

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

HONESTY IN ENVIRONMENTAL)	
ANALYSIS AND LEGISLATION)	CPSGMHB Case No. 96-3-0012 <i>HEAL</i>
(HEAL),)	<i>v. City of Seattle</i>
)	
Petitioners,)	ORDER on REMAND
)	
v.)	[Court of Appeals Division 1, Remand
)	of Case No. 40939-5-I and Mandate of
CITY OF SEATTLE,)	Superior Court Case No. 9602-24695-
)	6.SEA]
Respondent.)	

I. Procedural Background

On February 23, 1996, the Central Puget Sound Growth Management Hearings Board (**Board**) received a Petition for Review (**PFR**) from Honesty in Environmental Analysis and Legislation and seven individual petitioners: Jack and Bess Temple, Betty Locke, Irene Kochendorfer, Sam Brace, Wayne Klemp, and A. Duane Munro (collectively **HEAL**). HEAL challenged the City of Seattle's (**City**) adoption of Resolution 29253, which amended the policy basis for the City's steep slope regulations contained in its Environmentally Critical Areas regulations, and adoption of Ordinance 117945, which amended those regulations.

The Board issued its Final Decision and Order (the **FDO**) on August 21, 1996. In the FDO the Board determined that: the individual petitioners did not have standing, the Board did not have jurisdiction to review a Resolution adopting amendments to the City's steep slope policies, and that the City's amendments to its steep slope regulations complied with the requirements of the Growth Management Act (**GMA**), specifically RCW 36.70A.172(1). HEAL appealed to Superior Court.

On June 21, 1999, the Washington State Court of Appeals, Division One, published its opinion in Honesty in Environmental Analysis and Legislation (**HEAL**); Jack Temple and Bess Temple, husband and wife; Betty Lock; Irene Kochendorfer; Sam Brace; Wayne Kemp; and A. Duane Munro v. Central Puget Sound Growth Management Hearings Board 96 Wn. App.522, 979 P.2d 864 (1999) (**Division One's Decision**). While upholding the Board's FDO, in part, the Court of Appeals remanded a portion of the case, stating:

The case is remanded to the Board for determination of whether the critical areas policies adopted by Seattle comply with RCW 36.70A.172, consistent with this opinion.

Division One's Decision, at 15.

On December 20, 1999, the Court of Appeals issued its Mandate in this matter, stating in part: "This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion."

On March 21, 2001, King County Superior Court Judge Sharon Armstrong issued an "Order to Remand to Central Puget Sound Growth Management Hearings Board."

On April 20, 2001, the Board issued its "Notice of Remand Hearing Pursuant to Court of Appeals Case No. 40939-5-1 and King County Superior Court Mandate in Case No. 96-2-24695-6-SEA."

On May 9, 2001, the Board issued "Order Changing Date, Time and Location for Pre-Remand Hearing Conference."

On May 14, 2001, the Board received "City of Seattle's Index to Documents."

On May 17, 2001, the Board received "Respondent City of Seattle's Prehearing Memorandum" (**City PHM**), with attachments. Also on this date, the Board received "City of Seattle's Amendment to Index of Documents."

On May 18, 2001, the Board received from 1000 Friends of Washington a "Notice of Substitution of Counsel." (1000 Friends of Washington was not a party to the Board's proceeding, but appeared in the Court of Appeals proceeding.)

On May 21, 2001, beginning at 2:00 p.m., the Board conducted the pre-remand hearing conference in the above captioned matter in the A/B Conference Room of the Financial Center, 1215 Fourth Avenue, Seattle, WA. Present for the Board were Lois H. North, Edward G. McGuire and Joseph W. Tovar, presiding officer. Also present was Brian J. Norkus, the Board's legal intern. Representing the City was Eleanor S. Baxendale. Representing HEAL was Russell C. Brooks. Also present for HEAL was Randall Spaan.

At the beginning of the conference, Mr. Brooks handed to the Board "Petitioners' Prehearing Memorandum" (**HEAL PHM Response**), which responded to the City's PHM and raised additional questions about the Court of Appeals direction to the Board.

Ms. Baxendale stated that she had spoken with Mr. Trohimovich, representative of 1000 Friends of Washington, and that he had indicated that his organization did not intend to be involved in this proceeding. Upon confirmation from Mr. Trohimovich, 1000 Friends was dropped from this proceeding.

On June 18, 2001, the Board received “Respondent The City of Seattle’s Opening Brief on Remand,” with ten exhibits. (**City OBR**).

