

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

SALISH VILLAGE HOMEOWNERS ASSOCIATION,)	
)	Case No. 02-3-0022
)	
Petitioner,)	<i>(Salish Village)</i>
)	
)	
v.)	
)	
CITY OF KIRKLAND,)	ORDER GRANTING dispositive
)	MOTIONS
Respondent.)	
)	

I. Procedural history

On December 16, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Salish Village Homeowners Association (**Petitioner** or **Salish Village**). The matter was assigned Case No. 02-3-0022, and is hereafter referred to as *Salish Village v. City of Kirkland*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges the City of Kirkland’s (**City** or **Kirkland**) adoption of Ordinance No. 3862 amending the text of the City’s Zoning Code and Zoning Map. The basis for the challenge is noncompliance with the Growth Management Act (**GMA or Act**) and the State Environmental Policy Act (**SEPA**).

On December 19, 2002, the Board issued a “Notice of Hearing”^[1] (**NOH**) in the above-captioned case. The Order set a date for a prehearing conference (**PHC**)^[2] and established a tentative schedule for the case.

On January 24, 2003, the Board received the City of Kirkland’s “Index” of the record.

On January 27, 2003 the Board held the PHC. At the PHC, on behalf of Petitioner, Mr. Klauser indicated that the Issues stated in the PFR were based on those presented to the Superior Court^[3] and were not necessarily limited to issues involving compliance with the GMA. Mr. Klauser was given until noon, February 3, 2003, to winnow down and/or restate the issues presented as questions for Board review. Any clarified or restated issues must be based on those stated in the

PFR. The PO indicated that absent Petitioner's filing a restatement of the issues, those stated in the PFR would be reflected in the Prehearing Order (**PHO**), and would be the issues the Board addresses.

On February 3, 2003, in lieu of a clarification or restatement of the issues, the Board received "Petition for Declaratory Ruling" (**PDR**) from Petitioner. The PDR involves the same parties as the petition for review, and was captioned the same. The PDR was assigned case number CPSGMHB Case No. 03-3-0001pdr.

In the PDR, Salish stated "This motion is brought to resolve "threshold" questions of the Board's jurisdiction and the formulation of Salish's "Issues Presented." PDR, at 4.

On February 4, 2003, the Board issued its "Prehearing Order" (**PHO**) establishing the final schedule for this matter and setting forth the Legal Issues to be decided by the Board. The Legal Issues stated in the PHO are identical to the "Issues Presented" in Petitioner's PFR. The schedule included deadlines for filing Motions to Supplement the Record and for filing Dispositive Motions.

Also February 4, 2003, the Board issued an "Order Declining to Issue a Declaratory Ruling." This Order noted that the "threshold" question posed by Petitioner was inappropriate for the Board to address in the context of a declaratory ruling. However, the Order noted that, "If Petitioner wishes to move and argue that the Board does not have subject matter jurisdiction over the challenged action [Kirkland's Ordinance No. 3862] Petitioner may do so within the timeframes set forth in [this] PHO (prehearing order). *Salish Village v. City of Kirkland*, CPSGMHB Case No. 03-3-0001pdr, Order Declining to Issue Declaratory Ruling, (Feb. 4, 2003), at 2. This Order disposed of the PDR.

On February 28, 2003, the deadline for filing motions, the Board received "City of Kirkland's Dispositive Motion" (**Kirkland Motion**). The City moves to dismiss Legal Issues 7-10, as stated in the 2/4/03 PHO, ^[4] and ignore the standard of review urged by Petitioner. The Board did not receive a dispositive motion from Petitioner. Nor did the Board receive any request from Petitioner to consider portions of the PDR as a "dispositive motion." Finally, the Board did not receive any motions to supplement the record from either party within the stated motions deadline.

On March 7, 2003, the Board received "Petitioner Salish Village's Response to Kirkland's Dispositive Motions" (**Salish Village Response**).

On this same day, the Board received "City of Kirkland's Response to Petitioner's Request for Declaratory Ruling" (**Kirkland Response – PDR**). In this filing the City states:

Pursuant to the Board's Prehearing Order, the [City] submits its response to dispositive motions. While the City has not received a "dispositive motion" form Petitioner, it has received a document entitled, "Petition for Declaratory Ruling." The Board declined Petitioner's request to issue such a ruling (footnote omitted), and noted that if "Petitioner wishes to move and argue that the Board does not have subject matter jurisdiction over the challenged action [Kirkland Ordinance No. 3862] Petitioner may do so within the timeframes set forth in the PHO."

Petitioner has failed to identify within the timeframes set by the Board whether it is relying on the Petition for Declaratory Ruling as a "dispositive motion." However, to preserve its ability to respond, the City submits this pleading to the Board for its consideration.

Kirkland Response – PDR, at 1-2.

