

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

RAY, JACOBS, JACOBS, JORGENSEN, LEAN, and FRIENDS OF
THE WATERFRONT,

Petitioners,

v.

CITY OF OLYMPIA and DEPARTMENT OF ECOLOGY,

Respondents.

No. 02-2-0013

**FINAL DECISION
AND ORDER**

In a highly charged atmosphere of great public interest and passionate opposition, the City of Olympia made a decision to allow multi-story housing downtown in the waterfront region. The City decided to raise the allowable building heights to 70 feet in a shorelines area within the city limits to encourage increased housing density in the downtown core. Opponents of the City's action filed this appeal to challenge the process and consistency with which that decision was made. We find that the City acted within its discretion on all counts.

I. SUMMARY OF DECISION

The Petitioners in this case challenge the City's decision to raise the height limitation on residential buildings in part of the City's shoreline through a shoreline master program amendment. They argue that the raised height limitations are inconsistent with various City planning policies and development regulations; violate the goals and policies of the Growth Management Act ("GMA") and the Shoreline Management Act ("SMA") to protect the public interest; and that the process followed failed to comply with the public participation requirements of the GMA and SMA.

A finding of inconsistency requires a showing of actual conflict between competing provisions of a city's planning policies and development regulations. There is no inconsistency if it is possible for a particular development to meet the requirements of both sets of policies or regulations.

Moreover, a city's planning goals cannot be examined in isolation from one another. Here the City is balancing its goals of protecting waterfront views with its goals of increasing housing densities downtown. Since Petitioners cannot point to any provision of the City planning policies and regulations that is in actual conflict with the challenged shoreline master program amendment, their claim of inconsistency fails.

Petitioners also argue that the goals and policies of the GMA and the SMA dictate that the shoreline master program amendment not be approved. They urge that the City shorelines at issue here are of unquestionable public interest because they provide views of the historic Capitol buildings. However, Petitioners are essentially asking this board to substitute its judgment for that of the City policy-makers in determining what the public interest is in this case. The record shows that the City considered the impacts of the proposed changes and balanced the potential effects upon public views against the public interest in a vibrant waterfront with greater numbers of members of the public using it. The City is in compliance with respect to meeting the GMA and SMA goals regarding this shoreline master program amendment.

Petitioners also take issue with the public participation process followed by the City and later by the Department of Ecology. Petitioners note the great public interest that surrounded the proposed amendment and argue that the City should have held additional hearings to meet the public demand. The Petitioners fault the city council for holding its hearing late into the night when many had to go home without speaking. However, the City's choice to allow those attending to speak, and staying for that purpose, was a reasonable one. In addition, the City provided many opportunities for public input, not just at the city council hearing, The Department of Ecology did not hold another public hearing since they determined from the comments in the city's record that such a hearing would not produce helpful information. However, they did provide notice and an opportunity to comment to a list of those who had submitted comments to the City. The Department did not abuse its discretion in deciding not to hold an additional public hearing.

II. PROCEDURAL HISTORY

This case was originally filed in a Petition for Review by the Petitioners appearing pro se on December 20, 2002. After the prehearing conference, the Petitioners retained counsel and filed

an Amended Petition for Review on January 21, 2003. The issues presented in the Amended Petition for Review included challenges to the City's comprehensive plan amendments and SEPA review of them. However, these challenges were not raised within 60 days of the City's publication of adoption on July 3, 2002 and were therefore dismissed by the Board^[1] upon the City's motion. Decision on Jurisdictional Motions, March 3, 2003.

The appeal of the City's Shoreline Master Program amendments was timely, however, because that amendment was not published until October 24, 2002, after the Department of Ecology completed its review. The Board^[2] heard argument on the issues based on the City's Shoreline Master Program amendments at the hearing on the merits, held on May 6, 2003.

III. ISSUES PRESENTED

Issue No. 1: Are the challenged amendments to the Shoreline Master Program contrary to and non-compliant with the City's Comprehensive Plan as set forth in the City's development regulations under RCW 36.70A.040(4)(d), specifically OMC 18.06.020(B)(4)(a) and OMC 18.06.020(B)(4)(c)?

Issue No. 2: Are the challenged amendments to the Shoreline Master Program contrary to and non-compliant with the purposes of the Comprehensive Plan and to the Shorelines Management Act as set forth in the City's development regulations under RCW 36.70A.040(4)(d), to protect view corridors, specifically OMC 18.06A.025(A)?

Issue No. 3: Did the City violate the public participation requirements of RCW 36.70A.035, RCW 36.70A.140, RCW 36.70A.020(11) and RCW 90.58.100 by failing to properly evaluate affected views and view corridors through inadequate and grossly inaccurate analysis of such views, and by systematically excluding evidence of accurate view data at both the Planning Commission hearings, the City Council open hearings, and in the City Council transmission of the record to the Department of Ecology?

Issue No. 4: Did the City systematically and intentionally fail in its duty to provide public participation in violation of RCW 36.70A.035, RCW 36.70A.140 and RCW 36.70A.020(11) through the timing of hearings and receipt of public input?