On July 2, 2001, the Board received “Petitioners’ Response to the City of Seattle’s Opening Brief on Remand,” with eight exhibits. (**HEAL ROR**).

On July 11, 2001, the Board received “Respondent the City of Seattle’s Reply Brief on Remand,” with two exhibits. (**City Reply**).

On July 18, 2001, the Board received “Petitioner HEAL’s Surreply to Respondent Seattle’s Reply Brief,” with one exhibit. (**HEAL Surreply**)

On August 3, 2001, the Board conducted the Remand Hearing in this matter. Present for the Board was Edward G. McGuire and Joseph Tovar, presiding officer. Russel C. Brooks appeared for Petitioner HEAL. Eleanor S. Baxendale appeared for Respondent City of Seattle. Duane Lodel from Robert Lewis & Associates provided court-reporting services. A transcript was ordered.^[1]

On August 8, 2001, the Board received “Petitioner HEAL’s Reply to the Board’s Inquiry” (**HEAL Answer**); “Respondent the City of Seattle’s Response to Petitioner’s Response to Inquiry” (**City Answer**); and a letter from the City (**City Letter**) explaining that the City’s Critical Area policies were not adopted as part of the City’s comprehensive plan.

II. Applicable Law and Discussion

A. Standing

Seattle asks the Board to remove the individual petitioners from the caption of the appeal. The City points out that the Board’s FDO dismissed the individual parties and argues that “the decision of the Board on this matter was not appealed and is final. *Reninger v. Dep’t of Corrections*, 134 Wn.2d 437,951 P.2d (1998).” City OBR, at 16.

HEAL acknowledges that the Board previously dismissed the individual parties, but “Makes this argument to preserve the issue on appeal.” HEAL ROR, at 12. HEAL cites the three criteria for standing set forth at RCW 34.05.530 and asserts that the individual petitioners meet all three. *Id.* The essence of HEAL’s argument on this point is that the individual petitioners will be prejudiced by the challenged policies because future applications for exemptions to the City’s

steep slope regulations will be more difficult to secure. HEAL ROR, at 13.

Conclusion

The Board's FDO dismissed the individual parties from the case before the Board. FDO, at 23. This portion of the FDO was not challenged. No new argument or evidence was presented by HEAL that leads the Board to a different conclusion. The Board will therefore grant the City's request and eliminate the individual parties from the case caption in this portion of the proceeding before the Board.

B. RCW 36.70A.172, the Court of Appeals Decision and Resolution 29253

In *H.E.A.L. v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 979 P.2d 864, (1999),^[2] Division One of the Court of Appeals (hereafter, **Division One's Decision**) found that the Board had erroneously concluded that it did not have jurisdiction to review a resolution amending the City of Seattle's critical areas policies. The Court found that where a jurisdiction chooses to adopt critical areas policies the Growth Boards have jurisdiction to review such policies to determine whether the policies comply with the requirements of RCW 36.70A.172. *Division One's Decision*, at 5. Consequently, the Court remanded the case to this Board for a determination of whether the critical area policies adopted in 1995 by Seattle, in Resolution 29253, comply with RCW 36.70A.172.^[3] *Division One's Decision*, at 10.

The question on remand is essentially a restatement of Legal Issue 5 from the original Board decision that references Resolution 29253, instead of Ordinance No. 117945. Stated in that parlance, the issue before the Board on remand is:

Did the City of Seattle violate RCW 36.70A.172 by failing to include the best available science when it developed policies . . . for critical areas, specifically, amendments to its critical areas policies contained in Resolution 29253?

The relevant portion of RCW 36.70A.172, 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.

(Emphasis supplied.)

The Court of Appeals has clarified that to comply with .172, “evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.” Division One’s Decision, at 7.

Seattle’s Resolution 29253 amended its existing critical areas policies, adopted in 1992, to clarify the policy basis for steep slope regulations. The City’s policy for steep slopes was amended (underlining depicts amendatory language) as follows:

III. E. STEEP SLOPES

Policy

Development on steep slopes shall be regulated in order to protect the public health, safety, and welfare by minimizing erosion, water runoff, and siltation of streams, lakes, Puget Sound, and the City’s stormwater facilities. *The preferred method of preventing harm to the environment from development activity on steep slopes, and harm to the drainage systems in which steep slopes are located, is to minimize disturbance and to maintain and enhance existing vegetative ground cover.*

Resolution 29253, Exhibit A, at 1, (*italicized emphasis supplied*).