Also on March 7, 2003, the Board received "Petitioner Salish Village's Motion to Strike the City of Kirkland's Response to Petitioner's Motion for Declaratory Ruling" (**Salish Village Motion to Strike**). Petitioner acknowledged that the Board issued an Order declining to issue a declaratory ruling and stated, "The issue of a declaratory ruling is now moot." Salish Village Motion to Strike, at 2.

The Board did not receive a reply brief from Respondent.

As indicated in the PHO, the Board did not schedule or hold a hearing on the motions.

II. Discussion of motions

PDR and Motion to Strike:

Regarding Petitioner's PDR, **the Board disposed of this request in its Order Declining to Issue Declaratory Ruling, (Feb. 4, 2003)**. As stated in that Order, *and the PHO*, "If Petitioner wishes to move and argue that the Board does not have subject matter jurisdiction over the challenged action [Kirkland's Ordinance No. 3862] Petitioner may do so within the timeframes set forth in [this] PHO (prehearing order). PHO, at 2; and Order Declining to Issue Declaratory Ruling, at 2. **Petitioner did not file a dispositive motion within the prescribed timeframes, nor did the Board receive any request from Petitioner to consider portions of the PDR as a "dispositive motion."** Consequently, there is no dispositive motion from Petitioner regarding the Board's jurisdiction for the City to respond to. Hence, the City's response to the PDR is unnecessary at this time, and Petitioner's motion to strike is **granted**. The Board will not address

this issue further here; however, *see* Reservation of Rights, *infra*.

Kirkland's Dispositive Motions:

Regarding the City of Kirkland's dispositive motions, first, the City moves the Board to dismiss Legal Issues 8, 9 and 10, as stated in the PHO, arguing that these three issues pose U.S. and State Constitutional Issues. The City asserts that Constitutional issues are outside the Board's jurisdiction. Kirkland Motion, at 2-3. Second the City asks the Board to "ignore the language in the Petition [the language in the Legal Issues as stated in the PHO and PFR] which asserts an incorrect standard of review. Kirkland Motion, at 3-4. Next, Kirkland asserts that the "Appearance of Fairness doctrine does not apply to legislative enactments," such as the enactment challenged here. Therefore, Legal Issue 7 should be dismissed. Kirkland Motion, at 4. Finally, the City asserts it "reserves the right to raise the jurisdictional validity of issues raised in Petitioner's prehearing brief." In a footnote, the City explains, "It is unclear from Petitioner's petition and the Prehearing Order what legal issues fall under the scope of the Board's review under RCW 36.70A.290(1). However, since it is Petitioner's burden to come forward and explain its allegations, the City will not speculate as to the content of these issues at this time." Kirkland Motion, at 4.

In response, Petitioner does not dispute that the Board's standard of review in this matter is the clearly erroneous standard. Salish Village Response, at 2-3. Petitioner also argues that the question of whether the Appearance of Fairness Doctrine applies is premature, since the parties dispute whether the underlying action was legislative. Salish Village Response, at 3-4. Finally, Salish asserts that "The 'no jurisdiction' [of the Board] to decide constitutional questions is irrelevant." Salish Village Response, at 4. Petitioner continues:

The [City] assumes, without expressly arguing, that Salish intends that this Board exercise jurisdiction to invalidate City of Kirkland ordinances and/or state statutes based upon conflict with either the Washington State or the United States Constitutions. Salish seeks nothing of the sort. Salish agrees [with the City] that the GMHB has no such jurisdiction to provide constitutional relief. *The PFR claims, to the contrary, that state statutes and the City's own ordinances require an open record quasi-judicial hearing prior to making the type of decision made below [the adoption of Ordinance No. 3862].*

Salish Village Response, at 4, (emphasis supplied). Finally, Petitioner suggests that the City's motion is inappropriate since the City "made no specific request to the presiding officer regarding the timeframes for making or responding to the motion. Apparently, the City is relying upon the schedule contained on page 3 of the Prehearing Order, which does not address the question of oral argument on the motions." Salish Village Response, at 6.

The Board did not receive any (optional) reply briefing from the City.

Applicable Law and Discussion

Subject Matter Jurisdiction:

Matters that are subject to Board review are set forth in RCW 36.70A.280, which provides in relevant part:

(1) A growth management hearings board shall hear and determine *only* those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter *is not in compliance with the requirements of this chapter [36.70A RCW], chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.* (Emphasis added.)

This Board has also held that “this chapter” as used in RCW 36.70A.280(1) refers to Chapter 36.70A RCW. *South Bellevue Partners Limited Partnership and South Bellevue Development Inc v. City of Bellevue and Issaquah School District No. 411*, CPSGMHB Case No 95-3-0055, Order of Dismissal, November 30, 1995, at 6.

