

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

ELAINE LEWIS,)	
)	Case No. 01-3-0020
)	
Petitioner,)	<i>(Lewis)</i>
)	
v.)	FINAL DECISION AND ORDER
)	
CITY OF EDGEWOOD,)	
)	
Respondent.)	
)	
)	
)	

I. PROCEDURAL Background

A. General

On August 20, 2001, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Elaine Lewis (**Lewis**). The matter was assigned Case No. 01-3-0020, and will be referred to hereafter as *Lewis v. Edgewood*. Petitioner challenges Ordinance No. 01-0171 (the **Ordinance**) of the City of Edgewood (**Edgewood** or the **City**) which adopts the City’s Comprehensive Plan in compliance with the State of Washington Growth Management Act, RCW 36.70A; Repealing Ordinance No. 97-0079, the City’s Interim Comprehensive Plan; and establishing an effective date. The grounds for the challenge is noncompliance with various sections of the Growth Management Act (**GMA** or the **Act**).

On August 30, 2001, the Board issued a “Notice of Hearing” (the **Notice**) in this matter.

On September 19, 2001, the Board conducted a prehearing conference in this matter in Room AB of the Financial Center, 1215 Fourth Avenue, Seattle. Present for the Board were Joseph W. Tovar and Lois North, presiding officer. Petitioner Elaine L. Lewis appeared *pro se*. Representing the City was Wayne D. Tanaka. Also in attendance was Rose Hill, Mayor of Edgewood. After a review of the legal issues, the schedule, and other procedural matters, the presiding officer indicated that the prehearing order would be issued on September 21, 2001.

On the afternoon of September 19, the Board received the Petitioner's Amended Petition for Review. "A petition for review or answer may be amended as a matter of right until thirty days after its date of filing." WAC 242-02-260.

Also on September 19, 2001, the Board received the Index for the City of Edgewood.

On September 21, 2001, the Board issues the Prehearing Order (the **PHO**) in this matter, setting the date for the hearing on the merits, the schedule for the submittal of briefs and motions, and set forth the legal issues.

B. Motions

1. Motions to Supplement the Record

On October 3, 2001, the Board received Petitioner's "Motion to Supplement the Record And Supporting Brief." Petitioner requested the addition of twenty-eight items, none of which were attached to the Motion.

On October 16, 2001, the Board received the "City's Response to Request to Supplement the Record."

On October 17, 2001, the Board received Petitioner's "Motion to Compel Disclosure of Memorandum" with four exhibits. The Petitioner also sent an audio-cassette of Petitioner's testimony at the June 12, 2001 Edgewood City Council Meeting, and an additional taped excerpt from that same City Council Meeting (An exchange between Council-members, Mayor Hill, and City Attorney, Wayne Tanaka). In addition, the Petitioner sent copies of items P-13, P-14, and P-23 listed in Petitioner's "Motion to Supplement the Record" of October 3, 2001.

2. Motions to Dismiss Legal Issues

On October 2, 2001, the Board received the City of Edgewood's "Motion to Dismiss Legal Issues 1, 2, and 4." There were nine Exhibits attached to the Motion: Exhibits A – I.

On October 17, 2001, the Board received "Petitioner Elaine Lewis' Response to City of Edgewood's Motion to Dismiss Legal Issues 1, 2, and 4." Two Exhibits were attached.

On October 23, 2001, the Board received the "City's Rebuttal Regarding Its Motion to Dismiss Legal Issues 1, 2, and 3." This document corrected a mistake made by the Respondent. The City's Motion should be in reference to Legal Issues 1, 2, and 3 – not Legal Issues 1, 2, and 4.

On October 24, 2001, the Board received Petitioner Elaine Lewis' "Response to City's Rebuttal Regarding Its Motion to Dismiss Legal Issues 1, 2, and 3.

On October 29, 2001, the Board issued an Order on Motions which **granted** the Petitioner's Motion to Supplement the Record with Exhibits P-13, P-14, and P-23. The Board **denied** the Petitioner's Motion to Supplement the Record with the rest of the 28 items listed.

The Board **denied** the Petitioner's Motion to Compel.

The Board **denied** the Respondent's Motion to Dispose of Legal Issues 1, 2, and 3.

The Board **granted** the Respondent's Motion to remove the citation of RCW 36.70A.035 from Legal Issue 1.

On November 6, 2001, the Board received "Petitioner's Motion for Reconsideration of Motion to Supplement the Record" (**Lewis Reconsider**). Attached to the Motion was a copy of a communication between a Council member and the City's attorney (indicated as P-1(a)) allegedly referred to in the minutes of the June 12, 2001 regular meeting of the Council.

On November 7, 2001, the Board received "City of Edgewood's Response to Petitioner's Motion for Reconsideration" (**Edgewood Answer**). Respondent argued that the communication was a confidential communication between an attorney and client that Petitioner was not entitled to obtain.

On November 9, 2001, the Board issued an "Order Denying Motion for Reconsideration."

C. Briefing and Hearing on the Merits

On November 16, 2001, the Board received from the Petitioner the "Prehearing Brief" (the **PHB**).

On December 3, 2001, the Board received the "City's Response to Petitioner's Prehearing Brief" (the **City's Brief**).

The Petitioner did not submit a Reply Brief.

