

the City's enactment of Ordinance No. 5385 and finds that it **complies** with the challenged provisions of the GMA and SEPA.

II. Background

On September 16, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Beverly Gagnier, Betsy Swenson and Factoria Area Coalition for Tomorrow (**FACT**) (collectively **Petitioners** or **FACT**). The matter was assigned Case No. 02-3-0014, and is hereafter referred to as *FACT, et al., v. City of Bellevue*. Petitioners challenge the City of Bellevue's (**Bellevue** or **City**) adoption of Ordinance No. 5385 amending Bellevue's zoning and development regulations. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**) and the State Environmental Policy Act (**SEPA**).

On October 1, 2002, the Board received Factoria Square Limited Partnership's (**Factoria**), Motion to Intervene, and Declaration of Anthony Chan in support of Factoria's Motion to Intervene.

On October 3, 2002, the Board received Petitioner's Response to Factoria Square Limited Motion to Intervene.

On October 7, 2002, the Board granted Factoria Square Limited Partnership's Motion to Intervene.

On October 17, 2002, the Board conducted a Prehearing Conference (**PHC**) in Conference Room AB of the Financial Center, 1215 4th Avenue, Seattle. Present for the Board was Lois North presiding officer in this case. Beverly Gagnier and Betsy Swenson, the Petitioners, appeared *pro se*. Siona Windsor and Lori Riordan represented the City. Christina Gerrish represented the Intervenor, Factoria Square Limited Partnership. Robert Swenson and Bruce Young of FACT were in attendance as observers. Bellevue filed its Index of Record at the PHC.

At the PHC, the Petitioners filed an Amended Petition for Review. Pursuant to WAC 242-02-260, the Board accepted the Petition. The City submitted a "Motion for More Definite Statement." The City requested that the Board order the Petitioners to provide a "detailed statement of the issues" that included some factual basis for each of Petitioners' issues. After a review of the proposed schedule and other procedural matters, the presiding officer indicated that the Prehearing Order and the Order on Motion for More Definite Statement would be issued by Thursday, October 24, 2002.

On October 18, 2002, the Board received "Factoria Square Limited Partnership Joins in City of Bellevue's Motion for More Definite Statement."

On October 22, 2002, the Board received Petitioners' "Motion to Require that the City of Bellevue Provide a Complete Index with Sufficient Identifying Information."

On October 24, 2002, the Board denied the Motions of the City and of the Petitioners for more definite information and issued the Prehearing Order.

On November 8, 2002, the Board received Petitioners' "Motion to Supplement Index" with fourteen items.

On November 15, 2002, the Board received City of Bellevue's "Response to Motion to Supplement the Record" and the Intervenor's "Opposition to Petitioners' Motion to Supplement the Record."

On November 20, 2002, the Board received "Rebuttal to Opposition to Petitioners' Motion to Supplement."

On December 9, 2002, the Board received "Stipulated Motion for Extension of Time to File Briefs" signed by both the Petitioners and the Respondent.

On December 12, 2002, the Board granted the request for a one-week extension of the briefing deadlines and the Hearing on the Merits.

On December 20, 2002, the Board received the Petitioner's Prehearing Brief (**PPHB**) with thirty-three un-numbered exhibits.

On January 3, 2003, the Board issued an Order Rescheduling the Hearing On the Merits to Monday February 3, 2003.

On January 17, 2003, the Board received the City of Bellevue's Prehearing Brief (**RPHB**) with eleven numbered exhibits.

On January 17, 2003, the Board also received the Brief of Intervenor Factoria Square Limited Partnership (**IPHB**) with two attached documents.

On January 23, 2003, the Board received Motion to Dismiss Intervenor's Brief from the Petitioners.

On January 24, 2003, the Board received Intervenor's Response in Opposition to Petitioner's Motion to Dismiss Intervenor's Brief from the Intervenor.

On January 27, 2003, the Board received from the Intervenor "Errata to Intervenor's Response In Opposition to Petitioner's Motion to Dismiss Intervenor's Brief."

On January 27, 2003, the Board denied “Petitioner’s Motion to Dismiss Intervenor’s Brief” and granted “Extension of Deadline for Petitioner’s Reply Brief.”

On January 27, 2003, the Board received Petitioner’s Rebuttal to City’s Prehearing Brief (**Petitioner’s Reply**) with three attachments.

On February 3, 2003, the Board conducted a Hearing on the Merits (**HOM**) beginning at 10:00 am in Room 1022 of the Financial Center at 1215 4th Avenue in Seattle. Present for the Board were Edward G. McGuire, Joseph W. Tovar, and Lois H. North, Presiding Officer. The Board’s legal extern Sherman Snow was also in attendance. Betsy Swenson and Beverly Gagnier represented the Petitioners, *pro se*. Lori Riordan and Siona Windsor represented the City. Scott Missall represented the Intervenor Factoria Square Limited Partnership. Scott Kindle, of Mills and Lessard in Seattle, provided court reporting services. The meeting adjourned at 12:30 p.m.