In short, this Board has stated that its jurisdiction is generally limited to review of: 1) comprehensive plans and development regulations adopted, or amended, pursuant to Chapter 36.70A RCW; 2) the adoption or amendment of shoreline master programs, pursuant to Chapter 90.58 RCW; and 3) SEPA decisions and documents that accompany the actions or decisions noted in 1 and 2, *supra*.

Notwithstanding Petitioner’s statements in the Response Brief, Legal Issues 8, 9 and 10 allege violations of the Washington State Constitution and the U.S. Constitution. ^[5] Nowhere in these Legal Issues, or the identical “Issues Presented” in the PFR, does Petitioner allege noncompliance with any of the provisions of the GMA – Chapter 36.70A RCW.

In one of its first cases, the Board clarified the extent of its jurisdiction and held that RCW 36.70A.280 confers jurisdiction on the Boards to determine compliance with provisions of the GMA, not the State or Federal Constitutions. *See James Gutschmidt v. City of Mercer Island [William Wright and Ralph Gutschmidt – Intervenors]*, CPSGPHB Case No. 92-3-0006, Final Decision and Order, (Mar. 16, 1993), at 8, (The Board does not have jurisdiction to determine federal and state constitutional issues arising from a county of city’s implementation of the Act).

The Board has consistently adhered to this statutory grant of jurisdiction. Neither the State's Courts nor Legislature has expanded or amended the Board's jurisdiction as set forth in RCW 36.70A.280 to include authority to review constitutional issues.

In relation to Legal Issues 8, 9 and 10, Petitioner fails to specify or allege noncompliance with any of the provisions of the GMA; the alleged "violations" are with either the State or U.S. Constitutions, or both, not Chapter 36.70A RCW. Therefore, Kirkland's motion to dismiss Legal Issues 8, 9 and 10 for lack of subject matter jurisdiction is **granted**. Legal Issues 8, 9 and 10 are **dismissed with prejudice**.

Standard of Review:

Notwithstanding the assertions in the stated Legal Issues, the Board's standard of review is clearly prescribed in RCW 36.70A.320(3), "The board shall find compliance unless it determines that the action by the state agency, county or city is **clearly erroneous** in view of the entire record before the board and in light of the goals and requirements of this chapter." The Board indicated its standard of review at the PHC and restated it in the PHO, at 5-6. **The Board review is governed by clearly erroneous standard.**

Appearance of Fairness Doctrine:

Legal Issue 7 states, "The City's record discloses that decision makers had numerous and prolonged contacts with both Evergreen Hospital and Sound Transit regarding the developments being approved, all *in violation of state law appearance of fairness restrictions.*" PHO, at 9, and PFR, at 9, (emphasis supplied).

The Appearance of Fairness Doctrine ^[6] is a judicially created doctrine that is now codified at Chapter 42.36 RCW. As stated *supra*, RCW 36.70A.280 establishes the Board's jurisdiction, the matters subject to board review. Chapter 42.36 RCW is not among the statutes the Board has jurisdiction to review. As the Board stated in *Gain v. Pierce County [Cascadia Development Corporation – Intervenor] (Gain)*, CPSGMHB Case No. 99-3-0019, Order on Dispositive Motions, (Jan. 28, 2000), at 11: "*Nothing in [RCW 36.70A.280], or elsewhere in the GMA, grants the Board with subject matter jurisdiction to determine an appearance of fairness doctrine issue. The Board does not have jurisdiction to resolve this issue.*" (Emphasis supplied.) Likewise, here, the Board lacks subject matter jurisdiction to address an appearance of fairness issue arising from Chapter 42.36 RCW. The City's motion to dismiss Legal Issue 7 is **granted**. Legal Issue No. 7 is **dismissed with prejudice**.

Reservation of Rights:

The Board's Rules of Practice and Procedure provide, in relevant part:

(1) A motion can be filed at any time *unless otherwise specified* in these rules or by a board or presiding officer.

(2) After prehearing or other order. *If a prehearing order or other order has been entered establishing a deadline for filing motions, no written motion may be filed after the date specified in the order without the written permission of the board or presiding officer.*

WAC 242-02-532 (emphasis supplied). Here, the Board issued a PHO establishing the deadlines for filing, responding and replying to motions. The Board's 2/4/03 PHO specified February 28, 2003 as the deadline for filing Motions (both dispositive motions and motions to supplement the record). PHO, at 3-5. The PHO also stated, "No hearing on motions was scheduled in this case." PHO, at 5. Typically, the Board will not entertain *any* motions after this filing deadline. The Board will no longer entertain any motions to supplement the record. The record for this matter is comprised of those items as specified and contained in the City's Index of the record.