The Board conducted a hearing on the merits beginning at 10:00 a.m. on December 17, 2001 at the Metropolitan Parks Building in Tacoma, Washington. Present for the Board were Edward G. McGuire, Joseph W. Tovar, and Lois H. North, presiding officer. Petitioner Elaine Lewis represented herself, *pro se*. Representing the City was Wayne Tanaka. Court reporting services

were provided by Scott Kindle of Mills & Lessard, Seattle. No witnesses testified. The meeting adjourned approximately at noon.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Petitioner challenges Edgewood's adoption of its Comprehensive Plan, as adopted by Ordinance No. 01-0171. Pursuant to RCW 36.70A.320(1), Edgewood's Ordinance No. 01-0171 is **presumed valid** upon adoption. The **burden is on Petitioner** to demonstrate that the actions taken by Edgewood are not in compliance with the requirements of the GMA. RCW 36.70A.320(2). Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by [Edgewood] is **clearly erroneous** in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find Edgewood's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to Edgewood in how it plans for growth, consistent with the goals and requirements of the GMA. However, as our State Supreme Court has stated, "Local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561 (2000) (**King County**). Further, Division II of the Court of Appeals has stated, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a county's plan that is not 'consistent with the requirements and goals of the GMA.'" *Cooper Point Association v. Thurston County*, No. 26425-1-II (Court of Appeals, Div. II, September 14, 2001), ___ Wn. App. ___, ___ (2001).

III. PREFATORY NOTE

In the City's Brief, the City stated that the Petitioner "has totally failed to brief Legal Issue No. 4, dealing with the 2000 census" (City's Brief at 1). At the hearing on the merits, the Petitioner agreed. The Board declared that Legal Issue 4 **has been abandoned**.

The Board will first address the Petitioner's challenge to the requirements for public participation under RCW 36.70A.140 (Legal Issue No. 1). Then the Board will address Legal Issues No. 2 and No. 3.

The Petitioner has requested that the Board remand the Edgewood Comprehensive Plan to the City for corrective action. The Petitioner has not requested a declaration of invalidity.

IV. LEGAL ISSUE NO. 1

Does Ordinance No. 01-0171 as amended (Burgess, Area 4, Western Land Uses, and all other amendments) before final passage on June 12, 2001, fail to comply with GMA requirements for public participation? (RCW 36.70A.140.)

A. Applicable Law

In general, a city that is required to plan must:

establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.

RCW 36.70A.140. The section provides further that “[e]rrors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.” *Id.*

The Board first explored the requirements of RCW 36.70A.140 in *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016 (1994) (*WSDF I*) and *Sky Valley v. Snohomish County*, CPSGMHB Case No. 95-3-0068 (1995) (*Sky Valley*). A local government must establish procedures to ensure that the public has a reasonable opportunity to comment. *Sky Valley*, at 23. Despite “early and continuous” public participation in the development of a draft plan, final amendments still run the risk of violating public-participation requirements:

If a local legislative body wishes to make changes to the draft of a proposed comprehensive plan that, to that point, has ostensibly satisfied the public participation requirements of [RCW 36.70A.140], it has the discretion to do so. However, if the changes the legislative body wishes to make are substantially different from the recommendations received, its discretion is contingent on two conditions: (1) that there is sufficient information and/or analysis in the record to support the Council's new choice (e.g., SEPA disclosure was given, or the requisite financial analysis was done to meet the Act’s concurrency requirements); and (2) that the public has had a

reasonable opportunity to review and comment upon the contemplated change. If the first condition does not exist, additional work is first required to support the Council's subsequent exercise of discretion. If the second condition does not exist, effective public notice and reasonable time to review and comment upon the substantial changes must be afforded to the public in order to meet the Act's requirements for "early and continuous" public participation pursuant to RCW 36.70A.140. *WSDF I*, at 76-77.

In determining whether an amendment meets the "substantially different" test above, "the context may be as small as the immediate vicinity of the affected parcel(s)." *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008 (1995), at 58.

B. Discussion

1. Positions of the Parties

The Petitioner alleges that "The City denied the people of Edgewood opportunity for public participation when it proposed 14 amendments during its June 12, 2001 regular city council meeting for the second and final reading of the comp plan." PHB, at 3. "These amendments had not been published previously or been available for public review and comment." PHB, at 2, citing Exhibit C, pages 4-32. "Cumulatively the amendments proposed changing land use categories for nine percent of the land mass in the city, approximately 500 acres . . . Subsequently, each of the 14 amendments was introduced individually, with no opportunity for public comment. Each one was discussed among the council members, and then voted on by the City Council." PHB, at 3.

The City responds that "The Petitioner focuses on one meeting that occurred during the many year process of developing the Comprehensive Plan as the sole evidence that the City failed to comply with RCW 36.70A.140. A synopsis of the extensive public process, which included meetings, hearings, surveys, and workshops, is given in Chapter 2 of the Comprehensive Plan." City's Brief, at 1 and 2.

The Petitioner continues in her brief to allege the City's violation of RCW 36.70A.140. "The City failed to use the proper procedure to provide for broad dissemination of proposals . . . The City failed to provide any opportunity for written comments in response to the proposed amendments . . . The City did not provide opportunity for open discussion of the 14 amendments that could potentially change nine percent of the land use in the City of Edgewood . . . The City deprived citizens of any effective tools to provide meaningful dialogue with the City." PHB, at 4 and 5.

