

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

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| |) | |
| FINIS GERALD TUPPER, |) | |
| |) | Case No. 03-3-0018 |
| Petitioner, |) | |
| |) | ORDER ON MOTIONS |
| v. |) | |
| |) | |
| CITY OF EDMONDS |) | |
| |) | |
| Respondent. |) | |
| |) | |

I. Background

On September 24, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Finis Tupper (**Petitioner** or **Tupper**). Petitioner challenges the adoption by the City of Edmonds (the **City** or **Edmonds**) of Ordinance No. 3465. The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**). The matter was assigned Case No. 03-3-0018, and captioned as *Tupper vs. Edmonds*. Board member Joseph W. Tovar was assigned as the Presiding Officer for this matter.

On September 29, 2003, the Board received a “Notice of Appearance” from legal counsel for Edmonds.

On October 15, 2003, the Board received “Re-Statement of Legal Issues.”

On October 24, 2003, the Board received “Respondent City of Edmonds’ Index of the Record.” (the **Index**) The Index lists 509 items by Index number. Some Index numbers contain more than one item.

On October 24, 2003, the Board received “Amendment of Petition and re-statement of Legal Issues.”

On October 27, 2003, the Board conducted the prehearing conference in this matter in the Training Room on the 24th floor of the Bank of California Building, 900 4th Avenue, Seattle. Present for the Board were Bruce C. Laing and Joseph W. Tovar, presiding officer. Representing

the petitioner *pro se* was Finis Tupper. Also present with Mr. Tupper was Roger Hertich. Representing the City was Scott Snyder. The City offered for discussion two proposed legal issues for Mr. Tupper to consider as alternative language. The presiding officer asked Mr. Tupper to submit a Final Re-Statement of legal issues to the Board by no later than 4:00 p.m. on Wednesday, October 29, 2004.

No pleading was received from Petitioner on October 29, 2004.

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On October 30, 2003, the Board issued the Prehearing Order (the **PHO**) in this matter.

On November 10, 2003, the Board received “Respondent City of Edmonds’ Motion to Supplement” (**City’s Motion to Supplement**). Attached to the motion are 18 proposed exhibits.

On November 10, 2003, the Board received “Respondent City of Edmonds’ Dispositive Motion” (**City’s Dispositive Motion**) requesting dismissal of Legal Issues 1 and 5. The City’s Dispositive Motion requests the Board to take official notice of City Ordinance 3387 and City Ordinance 3465, which are attached to the motion as exhibits.

On November 19, 2003, the Board received “Response of Petitioner to City of Edmonds Dispositive Motion” (**Response to Dispositive Motion**).

On November 24, 2003, the Board received “Respondent City of Edmonds’ Rebuttal – Dispositive Motions” (**City’s Rebuttal – Dispositive Motion**)

The Board, having reviewed the above-referenced documents, enters the following ORDER:

II. ORDER ON MOTION TO SUPPLEMENT

The City’s Motion addresses 18 specific items the City seeks to have included in the record: 1) 5 ordinances; and 2) 13 documents supporting the City’s action in the 5 ordinances (*i.e.* Planning Board minutes recommendations and Council minutes).

The Petitioner did not respond to the City’s motion to Supplement.

1. WAC 242-02-660(4) enables the Board to take official notice of ordinances enacted by the City. Therefore the Board **takes notice** of the 5 City ordinances.
2. Since the remaining 13 proposed exhibits go to the City’s adoption of those ordinances they are **admitted**.
3. The Board has determined these exhibits may be necessary or of substantial assistance

to the Board in rendering its decision.

The Board notes that City Ordinance 3387 and City Ordinance 3465, both attached to the City's Dispositive Motion, are listed in the Index as Ex. No. 210 and Ex. No. 509.

The parties are cautioned that **each exhibit must be relevant** to the issues before the Board. Its listing on the Index as a part of the record below, or its admission as a supplemental exhibit, does not necessarily mean that a specific exhibit is relevant to the legal issues, as set forth in the PHO.

In the summary tables below:

- “Admitted” means the proposed exhibit becomes a supplemental exhibit. Each new exhibit is assigned an Index No.
- “Board takes notice” means that the Board recognizes the existence of a decision, order, statute, ordinance, resolution or document adopted by such instrument. Each is assigned an Index No. However, since the Board may not have access to a copy of such documents, the party offering the exhibit shall provide a complete copy to the Board.