Issue No. 5: Are the challenged amendments in the Shorelines Master Program inconsistent with existing Olympia Shoreline Master Program requirements, Section XVI(B)(1), Section XVI(C)(4), and Section XVI(b)(10)?

Issue No. 6: Did the City fail to amend the Shoreline Master Program to eliminate the requirement set out in Issue No. 5 above, in violation of RCW 36.70A.040(4)(d)?

Issue No. 7: By raising the height limitations in the Shoreline Master Program, did the City violate the basic planning goals of considering the public interest set forth in RCW 36.70A.020 and RCW 90.58.020, and contradict the 1993 vision statement in its “special Area Management Plan on the Urban Waterfront” and the “Heritage Park Master Plan”?

Issue No. 8: Does allowing multi-family dwellings on the waterfront fail to comport with the public interest as the public interest is set forth in the Shoreline Management Act, incorporated into the Growth Management Act in RCW 36.70A.480, when multi-family housing is not a preferred use under RCW 90.58.020? Does the City have a duty under the Growth Management Act and the Shoreline Management Act to articulate a compelling reason why such buildings are needed to increase the housing base for the city and has the City failed to articulate such a compelling reason?

Issue No. 9: Do the challenged amendments violate RCW 90.58.320 by allowing development above 35 feet in height in the shoreline area, in the view of a substantial number of current downtown residences?

Issue No. 10: Did the Department of Ecology abuse its discretion by failing to hold its own hearings on the challenged amendment under RCW 90.58.090(2)(b) in light of the substantial public interest generated in the proposed changes to the Shoreline Master Program and significant statewide interest involved in allowing buildings that encumber views of the State Capitol?

Issue No. 11: Did the Department of Ecology fail to consider the statewide importance of the people’s visual access to and from their Capitol under RCW 90.58.020 and fail to weigh it as part of its overriding responsibility in its review function under RCW 90.58.090?

Issue No. 12: In adopting the challenged Shoreline Master Program amendments, did the city fail to consider the unique historic, architectural and social importance of the State Capitol, its structures and location and the views from and toward the State Capitol, in violation of RCW 36.70A.020(9), (10) and (13)?

IV. BURDEN OF PROOF

Pursuant to RCW 36.70A.320(1), and the 2000 amendments thereto, the City’s actions are presumed valid upon adoption. The burden is on Petitioner to demonstrate that the action taken by the City 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] determine[s] that the action by [the City] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” The City’s actions were clearly erroneous if the Board is “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).

V. ANALYSIS AND DISCUSSION OF ISSUES

Petitioners’ issues fall into and were argued in three major categories: challenges to the consistency of the Shoreline Master Program amendment with City planning policies; challenges to the City’s public participation process under the GMA, Ch. 36.70A RCW and Shoreline Management Act, Ch. 90.58 RCW; and challenges to the City’s compliance with the Shoreline Management Act, Ch. 90.58 RCW and the Growth Management Act, Ch. 36.70A RCW, based on view analysis and the public interest.

Consistency With The City’s Planning Policies:

Issue No. 1: Are the challenged amendments to the Shoreline Master Program contrary to and non-compliant with the City’s Comprehensive Plan as set forth in the City’s development regulations under RCW 36.70A.040(4)(d), specifically OMC 18.06.020(B)(4)(a) and OMC 18.06.020(B)(4)(c)?

Issue No. 2: Are the challenged amendments to the Shoreline Master Program contrary to and non-compliant with the purposes of the Comprehensive Plan and to the Shorelines Management Act as set forth in the City’s development regulations under RCW 36.70A.040(4)(d), to protect view corridors, specifically OMC 18.06A.025(A)?

Issue No. 5: Are the challenged amendments in the Shorelines Master Program inconsistent with existing Olympia Shoreline Master Program requirements, Section XVI(B)(1), Section XVI(C)(4), and Section XVI(B)(10)?

Issue No. 6: Did the City fail to amend the Shoreline Master Program to eliminate the requirement set out in Issue No. 5 above, in violation of RCW 36.70A.040(4)(d)?

Applicable Law:

Growth Management Act:

Development regulations must implement comprehensive plans.

Any county or city that is required to conform with all the requirements of this chapter, as a result of the county legislative authority adopting its resolution of intention under subsection (2) of this section, shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city that is located within the county shall adopt development regulations conserving agricultural lands, forest lands, and mineral resource lands it designated under RCW 36.70A.060 within one year of the date the county legislative authority adopts its resolution of intention; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; and (d) *the county and each city that is located within the county shall adopt a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan not later than four years from the date the county legislative authority adopts its resolution of intention, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of community, trade and economic development of its plan and development regulations.*

RCW 36.70A.040(4)(d) (emphasis added)

Shorelines of the state.

(1) For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020. *The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan.* All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

RCW 36.70A.480(1)(emphasis added)

City Code:

The purpose of each commercial district is as follows:

...

4. Urban Waterfront District. This district is intended to:
 - a. Integrate multiple land uses in the waterfront area of downtown and the West Bay in a way that improves the City's appeal and identity as the

Capital City on Budd Inlet.