The City notes that the City Council held a public hearing on the Comprehensive Plan on May

29, 2001, at which a number of people testified, including the Petitioner. “During Council discussions at the May 29 meeting, it was clear that some Councilmembers desired to propose changes to the Plan.” City’s Brief, at 2. Council public workshops were scheduled for June 5th and 6th which were designed to give the Council and the Mayor the opportunity to discuss the testimony received and to discuss any Councilmembers’ proposed Amendments. “At the June 5th and 6th workshops, a number of Amendments were in fact offered by various Councilmembers . . . These proposed Amendments were fully discussed at the workshops which were open to and attended by the public.” City’s Brief, at 2.

“At the June 12 Council meeting, the public was given a chance to comment on the proposed Plan. As the minutes reflect, the Petitioner was present and gave comments. While there were 14 Amendments that were offered by various Councilmembers, only 6 of them passed . . . All of them were presented in one form or another at the workshops held a week earlier.” City’s Brief, at 3.

The City goes on to discuss the Amendments in detail. “From the above description of the Amendments and the process that proceeded, it can be easily seen that the public had ample opportunity to be informed about the proposals and to provide comments thereon. In fact, all, save one of the Amendments, that were finally adopted were the result of comments made to the Council at their last public hearing on May 29. All the Amendments had been introduced in some form at the workshops.” City’s Brief, at 4.

2. Analysis

Petitioner, in addition to alleging violations of RCW 36.70A.140, also discusses Goal 11 of the GMA as well as RCW 36.70A.106 in the PHB. These two sections were not framed as part of Legal Issue No. 1. Therefore, the Board is not required to address these matters and will only discuss matters relating to the framed issue.

While the City asserts that five of the six passed amendments stem from requests made at the hearings, only Amendments 4, 5, and 6 respond directly to citizen concerns—the removal of commercial and light industrial uses from neighborhoods along the southern border of the city. Amendments 8 and 9 add uses not previously contemplated along the southwestern border: Business Park and Mixed Use designations in areas where all previous alternatives had indicated a “Mixed Residential” or “Multiple Family” designation.^[1] Amendment 1, changing 3.59 acres in the North Business Park to Single Family, did not result from comments and did not appear in proposed alternatives. City’s Brief, at 3 – 4; FEIS, Ch. 2. In the context of the southwestern and northern portions of Edgewood, then, these proposals were “substantially different” from prior designations in the draft comprehensive plan. The question, then, is whether the means by which

they were introduced afforded the public “a reasonable opportunity to comment.” *Sky Valley*, at 23.

The City states that all the amendments were discussed “in one form or another” at public workshops on June 5 and 6. City’s Brief, at 3. The Petitioner does not dispute (or even mention) this assertion. The City also states that Mayor Faherty recommended at the May 29 public meeting “that councilmembers who had Amendments would bring them up at the public workshops.” City’s Brief, at 2. Neither the record nor the briefing shows, however, whether notice of the workshops and their subject matter was disseminated to members of the public not present at the May 29 meeting. Nor does the record show how much and what sort of public participation took place at the workshops.

The timeline as the Board sees it, is this:

May 29: Final public hearing on the draft comprehensive plan. Commentators suggest changes, and Councilmembers also indicate a desire to introduce amendments. The Mayor recommends that all amendments be discussed at the upcoming public workshops, one week later.

June 5 and 6: Public workshops. Members of the public attend, and at least ten proposals and amendments are discussed “in one form or another.”

June 8 – 12: Several additional proposals and amendments are prepared.

June 12: Council Meeting. Final drafts of fourteen amendments are distributed to the public during the meeting. Attendees view an overhead presentation about the proposed amendments and are given time to make brief comments about the draft plan. The City Council votes on all the amendments, adopting six of them, and then adopts the entire Comprehensive Plan, as amended.

Faced with a similar scenario in *Andrus v. City of Bainbridge Island*, CPSGMHB Case No. 98-3-0030 (1998) (*Andrus*), the Board concluded that the last minute adoption of amendments to the master plan did not satisfy the requirements of RCW 36.70A.140.^[2] Petitioner Andrus challenged Bainbridge’s adoption of the master plan because changes were introduced and adopted towards the end of the planning process. *Id.*, at 4. The Board agreed that there had been inadequate opportunity for the public to participate, despite opportunities for public participation prior to the final changes. There had been numerous opportunities for public comment while the plan was being drafted, *Id.*, at 7, and the Land Use Committee’s suggested changes to the plan were discussed at four public meetings between December 1997 and March 24, 1998. However, the Land Use Committee made its final recommendations to the City Council on March 30, after

the public meetings. *Id.*, at 8.

The Board found that the window of time between notice of the April 16 meeting and close of the comment period gave Bainbridge citizens seven days at best, two days at worst, to review and prepare written comment on the plan as modified, and they had one day less to prepare oral comment. *Id.*, at 9.