| Proposed Exhibit: Documents | Ruling |
|---|---|
| 1. City Ordinance 3294. | <i>Board Takes Notice. Supp. Ex No. 1.</i> |
| 2. City Ordinance 3300. | <i>Board Takes Notice. Supp. Ex. No. 2.</i> |
| 3. City Planning Board minutes re. consideration of Ord.3294 and Ord. 3300. | <i>Admitted. Supp. Ex. No. 3.</i> |
| 4. City Planning Board recommendation re. Ord. 3294 and Ord. 3300. | <i>Admitted. Supp. Ex. No. 4.</i> |
| 5. City Council record and minutes re. adoption of Ord. 3294. | <i>Admitted. Supp. Ex. No. 5.</i> |
| 6. City Council packet and minutes re. consideration of Ord. 3300. | <i>Admitted. Supp. Ex. No. 6.</i> |
| 7. City Ordinance 3327. | <i>Board Takes Notice. Supp. Ex No. 7.</i> |

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| 8. City Planning board minutes re. consideration of Ord. 3327. | <i>Admitted. Supp. Ex. No. 8.</i> |
| 9. City Planning Board recommendation re. Ord. 3327. | <i>Admitted. Supp. Ex. No. 9.</i> |
| 10. City Council record And minutes re. adoption of Ord. 3327. | <i>Admitted. Supp. Ex. No. 10.</i> |
| 11. City Ordinance 3147. | <i>Board Takes Notice. Supp. Ex No. 11.</i> |
| 12. City Planning board minutes and record re. Ord. 3147. | <i>Admitted. Supp.Ex. No. 12.</i> |
| 13. City Planning Board recommendation re. Ord. 3147. | <i>Admitted. Supp.Ex. No. 13.</i> |
| 14. City Council record and minutes re. adoption of Ord. 3147. | <i>Admitted. Supp.Ex. No. 14.</i> |
| 15. City Ordinance 3363. | <i>Board Takes Notice. Supp. Ex No. 15.</i> |
| 16. City Planning Board minutes and record re. Ord.3363. | <i>Admitted. Supp.Ex. No. 16.</i> |
| 17. City Planning Board recommendation re. Ord. 3363. | <i>Admitted. Supp.Ex. No. 17.</i> |
| 18. City Council record and minutes re. adoption of Ord. 3363. | <i>Admitted. Supp.Ex. No. 18.</i> |

The Record for CPSGMHB Case No. 03-3-0018 consists of the items listed in the Index and the 18 items included in the Record as noted in the summary table above. These documents constitute the Record to this proceeding. Each exhibit filed with the Board shall reference the document numbers as indicated in the Index or as specified above. Exhibits shall be filed with briefs. *PHO, Section VII.*

III. ORDER ON DIPOSITIVE MOTION

Discussion

The dispositive motion, response and rebuttal involve Legal Issues No. 1, No. 2 and No. 5, contained in the Prehearing Order as follows:

Legal Issue No.1. Is the City of Edmonds (City) adoption of Land Use Regulations, Planned Residential Development (PRD) Ordinance No. 3465 and Edmonds Community Development Code (ECDC) 20.35.080A(4) inconsistent with RCW 35A.63.170.2 and RCW 36.70A.020(11) because the Ordinance exceeds statutory authority and does not provide continuous public participation and resolution of conflicts early in planning process?

Legal Issue No.2. Does Ordinance No. 3465, EDC 20.35.080A(4), for the Hearing Examiner's preliminary decision to be final and appeal to Superior Court, further limit citizen participation in the land use planning process for critical areas with natural resources and steep slopes in Edmonds and therefore not comply with RCW 36.70A.010(10) and (11)?

Legal Issue No.5. Does the prohibiting of Accessory Dwelling Units ECDC 20.21.010 and Home Occupation Permits ECDC 20.21.010 for all PRDs discriminate property rights allowed to other property owners and residents in the same zoning district and comply with RCW 36.70A.020(1),(2) and (6)?

1. Arguments Regarding Legal Issue No. 1

a. Jurisdiction

The City argues that Legal Issue No. 1 exceeds the subject matter jurisdiction of the Board in so far as it asserts inconsistency with RCW 35A.63.170.2. The City cites RCW 36.70A.280(1)(a) and (b) as the basis for this argument. City's Dispositive Motion, at 1-2.

Petitioner responds that the provisions of RCW.36.70A.280 authorize the Board to review development regulations codified in City Ordinance 3465 and City Development Code 20.35 for compliance with the provisions of the Growth Management Act; and the Board is not precluded from review and consideration of other statutes. Petitioner asserts the dispositive motion is silent on the issue as to the compliance of the ordinance with RCW 36.79A.020(11) (**Goal 11**) and the issue of resolving conflicts early in the planning process. Response to Dispositive Motion, at 1-2.