After the HOM, a transcript of a portion of the HOM was ordered (**transcript Excerpt**).

III. PRELIMINARY MATTERS AND ABANDONED ISSUES

A. Preliminary Matters

On November 8, 2002, the Board received Petitioner’s “Motion to Supplement Index” with fourteen items.

On November 15, 2002, the Board received the City of Bellevue’s “Response to Motion to Supplement Record” and “Intervenor’s Opposition to Petitioner’s Motion to Supplement Record”.

On November 20, 2002, the Board received “Rebuttal to Opposition to Petitioner’s Motion”.

The Board hereby **grants** the “Petitioner’s Motion to Supplement the Index” with fourteen items.

B. Abandoned Issues

Legal Issues 4 and 6 are not itemized under any of the headings in the Petitioner’s Brief. The Board determines that Legal Issues 4 and 6 are **abandoned**.

IV. JURISDICTION, presumption of validity, burden of proof and standard of review

A. Applicable Law

1. Jurisdiction

The Board has subject matter jurisdiction over the challenged ordinance, pursuant to RCW 36.70A.280(1)(2). Petitioners have GMA participation standing to appear before the Board pursuant to RCW 36.70A.280(2). Petitioner's PFR was timely filed, pursuant to RCW 36.70A.290(2).

2. Presumption of Validity

Petitioners challenge the City of Bellevue's adoption of Ordinance No. 5385. Pursuant to RCW 36.70A.320(1), Bellevue's Ordinance No. 5385 is presumed valid upon adoption.

3. Burden of Proof and Standard of Review

The burden is on Petitioners to demonstrate that the action taken by the City of Bellevue is 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 [Bellevue] 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 Bellevue's action 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 Bellevue 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), 108 Wn. App. 429 (2001).

In affirming the *Cooper Point* court, the Supreme Court recently stated:

Although we review questions of law *de novo*, we give substantial weight to the

Board's interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board] is appropriate where the administrative agency's construction of statutes is within the agency's field of expertise . . .

Thurston County v. Western Washington Growth Management Hearings Board, Docket No. 71746-0, November 21, 2002, at 7.

B. Discussion

The Board has great respect for the considerable effort that *pro se* petitioners must expend in order to place issues that concern them before the Board. Nevertheless, the burden of proof that a petitioner must carry is the same regardless of whether the petitioner is an attorney or a non-attorney. As noted above, in order to overcome the presumption of validity, a petitioner must persuade the Board that the local government has acted erroneously, and to do so it must present clear, well-reasoned **legal argument** supported by appropriate reference to the relevant facts, statutory and case law provisions. Written or oral pleadings that lack these attributes will not suffice.

Here, the Petitioners' case is undermined by the fact that the organization and presentation of argument was difficult for the Board to follow; argument about specific legal issues was difficult to locate or missing entirely, as was citation to relevant facts. For example, the Petitioners attached an Exhibit List and thirty-three **un-numbered** documents to their Prehearing Brief, but then never referred to **any** of the exhibits in the text of the brief. References to the record throughout the brief lack identification as specific exhibits or appendices.

Further, rather than provide argument grouped under specific legal issues, the Petitioners grouped many legal issues together under several headings.^[1] The text under these headings does not cite to the actual wording in the specific sections of RCW 36.70A (with the exception of RCW 36.70A.140 on pg. 9 of PPHB). The arguments are not focused on the Legal Issues as laid out under sections II & IV. Legal Issue 2 is referred to twelve times, while Legal Issues 1, 3, 12, 14, 15 are never mentioned. In Section IV "The Action is Inconsistent with the State Environmental Policy Act", only Legal Issues 7 and 8 cite RCW 43.21C, which is the State Environmental Policy Act. Issues 9, 10, 11, 13, and 18 cite sections of the GMA, RCW 36.70A

The Petitioners express criticisms of the 1993 zoning and development regulations of the three land use districts (F1, F2 and F3), which were agreed to at the time that the City annexed Factoria.^[2] The Board notes that the 1993 zoning and development regulations are not within the Board's jurisdiction. RCW 36.70A.290 (2) stipulates that the Board has jurisdiction over local

governmental actions when a Petitioner has filed a PFR with the Board within 60 days after publication of the actions taken by county or city legislative bodies.

C. Organization of Discussion of Legal Issues

The Petitioners filed nineteen (19) Legal Issues for review in their amended Petition for Review. These Issues are attached to this Final Decision and Order as Appendix A.