Based on these circumstances, the Board concluded that Bainbridge Island had not provided reasonable opportunity for public review and comment on the proposed revisions, and that its actions were clearly erroneous. *Id.*

In the present case, the citizens of Edgewood had even less opportunity to review and comment on the final amendments than the citizens of Bainbridge had to review revisions to the Winslow plan. Aside from those changes urged by citizens participating in meetings on May 29, 2001, and earlier, citizens first learned of other proposed amendments to the comprehensive plan—“in one form or another”—at the public workshops held June 5 and 6, one week prior to final plan adoption. City’s Brief, at 3. [\[3\]](#)

The record does not reflect whether final versions of these amendments were available to the public at all before the June 12 meeting at which they were adopted. Petitioner asserts that the amendments were not placed on the table “traditionally reserved for written material related to agenda items.” PHB, at 4. She also notes that the text of the amendments and staff analysis, totaling 38 pages, was handed out to attendees of the June 12 meeting after the agenda item of Ordinance No. 01-0171 was announced. PHB, at 2, 4. The City does not refute either assertion. It is not clear from the record whether citizens potentially affected by changes not previously discussed, such as the changes from Mixed Residential to Mixed Use and Business Park, ever had notice that such changes would be discussed at the public workshops or the June 12 City Council meeting. The record also does not show whether workshop attendees received any materials they could take with them for review. It appears that at the workshops, all visual aids relating to the proposed amendments were provided via Power-point presentation. City’s Brief, at 2, Footnote 5; Exhibit 2.

In considering whether the citizens of Edgewood had reasonable opportunity to comment, the Board does not agree with the City that it should only consider whether there was reasonable opportunity to comment on the six amendments that passed. City’s Brief, at 3 The reasonableness of opportunity for review is measured against all of the proposed revisions. *Andrus*, at 10, footnote 5. The public could not know which of the amendments would pass; it would have to consider the potential impacts of all the amendments. Indeed, until the June 12 meeting, the public did not know the total number of proposed amendments. At that point it had 38 pages of text proposing and discussing changes affecting up to 9% of the city’s land mass. PHB, at 2-3.

At the end of that very meeting, the Council voted to adopt six of the amendments and the entire comprehensive plan, as amended. The Board concludes that under the circumstances, the City did not provide the public with a reasonable opportunity to review and comment on the proposed amendments.

C. Conclusion

RCW 36.70A.140 requires local governments to provide for both early and continuous public participation. While the Board agrees that the process has to end at some point, three years of exemplary public participation in development of a draft plan cannot excuse the City for adopting substantial last-minute amendments without providing sufficient opportunity for public review and comment. If the City had unfettered discretion to make such changes without meaningful public input, all prior public participation would be illusory. Something more is required, whether it be a full public hearing or an invitation to make written comments. It was clearly erroneous for the City to introduce substantive amendments to the Draft Comprehensive Plan in the week before the meeting in which it voted on them, providing final drafts of the amendments only at that meeting. **The Board holds that a public participation program under RCW 36.70A.140 must provide sufficient time to enable meaningful public review and comment. The amount of time provided must be commensurate with the complexity and magnitude of the material to be considered.**

IV. LEGAL ISSUE NO. 2

Does Ordinance No. 01-0171 fail to comply with the planning requirements under RCW 36.70A.060, RCW 36.70A.170, and RCW 36.70A.172 as to critical areas policies and maps and as to flood hazard areas?

A. Applicable Law

RCW 36.70A.060 provides in relevant part:

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW [36.70A.170](#). For counties and cities that are required or choose to plan under RCW [36.70A.040](#), such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

(3) Such counties and cities shall review these designations and development

regulations when adopting their comprehensive plans under RCW [36.70A.040](#) and implementing development regulations under RCW [36.70A.120](#) and may alter such designations and development regulations to insure consistency.

RCW 36.70A.170 provides in relevant part:

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

(d) Critical areas.

RCW 36.70A.172 provides in relevant part:

(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.

B. Discussion and Analysis

1. Positions of Parties

The Petitioner alleges that the City is not in compliance with the GMA requirement to protect critical areas regarding: Potholes, Frequently Flooded Areas and Steep Slopes.

Petitioner describes the unique enclosed depressions [potholes] that function as natural infiltration ponds and recharge the aquifer as well as contain storm water. These potholes are as large as 30 or 40 acres. PHB, at 7. Petitioner contends that “Edgewood’s unique pothole are not defined in the Critical Areas regulations that have been adopted from Pierce County, and have limited protection under the interim regulations. Because the potholes provide a major source of water for the wells in Edgewood, the City is also in violation of RCW 36.70A.070(1), which requires protection of the quality and quantity of ground water used for public water supplies.” PHB, at 9.

Petitioner states that the City's 1997 Surface Water Management Plan (SWMP) recommended that "the City should, by ordinance, prohibit any building with a footing grade less than five feet above the historic ponding level or the FEMA 500 year flood plain, whichever is the greater elevation." (Exhibit 8) PHB, at 8. Petitioner continues with "'Best Available Science' gives evidence that a high standard of protection should be implemented through regulating frequently flooded areas at the 500 year ponding level. The City failed to comply with RCW 36.70A.170 and .172 when it designated the 100-year flood hazard area as its frequently flooded area, because the City also designated its frequently flooded area to receive 25 percent development capacity. (Exhibit P-23 [e])." PHB, at 8.

Petitioner concludes her argument on this subject with "In Assumption #5 the City states, 'Frequently Flooded Areas include both the 100-year and 500-year flood plains and the flood fringe.' But the City has already declared in its comprehensive plan, chapter 3, page 8, 'The City has designated the 100-year flood hazard areas as its frequently flooded areas.' The City wants to have it both ways. It is pretending to use 'Best Available Science' and protect the public from potential flood related public health and safety issues, but chooses instead to disregard 'Best Available Science' in favor of a definition of 'Frequently Flooded Areas' that will allow development in areas known to flood." PHB, at 8-9.