...

c. Encourage development that protects views of Budd Inlet, the Olympics, Mt. Rainier, and the Capitol, and preserves a sense of openness on the waterfront.

OMC 18.06.020(B)(4)(a) and (c)

Downtown – Site design – Waterfront view corridors.

A. **REQUIREMENT:** On waterfront sites, provide for public view corridors of Capitol Lake and Budd Inlet. All development shall be evaluated as to how it affects both territorial and immediate views for significant numbers of people from public rights-of-way.

OMC 18.06A.025(A)

City Shoreline Master Program:

RESIDENTIAL DEVELOPMENT.

...

B. Policies

1. Residential development on shorelines and wetlands should be planned with minimum adverse environmental and visual impact.

...

10. Residential structures should be located to minimize obstruction of views of the water from upland areas. The intent of this policy is to encourage the retention of views in and through new residential developments. This policy is not intended to prohibit the development of individual shoreline lots simply because it may minimize or eliminate views from upland properties.

C. General Regulations

...

4. Residential development shall be arranged and designed to protect views, vistas, aesthetic values to protect the character of the shoreline environment and the views of neighboring property owners.

Olympia Shoreline Master Program XVI(B)(1),(10) and XVI(C)(4).

Positions of the Parties:

Petitioners assert that the amendments to the shoreline master program create a code that “is at war with itself”. Petitioners’ Opening Memorandum, p. 4. They argue that the development regulations that permit building heights to 70 feet conflict with other code provisions (and the shoreline master program) that encourage preservation of views. This, they argue, creates uncertainty about what development will be permitted and thus conflicts with the legislative purpose in adopting regulatory reform. *Ibid.* at 5-6.

The City responds that the challenged amendments to the Shoreline Master Program only create a new height maximum of 70 feet. Each specific project will have to be evaluated in light of its effect on public views. Respondent City of Olympia’s Opening Brief, p. 12. Further, the City points out that the actual city blocks at issue sit only partially in the shoreline; and they sit across the street from the actual waterfront. *Ibid.* at 11. This, the City argues, shows very little impact on views. The City also points out that SMP Policy XVI(B)(10) provides that it “is not intended to prohibit development simply because it may minimize or eliminate views from upland properties”. *Ibid.*

Discussion:

Petitioners challenge the City’s shoreline master program amendment that permits building heights of 70 feet in part of the City’s shoreline. They argue that allowing such building heights conflicts with various existing city code, comprehensive plan and shoreline master program provisions. Such an inconsistency, they maintain, is a violation of RCW 36.70A.040. This provision of the GMA requires consistency between development regulations and the comprehensive plan (which includes the shoreline master program policies pursuant to RCW 36.70A.480(1)). On this basis, Petitioners ask the Board to find that the City has not complied with the Growth Management Act, RCW 36.70A.040.

We must first determine if there is an inconsistency between the shoreline master program amendments and the City’s existing code and shoreline master program provisions.

The administrative regulation defining consistency among planning policies is found in WAC 365-195-210: “‘Consistency’ means that no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.”

In determining when an inconsistency exists between various parts of a local jurisdiction's planning policies and regulations, we have held that consistency means that no feature of the plan or regulation is incompatible with any other feature of the plan or regulation. *CMV v. Mount Vernon*, WWGMHB 98-2-0006 (July 23, 1998 Final Decision and Order). Said another way, no feature of one plan may preclude achievement of any other feature of that plan or any other plan. *Carlson v. San Juan County*, WWGMHB 00-2-0016 (September 15, 2000, Final Decision and Order).

Consistency does not mean consistency of vision or philosophy. Rather, it means avoidance of an actual conflict between competing provisions in codes and plans. In a case arising under the Land Use Petition Act, the Court of Appeals (Division I) held that there was no conflict between the zoning code and the interim critical areas regulations as long as a proposed development could satisfy the requirements of both the zoning code and the interim critical areas regulations. *Faben Point v. Mercer Island*, 102 Wn. App. 775, 780, 11 P.3d 322 (2000). The appellant had argued that the GMA policies to encourage development in the urban areas and to reduce sprawl created a "philosophical or policy conflict" with the City's zoning code. The court rejected this and stated that this "philosophical conflict" does not create an "actual conflict with the GMA". *Faben Point*, at 781. In the absence of an actual conflict, the provisions must be read together. Unless there is an actual conflict among the provisions, the court found, there is no inconsistency.

Here, the Petitioners point to a philosophical difference between a code that emphasizes preservation of views and a development regulation that allows 70 foot heights in a shorelines area. However, the language of the comprehensive plan, the shoreline master program, and the cited code provisions does not create an actual conflict. The policies to "[i]ntegrate multiple land uses in the waterfront area of downtown and the West Bay in a way that improves the City's appeal and identity as the Capital City on Budd Inlet" (OMC 18.06.020(B)(4)(a)) and to "[e]ncourage development that protects views of Budd Inlet, the Olympics, Mt. Rainier, and the Capitol, and preserves a sense of openness on the waterfront" (OMC 18.06.020(B)(4) (c)) do not inherently preclude 70 foot height limitations for multi-family housing. They simply provide a set of principles for assessing development as it is proposed.