In setting forth this Final Decision and Order, the Board will first consider the allegations that Ordinance No. 5385 is not in compliance with Bellevue's Comprehensive Plan. Secondly, the Board will address the matter of whether Ordinance No. 5385 is inconsistent with the comprehensive plans of neighboring jurisdictions. Third, the Board will discuss the issue of City compliance with the GMA's requirement for public participation. Last, the Board will address the City's compliance with the requirements of SEPA.

V. IS ORDINANCE NO. 5385 IN COMPLIANCE WITH THE CITY OF BELLEVUE'S COMPREHENSIVE PLAN?

A. Applicable Law

Petitioners reference Legal Issues 1, 2, 3, 12, 13, 14, 15, 16, 17, and 19 from the Amended Petition for Review. The reader is referred to Appendix A of the FDO for these legal issues and to RCW 36.70A for the text of the cited sections.

B. Positions of the Parties & Discussion

Petitioners argue, "the action was adopted as a development regulation amendment, when it should have been reviewed as an Amendment to the Comprehensive Plan." PPHB at 7. Petitioners state that the City should have initiated a process to update their Factoria Subarea Plan. "The action was reviewed as an area-wide legislative rezone when, in fact, it was a site-specific re-zone." PPHB at 8.

The City responds that the Ordinance was appropriately processed as a development regulation amendment.

The F1 through F3 zones are unique in the City of Bellevue. They were created for purposes of facilitating the annexation of the Factoria area to the City. Neither the King County zoning for the property, nor the existing development lent themselves to easily fitting within any of the existing zoning designations for the City. Because of the unique nature of the F zoning designations, and the concessions the City had made to the property

owners in the pre-annexation agreement regarding future development and zoning changes, the City's intent had been to consider whether to eliminate the F zoning designations altogether, or, as noted above, to expand the use of this type of district into other areas of the City which would, of course, required both comprehensive plan and zoning amendments.

FACT claims that these land use code amendments were actually rezones and that they were site-specific, so should have been considered under a quasi-judicial standard of review. Ordinance 5385 is not in fact a zoning ordinance—it did not alter the land uses available to property owners within the districts. Rather, the ordinance capped the amount of development available for those land uses and placed further restrictions of the configuration of those uses. The Planning Commission considered and expressly rejected the approach of rezoning the districts to more traditional zoning designations used in the City, such as Community Business (CB), and Office-Limited Business (OLB). (00007-00008) (Exhibit 10). The basis for rejecting the rezone approach was the concern over creating large numbers of non-conforming buildings and the potential financial consequences that could affect those property owners of those non-conforming buildings. *Id.*

Further, if the Board were to find that Ordinance 5385 was in actuality, a site-specific rezone, the Board would be required to dismiss this petition for lack of subject matter jurisdiction. A site-specific rezone that is authorized by a comprehensive plan is a 'project permit application' that growth management hearings board lacks jurisdiction to review, regardless of whether a comprehensive plan was adopted under Growth Management Act (GMA). *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 4 P.3d 123 (2000). RPHB, at 12 and 13.

FACT alleges that Ordinance 5385 is inconsistent with various elements of the Factoria Subarea Plan and with policies of the City's Comprehensive Plan. PPHB, at 10 - 15.

The City answers:

Many of FACT's complaints about the failure of the City to enact an ordinance that is consistent with its Comprehensive Plan policies are based upon an erroneous presumption—that the Board should be considering the proposed amendments in the context of either undeveloped land or the existing development as opposed to the existing land use controls. Ordinance 5385 limited the development potential and brought the property back under stricter land use controls than were available under Ordinance 4605.

The Comprehensive Plan policies that FACT alleges Ordinance 5385 are inconsistent with include S-FA-1, which requires that the City maintain the land uses as depicted in the

Land Use Plan. The ordinance does precisely this—all of the uses allowed under Ordinance 5385—retail, office and residential were all allowed under the Land Use Plan, and have been maintained with the new regulations. FACT is clearly mistaken in this claim.

Likewise, the Ordinance is not inconsistent with S-FA-3, which requires that the City maintain densities that will not intensify vehicular congestion. The test here is whether the new regulations will intensify congestion beyond that which is allowed under the old regulations.

S-FA-5 does encourage inclusion of parks. It also encourages inclusion of landscaping and pedestrian access. FACT fails to acknowledge that the Design Guidelines provide for both landscaping enhancements and significant pedestrian amenities. FACT's expectation that the property owner should be required to develop a park and that the City is showing 'contempt' for the community by not requiring a park is unfair. It fails to acknowledge the actual developed state of the property.

RPHB, at 17.