Therefore, the question before the Board on remand is whether the new language adopted by Seattle in 1995, indicating a preference for minimizing disturbance and maintaining and enhancing existing ground cover, complies with the requirements of RCW 36.70A.172(1). In other words, was this policy preference developed and derived from a process where the evidence of the best available science (**BAS**) was in the record; and was it considered substantively – was it discussed, deliberated upon and balanced with other factors?

Position of the Parties

The City argues that the Court of Appeals upheld the Board’s determination that the City complied with RCW 36.70A.172^[4] when the City amended its critical area regulations. The amendments to the regulations and the amendment to the policy, in Resolution 29253, were done at the same time based upon the same record. Because of this, the City asserts that the law of the case doctrine governs this review and therefore contends that the policy amendment contained in Resolution 29253 also complies with RCW 36.70A.172. City PHM, 3-4; City OBR, at 13-16; City Reply, at 13. The City also argues that the Court of Appeals, in upholding the Board, agreed that the competing science in the record is respectable and of equal dignity, and thereby allows

the city to exercise its discretion in selecting a preference; and that the City considered the competing sciences. The City also contends .172(1) does not specify an outcome. City OBR, at 3, 11-13; City Reply, at 7-12.

HEAL argues that the City's Resolution 29253 amends a much broader policy than the limited exceptions added to the City's regulations. Therefore, the law of the case doctrine does not apply. HEAL PHM Response, at 4-5; HEAL ROR, at 2-4. Additionally, HEAL argues that neither the Court nor the Board determined whether the City considered substantively BAS when it adopted Resolution 29253, and the Board must undertake a new analysis to determine if the policies support the outcome (policies that protect steep slopes). HEAL PHM Response, at 6-8; HEAL ROR, at 4-11; HEAL Surreply, at 2-13.

Discussion

The parties have aggressively advocated their respective positions. Each has argued what it believes the Court of Appeals has directed the Board to undertake on remand. Neither party disputes the Court of Appeals direction that the Board has jurisdiction to review Resolution 29253 for compliance with RCW 36.70A.172(1). Nor does either party dispute that .172(1) requires that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations. Notwithstanding the urgings of the parties as to what else the Court directed the Board to do, the Board turns to the Court of Appeals decision itself for guidance.

The Court of Appeals stated,

A comparison with federal authority interpreting a similar 'best available science' requirement in the Endangered Species Act (ESA) is instructive. "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." State of Louisiana v. Verity, 853 F.2d 322, 329 (5th Cir. 1988). The purpose of the ESA's best available science requirement is to ensure that regulations not be based on speculation and surmise. (Citations omitted). We apply this view to RCW 36.70A.172(1).

The Board properly applied the State of Louisiana v. Verity to the record before it in this case. The Board found the City took evidence and included it in the record. HEAL presented evidence contrary to the evidence relied upon by the City. The Board properly concluded it could not displace the City's judgment about which science the City would rely upon as the best available science.

The Board keyed on the statutory phrase “in developing.” The Board correctly concluded the best available science was to be part of the process of developing critical areas regulations. The science was included ‘so the information can be considered before any legislative action is taken.’ *The Board rejected the idea that the statute required any particular substantive outcome or product. The Board is correct.*

. . .The GMA requires balancing of more than a dozen goals and several specific directives for implementing those goals. The legislature passed RCW 36.70A.172(1) five years after the GMA was adopted. It knew of the other factors, but neither made best available science the sole factor, the factor above all other factors nor made it purely procedural. Instead the Legislature left the cities and counties with the authority and obligation to take scientific evidence and to balance that evidence among the many goals and factors to fashion locally appropriate regulations based on the evidence not on speculation and surmise.

[After discussing the trial court’s formulation of substantively consider (evidence to guide decision-making) and the Board’s (evidence must be considered and balanced before legislative action is taken), the Court of Appeals concluded that the Board’s decision was correct - .172(1)’s BAS requirement does not compel a specific outcome or product]

Division One’s Decision, at 6-7.

In light of this discussion and holdings of the Court of Appeals, the Board agrees with the position advanced by the City of Seattle. The same evidence of best available science was included and substantively considered by the City when it simultaneously adopted amendments to the steep slope portion of its critical areas regulations and the amendment to its steep slope policy (Resolution 29253).^[5] Consequently, the Board concludes that the City’s adoption of the steep slope (critical areas) policy amendment, contained in Resolution 29253, **complies with the requirements of RCW 36.70A.172(1)**. Petitioner’s challenge to the City’s compliance with RCW 36.70A.172 is **dismissed with prejudice**.

