

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 RE SOURCES, INC.

Case No. 09-2-0015

4 Petitioner,

5
6 v.

7 CITY OF BLAINE,

8
9 Respondent.

**ORDER ON MOTION TO
SUPPLEMENT THE RECORD
AND ORDER ON MOTION TO
DISMISS ISSUES**

10
11 THESE Matters came before the Board on the following motions:

12 First, the City of Blaine (Respondent) filed a Motion to Supplement the Record with five
13 exhibits which include mitigation requirements, a mitigation bond worksheet, maps showing
14 vested development projects, and the City of Blaine Municipal Code.¹ The Petitioner did not
15 file any objection to Respondent's request to supplement the record with these documents.
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18 Second, RE Sources (Petitioner) filed a Motion to Supplement the Record with an audio
19 recording of a December 18, 2008 work session of the Blaine Planning Commission and
20 City Council pertaining to the critical areas.² The Respondent did not object to
21 supplementing the record, provided that the entire audio recording was transcribed.³ The
22 Petitioner disagreed that the entire recording should be transcribed and asserted that only
23 relevant portions should supplement the record.⁴
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30 ¹ Respondent's Motion to Supplement the Record, filed December 9, 2009.

31 ² Petitioner's Motion to Supplement the Record, filed on December 9, 2009.

32 ³ Respondent's Response to Petitioner's Motion to Supplement, filed on December 9, 2009.

⁴ Petitioner's Reply to Respondent's Response, filed December 21, 2009. The Board also received, on December 23, 2009, Respondent's Sur-Reply to Petitioner's Motion to Supplement the Record – in essence, a Reply to the Petitioner's Reply. It is not the Board's practice to accept such filings and, therefore, Respondent's Sur-Reply was disregarded by the Board.

ORDER ON MOTIONS

Case No. 09-2-0015

January 5, 2009

Page 1 of 8

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1 Third, the City of Blaine filed a Motion to Dismiss Issues Raised Under RCW 36.70A.050(3)
2 and RCW 36.70A.130.⁵ With this Motion, Respondent asserts that it either has no authority
3 or ability to violate the cited provisions and/or has fully complied with their requirements.⁶
4 Petitioners object to the Respondent's request.⁷

6 I. BOARD DISCUSSION AND ANALYSIS

7 1. Motions to Supplement the Record

8 For purposes of the motions to supplement, the Board must be convinced that the proposed
9 supplemental evidence is necessary or will be of assistance in reaching (its) decision.⁸

10 RCW 36.70A.290(4) provides: (Emphasis added)

11
12 The board shall base its decision on the record developed by the city, county, or
13 the state and *supplemented with additional evidence if the board determines that*
14 *such additional evidence would be necessary or of substantial assistance to the*
15 *board in reaching its decision.*

16 In addition, WAC 242-02-540 provides: (Emphasis added)

17 Generally, a board will review only the record developed by the city, county, or
18 state in taking the action that is the subject of review by the board. A party by
19 motion may request that a board allow such *additional evidence as would be*
20 *necessary or of substantial assistance to the board in reaching its decision*, and
21 shall state its reasons. A board may order, at any time, that new or supplemental
22 evidence be provided.

23 The burden is on the party moving to supplement the record to demonstrate to the Board
24 why the additional evidence would be necessary or of substantial assistance.

- 25 • City of Blaine's Motion to Supplement

26 In regards to the first matter, the Respondent seeks the addition of the following documents:

- 27 1. Mitigation Plan Requirements Calculator
- 28 2. Critical Areas Mitigation – Bond Quantity Worksheet

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32 ⁵ Respondent's Motion to Dismiss Issues, filed on December 2, 2009.

⁶ City's Motion to Dismiss, at 1.

⁷ Petitioner's Response to Motion to Dismiss Issues, filed December 16, 2009.

⁸ San Juan Floatplane Defense, et al. vs. San Juan County, at al, Case No. 99-2-0005, May 3, 2005.

- 1 3. Buffer or Wetland Enhancement Mitigation Plan Review Checklist
- 2 4. City of Blaine Vest Projects Map
- 3 5. Blaine Municipal Code

4 As there was no objection to the Respondent's request to supplement the record, the Board
5 will supplement the record with these documents. However, as to the Blaine Municipal
6 Code, the Board sees no assistance in the entire code becoming part of the record.
7 Therefore, the Record is supplemented only with Title 17 Land Use, which includes the
8 City's Critical Areas Ordinance (CAO) at Chapter 17.82.
9

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11 • RE Sources' Motion to Supplement

12 Petitioner seeks the addition of an audio recording from a December 18, 2008 City
13 Council/Planning Commission work session. The Respondent accepted the addition of the
14 audio recording as long as the recordings were transcribed in total.⁹ Petitioner argues that
15 transcribing the entire audio recording would place undue burden on them and place
16 irrelevant material into the Record.¹⁰
17

18 With the lack of objection to the December 18, 2008 CD, the Board is perplexed as to why
19 this Motion to Supplement was even needed as the more appropriate avenue would have
20 been for the City to file an Amended Index of the Record as this work session appears to
21 have been related to the subject matter of the challenged action. Regardless, the Board
22 grants this request and the original document – the December 18, 2008 Audio CD of the
23 Planning Commission/City Council work session - is supplemented to the Record of this
24 proceeding and available for all parties' use. However, as the Board has previously noted,
25 if either of the parties wishes to utilize excerpts of the discussions that occurred during the
26 work session, then that party will need to present the transcribed excerpt to the Board as an
27 exhibit with its brief.
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⁹ Respondent's Response, at 1

¹⁰ Petitioner's Reply to Respondent's Response, at 1-2.