Turning to the issue of steep slopes in critical areas, Petitioner states that "The City is backing away from the criteria established in its interim code through adoption of Pierce County's Chapter 18-E.40 which begins regulation of slopes at 15% and now chooses to begin regulation at 20%." PHB, at 9. "The development of property over 20% can be allowed if adequate mitigating measures can be implemented. (Exhibit P-23 g)" PHB, at 10.

Petitioner concludes her arguments by saying that "The City refuses to protect its critical areas by ignoring best available science and evidence documenting the location of environmentally constrained lands and critical areas." PHB at 1-2.

The City responds to Legal Issue No. 2 by stating, "RCW 36.70A.060 deals only with development regulations that are designed to protect certain critical areas. There is no mention of a Comprehensive Plan in this section. As indicated in the Petitioner's Brief, the City did adopt such critical areas regulations upon incorporation in 1996." City's Brief, at 5. Edgewood did adopt Pierce County's Critical Areas Regulations, Title 18-E and 18-I as interim regulations. *See: Finding of Fact #6.*

The City continues with "RCW 36.70A.170 also requires designation of critical areas, such as was done by the City in 1996. RCW 36.70A.172 imposes the requirement to use 'best available science' in designating and protecting critical areas when a city develops 'policies and development regulations' to protect critical areas. Although the statute uses the word 'policies'

in connection with the requirement to use ‘best available science,’ this Board has made clear that the law does not require cities to adopt policies to protect critical areas.”^[4]

The Respondent continues with “The second faulty legal assumption is that the GMA requires that ‘best available science’ trump all other considerations that the City Council must weigh when making a decision on the final Comprehensive Plan. In the HEAL decision, this Board stated that while the best available science must be included in the record of information that the City considers, nothing in the law requires the City to adopt policies that are allegedly dictated by ‘best available science.’ Rather, the City must balance the policy of including ‘best available science’ with the other policies set forth in the GMA. Thus, even if Petitioner is factually correct that the CATRAC^[5] studies represented the ‘best available science,’ the City’s alleged failure to adopt their recommendations in total does not mean that the City is in violation of RCW 36.70A.172.”

2. Analysis

Compliance with RCW 36.70A.070(1)?

Pertaining to potholes, Petitioner raised the issue of the City’s compliance with RCW 36.70A.070 (1) for the first time in her PHB, the issue was not framed in the petition for review (**PFR**) or in the Board’s Prehearing Order (**PHO**). “The board shall not issue advisory opinions on issues not presented to the board in the statement of the issues [i.e. the PFR], as modified by any prehearing order.” RCW 36.70A.290. Neither Petitioner’s PFR nor the Board’s PHO raise Edgewood’s compliance with RCW 36.70A.070(1) as an issue for the Board to resolve; therefore, it is **dismissed**.

Compliance with RCW 36.70A.170 and .060(2)?

It is undisputed that Edgewood identified and designated critical areas and adopted interim regulations to protect those critical areas when, in 1996, the City adopted Pierce County’s critical areas for Edgewood and Pierce County’s Critical Areas Regulations, Title 18-E and 18-I. PHB, at 7 and 9; City Brief, at 5. This action occurred almost six years ago, therefore, Petitioner’s challenge to the City’s compliance with RCW 36.70A.170 and .060(2) is untimely^[6] and therefore **dismissed**.

Compliance with RCW 36.70A.060(3)?

RCW 36.70A.060(3) requires Edgewood to *review* their interim critical area *designations* and

interim critical area *regulations* when adopting their comprehensive plans and implementing regulations. The Board notes that, to date, Edgewood has not adopted its final development regulations, or permanent critical area regulations (including designations ^[7]), to implement its Plan. Edgewood has a GMA duty to promptly adopt regulations that are consistent with and implement the new Plan. Nonetheless, the *only* ordinance before the Board is Ordinance No. 01-0171, adopting Edgewood's Comprehensive Plan.

As Edgewood has pointed out, RCW 36.70A.060 addresses only development regulations – not comprehensive plans, even though it requires review in the context of plan adoption. Respondent is correct about .060's application. Edgewood's Plan, not development regulations, is the subject of Petitioner's challenge. The challenge is misplaced and premature. Therefore, Petitioner's challenge to the City's compliance with RCW 36.70A.060(3) is **dismissed**.

The challenge posed in Petitioner's Legal Issue No. 2 would be timely, and perhaps appropriate, *after* Edgewood adopts its new implementing regulations, including its permanent critical areas regulations, to carry out the goals and policies of their newly adopted GMA comprehensive plan.

Compliance with RCW 36.70A.172?

Petitioner questions whether the City used the best available science (**BAS**) to protect critical areas when it adopted its Plan. The City argues that RCW 36.70A.172 only applies to regulations, not the City's development of critical area policies. [*Citing: HEAL v. City of Seattle*, CPSGMHB Case No. 96-3-0012, Final Decision and Order, (Aug. 12, 1996, at 14-15.)] Respondent further erroneously contends, "A Comprehensive Plan is a policy statement, and therefore any critical area policies are not subject to Board review." City Brief, at 5. Respondent is wrong on the law.

In its 1999 decision, Division I of the Court of Appeals found that the Board had erroneously concluded that it did not have jurisdiction to review critical area policies. The Court found that when a jurisdiction chooses to adopt critical area policies, [in its Plan, or separately] the Boards have jurisdiction to review such policies to determine whether the policies comply with the requirements of RCW 36.70A.172. ^[8] *See: H.E.A.L. v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 979 P.2d 854 (1999). The Board does have jurisdiction to review critical areas policies for compliance with RCW 36.70A.172.