Conclusion

The Board concludes that the City’s adoption of the steep slope (critical areas) policy amendment, contained in Resolution 29253, **complies** with the requirements of RCW 36.70A.172 (1). Petitioner’s challenge to the City’s compliance with RCW 36.70A.172 is **dismissed with prejudice**.

III. ORDER

Having reviewed the Board's original FDO, the Superior Court decision, the Decision of the Court of Appeals, and having considered the briefing, exhibits and arguments of the parties, and having deliberated on the matter the Board ORDERS:

- 1.** The Board **grants** the City's request to eliminate the individual parties from the case caption in this portion of the proceeding before the Board.
- 2.** The City's adoption of the steep slope (critical areas) policy amendment, contained in Resolution 29253, **complies with the requirements of RCW 36.70A.172(1).**
- 3.** Petitioner HEAL's challenge to the City's compliance with RCW 36.70A.172 is **dismissed with prejudice.**

So ORDERED this 4th 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 (Board Member Tovar filed a concurring opinion)

Note: This Order on Remand constitutes a final order as specified by RCW 36.70A.300 unless a party files a petition for reconsideration pursuant to WAC 242-02-832.

Board Member Tovar's Concurring Opinion

I concur with the conclusions reached by my colleagues in disposing of the current phase of the *HEAL* matter. However, I am compelled to offer two cautions to those trying to glean from this case clarification of the GMA's critical areas requirements.

First, it should be remembered that petitioners challenged **only** Seattle's compliance with RCW 36.70A.172. Petitioners never challenged the City's compliance with either RCW 36.70A.170 or RCW 36.70A.060. "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." FDO, at 5. Thus, the only GMA question answered by the *HEAL* case was "Did the City of Seattle include best available science in the development of its critical areas policies and regulations for steep slopes?" Both the Board and the Court of Appeals answered in the affirmative. Neither the Board nor the Court had before it the question "Did Seattle's policies and regulations designate and protect steep slopes?"

Second, it should also be remembered that the critical areas in question in the *HEAL* case dealt only with one type of critical area - "geologically hazardous areas" or "steep slopes" as the City characterized them. *HEAL* did not address whether Seattle's policies and regulations for "aquatic" critical areas^[6] were prepared including BAS or whether those policies and regulations *protect* those aquatic critical areas.

Those who read the *HEAL* decision to impose only a procedural duty on local government must bear in mind that the Act's requirements must be read as a whole. In *Tulalip Tribes*,^[7] the Board applied this rule of statutory construction to a case focused on GMA requirements for ecosystems involving "wetlands" and "fish and wildlife habitat conservation areas." The Board held that the procedural mandate of RCW 36.70A.172(1) must be read together with the substantive mandate in .060 to protect critical areas and the guidance in RCW 36.70A.020(8) and (9) to maintain and enhance fish and wildlife habitats.

^[1] The transcript was received August 10, 2001.

^[2] The Board's references and page citations to this case are cited to the LEXIS copy of this case [99 Wash App. LEXIS 1112] provided as Exhibit A to "Petitioners' Response to the City of Seattle's Opening Brief on Remand."

^[3] It is important to note that the scope of the Board's review in this remand proceeding is limited to the question of

compliance with RCW 36.70A.172. Other aspects of the GMA pertaining to critical areas, such as .050, .060, and .170, are not before the Board.

[4] The Court of Appeals reversed the trial court and reinstated the Board's FDO with respect to legal issue 5 – compliance with .172(1). Division One's Decision, at 9. The Board held that the City's adoption of Ordinance No. 117945, amending the critical areas regulations "did not violate RCW 36.70A.172" and "the . . . amendments to its critical areas regulations, Ordinance No. 117945, are in compliance with the requirements of the Growth Management Act." *HEAL v. Seattle*, CPSGMHB Case No. 96-3-0012, Final Decision and Order, (Aug. 21, 1996), at 21 and 23, respectively.

[5] The Board notes that the selected BAS (*i.e.*, natural systems science) is included and *used* to implement the City's critical areas (steep slope) program. The Board also notes that the City's approach does not rely on natural systems science to the exclusion of other science of equal dignity. (*i.e.*, engineering or geotechnical science).

[6] These four types of critical areas are: "(a) wetlands, (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas." RCW 36.70A.0030(5). Emphasis added.

[7] *Tulalip Tribes v. Snohomish County*, CPSGMHB No. 96-3-0029, FDO, Jan. 8, 1997.