The remainder of FACT's arguments regarding inconsistency of the Ordinance with Comprehensive Plan policies are mere conclusory statements that inconsistency exists. In order to meet its burden, FACT must identify to the Board precisely what the inconsistency is when comparing the existing regulations and the proposed regulations, and explain how it is inconsistent. FACT has failed to meet this burden.

RPHB, at 18.

The Board agrees that the City did follow the appropriate process in adopting Ordinance 5385 as a development regulation amendment. The City's Comprehensive Plan was not affected by this Ordinance and an amendment was not required.

C. Conclusion

The Board concludes that the Petitioners have failed to carry the burden of proof in demonstrating that Ordinance No. 5385 is not consistent with or does not implement Bellevue's Comprehensive Plan.

VI. IS ORDINANCE NO. 5385 INCONSISTENT WITH THE REQUIREMENTS OF RCW 36.70A.100 THAT COMPREHENSIVE PLANS BE COORDINATED WITH NEIGHBORING JURISDICTIONS?

A. Applicable Law

This is Legal Issue 5 of the Amended Petition for Review. The applicable law of RCW 36.70A.100 “Comprehensive Plans—must be coordinated” provides in relevant part:

The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues.

B. Positions of the Parties and Discussion

The Petitioners set forth their arguments under III on page 19 of their brief. They are here quoted in their entirety:

There is no evidence in the record that the City of Newcastle was involved, or even notified, of this very significant increase of development in an area that has direct significant impacts on that nearby City. Virtually all of the westbound traffic out of the City of Newcastle travels along Coal Creek Parkway, and that local highway also carries a large amount of the traffic from the re-zone site. Coal Creek Parkway’s on-ramp to I-405 is already experiencing extreme traffic congestion.

There is no evidence in the record that the City considered any of the planning documents from the City of Newcastle or King County in making its consistency determination.

There is no evidence in the record that the City contacted any of the local, and affected, fire and water districts.

The City should have involved these affected jurisdictions as part of its duty under GMA to ensure consistency between neighboring jurisdictions.

PPHB, at 19.

The City replies:

GMA does not require consultation between cities in making decisions to amend development regulations. GMA does require that cities coordinate their Comprehensive Plans with neighboring jurisdictions. Here, the ordinance at issue is a development regulation, not a comprehensive plan amendment. Further, FACT fails to provide the Board with any proof that the Ordinance is actually inconsistent with the comprehensive plans of any neighboring jurisdictions.

RPHB, at 19.

The Board agrees with the City. RCW 36.70A.100 requires consistency of **Plans** between adjacent jurisdictions. The Ordinance in question here is a development regulation. RCW 36.70A.100 does not apply.

C. Conclusion

The Board concludes that RCW 36.70A.100 is not applicable to Ordinance No. 5385.

VII. IN THE ENACTMENT OF ORDINANCE NO. 5385, DID THE CITY COMPLY WITH THE GMA'S REQUIREMENT FOR PUBLIC PARTICIPATION?

A. Applicable Law

Petitioner's Legal Issues No. 15 and 16 refer to RCW 36.70A.035 and RCW 36.70A.140.

Petitioner cites RCW 36.70A.140 on page 9 of the PHB as "requiring early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations." Petitioner does not cite RCW 36.70A.035, which deals with Notice Provisions, anywhere in the text of the PPHB.

B. Positions of Parties and Discussion

Petitioners allege three errors on the part of the city in meeting the requirements for public participation under the GMA: inadequate initial notice; failure to appoint Citizens Advisory Committee (**CAC**); and an eleventh hour amendment by a city councilman to increase the commercial square footage in the F1 zone.

Petitioners argue that:

The public was first notified by a phone call from a staff member that Factoria was proposing 'another rezone' in April 2000. This unofficial 'tip-off' was many months after the staff and the ownership group had been meeting and negotiating terms of the Amendment. While this conduct might be permissible for an applicant sponsored quasi-judicial application, it is totally unacceptable for an area-wide legislative planning decision such as this. The Pre-Annexation Agreement (PAA) zoning which was used as the basis for the amendment was 'never really advertised' as a 'zoning district' (Hardin staff memo 3/27/00). It 'did not come about in an open manner' (Hardin April 5, 2000 comment to Planning Commission Bates 01786-88). The PSA zoning was never reviewed

by the Planning Commission and never went through SEPA review.

PPHB, at 9.