The shoreline master program policies that are alleged to conflict with the new regulations

provide: “Residential development on shorelines and wetlands should be planned with minimum adverse environmental and visual impact” (Olympia Shoreline Master Program XVI(B)(1)); and “Residential structures should be located to minimize obstruction of views of the water from upland areas” (Olympia Shoreline Master Program XVI(B)(10)). They do not prohibit a particular building height. In fact, the policy to minimize obstruction of views expressly provides that it is not intended to prohibit development that may even *eliminate* views:

This policy is not intended to prohibit the development of individual shoreline lots simply because it may minimize or eliminate views from upland properties.

Olympia Shoreline Master Program XVI(B)(10).

When it comes to the point that a particular project permit application is submitted, the City will have to consider and harmonize its policies in processing a permit for multi-family housing proposed for the waterfront area. However, Petitioners have not shown that there could be no project over 70 feet in height that could be permitted under the policies cited.

In addition, it is important to remember that there are many goals in both the City’s planning policies and in the GMA itself. *See* RCW 36.70A.020. The area proposed for increased building heights is in the desirable waterfront area. The City’s stated aim in allowing building heights up to 70 feet in the waterfront area was to address “City goals to double the downtown resident population [are] key to transportation, environment, housing and land use goals of the City Plan.” Index 20, Supplemental Environmental Impact Statement, p. 0736. From studies it had done on finding ways to increase housing density in the downtown core, the City concluded that increasing allowable building heights would be necessary to attract development that would provide structural parking facilities within new buildings: “Infill and density goals can’t be met with continued dependence on surface parking – and projects won’t be financed or marketed without parking.” Index 20, Supplemental Environmental Impact Statement, p. 0748. To be able to include structural parking within new housing, developers would need to build higher buildings. *Ibid.*

In making the challenged decision, the City was attempting to meet the GMA goal of channeling growth into urban areas by attracting developers to the downtown core. One of the challenges for cities and counties is to balance the goals in their policies and in the GMA. In this case, the City

struck a balance between preservation of waterfront views and increased urban housing densities. This is precisely the type of balancing that the Legislature left to the cities and counties. *See* RCW 36.70A.020. Petitioners argue that the City's policies are at war with each other but point to no actual conflict. Since the regulations the City adopted did not create an actual conflict with existing policies and regulations, the challenged action is not inconsistent and does not violate RCW 36.70A.040.

Conclusion:

The challenged shoreline master program amendments are not inconsistent with Olympia Shoreline Master Program XVI(B)(1),(10) and XVI(C)(4), OMC 18.06A.025(A), or OMC 18.06.020(B)(4)(a) and (c), and thus do not violate RCW 36.70A.040.

Public Participation Under The Growth Management Act (Ch. 36.70a RCW) And The Shoreline Management Act (Ch.90.58 RCW):

Issue No. 3: Did the City violate the public participation requirements of RCW 36.70A.035, RCW 36.70A.140, RCW 36.70A.020(11) and RCW 90.58.100 by failing to properly evaluate affected views and view corridors through inadequate and grossly inaccurate analysis of such views, and by systematically excluding evidence of accurate view data at both the Planning Commission hearings, the City Council open hearings, and in the City Council transmission of the record to the Department of Ecology?

Issue No. 4: Did the City systematically and intentionally fail in its duty to provide public participation in violation of RCW 36.70A.035, RCW 36.70A.140 and RCW 36.70A.020(11) through the timing of hearings and receipt of public input?

Issue No. 10: Did the Department of Ecology abuse its discretion by failing to hold its own hearings on the challenged amendment under RCW 90.58.090(2)(b) in light of the substantial public interest generated in the proposed changes to the Shoreline Master Program and significant statewide interest involved in allowing buildings that encumber views of the State Capitol?

Applicable Law:

Public participation -- Notice provisions.

(1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed

amendments to comprehensive plans and development regulation.

RCW 36.70A.035

Comprehensive plans -- Ensure public participation.

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall 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

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:

...

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

RCW 36.70A.020(11)

Approval of master program or segments or amendments thereof, when -- Procedure -- Departmental alternatives when shorelines of statewide significance -- Later adoption of master program supersedes departmental program.

...

(2) Upon receipt of a proposed master program or amendment, the department shall:

(a) Provide notice to and opportunity for written comment by all interested parties of record as a part of the local government review process for the proposal and to all persons, groups, and agencies that have requested in writing notice of proposed master programs or amendments generally or for a specific area, subject matter, or issue. The comment period shall be at least thirty days, unless the department determines that the level of complexity or controversy involved supports a shorter period;

(b) In the department's discretion, conduct a public hearing during the thirty-day comment period in the jurisdiction proposing the master program or amendment;

RCW 90.58.090(2)(a) and (b)

Positions of the Parties:

Petitioners argue that the City failed to provide adequate public participation on two grounds: (1) the City failed to discuss alternatives to the proposed action and also failed to disclose its studies that pertained to the issues; and (2) the City designed its public hearings to limit public testimony. Petitioners' Opening Brief, pp.10-13. Petitioners also allege that the Department of Ecology abused its discretion in not holding a public hearing on the proposed shoreline master program amendments. Petitioners' Opening Brief, pp. 15-16.