1 **2. City of Blaine's Motion to Dismiss**

2 Respondent seeks dismissal of portions of the issues presented for the Board's review
3 based on alleged violations of RCW 36.70A.050(3) and 36.70A.130.¹¹ The Respondent
4 contends that RCW 36.70A.050 imposes no directive or obligation on a local jurisdiction but
5 rather establishes mandates solely for the Department of Commerce (Commerce).¹² As for
6 RCW 36.70A.130, the Respondent argues that this provision merely establishes a
7 timeframe under which the Respondent was required to act and that it completed the
8 requirement to update its critical areas ordinance (CAO) two years prior to the statutory
9 deadline of 2011.¹³

11
12 Petitioner objects to Respondent's request for dismissal, contending not only complex
13 issues such as the ones it has presented are not properly decided through a dispositive
14 ruling but both of the RCW provisions create obligations for the Respondent.¹⁴ Petitioner
15 contends that although many of the provisions of RCW 36.70A.050 do create duties for
16 Commerce, Section 3 establishes a duty for local jurisdictions to consider the guidelines
17 when updating CAOs.¹⁵ Petitioner further argues that RCW 36.70A.130, based on the
18 Supreme Court's holding in *1000 Friends of Washington v. McFarland*, requires
19 amendments to CAOs to be done in light of best available science (BAS) and this is a
20 primary issue presented in this matter.¹⁶

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23 • RCW 36.70A.050(3)
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29 ¹¹ Respondent's Motion to Dismiss. As set forth in the November 6, 2009 Prehearing Order, all of the
30 Petitioner's three issue statements allege a violation of RCW 36.70A.050(3) and 36.70A.130.

31 ¹² Respondent's Motion to Dismiss, at 2-3.

32 ¹³ Respondent's Motion to Dismiss, at 3.

¹⁴ Petitioner's Response, at 1, 3-4.

¹⁵ Petitioner's Response, at 2-3 (Citing to several cases from all three of the Boards to support this contention as well as a decision from the Court of Appeals).

¹⁶ Petitioner's Response, at 4.

1 RCW 36.70A.050 is entitled “Guidelines to classify agriculture, forest, and mineral lands and
2 critical areas.” Much of this provision contains language expressly creating duties for the
3 Department of Commerce,¹⁷ but .050(3) also provides:

4 The guidelines under subsection (1) of this section shall be minimum
5 guidelines that apply to all jurisdictions, but also shall allow for regional
6 differences that exist in Washington state. The intent of these guidelines is to
7 assist counties and cities in designating the classification of agricultural lands,
8 forest lands, mineral resource lands, and critical areas under RCW
9 36.70A.170.

10 It is the reference to the guidelines being the “minimum guidelines that apply to all
11 jurisdictions” that Petitioner contends mandates that the Respondent consider the
12 guidelines when amending its CAO and there is no indication that the Respondent complied
13 with this requirement.¹⁸

14
15 The Board disagrees. Reading RCW 36.70A.050 as a whole demonstrates that this
16 provision creates duties for Commerce in developing guidelines for the *classification* of
17 natural resource lands and critical areas, not for regulations seeking to protect these areas.
18 This Commerce has done with the adoption of WAC 365-190. Thus, the Board does not
19 read .050(3)’s “minimum guidelines that apply” as creating a duty for local jurisdictions to
20 consider the provisions of WAC 365-190 when designating critical areas; this is
21 accomplished via RCW 36.70A.170(2) which mandates that cities and counties consider the
22 guidelines established pursuant to RCW 36.70A.050.¹⁹ The Board sees .050(3)’s language
23 as a directive to Commerce when developing the guidelines - that the guidelines are to be
24 minimums and they are to have flexibility so as to allow for regional differences.
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31 ¹⁷ See e.g. RCW 36.70A.050(1) “... the department shall adopt guidelines ... the department shall consult with
32 ...”; 36.70A.050(2) “In carrying out its duties under this section, the department shall consult ... the department
shall conduct public hearings ... the department shall consider the public input”.

¹⁸ Petitioner’s Response, at 3.

¹⁹ RCW 36.70A.170(2) provides (Emphasis added): In making the designations required by this section,
counties and cities *shall consider* the guidelines established pursuant to RCW 36.70A.050.

