 36.70A.020, in one or more ways: Goal 1, Urban Growth; Goal 2, Reduce Sprawl; Goal 4, Housing; *Goal 6, Property Rights*; Goal 9, Open Space and Recreation, because the Ordinance, wherever wetlands are present, discourages urban development and infilling within urban areas, thereby rendering the Ordinance invalid?

September 13, 2001, PHO, at 6, (emphasis supplied).

The parties do not dispute that the Board has jurisdiction to review actions for compliance with the Goals of the Act, including RCW 36.70A.020(6). Nor do the parties dispute that the Board does not have jurisdiction to determine whether an action is constitutional. Legal Issue 2 clearly includes a specific challenge to Bainbridge Island's compliance with Goal 6 – an issue that the Board clearly has jurisdiction to decide. In contrast, the phrasing of Legal Issue 4, although it mentions Goal 6, tends towards a constitutional challenge – an issue that the Board clearly does not have jurisdiction to decide. Since Legal Issue 2 will allow Petitioner to make specific argument pertaining to compliance with Goal 6, the Board **grants** the City's motion, and **dismisses with prejudice**, Legal Issue 4 from further consideration in this case. The Board notes that dismissing Legal Issue 4, which includes reference to Goal 6, does not impair, or otherwise preclude, Homebuilders' right to challenge and argue the City's compliance with Goal 6 (RCW 36.70A.020(6)) in Legal Issue 2.

III. ORDER

Based upon review of the petition for review, prehearing order, the briefing of the parties, the Board's prior cases, the GMA, having considered the arguments of the parties and deliberated on the matter, the Board ORDERS:

1. The City of Bainbridge Island's Motion to Dismiss Legal Issue 4 is **granted**.
2. Legal Issue 4 from the September 13, 2001 Prehearing Order is **dismissed with prejudice**.

So ORDERED this 18th day of October, 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

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This Order constitutes a final decision pursuant to RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.