As to their first point, Petitioners claim that the City was aware of other options for increasing downtown housing because it was studying them. Index #101, pp. 3-4 cited in Petitioners' Opening Brief at p. 11. However, Petitioners claim, the public was unaware of the options.

The City responds that the City followed the public participation program set forth in its Comprehensive Plan. Respondent City of Olympia's Opening Brief, p.16. The draft Supplemental Environmental Impact Statement disclosed all of the studies undertaken by the City regarding increased downtown housing. Index 20, pp. 0746-0753. The option finally adopted by the City Council responded to public opposition to higher building heights on the area known as the "isthmus" by removing the "isthmus" (Blocks 1-4) from the amended waterfront zone. *Ibid* at 19; Index 30 (Partial Transcript of Olympia City Council Study Session, May 28, 2002).

As to their second point, Petitioners argue that the City deliberately tried to limit the public process by the timing of the hearing. Petitioners note that the City knew there was great public interest in the topic as evidenced by the City's decision to use a larger forum than usual for the hearing. Petitioners' Opening Brief, p. 11. However, despite the large crowd, the City did not begin taking public testimony until almost 9:00 at night and many members of the public had to leave before they could be heard. Index 0954.

The City responds that the fact that the meeting went until 1:00 in the morning is evidence that the City was trying to allow all those who wanted to speak to have the opportunity. Respondent City of Olympia's Opening Brief, p. 19. In addition, the mayor announced at the outset that the City would also offer three additional ways for members of the public to provide their input: comments by mail, telephone, and e-mail. Index 30. The City offered to leave the record open through Friday at 5:00 pm and to have operators standing by to answer phones. *Ibid.* The record itself reflects substantial public comment, the City points out. Index 28, Public Comment Letters.

Petitioners finally argue that the Department of Ecology abused its discretion in not holding its own public hearings on this issue. Petitioners argue that a public hearing was mandated because the amendment to the City's shoreline master program: involved the greatest outpouring of public concern in the city's history; involved effects on land owned or managed by sister agencies; affected lands of the greatest possible significance to the people of the state; had undergone only limited public testimony; and because no survey of affected surrounding residential uses had been done by the city. Petitioners' Opening Brief, p. 15.

The Department of Ecology responds that because the City had already held several public meetings and hearings regarding the proposed amendment to the shoreline master program, there was no need to hold an additional public hearing. Department of Ecology's Hearing Brief, p. 4, AR 10018. The Department summarized its reasons for not holding a hearing:

“In summary, the subject SMP amendment did not appear complex and considerable opportunities were afforded for public participation. An additional hearing would probably not produce new testimony adding to the list of concerns or understanding of the SMP and its comprehensive planning process.”

AR 10018.

In addition, the Department points out that it did provide the public with notice and an opportunity to provide written comments. AR 003, 10087-88, 10092-93. In response to this notice, the Department received only nine or ten comments. AR 10024-10052.

Discussion:

The City followed an extensive public participation process. Index 28, pp.11455-56 The record shows that the public was invited to participate in a number of public meetings and public hearings concerning the proposed building height changes. Index 83, p.10715; p. 0730. Extensive public comments were taken both orally and in writing. See Index 28, Public Comment Letters. Reference to the study to which Petitioners refer (see Petitioners' Opening Memorandum, p. 4) is found in Index 20, the Supplemental EIS. This is simply a study of a future housing project that the City is considering in an adjacent area, as a public-private partnership. It is not a study of an alternative option. Petitioners erroneously claim that this was kept from the public – it was referenced in the Supplemental Environmental Impact Statement. There was no failure of public participation on this count.

Petitioners also urge that the city council meeting was timed deliberately in such a way as to preclude public testimony. There is simply no evidence in the record to indicate such an intention. The City provided a special location at a public auditorium so more people could attend. When many people signed up to speak, the council stayed until 1:00 am so that all who wanted could testify. Index 13, May 21, 2002 Olympia City Council minutes. In addition, the City offered to keep the record open to receive any further comments by mail, phone or e-mail. Index 30. These circumstances do not demonstrate an intention to keep the public from having input. Nor do they show that the public was prevented from participating.

Finally, Petitioners challenge the Department of Ecology's decision not to hold an additional public hearing. Petitioners suggest that an additional hearing would have showed the breadth of public opposition. However, there is nothing in the statute governing the Department's review to indicate that public opposition is a reason to deny approval of an otherwise appropriate shoreline master plan amendment. The Department's determination not to hold an additional hearing reflects an understanding of the opposition to the amendment and its bases. AR 10018.

In addition, the mailing list of all those to whom the Department sent notice of its review shows that the Department was aware of the people who had submitted comments to the City. AR 10109-10122. Since only nine or ten people submitted comments in response to the Department's notice and none of those comments raised additional issues beyond those already present in the record, it is unclear that the additional public hearing would have been of any benefit.