Regarding potholes, Petitioner relies on the science in the City's SWMP which describes the importance of potholes as a major source of the City's water supply through aquifer recharge. PHB, at 7. However, Petitioner fails to note any contradiction in Edgewood's Plan that suggests potholes are not recognized as providing this function. PHB, at 7-10. To the contrary, the Board

notes that, consistent with the science in the SWMP, the Plan reflects the importance of potholes in its description of Stormwater and Drainage and in the Plan. Plan Policy NE 29 states, “Protect areas that are critical for aquifer recharge.” Plan, Chapter 3, at 8. Petitioner claim is without merit.

However, Petitioner does demonstrate a contradiction between the science underlying the SWMP and a statement in the Plan related to frequently flooded areas. PHB, at 8. Petitioner shows that the SWMP recommends:

Septic Systems – Past land development approvals by Pierce County have resulted in a large number of homes constructed at or below the FEMA designated 100-year flood plain. As a result, during the recent wet winters several homes have been flooded and many septic sewage disposal systems have been inundated. This presents a potential health hazard that must be addressed.

To prevent the problem of flooded septic systems from getting worse, it is recommended that no septic systems be approved unless the bottom of the lowest drain field trench is five feet or more above the FEMA designated 500-year flood elevation as identified on the large scale drainage contour maps provided to the City as part of the SWMP.

The FEMA 500-year flood elevations are actually more nearly the wet winter water surface elevations as experienced the past two winters.

Flood Protection – In addition to the protection of septic systems, the City should, by ordinance, prohibit any building with a footing grade less than five feet above the historic ponding level of the FEMA 500-year flood plain, whichever is the greater elevation.

Also no drainage detention or infiltration system shall be constructed with a bottom elevation lower than five feet above the historic ponding level of the FEMA 500-year flood plain.

Ex. 8, SWMP, at 20-2, (emphasis in original).

Petitioner notes that notwithstanding these recommendations in the SWMP, Edgewood’s Plan state’s “These maps [FEMA maps] illustrate the predicted flood area in a 100-year and 500-year storm event. *The City has designated the 100-year flood hazard areas as its frequently flooded areas.*” Chapter 3, Plan, at 8, (emphasis supplied). Although there may well be a scientific basis to support this designation, Edgewood fails to cite to a scientific basis for this 100-year flood

plain designation. Consequently, the Board concludes that Edgewood’s Plan declaration and designation of the 100-year flood plain as its frequently flooded area – critical area, does not comply with the requirements of RCW 36.70A.172.

For steep slopes, Petitioner acknowledges the City’s current interim critical areas regulations regulate slopes steeper than 15%. ^[9] The City does not dispute this statement. City Brief, at 5-6. Petitioner then asserts that the City “[N]ow chooses to begin regulation at 20% [slope].” PHB, at 9. Petitioner fails to point to science in the record, best available or otherwise, that indicates a percentage basis for regulating steep slopes. Furthermore, Petitioner fails to demonstrate where in the Plan Edgewood indicates it will now begin regulating only steep slopes exceeding 20%. Absent a showing of a scientific basis in the record for establishing steep slope regulations, and absent a reference to a Plan policy that ignores or contradicts the scientific basis of the policy, Petitioner’s challenge must fail.

C. Conclusion

The Board concludes that Petitioner has **failed carry the burden of proof** in demonstrating that Edgewood’s adoption of Ordinance No. 01-0171 failed to comply with the requirements of RCW 36.70A.060, RCW 36.70A.170. Those challenges are **dismissed**. With regard to Petitioner’s challenge to Edgewood’s compliance with RCW 36.70A.172, the Board concludes that Edgewood’s identification and designation of the 100-year flood plain as a frequently flooded area – critical area, **does not comply** with the requirements of RCW 36.70A.172. Ordinance No. 01-0171 will be remanded with directions to take the necessary actions to comply with the requirements of RCW 36.70A.172.

V. LEGAL ISSUE NO. 3

Does Ordinance No. 01-0171 fail to comply with GMA planning requirements under RCW 36.70A.070(6) because the comprehensive plan does not address how land use assumptions will be reassessed and financial requirements will be met in regards to transportation level of service?

A. Applicable Law

RCW 36.70A.070 spells out the mandatory elements of comprehensive plans of a county or city. It provides in relevant part:

(6) A transportation element that implements, and is consistent with, the land use element.

(a) The transportation element shall include the following subelements:

(i) Land use assumptions used in estimating travel;

.....

(iii) Facilities and services needs, including:

.....

(B) Level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system. These standards should be regionally coordinated;

.....

(iv) Finance, including:

(A) An analysis of funding capability to judge needs against probable funding resources;

(B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year street, road, or transit program required by RCW [35.77.010](#) for cities, RCW [36.81.121](#) for counties, and RCW [35.58.2795](#) for public transportation systems. The multiyear financing plan should be coordinated with the six-year improvement program developed by the department of transportation as required by RCW [47.05.030](#);

(C) If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met;

B. Discussion

1. Positions of the Parties

The Petitioner alleges that “the City has adopted a level of service C with a volume /capacity ratio of 0.75 for State Highway 161. (Exhibit P-23[K]). The City’s Final Environmental Impact Statement proposes a LOS D with a volume/capacity ratio of 0.90 on Meridian Avenue East (SR-

161) between 8th Street East and 36th Street East. (Exhibit P-23[m]). This directly conflicts with the LOS C that is listed in the City's Goals and Policies as stated above. The segment of SR-161 between 8th and 36th currently operates at a LOS F according to Table 3.6-2. (Exhibit P-23[n])." PHB, at 11.