The City responds:

FACT's argument that the City failed to provide for adequate public participation is not supported by the record. While FACT focuses upon the manner in which they first became aware of the potential for changes to the development regulations governing Factoria, and upon the amount of time they were given to comment at the various study sessions and public hearings involved in the consideration of these land use code amendments, FACT fails to cite the Board to the hundreds of letters and E-mails received by the City from FACT members and other interested citizens regarding the proposal. (Exhibit 6). Much of FACT's complaints about the City's actions with respect to the Factoria districts focus upon the initial adoption of the Factoria zoning in Ordinance 4605 and the Pre-Annexation Agreements. As noted above, the time for challenging those actions has long-since passed. In deference to the Board's preference for designation of exhibits from the record of only those documents that are essential to the Board's decision-making, the City will not submit all of the public comment documents received during the two years that these amendments were studied by the City. The City has appended a representative sample of the documents, and represents to the Board that in excess of 75 people submitted written comments some of them multiple times prior to March 2002. E-mail comments, in particular, were directly responded to by City staff, as were some letters.

RPHB, at 14.

In regard to the Citizen Advisory Committee, the Petitioners state:

Even though this was a major land use decision, no forum was provided to directly involve citizen participation in the planning process. Though the City's Comprehensive Plan Citizen Participation Element CP-7 recommended a Citizen's Advisory Committee (CAC), and though the City funded and created two other CAC for two other neighborhood shopping centers, Newport Hills and Lake Hills at the same time, no such Committee was formed for Factoria.

PPHB, at 10.

The City responds:

FACT cites to CP-7, the City's Comprehensive Plan Participation Element, which provides:

Policy CP-7. Utilize Citizen Advisory Committees which represent a broad spectrum of viewpoints wherever reasonable to oversee major revisions to the general elements and subareas of the Comprehensive Plan.

This policy, by its terms, applies to amendments to the Comprehensive Plan, an action which was not undertaken in this instance. The City's decision to not utilize the CAC process isn't subject to Board challenge under the circumstances and does not provide a basis for finding the City failed to comply with the requirement of public participation.

RPHB, at 15-16.

As to the last minute amendment, Petitioners claim:

The public was not allowed to comment on a major change to the land use amendment when an 11th hour Amendment was proposed by Councilman Mosher after public testimony on July 15, 2002, and Ordinance #5385 passed by a vote by the Council of 7-0.

PPHB, at 10.

The City responded to this allegation at the Hearing on the Merits:

With respect to what happened at the very last city council meeting, the extra square footage had been presented as a proposal to the planning commission. The planning commission did not accept it. So that was aired at a public meeting with the planning commission. And as they were present at all of the meetings that the planning commission had on these proposals as they went through the process for the two-year period, FACT was there and did comment and did express their displeasure with the idea. The planning commission selected the lower intensity. The city council went with the greater intensity. So there was an opportunity to comment and the position of FACT and many, many other citizens in the area was well known. They were well known to the city council. The city council made a decision.

That gets into the area of public participation that is probably most problematic for citizens to grapple with, and that is the political reality that the decision that is made is the decision of the legislators, and it sometimes will not be what residents and citizens want or expect. But their remedy in this situation, public participation, as the board has said, does not equate to public decision-making. The ultimate decision goes to the city council, and when the citizens are unhappy with that choice, they have the political process to do something about it.

Transcript Excerpt, at 7 and 8.

This Board has emphasized the importance of the public participation requirements of the GMA on many occasions and in numerous FDOs. The Board has explained this requirement as follows:

The GMA requires public participation, but it does not require that a city necessarily act upon the desires expressed by the public during that participation and comment:

However, the “public participation” that is one of the hallmarks of the GMA, does not equate to “citizens decide”. The Act requires the elected legislative bodies of cities and counties, not individual citizens, to ultimately “decide” on the direction and content of policy documents such as county-wide planning policies and comprehensive plans. The Act assigns this policy-making authority to city and county elected officials, who are accountable to their citizens at the ballot box.

Twin Falls v. Snohomish County, CPSGMHB Case No. 93-3-0003, Final Decision and Order, (Sept. 7, 1993) at 55 (quoting *Poulsbo, et. al, v. Kitsap County*, CPSGMHB Case No. 92-3-0009, Final Decision and Order, (Apr. 6, 1993) at 26.

The Board understands that FACT is disappointed by the City Council’s decision to adopt Ordinance 5385. Although the parties disagree over the extent to which FACT members and other citizens influenced the City’s final decision, they were clearly involved and were given many opportunities to comment upon the proposal. The Petitioner would have preferred that the City go further to limit development potential of the districts, but they have not met the burden of showing that the City failed to provide adequate opportunities for public participation.

C. Conclusion

The Board concludes that the petitioners have failed to carry the burden of proof in demonstrating that the City failed to comply with the notice and public participation requirements of the GMA.

VIII. IN THE ENACTMENT OF ORDINANCE NO. 5385, DID THE CITY COMPLY WITH THE REQUIREMENTS OF THE STATE ENVIRONMENTAL POLICY ACT (SEPA)?