The Department asserts that the abuse of discretion standard does not apply to review of the Department's decision not to hold a hearing. Department of Ecology's Hearing Brief, p. 6. Instead, the Department asserts that the decision is only reviewable under the arbitrary and capricious standard of the APA. *Ibid.* Although the Department did not cite to the provision of the APA on which it relies, it appears to rely upon the rules for judicial review of agency actions found in RCW 34.05.570(4)(c). Without discussion of the applicable section of the APA, however, we have not had the benefit of an analysis of the rules that apply to this case. That would have been helpful. However, even under the abuse of discretion standard urged by the petitioners, the Department's decision does not meet the abuse of discretion test : that no reasonable person would have decided as it did. *State v. Ellis*, 136 Wn.2d 498, 504, ___ P.2d ___ (1998) cited at p. 7 of Petitioners' Reply Brief. The Department did not abuse its discretion in determining not to hold an additional public hearing.

Challenges To The City's Compliance With The Shoreline Management Act And The Growth Management Act Based On View Analysis And Public Interest:

Issue No. 7: By raising the height limitations in the Shoreline Master Program, did the City violate the basic planning goals of considering the public interest set forth in RCW 36.70A.020 and RCW 90.58.020, and contradict the 1993 vision statement in its "Special Area Management Plan on the Urban Waterfront" and the "Heritage Park Master Plan"?

Issue No. 8: Does allowing multi-family dwellings on the waterfront fail to comport with the public interest as the public interest is set forth in the Shoreline Management Act, incorporated into the Growth Management Act in RCW 36.70A.480, when multi-family housing is not a preferred use under RCW 90.58.020? Does the City have a duty under the Growth Management Act and the Shoreline Management Act to articulate a compelling reason why such buildings are needed to increase the housing base for the city and has the City failed to articulate such a compelling reason?

Issue No. 9: Do the challenged amendments violate RCW 90.58.320 by allowing development above 35 feet in height in the shoreline area, in the view of a substantial number of current downtown residences?

Issue No. 11: Did the Department of Ecology fail to consider the statewide importance of the people's visual access to and from their Capitol under RCW 90.58.020 and fail to weigh it as part of its overriding responsibility in its review function under RCW 90.58.090?

Issue No. 12: In adopting the challenged Shoreline Master Program amendments, did the city fail to consider the unique historic, architectural and social importance of the State Capitol, its structures and location and the views from and toward the State Capitol, in violation of RCW 36.70A.020(9), (10) and (13)?

Applicable Law:

...

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental to thereto.

The legislature declares that the interest of all the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

1. Recognize and protect the statewide interest over local interest;
2. Preserve the natural character of the shoreline;
3. Result in long term over short term benefit;
4. Protect the resources and ecology of the shoreline;

5. Increase public access to publicly owned areas of the shorelines;
6. Increase recreational opportunities for the public in the shoreline;
7. Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

RCW 90.58.020 (in pertinent part)

No permit shall be issued pursuant to this chapter for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

RCW 90.58.320

Positions of the Parties:

Petitioners argue that the Olympia waterfront is an area of paramount public interest because of the views it affords of the State Capitol buildings. “One can hardly doubt that these structures on the hill are unique architectural treasures for the state of Washington.” Petitioners’ Opening Brief p. 13. For that reason, Petitioners argue that the shorelines at issue here have a unique status. Petitioners argue that the City and the Department had duties to promote GMA goals of maintaining open space and recreational spaces (RCW 36.70A.020(9)), maintaining the state’s high quality of life (RCW 35.70A.020(10)) and to preserve” the lands and sites that have the highest possible historic significance in this state – the areas around the State Capitol.” Petitioners’ Opening Brief, p. 14. Had the City and Department acted in conformity with their duties, they argue, neither the City nor the Department would have approved the shoreline master program amendments. The petitioners also rely upon RCW 90.58.020 to argue that the City and the Department have failed in a duty to protect the public’s opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state. *Ibid.*

The City responds that the shoreline master program amendments actually do advance the public interest because mixed-use residential development will encourage the presence of pedestrians and restaurant patrons on the waterfront. City of Olympia’s Opening Brief, p. 22. The efforts to encourage more residential development near the waterfront further enhance the goal of increased

public safety by placing more “eyes on the street”. City of Olympia’s Opening Brief, p. 24. There is, therefore, a demonstrable effort to consider the public interest.

The City also points out that the SMA does not prohibit multi-family residences in the shoreline and that, in any event, Petitioners have failed to provide authority or argument for the proposition that the City must articulate a compelling reason for allowing multi-family housing the shoreline. City of Olympia’s Opening Brief, p.24. For the reasons already stated, the City argues that there is a compelling public interest in advancing the shoreline master program amendments, but that there is no duty shown for the City to show such a compelling interest.

The Department points out that the main provision on which the petitioners rely, RCW 90.58.320, does not apply to shoreline master programs but to permits. Department of Ecology’s Hearing Brief, p. 7. Even if the cited statute did apply to master programs, the Department argues, there is no evidence in the record demonstrating that the views of a substantial number of residences will be obstructed. *Ibid*. The area affected by the proposed amendments does not lie in the historic view corridor between the Capitol Building, Capital Lake, and Budd Inlet. Pedestrian views of the shoreline and Capitol outside the view corridor are either already obscured by the existing buildings or would be obscured by buildings less than thirty-five feet tall as were allowed under the pre-amendment master program. *Ibid* at 8.