The Respondent replies that the Petitioner's cited material "shows instead that the LOS on two portions of Meridian would be F. The cited material also correctly notes that WSD07 establishes LOS on state highways and has established a LOS D for Meridian. The EIS analyzes Meridian in terms of a LOS D standard." City's Brief, at 7.

The Petitioner claims that the City's Plan does not address how it will fund transportation improvements, including improvements needed on the Meridian corridor. "The City's capital facilities element illustrates that by the year 2006, the fund will be depleted. (Exhibit P-23[p]). The City does not address how it will fund transportation improvements, not just to the other arterials, but especially to the Meridian corridor." She continues, "If the City is using a capital facilities plan that demonstrates funding depletion within four years, then the City needs to alter its land use assumptions, and/or other growth and funding policies accordingly." PHB, at 12.

The Petitioner concludes her argument by stating that "The City's transportation element fails to demonstrate how it will provide for improvements to an arterial that the City's preferred growth alternative shows will house fifty percent of the City's future population. The City needs to be responsible in addressing how new growth will be paid for through its capital facilities plan, its land use, and its goals and policies in meeting concurrency requirements." PHB, at 13.

The City responds that the "Petitioner's argument appears to be that the Plan fails to meet the requirements in RCW 36.70A.070(6)(a)(iv)(C) which states:

If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met.

The Plan does contain such a discussion in several different areas. In Chapter 9 of the Plan, Goal T VIII specifically discusses the need to secure a reliable financing plan to assure the LOS standards are met. This Goal and the subgoals T 42 through T 56 meet the requirements for discussion how the Plan will be revised if funding is not received to make the needed

improvements along Meridian. ^[10] A fair reading of these sections clearly indicates that the City discusses a number of funding options, and specifically deals with how land use assumptions will be reassessed to meet the adopted LOS." City's Brief, at 7.

2. Analysis

The Board notes that Petitioner claims that the City has adopted level of service C for State Highway 161. Exhibit P-23 [k] of the PHB clearly states that LOS C is designated for all arterials in the City of Edgewood **with the following exceptions** (Emphasis added):

- Maintain LOS F with a volume/capacity ratio of 1.30 on Meridian Avenue East (SR-161) between 36th Street East and the Union Pacific rail crossing.
- Maintain LOS F with a volume/capacity ratio of 1.30 on Meridian Avenue East (SR-161) between 8th Street East and the King County Line.

Edgewood Comprehensive Plan, Chapter 9, Page 19.

It is clear to the Board that the City did not adopt LOS C for State Highway 161, but indeed spelled out these two exemptions pertaining to SR-161. The Petitioner would seem to be in error on this point. Additionally, the Board notes that it is WSDOT, not cities or counties, that designates LOS standards on state highways, and Meridian *is* a state highway.

While the Petitioner alleges that the City has failed to address how it will fund the transportation improvements, Chapter 9 of the City's Comprehensive Plan discusses how the Plan will be revised if funding is not received to make improvements along Meridian. Attachment 5, City's Brief. A number of funding options are proposed and there is recognition that land use assumptions will be reassessed to meet the adopted LOS.

The Board notes that there is no provision in the GMA that requires a city to specifically identify all funds needed for the next twenty years in order to build the transportation facilities made necessary for the growth that may occur. The City must do an analysis of funding capability to judge needs against probable funding sources [\[11\]](#) and that is acknowledged in Chapter 9 of the City's Comprehensive Plan.

For all of the reasons above, the Board determines that the City has complied with the planning requirements under RCW 36.70A.070(6).

C. Conclusion

The Board concludes that the Petitioner has **failed to carry the burden of proof** that the City failed to comply with RCW 36.70A.070(6).

VII. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the argument of the parties, and having deliberated on the matter, the Board **ORDERS**:

1. Petitioner Elaine Lewis has **failed to carry the burden of proof** as to Legal Issue No. 3. The City of Edgewood is in **compliance** with GMA planning requirements under RCW 36.70A.070(6) because the comprehensive plan addresses how land use assumptions will be reassessed and financial requirements will be met in regards to transportation levels of service.
2. Petitioner has **failed to carry the burden of proof** in demonstrating that Edgewood's adoption of Ordinance No. 01-0171 failed to comply with the requirements of RCW 36.70A.060 and RCW 36.70A.170. Those challenges are **dismissed**
3. Edgewood's identification and designation of the frequently flooded areas **does not comply** with the requirements of RCW 36.70A.172. The City's action was **clearly erroneous**. The Board **remands** Ordinance No. 01-0171 to the City with direction to comply with the requirements of RCW 36.70A.172 in identifying and designating frequently flooded areas and take appropriate legislative action as is necessary.
4. The City of Edgewood has **failed to comply** with the requirements of RCW 36.70A.140. The City was **clearly erroneous** in not providing its citizens reasonable opportunity to review the 14 amendments to the Draft Comprehensive Plan, and therefore failed to afford the "early and continuous public participation" required by the GMA.
5. The Board therefore **remands** Ordinance No. 01-0171 to the City with the following instructions:
 - By no later than **May 7, 2002**, the City shall take appropriate legislative action, after providing the public a reasonable opportunity to comment, to repeal, amend, or reconsider the six amendments to the Draft Comprehensive Plan that were adopted by City Council on June 12, 2001.
 - By no later than **May 7, 2002**, the City shall take appropriate legislative action to comply with the requirements of RCW 36.70A.172.
 - By no later than **May 14, 2002**, the City shall file with the Board an original and four copies of a Statement of Actions Taken to Comply (**SATC**) with the GMA, as set forth in this FDO. The City shall simultaneously serve a copy of the SATC, with attachments, on Petitioner Lewis.