The City's rebuttal argues that Petitioner's wording of Legal Issue No. 1 makes it clear Petitioner is not seeking an interpretation or application of RCW35A.63.170.2, but rather a determination that the city ordinances under review violate the statute. Edmonds argues that this portion of Legal Issue No. 1 should therefore be dismissed. Regarding compliance with RCW 36.70A.020 (11), the City argues it is difficult to determine the extent to which Petitioner's allegation of non-

compliance with Goal 11 of the GMA under Legal Issue No. 1 overlaps with its allegation in Legal Issue No. 2, which refers to the hearing examiner's decision making authority and Goal 11. The City suggests that Legal Issue No. 1 could be dismissed entirely allowing Petitioner to press his arguments under Legal Issue No. 2; or the Board could strike that portion of Legal Issue No. 1 which refers to RCW35A.63.170.2 as beyond the jurisdiction of the Board. City's Rebuttal to Dispositive Motion, at 1-2.

b. Timeliness

The City asserts that Legal Issue No. 1 was not timely filed and should be dismissed under provisions of RCW 36.70A.290(2). The City argues that the intent of Legal Issue No. 1 is to challenge the action of the City Council's grant of final decision making authority over planned residential developments to the hearing examiner. The original grant of this authority to the hearing examiner was made by the City in Ordinance 3387 on December 12, 2001, published December 18, 2001. Edmonds contends that City Ordinance 3465 merely confirms Ordinance 3387 and the grant of final decision making authority to the hearing examiner. Petitioner's petition was filed on or about September 23, 2003 requesting review of an action which was originally effective on December 18, 2001 and Edmonds argues that it therefore is not timely. City's Dispositive Motion, at 2-3.

Petitioner responds that City Ordinance 3465 repealed and reenacted City development code Chapter 20.35 as a new development regulation. City Ordinance 3465 was passed by the City Council on August 5, 2003 and published in The Herald on August 10, 2003. The PFR was filed on September 24, 2003, within the 60 days required under RCW 36.70A.290(2). Therefore the challenge was timely filed. Petitioner asserts that there are distinct differences between the language and the public participation process of chapter 20.35 adopted under Ordinance 3387 and that subsequently adopted under Ordinance 3465. Response to Dispositive Motion, at 2-3.

2. Arguments Regarding Legal Issue No. 5

The City makes the following assertions and arguments regarding Legal Issue No. 5:

The City contends that Legal Issue No. 5 exceeds the subject matter jurisdiction of the Board. It argues that the Board does not have subject matter jurisdiction to determine compliance with any statutory provision beyond those set forth in RCW36.70A.280. While the Board may consider the common law, other statutes and processes in determining GMA claims, the City argues that it lacks jurisdiction to determine whether common law, other statutes and processes, not specifically referenced in RCW 36.70A.280(1), have been violated. Similarly, the City asserts that the Board

does not have jurisdiction to determine federal and state constitution issues arising from a county or city's implementation of the Act. City's Dispositive Motion, at 3-4.

Edmonds argues that the property rights goal of the Growth Management Act is not supreme. The City points out that the Act requires local government to balance all 13 goals and to consider the process recommendations of the Attorney General's office. The City states that Board rulings make it clear that the Board's interest is in the overall process to be followed in the consideration of property rights, and not in a determination that property rights have been violated as a matter of federal or state constitutional law or statute. The City contends that to answer Legal Issue No. 5 would require the Board to interpret the provisions of RCW 35A.63.170.2 or the statutory or constitutional rights of property owners. City's Dispositive Motion, at 4.

Petitioner makes the following assertions and arguments in response:

Petitioner Tupper argues that City Ordinance 3465 is a land use regulation and the planning goals listed in 36.70A.020 therefore apply. Petitioner asserts that Edmonds failed to consider the goals of GMA in developing the new PRD regulations, including Goal 6 regarding the protection of the property rights of landowners from arbitrary and discriminatory actions. The Petitioner requests the Board to review and provide guidance pertaining to the requirement that Edmonds must consider RCW 36.70A.020 (1) (2) and (6) in adopting the PRD development regulations prohibiting Accessory Dwelling Units and Home Occupation Permits, ECDC Section 20.21.010. Response to Dispositive Motion, at 3-4.

3. Arguments Regarding Legal Issues No. 1 and No. 5

The City makes the following assertions and arguments regarding Legal Issues No. 1 and No. 5:

Edmonds asserts that Petitioner's Legal Issues do not allege violations of specific requirements of RCW 36.70A.035 nor other specific provisions of RCW 36.70A, other than the Goals in RCW 36.70A.020(1), (2), (6) and (11). Therefore, it contends, the Board inquiry must be limited to review of those Goals on the question of whether or not substantial interference has occurred. In order to do so, the Board must necessarily look at the City's public participation and hearing process. The City argues that nothing in the "Petitioner's Restatement of Legal Issues" presents a challenge to the City's public participation and hearing process which are contained in other portions of the Edmonds Community Development Code than those challenged by the Petitioner, and are not part of the record. Edmonds argues that Petitioner therefore failed to preserve his challenge for the Board's review as those processes are outside the record of this proceeding. City's Dispositive Motion, at 4-5.