A. Applicable Law

Petitioners reference Legal Issues 7, 8, 9, 10, 11, 13, and 18 from the Amended PFR. The reader is referred to Appendix A of this FDO for these legal issues and to RCW 36.70A for the text of the sections cited in the legal issues. Only Legal Issues 7 and 8 cite RCW 43.21C, SEPA. Issues 9, 10, 11, 13, and 18 cite sections of the GMA - RCW 36.70A.

B. Positions of Parties and Discussion

Petitioners allege that “a fundamental flaw in the City’s SEPA review is its assumption that this Action is a non-project action, and therefore exempt from a thorough SEPA analysis.” PPHB, at 21. Petitioners continue with “The City of Bellevue claims this is a legislative rezone with no specific development applications. Based on the totality of the circumstances, it is reasonable to conclude that specific future development will result directly as a result of this proposed Action. It is not appropriate for the City to avoid analyzing significant environmental impacts by relying on the fiction that the Action is ‘non-project’.” PPHB, at 22.

The City responds:

As part of the land use code amendment process, the City undertook an environmental review as provided under WAC 197-11-060(5) and WAC 197-11-355. The proposed land use code amendments were not a development permit specific review for any building or use nor were they intended to be a planned action. Ordinance 5385 does not result in the issuance of permits for construction. (07592) (Exhibit 1).

The City prepared an environmental checklist dated March 11, 2002 as well as the Supplemental Sheet for Non-project Actions, using the suggested WAC 197-11-960 form. (006900-06912) (Exhibit 3). Using the environmental checklist and the documents and information on which it was based, on May 9, 2002 the City issued and published a DNS that the adoption of the proposed land use regulations would not have a ‘probable significant adverse impact on the environment.’ (07534-07551) (Exhibit 4). The City further prepared an environmental summary for the Planning Commission as provided in WAC 197-11-253(3)(b) that further highlights that the DNS at issue in this SEPA challenge is appropriate. (07592 – 07609) (Exhibit 1).

RPHB, at 4. The City continues with the listing of thirteen key facts supporting the DNS.

Petitioners argue that the City’s Environmental Checklist and Environmental Analysis were clearly erroneous and inadequate. Petitioners assert that traffic impacts, geological conditions and hazards, storm-water impacts, utility impacts, recreational impacts, public safety and emergency services and evacuation issues, and noise issues were not adequately analyzed and were clearly erroneous. PPHB, at 24-29.

The Petitioners summarize their concerns as to the inadequacy of the SEPA process:

The vastly increased development intensity proposed is inappropriate for a site that is regarded as one of the most potentially dangerous in all of Bellevue, given the seismically-

hazardous Seattle earthquake fault, its known poor soil conditions with potential for liquefaction, high water table with large portions of wetlands and streams that were paved over, its location next to a major, low-lying section of the Olympic Pipeline (which might rupture in a sizeable earthquake), and its well-documented near-gridlock traffic congestion.

PPHB, at 30.

The City answers the Petitioner's allegations with:

FACT's SEPA challenges fail for the following reasons:

1. The Board has authority to hear a SEPA appeal from a GMA city that is a part of a proposed action whether or not the city has an internal appeal procedure for SEPA challenges.
2. The optional DNS process, WAC 197-11-355, is applicable to SEPA review of a proposed legislative land use code amendment, whether or not for a minor project, where probable significant adverse environmental impacts are unlikely.
3. FACT has failed to sustain their burden to demonstrate that Ordinance 5385, a land use code amendment that reduced the density of potential development in a commercial district that has no critical sensitive areas, that has 95% existing impervious surfaces and would not exceed the established transportation Level of Service established for 2001-2011, would have probable significant adverse environmental impacts. FACT's opening brief fails to include any analysis of:
 - a. whether the claimed impacts they identify would be any different, much less presenting a significantly adverse impact, from the development that could occur under the City's regulations existing immediately before enactment of ordinance 5385
 - b. why claimed impacts, if they exist would not be better addressed at the time an actual development application is received when the actual scope of any development and the potential impacts could be better identified in relation to existing City codes and regulations that will adequately address and mitigate any impacts.

RPHB, at 20-21.

The Board agrees with the City that the optional DNS process, WAC 197-11-355, is an appropriate SEPA review for a proposed **legislative** land use code amendment where probable significant adverse environmental impacts are unlikely. Claimed adverse impacts will be better addressed at the time an actual development application is received; potential impacts could be better identified and appropriate mitigation could be pinpointed.

C. Conclusion

The Board concludes that the Petitioners have failed to carry the burden of proof in demonstrating that the City failed to comply with the requirements of SEPA.