1 As to the previous holdings of the Boards cited by Petitioner, in almost all of the cases the
2 Board was addressing .050(3) in relationship to the consideration of WAC 365-190's
3 guidelines for designating natural resource lands or critical areas and any finding of non-
4 compliance appears to have stemmed from a failure to properly consider the WAC
5 guidelines themselves.²⁰ In addition, the Board notes specifically that in *1000 Friends v.*
6 *Snohomish County*, CPSGMHB Case No. 03-3-0019c, the Central Board stated:²¹

8 Because RCW 36.70A.050 creates a duty for DCTED in its role adopting
9 guidelines pursuant to WAC 365-190-050, rather than a duty for local
10 governments, the Board dismisses the portion of Legal Issue No. 2 that
11 alleges County noncompliance with RCW 36.70A.050.

12 In addition, the Board notes that this case pertains to the Respondent's development
13 regulations adopted to protect critical areas and not the classification of critical areas, with
14 classification being the subject matter of both RCW 36.70A.050 and WAC 365-190.²²

15 Therefore, the Respondent's motion to dismiss alleged violations of RCW 36.70A.050(3) is
16 GRANTED. The reference to that GMA section will be stricken from all of Petitioner's issue
17 statements as set forth in the Board's Prehearing Order.

- 18 • RCW 36.70A.130

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21 The Respondent seeks dismissal of Petitioner's allegations in relationship to RCW
22 36.70A.130, asserting that provision establishes a minimum timeframe under which cities
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25 ²⁰ See e.g., *Citizens Protecting Critical Areas v. Jefferson County*, WWGMHB 08-2-0029, FDO (Nov. 19,
26 2008)(Case pertained to designation of critical areas – Channel Migration Zone – and Petitioners did not
27 allege a violation of .050(3), rather reference was based on RCW 36.70A.170(2)'s requirement to consider the
28 guidelines); *Franz v. Whatcom County*, WWGMHB 05-2-0011, FDO (Sept 19, 2005)(Petitioners did not allege
29 a violation of .050(3) although Board noted it for the first time in a Conclusion of Law but the case related to
30 consideration of the WAC guidelines); *TS Holdings v. Pierce County*, CPSGMHB 08-3-0001, FDO (Sept. 2,
31 2008)(Case related to de-designation of agricultural lands and, although the CPSGMHB did denote
32 compliance with .050, this was in context of the WAC guidelines). As for the single court case cited by
Petitioners – *Manke Lumber v. Diehl*, 91 Wn. App. 793 (1998) – the Court of Appeals was also dealing with the
application of the WAC guidelines in regards to forest lands designation and only noted, in passing, that the
guidelines are to be adopted via .050 and serve as minimums. The Court did not hold that a city or county
could violate this provision.

²¹ Corrected FDO, at 30 (March 22, 2004).

²² WAC 365-190-040(1) states: Classification ... means defining categories to which natural resource lands
and critical areas will be assigned.

1 must act and that the Respondent has complied, adopting its revised CAO two years prior to
2 the deadline.²³

3
4 Petitioner argues, when read in context, RCW 36.70A.130 requires that local jurisdictions
5 must review, evaluate, and revise development regulations in light of the best available
6 science (BAS). Petitioner contends it will demonstrate after complete briefing that the
7 Respondent failed to include BAS and thus violated this GMA provision.²⁴

8
9 Respondent's argument appears to be premised on a mistaken belief that RCW 36.70A.130
10 only establishes a time line for cities and counties planning under the GMA. This provision
11 does more than that as it establishes, among other things, limitations and conditions on
12 amendments.²⁵ Here, Petitioner's issues are based on an allegation that the Respondent
13 has failed to include BAS when amending its CAO. Although RCW 36.70A.172, which
14 Petitioner cites as well, could be utilized in a similar fashion, RCW 36.70A.130 does require
15 that development regulations comply with the requirements of the GMA in its entirety. How
16 Petitioner chooses to argue this will be revealed in its briefing but, for now, the Board finds
17 no basis for dismissal of this GMA provision and therefore, Respondents motion to dismiss
18 alleged violations of RCW 36.70A.130 is DENIED.
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21 II. ORDER

22 Based on the foregoing the following order is entered:

- 23
- 24 1. The City of Blaine's Motion to Supplement the Record is GRANTED, *except* that only
 - 25 Title 17 Land Use of the Blaine Municipal Code is added to the Record.
 - 26 2. RE Sources' motion to supplement the record with an audio CD of a December 18,
 - 27 2008 Blaine Planning Commission/City Council Work Session is GRANTED, *except* that
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31 ²³ Respondent's Motion to Dismiss, at 3.

32 ²⁴ Petitioner's Response, at 4.

²⁵ See e.g., RCW 36.70A.130(2)(a) requires dissemination of public participation program, limits comprehensive plan amendments to no more than once a year; .130(2)(b) requires concurrent review of proposals so the cumulative effect can be ascertained.

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if any party seeks to rely on the contents of this CD, that party must transcribe the relevant portion of the work session for presentation to the Board.

3. The City of Blaine's motion to dismiss allegations related to RCW 36.70A.050(3) is GRANTED.

4. The City of Blaine's motion to dismiss allegations related to RCW 36.70A.130 is DENIED.

Entered this 5th day of January, 2010.

Nina Carter, Board Member

Will Roehl, Board Member

James McNamara, Board Member

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