The Petitioner makes the following assertions and arguments in response:

Tupper complains that the City misunderstands the challenge, and argues that Petitioner does not allege the City violated the requirements of Public Participation and Notice Provisions of RCW36.70A.035. Petitioner alleges the City didn't consider the planning Goal, RCW36.70A.020 (11), when they limited, interfered and impeded public testimony and participation in adopting Ordinance 3465. Response to Dispositive Motion, at 4.

Applicable Law

1. RCW 36.70A.020 Planning goals. The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. ...

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions. ...

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts. ...

2. RCW 36.70A.280 Matters subject to board review.

(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, 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; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted...

3. RCW 36.70A.290 Petitions to growth management hearings boards -- Evidence. ... (2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.

(a) Except as provided in (c) of this subsection, the date of publication for a city shall be the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations, or amendment thereto, as is required to be published.

(b) Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations or amendment thereto. Except as provided in (c) of this subsection, for purposes of this section the date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

(c) For local governments planning under RCW 36.70A.040, promptly after approval or disapproval of a local government's shoreline master program or amendment thereto by the department of ecology as provided in RCW 90.58.090, the local government shall publish a notice that the shoreline master program or amendment thereto has been approved or disapproved by the department of ecology. For purposes of this section, the date of publication for the adoption or amendment of a shoreline master program is the date the local government publishes notice that the shoreline master program or amendment thereto has been approved or disapproved by the department of ecology.

Findings of Fact

1. Edmonds City Ordinance 3465 was passed by the City Council on August 5, 2003, and published in The Herald on August 10, 2003. *See* Index No. 509, Attachment C to City's Dispositive Motion.

2. The caption of Ordinance 3465 reads:

AN ORDINANCE OF THE CITY OF EDMONDS WASHINGTON, REPEALING AND **REENACTING** CHAPTER 20.35 RELATING TO PLANNED RESIDENTIAL DEVELOPMENT (PRD), AMENDING ECDC SECTION 16.20.030 TABLE SITE DEVELOPMENT STANDARDS, REPEALING ECDC 20.160.010(A)(4) RELATING TO HEARING EXAMINER RECOMMENDATIONS, AMENDING ECDC 20.20.015 TO ADD A NEW SECTION (D) PROHIBITING CERTAIN HOME OCCUPATIONS IN PRD, AMENDING ECDC CHAPTER 20.21 TO ADD A NEW SECTION 20.21.010

PROHIBITING ACCESSORY DWELLING UNITS IN PRD, AND FIXING A TIME WHEN THE SAME SHALL BECOME EFFECTIVE.

Id (Emphasis Supplied).

Conclusions

1. Conclusions Regarding Legal Issue No. 1.

a. Jurisdiction.

That portion of legal Issue No. 1 which refers to RCW35A.63.170.2 is beyond the jurisdiction of the Board under the provisions of RCW 36.70A.280 and the reference is hereby **stricken**. The City's motion regarding this point is partially **granted**.

b. Timeliness

City Ordinance 3465 repealed and *reenacted* Chapter 20.35 of the development code. This constitutes the adoption of a development regulation. The PFR was filed within sixty days after publication of Ordinance 3465 in compliance with RCW 36.70A.290(2). The PFR was timely filed. The City's motion regarding this point is **denied**.

2. Conclusions Regarding Legal Issue No. 5

City Ordinance 3465 added to the City Development Code new section 20.21.010 prohibiting accessory dwelling units and Home Occupation permits. Under the provisions of RCW 36.70A.280 the Board has jurisdiction to review the City's adoption of this development regulation for compliance with RCW 36.70A.020. Legal Issue No. 5 is retained. The City's motion regarding this point is **denied**.

IV. ORDER

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

The City's motion to dismiss Legal Issue No. 1 because it exceeds the subject matter jurisdiction of the Board is **granted** in part. Reference to RCW 35A.63.170.2 is stricken.

The revised wording of Legal Issue No. 1 is as follows:

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Legal Issue No. 1. Is the City of Edmonds' (**City**) adoption of Land Use Regulations, Planned Residential Development (**PRD**) Ordinance No. 3465 and Edmonds Community Development Code (**ECDC**) 20.35.080A(4) inconsistent with RCW 36.70A.020(11) because the Ordinance does not provide continuous public participation and resolution of conflicts early in planning process.

The City's motion to dismiss Legal Issue No. 1 because it was not timely filed is **denied**.

The City's motion to dismiss Legal Issue No. 5 because it exceeds the subject matter jurisdiction of the Board is **denied**.

So ORDERED this 3rd day of December 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
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 pursuant to WAC 242-02-832.

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Effective November 3, 2003, the Presiding Officer in this case is Board Member Bruce C. Laing.