IX. ORDER

Having reviewed and considered the GMA and SEPA, prior Orders of the Boards, the above-referenced documents, briefing and oral arguments of the parties, and having deliberated on the matter, the Board hereby ORDERS:

1. The City of Bellevue's enactment of Ordinance No. 5385, adopting and amending zoning and development regulations applicable to Factoria Land Use Districts F1, F2, and F3, was **not clearly erroneous** and the City has **complied** with the challenged requirements of the GMA (Chapter 36.70A RCW).
2. The City of Bellevue's Determination of Non-Significance was **not clearly erroneous** and the City has **complied** with the challenged requirements of SEPA (Chapter 43.21C RCW).

So ORDERED this 17th day of March 2003.

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.

APPENDIX A

Legal Issue No. 1

Did the City’s adoption of Ordinance 5385 fail to comply with requirements of RCW 36.70A.040 (4)(2)(d) and RCW 36.70A.030(7) that the City shall adopt development regulations to be consistent with the City’s Comprehensive Plan (which currently recognizes the F1 site as “Community Business”[CB]), including but not limited to issues relating to zoning and City of Bellevue Comprehensive Plan elements related to land use, housing, utilities and environment and 2002 Comprehensive Plan Update related to the Endangered Species Act?

Legal Issue No. 2

Did the City’s adoption of Ordinance 5385 fail to comply with requirements of RCW 36.70A.130 (1)(b) that Amendments of or revisions to development regulations shall be consistent with and implement the Comprehensive Plan including, but not limited to issues related to zoning and City of Bellevue Comprehensive Plan elements related to land use, housing, utilities and environment and 2002 Comprehensive Plan Update related to the Endangered Species Act?

Legal Issue No. 3

Did the City’s adoption of Ordinance 5385 fail to comply with RCW 30.70A.080(2) that development regulations shall be consistent with Subarea Plans and, specifically, the Factoria Subarea Plan?

Legal Issue No. 4

Did the City’s adoption of Ordinance 5385 fail to comply with the requirements of RCW 36.70A.210(1)(2)(a)(b) that City and County plans are consistent?

Legal Issue No. 5

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Did the City's adoption of Ordinance 5385 fail to comply with requirements of RCW 36.70A.100 that Comprehensive Plans be coordinated with neighboring jurisdictions?

Legal Issue No. 6

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Does the City's adoption of Ordinance 5385 fail to comply with RCW 36.70A.040(3)(b) in terms of designation of Critical Areas and adoption of development regulations protecting Critical Areas?

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Legal Issue No. 7

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During its adoption of Ordinance 5385, did the City fail to follow guidelines and procedures related to analysis of environmental impacts set forth in SEPA RCW 43.21C.030(a)(b)(c)(i)(ii) (iii) and did the City fail to develop an ordinance that complies with the City of Bellevue's "2001-2012 Transportation Facilities Plan" (SEPA RCW 43.21C and Chapter 22.02 of Bellevue City Code)?

Legal Issue No. 8

Did the City's Environmental Coordinator fail to comply with SEPA RCW 43.21C.031(1) when making the SEPA threshold determination, Determination of Non-Significance, File Number 01-107064 AD that the proposal to amend the F1, F2 and F3 Land Use Districts "does not have a probable significant adverse impact on the environment"?

Legal Issue No. 9

Does the City's adoption of Ordinance 5385 fail to comply with RCW 36.70A.040(3)(b) and RCW 36.70A.170(1)(d) in terms of designation of Critical Areas?

Legal Issue No. 10

Does the City's adoption of Ordinance 5385 fail to comply with RCW 36.70A.172(1), which requires the designation and protection of Critical Areas, Sensitive Areas, aquifer recharge areas and anadromous fisheries and requires inclusion of and reference to "best available science in developing policies and development regulations"?

Legal Issue No. 11

Does the City's adoption of Ordinance 5385 fail to comply with RCW 36.70A.040(3)(b) and RCW 36.70.060(2)(3) provisions requiring development of regulations that protect Critical Areas?

Legal Issue No. 12

Did the City's adoption of Ordinance 5385 fail to comply with requirements of RCW 36.70A.070 (1)(2)(3) regarding: (1) housing, public utilities, population densities, building densities, estimates of future population growth; protection of groundwater used for water supplies; review of drainage, flooding and storm water runoff; corrective actions to mitigate/cleanse discharges that pollute waters; (2) inventory of housing needs; and, (3) forecast of future needs and facilities including reassessment if funding falls short?

Legal Issues No. 13

Did the City's adoption of Ordinance 5385 fail to comply with RCW 36.70A.020(9)(10)(11)(12) regarding: consistency with the comprehensive plan; conservation of fish and wildlife, protection of the environment, including air and water quality and the availability of water; ensuring adequate funding for public facilities and services; and encouraging "involvement of citizens in the planning process" and ensuring "coordination between communities and jurisdictions to reconcile conflicts"?