However, given Petitioner's phrasing of the Legal Issues presented here, the Board **grants permission** and **will allow** the City to include dispositive motions, pertaining to the remaining Legal Issues, in Respondent's Prehearing Brief (due April 30, 2003).^[7]

Although Petitioner has *not filed a dispositive motion* asking the Board to determine whether it has jurisdiction to review Ordinance No. 3862 (amending the City's zoning map and the text of the zoning code) it appears that Petitioner *does* question whether the Board has such jurisdiction. Therefore, the Board **grants permission** and **will allow** Petitioner to include such a dispositive motion^[8] in Petitioner's Prehearing Brief on the remaining Legal Issues in this matter (due April 9, 2003).^[9] If Petitioner does not brief and argue (in writing) such motion in that brief, the Board will deem the issue **abandoned**, and will entertain no further discussion or argument of the issue during the course of this proceeding.

The parties are advised that the Board may allow oral argument, but will not rule on any such dispositive motions at the Hearing on the Merits. The Board will address any dispositive motions in writing in its Final Decision and Order.

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Conclusion

The Board has disposed of the PDR and Petitioner has not filed any dispositive motions.

III. ORDER

Based upon review of the Petition for Review, the PHO, the briefs and materials submitted by the parties, the Act, and prior decisions of the Courts, this Board and other Growth Management Hearings Boards, the Board enters the following Order:

- Petitioner's motion to strike Kirkland's Response to the PDR is **granted**. Petitioner has not presented a dispositive motion to the Board that necessitates a response.
- The City of Kirkland's motion is **granted**. Legal Issues 7, 8, 9 and 10 are **dismissed with prejudice** for lack of subject matter jurisdiction. The remaining Legal Issues in this matter are Legal Issues 1 through 6, as stated in the PHO.
- The parties are **granted** permission to include dispositive motions in their prehearing briefing as described *supra*.

So ORDERED this 19th day of March 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

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

motion for reconsideration pursuant to WAC 242-02-832.

[1] In the NOH, Board Member Tovar recused himself, withdrawing from any participation in this matter.

[2] On January 14, 2003, due to conflicts the Board issued a “Notice of Revised Prehearing Conference Date” rescheduling the PHC for January 27, 2003.

[3] Petitioner originally filed an action in superior court challenging the City of Kirkland’s action. The Honorable Sharon Armstrong of King County Superior Court, determined that the City’s “governmental action is legislative and LUPA does not apply; remaining claims must be directed first to the GMHB.” Order on Civil Motions; Cause No. 02-2-29881-8 SEA, December 6, 2002, at 1. See also, Order Granting the City’s Motion to Dismiss LUPA Petition and Statutory and Constitutional Writs; and Order and Judgment of Dismissal.

[4] As noted in the PHO, “The Legal Issues stated below [in Section IX of the PHO] are directly from the “Issues Presented” in Petitioner’s December 16, 2002 PFR, at 9-10.” PHO, at 8.

[5] The three Legal Issues in question state:

8. The City is engaging in “spot zoning” in *violation of due process restrictions contained in both the United States and Washington Constitutions.*

9. The City is taking and damaging Salish Village’s property rights without compensation. Evergreen Hospital has indicated that long-term development of its hospital campus will require either greater height allowances or greater site coverage, but not both. The City gave both height and coverage increases solely to induce Evergreen Hospital to deplete its campus size in order to devote a portion thereof to a public improvement, Sound Transit’s proposed Regional Transit Center. The City is taking and damaging the property of Salish Village Condominiums by taking the single most unique property value they have – their view and open space. The City is taking and damaging Salish Village’s property for a public purpose and for a private purpose without compensation, *in violation of Salish Village’s rights as guaranteed by Washington Constitution Article I § 16.*

10. The City’s designations exempt Evergreen Hospital and Sound Transit from the city-wide restrictions on height of roof top appurtenances. This action is arbitrary and capricious, is made solely to retroactively relieve Evergreen Hospital of its illegal development of nonconforming rooftop appurtenances, and is *in violation of Washington Constitution Articles I § 8 and § 12, and the Fourteenth Amendment to the United States Constitution.*

PHO, at 9 - 10, and PFR, at 9-10, (emphasis supplied).

[6] This doctrine was first articulated by the State Supreme Court in *Smith v. Skagit County*, 75 Wn.2d 715, 739, 453 P.2d 32 (1969):

It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.

[7] If the City includes a dispositive motion in its Response Brief, Petitioner may respond in their Reply Brief. The City may reply in an additional and separate brief, *limited to the dispositive motion*, by May 9, 2003.

[8] Simply stated, the issue can be stated, “Does the Board have subject matter jurisdiction to review Kirkland’s Ordinance No. 3862 (amending the City’s zoning map and the text of its zoning code)?

[9] If Petitioner includes such a motion in the Prehearing Brief, the City may respond in their Response Brief and Petitioner may reply in Petitioner’s Reply Brief.