Discussion:

Petitioners’ challenges to the City’s and the Department’s compliance with the GMA and the SMA focus on the goals of those acts. Fundamentally, Petitioners believe that allowing 70-foot high buildings in the Olympia shoreline violates the public interest as expressed in both the GMA and the SMA.

However, Petitioners have the burden of demonstrating non-compliance on the part of the City and the Department. RCW 36.70A.320(2). It is not enough that the petitioners make arguments why it would have been better not to allow buildings up to 70 feet in height. The Board is not to substitute its judgment for that of the City’s decision-makers. We are limited to determining whether the City and the Department have complied with the GMA and SMA.

With the burden on Petitioners to demonstrate non-compliance, Petitioners must show that the

City's actions violate some provision of the GMA. Petitioners rely upon the "planning goals of considering the public interest" in RCW 36.70A.020 (Issue No. 7). However, RCW 36.70A.020 does not describe "considering the public interest" as a goal. There are thirteen planning goals listed in RCW 36.70A.020 and all may be deemed in the public interest but none specify the public interest as the goal. Petitioners appear to be implying that there is a "penumbra" of public interest over all the thirteen goals but they certainly have not developed this concept. Nor have they cited to any authority that creates such a penumbra.

The Petitioners further urge that the location of the area affected by the shoreline master program amendments requires special treatment under RCW 36.70A.020(9),(10) and (13). These are three of the thirteen planning goals of the GMA: Open space and recreation (9); Environment (10); and Historic Preservation (13). However, again Petitioners fail to cite to policies that require a specific result or which are put in jeopardy by the City's action.

When it comes to the SMA, however, Petitioners are able to point to language in RCW 90.58.020 concerning the public interest: "the interest of all of the people shall be paramount in the management of shorelines of statewide significance"; and "[t]his policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest", for example.

Yet these principles of the SMA do not lead to the particular conclusion advanced by Petitioners. First, the SMA itself provides that "it is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." RCW 90.58.020. This is not a policy to foreclose uses without an examination of their merits. Second, judicial review of application of the SMA has approved a variety of development activities within the shoreline, from hotels (*see The Overlake Fund v. Shorelines Hearings Board*, 90 Wn. App. 746, 954 P.2d 30 (1998)) to sewage treatment facilities (*see Puget Sound Water Quality Defense Fund v. Metropolitan Seattle*, 59 Wn. App. 613, 800 P.2d 387 (1990)). There is nothing in either the statute or in prior judicial opinions to indicate that the SMA requires disapproval of building heights up to 70 feet in the shoreline area at issue here.

There is clearly a legitimate difference of opinion between those who favor multi-story residential buildings in the Olympia shoreline and those who do not. Both sides argue in favor of

the public interest. Petitioners believe that open views to the waterfront from the uplands are the highest public value. The City, on the other hand, believes that views have been sufficiently preserved with these amendments and that there is a countervailing need to encourage increased housing densities downtown. We must emphasize that we are not empowered to decide between these two sets of opinions. The City's actions are presumed valid unless we find them non-compliant. RCW 36.70A.320. The general principles of the SMA cited by Petitioners do not render the City or the Department non-compliant.

Petitioners also allege that the City is non-compliant based on RCW 90.58.320. This regulation applies to permits for specific projects, not to shoreline master programs. By its very terms, the statute envisions that shoreline master programs might allow building heights in excess of 35 feet:

No permit shall be issued pursuant to this chapter for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines *except where a master program does not prohibit the same* and then only when overriding considerations of the public interest will be served.

RCW 90.58.320 (emphasis added)

Both sides have raised the view analysis conducted by the City in its Supplemental EIS. Index 20. Petitioners maintain that there was no analysis of the blockage of residential views while the City and the Department maintain that a very thorough analysis of the views was done. The Supplemental EIS contains photos from Percival Landing, 4th Avenue and Simmons Street. 0754-0763. There are two View Maps. 0765-0766. There are also drawings and photos of what potential development might look like. 0771, 0773, 0775. The view analysis discusses various options and notes that the currently permissible building height levels would block views if *any* development were to take place. 0752. Petitioners supplemental exhibit #102(6-9) contains photos drawn with estimated potential 70 feet high buildings.

Nothing in the record shows that the views of a substantial number of residences on areas adjoining the shorelines will be obstructed. Petitioners claim that that is evidence that the view analysis was not done adequately or it *would* show that residential views were blocked. Petitioners' Reply Brief, p. 2. The photos in supplemental exhibit #102 do not show (nor were

they introduced to show) obstruction of residential views. Therefore, there is still no evidence to show that a substantial number of residential views would be blocked if development were to proceed as envisioned under the shoreline master program amendments. At the time of a particular project permit application, the views actually at issue will be known and the provisions of RCW 90.58.320 may well come into play. At this juncture, however, we do not have a basis for assuming that will be the case.