Legal Issue No. 14

Did the City's adoption of Ordinance 5385 fail to comply with RCW 36.70A.070(6)(a)(iii)(B) that Level of Service standards for all locally owned arterials and transit routes be regionally coordinated?

Legal Issue No.15

Does the City's Ordinance 5385 fail to comply with RCW 36.70A.035 to provide public participation and notices to property owners and other interested individuals of proposed amendments to City of Bellevue 's Comprehensive Plans and Development Regulations?

Legal Issue No. 16

Did the City's adoption of Ordinance 5385 fail comply with requirements of RCW 36.70A.140 because it did not provide for "early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations"?

Legal Issue No. 17

Did the City’s adoption of Ordinance 5385 fail to comply with requirements of RCW 36.70A.040 (4)(2)(d), RCW 36.70A.030(7), existing Bellevue Land Use Code Chapter 20.10.020, 20.10.100, 20.10.440, Chapter 20.20.10.1, Chapter 20.20.590F, Chapter 20.25B.020 and 20.25B.040, Chapter 20.25, 20.25B and 20.25H.070.A(2) C, 20.25H.090.B(3) and 20.25H.110.C, Bellevue City Code Chapter 22.02 Bellevue Environmental Procedures Code BCC 22.02.005(B)(C)(1)(2) (3)(4), BCC 22.02.010, BCC 22.02.015, BCC 22.02.038(B)(2)(4)(5)(C)(D), 22.02.040 under WAC 197-11-535(2) and BCC 22.02.045?

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Legal Issue No. 18

Did the City’s adoption of Ordinance 5385 fail to comply with the requirements of RCW 36.70A.175 because it did not acknowledge the delineation of sub-surface wetlands existing at the F1 site or incorporated related provisions that are consistent with the manual adopted by the Department of Ecology pursuant to RCW 90.58.380, in terms of buffers, mitigation requirements and Fish and Wildlife Habitat Conservation Areas?

Legal Issue No. 19

Did the City’s adoption of Ordinance 5385, with its very large multifamily residential element, fail to comply with the requirements of RCW 36.70A.215 (GMA Buildable Lands legislation), which states that the density and intensity of development be consistent with the Comprehensive Plan?

APPENDIX B

Findings of Fact

1. In 1993, the City of Bellevue entered into a Pre-annexation Agreement with King County that included the area at issue here. (RPHB Exhibit 1, **Ordinance No. 4605**)
2. The property (**Property**) commonly known as Factoria Mall was annexed to the City of Bellevue in 1993 and was designated as an “F1 District”. (RPHB, 2)
3. Upon annexation Factoria Mall was formally zoned “community business” (**CB**). As a part of that agreement, the City agreed to create three land use districts (F1, F2, F3),

substantially preserving the King County development potential for a period of seven years [*i. e.* until 2000]. Under Ordinance 4605, the CB zoning regulations for F1 were altered or suspended so that the Property was regulated in a manner somewhat like the regulations applicable under King County’s jurisdiction. (IPHB, 3; RPHB 2)

4. Ordinance 4605 expired by its own terms in December 2000, causing the property to revert in full to the City’s underlying CB Zoning designation. (IPHB, 3)

5. On July 16, 2002, the City of Bellevue adopted Ordinance No. 5385. This Ordinance restricted the development in the “F1 District” that was allowed in the CB zoning designation. It included an additional 100,000 square feet of retail space (under certain circumstances), no office space, and allowed up to 685 residential units. (IPHB, 3)

6. For environmental review in passing Ordinance 5385, the City used the optional determination of non-significance (**DNS**) process under WAC 197-11-355. (RPHB, 20, Ex. 1).

7. On September 12, 2002, Petitioner filed a petition for review with the Board challenging the City’s adoption of Ordinance No. 5385. (PFR, at 1)

[1]

For example, “II. Action is Inconsistent with City of Bellevue Comprehensive Plan and Related Plans. Reference: Legal Issues #1, 2, 3, 12, 13, 14, 15, 16, 17, 19 from the Amended Petition for Review”. Petitioner’s Prehearing Brief (PPHB) at 7. “IV. The Action is Inconsistent with the State Environmental Policy Act. Legal Issues Reference: Legal Issues #7, 8, 9, 10, 11, 13, 18 from the Amended Petition for Review.” PPHB at 19.

[2]

The F1, F2 and F3 zoning and development regulations substantially preserved the King County development potential for a period of seven years. Respondent’s Prehearing Brief (RPHB) at 2.