Pursuant to RCW 36.70A.330(1) upon receipt of the City's SATC, the Board will schedule a Compliance Hearing and establish dates for comments of the SATC for Petitioner and Reply by the City.

If the City takes legislative compliance actions prior to the May 7, 2002 deadline set forth in section 4 of this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 7th day of February, 2002.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

Joseph W. Tovar, AICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration.

FINDINGS OF FACT

1. On May 29, 2001, the City of Edgewood conducted a Public Hearing to receive public comment on the proposed Comprehensive Plan. PHB, Exhibit B.
2. On June 5 and 6, 2001, the City Council conducted two Public Workshops to discuss amendments to the Draft Comprehensive Plan. Several proposals by various Councilmembers were presented and discussed. City's Brief, Attachment 2.
3. Between June 8 and 12, 2001, several additional proposals and amendments were prepared. City Brief, Attachment 2.
4. At the June 12, 2001 meeting, fourteen amendments to the plan were offered by various Councilmembers. Six of the fourteen amendments were adopted. PHB, Exhibit C.
5. After adopting the six amendments the City Council adopted Ordinance No. 01-0171, the Comprehensive Plan. PHB, Exhibit C.
6. In 1996, the City of Edgewood adopted Pierce County's Critical Areas Regulations, Title 18-E and 18-I, as part of its Interim Comprehensive Plan and Zoning Code pending a revision during the Development Regulations phase of the Final Comprehensive Plan. PHB, at 7 and 9. City's Brief, at 5.
7. Chapter 9 of Edgewood's Comprehensive Plan discusses the need to secure a reliable financing plan to assure the LOS standards are met. This Chapter addresses a number of funding options, and addresses the matter of how land use assumptions will be reassessed to meet the adopted LOS. City's Brief, Attachment 5.

[1] See maps in Comprehensive Plan, Ch. 5, p. 12, Final Environmental Impact Statement (FEIS), Ch. 2, Figures 2.1-1, 2.2-1, and 2.3-1.

[2] In that case, the master plan for the Winslow Mixed Use Town Center was to be incorporated into the existing comprehensive plan. The master plan had been developed over three years with the help of numerous hearings, meetings, and deliberations. *Andrus*, at 3. The Draft Winslow Master Plan and Integrated Final Environmental Impact Statement was presented to the City Council in December 1997. *Id.* On April 16, the City Council held a public hearing to discuss the December 1997 master plan and proposed revisions. *Id.*, at 4. According to the record available to the Board, the City had used various means to notify the public of this meeting, but there was no record of anyone receiving notice earlier than April 10, six days before the April 16 meeting. *Id.* The deadline for written comments was April 17. *Id.* Although the Council did not vote on and adopt the plan until May 21, 1998, the record did not show that the public had any opportunity to comment after April 17. *Id.*, at 4.

[3] The City directs the Board to the "Citizen Participation" Section of the Comprehensive Plan to see the thorough public participation. The Board notes that the chronology ends at May 29.

[4] *HEAL v. Seattle*, Case No. 96-3-0012, 1996 FDO, p. 11.

[5] CATRAC stands for "Capacity Analysis Technical Review Ad Hoc Committee," November 1999.

[6] The Board notes that the BAS requirement of RCW 36.70A.172 was added to the GMA in 1995.

[7] The Board notes that typically the critical areas identified and designated for regulation are identified in the regulations themselves, through map references or other geographic notations. However, it is conceivable that a jurisdiction could identify, designate and locate such critical areas in its Plan. Nonetheless, such approach is not the case or issue here.

[8] The Board ultimately found that Seattle's steep slope policies (critical area policies) were based on BAS and complied with RCW 36.70A.172. *See: HEAL v. City of Seattle*, CPSGMHB Case No. 96-3-0012, Order on Remand [Court of Appeals Divisions 1, Remand Case No. 40939-5-I and Mandate of Superior Court Case No. 9602-24695-6. SEA], (Oct. 1, 2001).

[9] Edgewood's interim critical areas regulations identify landslide hazard areas by four different criteria. Only one criteria includes a reference to slope as factor. "Landslide hazard areas are those areas meeting any of the following criteria: (1) . . .(2) Areas with all three of the following characteristics: (a) *slopes steeper than 15 percent*; and (b) Hillside intersecting geologic contacts with a relatively permeable sediment overlying a relatively impermeable sediment or bedrock; and (c) Springs or groundwater seepage, (3) . . .(4) . . . Ex. 9, Chapter 20.05 Edgewood Municipal Code, incorporating Pierce County Code Title 18E.

[10] *See* Attachment 5 to City's Brief.

[11] RCW 36.70A.070(6)(a)(iv)(A).