Conclusion: Petitioners have failed to meet their burden of proving non-compliance with the GMA or SMA on the basis of view analysis or public interest.

VI. FINDINGS OF FACT

- 1) The City of Olympia is a city located in Thurston County, a county situated west of the crest of the Cascade Mountains required to plan under RCW36.70A.040.
- 2) The Petitioners are residents of Olympia. They participated in the City of Olympia's public participation process regarding the shoreline master program amendments created in Ordinance 6195 by submitting written and oral comments to City decision-makers.
- 3) The Department of Ecology is the state agency charged with reviewing shoreline master program amendments. The Department approved the challenged amendment on September 23, 2002.
- 4) Petitioners challenge the shoreline master program amendment created in Ordinance 6195 which was passed on June 25, 2002 and published on July 3, 2002. The Department's approval was published on October 24, 2002. The original petition for review was filed on December 20, 2002. An amended petition was filed on January 21, 2003.
- 5) The City of Olympia's comprehensive plan (enacted in 1994) calls for doubling the number of residential units in the downtown over 20 years. To accomplish this and other planning goals, the City instituted a housing study, to analyze ways of encouraging additional housing development in downtown. The City's housing study found that the existing restriction on building heights of

a 35-foot maximum would not make construction of downtown housing units financially feasible, particularly because the housing would need to include structured parking.

6) Because of this finding, the City's Planning Department recommended creating an Urban Waterfront-Housing Zone of increased building heights, some blocks of which were within the City's shoreline area. The proposals are set out in the City's Supplemental Environmental Impact Statement ("SEIS"). The area of the proposed Urban Waterfront-Housing Zone includes city blocks east of Water Street and the boardwalk of the waterfront; and the "isthmus", a four-block area along the waterfront, between Percival Landing to the north and Heritage Park to the south. In the SEIS, the building height limitation proposal ranged from 55 to 75 feet within the proposed Urban Waterfront- Housing Zone.

7) The City provided public notice of the proposed shoreline master program amendment and held at least fifteen public meetings concerning the proposal. The draft SEIS was issued on March 18, 2002 and a public comment period followed.

8) The City received many public comments concerning the proposal, both for and against the proposal. Petitioners and others opposing the amendments argued that raising building heights in the waterfront area would block existing views of the Capitol buildings, as well as views of natural attractions. They pointed out that the area proposed for redevelopment borders Heritage Park, an area already designated for public use and recreation. Petitioners and many others opposing the amendments requested the city council to leave the height restrictions in the waterfront area as they were and to concentrate efforts at developing downtown housing in other parts of Olympia.

9) The City determined that many of the comments opposing the City's plan were directed to "the isthmus". Based on these comments, the City decided to remove certain blocks (the "isthmus") in the shoreline from the proposed Urban Waterfront – Housing zone. The final shoreline master program amendments do not apply to the isthmus, but to four blocks to the east of Water Street, the street that borders the public walkways west along the waterfront.

10) The City held two public hearings regarding the proposed shoreline master program

amendment. The first was a planning commission hearing held on April 15, 2002. The second was a city council hearing held on May 21, 2002.

11) Because of keen public interest, the city council held their hearing in a public auditorium. Many people attended the hearing, and public testimony was taken until past midnight. The mayor announced at the hearing that the City would also hold open the record for additional forms of comment – letters, e-mails, and telephone calls. Some of those attending left without testifying as the hour grew late.

12) The City adopted the final shoreline master program amendment in Ordinance 6195 on June 25, 2002 and submitted it to the Department of Ecology for review.

13) The Department of Ecology determined not to hold an additional public hearing because the proposed shoreline master program amendment “lacked complexity”, the City had already provided extensive public participation, and “an additional hearing would probably not produce new testimony adding to the list of concerns or understanding of the SMP”.

14) The Department of Ecology did send out public notice to a list of interested people gleaned from the public comments submitted to the City and received nine or ten comments in response.

15) The Department of Ecology issued its approval of the proposed shoreline master program amendment on September 23, 2002 and it was published on October 24, 2002.

VII. CONCLUSIONS OF LAW

A) This Board has jurisdiction over this matter.

B) Petitioners have standing to bring this challenge to the City’s shoreline master program amendment, enacted in Ordinance 6195.

C) The City’s enactment of the shoreline master program amendment in Ordinance 6195 is in compliance with the Growth Management Act (ch. 36.70A RCW) and the Shoreline Management Act (ch. 90.58 RCW).

VIII. ORDER

The City being in compliance with the Growth Management Act and the Shoreline Management Act with respect to the shoreline master program amendment adopted in Ordinance 6195 the amended petition for review is HEREBY DISMISSED.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten (10) days of issuance of this final decision.

So ORDERED this 11th day of June, 2003.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Margery Hite

Nan Henriksen

[\[1\]](#) Board Member Holly Gadbow recused herself from hearing this case due to her participation and advocacy during the City's process.

[\[2\]](#) Due to Ms. Gadbow's recusal, the Board consisted of two members only – Nan Henriksen and Margery Hite.