

Overton & Associates, Alpine Evergreen Company, Inc. and Olympic Property Group moved to be allowed to participate as amicus curiae. The Board grants amicus status, limiting the brief of amicus to particular issues set forth in this Order.

III. BACKGROUND

On December 28, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) with three exhibits from 1000 Friends of Washington¹ and Kitsap Citizens for Responsible Planning (**Petitioners** or **1000 Friends/KCRP**). The matter was assigned Case No. 04-3-0030. Board member Margaret Pageler is the Presiding Officer (**PO**) for this matter. Petitioners challenge Kitsap County's (**Respondent** or the **County**) adoption of Ordinance No. 326-2004 amending the Comprehensive Plan and Resolution No. 158-2004 providing an addendum to the buildable lands analysis report. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On December 30, 2004, the Board received a PFR from Jerry Harless (**Petitioner** or **Harless**). The matter was assigned Case No. 04-3-0031. Harless challenges the County's adoption of Ordinance No. 326-2004 amending the Comprehensive Plan. Harless also challenges the County's failure to act to adopt "reasonable measures" and revise Urban Growth Areas. The basis for the challenge is noncompliance with various provisions of the GMA.

On January 4, 2005, the Board received Notices of Appearance in Case No. 04-3-0030 and -0031 on behalf of Kitsap County from Shelley E. Kneip and Lisa J. Nickel.

On January 5, 2005, the Board issued a Notice of Hearing and Potential Consolidation for the PFRs of 1000 Friends/KCRP and Harless.

On January 13, 2005, the Board received a Notice of Association of Simi Jain as co-counsel for 1000 Friends of Washington.

On January 28, 2005, the Board received the County's Preliminary Index to the Record.

On January 31, 2005, at 10:00 a.m., the Board conducted the Prehearing Conference at the Union Bank of California Building, 5th Floor Conference Room, 900 Fourth Avenue, Seattle. Board member Margaret Pageler, Presiding Officer in this matter, conducted the conference, with Board members Bruce Laing and Ed McGuire in attendance. Petitioners 1000 Friends of Washington and KCRP were represented by attorneys John Zilavy and Simi Jain. Tom Donnelly of KCRP also attended. Petitioner Jerry Harless was present *pro se*. Kitsap County was represented by its attorneys Shelley Kneip and Lisa Nickel and by County Planner Angie Silva. Attorney Lawrence A. Costich, Graham & Dunn, attended on behalf of potential intervenors (herein granted *amicus* status).

¹ 1000 Friends of Washington has changed its name to Futurewise.
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At the Prehearing Conference, the Board indicated to the parties its intention to consolidate the cases pursuant to RCW 36.70A.290(5). The parties concurred.

On February 1, 2005, the Board issued a Prehearing Order and Order of Consolidation consolidating the PFRs as **CPSGMHB Consolidated Case No. 04-3-0031c**, hereafter referred to as *1000 Friends/KCRP v. Kitsap County*. The Prehearing Order (**PHO**) set forth the legal issues to be decided as Legal Issues 1-4, submitted in the 1000 Friends/KCRP PFR, and Legal Issues 5-8, submitted in the Harless PFR.

On February 17, 2005, the Board received Kitsap County's Core Documents, as follows:

- Kitsap County Comprehensive Plan, Index 26832
- Resolution No. 158-2004, Index 27441
- Provisions of Zoning Code referenced in Resolution 158-2004 [N/A]
- Ordinance No. 326-2004 amending Comp Plan and Zoning Map, Index 27334
- Population Appendix to Kitsap County Comp Plan, Index 20539
- Buildable Lands Analysis, Index 23627
- Ordinance No. 327-2004 amending County-Wide Planning Policy [N/A]
- Ordinance No. 311-2003 amending Comp Plan and Map for 2003, Index 25559

Subsequent procedures in these consolidated cases are itemized in the appropriate sections below.

III. KITSAP COUNTY'S MOTION TO DISMISS

Background

On February 17, 2005, the Board received "Kitsap County's Motion to Dismiss Legal Issues 5, 7 and 8", accompanied by the Declaration of Opal Robertson with an attached Affidavit of Publication. Legal Issues 5, 7 and 8, submitted in the Harless PFR, challenge Ordinance 326-2004. The Robertson Declaration affirmed the publication of notice of adoption of Ordinance 326-2004 on October 30, 2004. Kitsap's Motion to Dismiss was based on the untimely filing of the Harless PFR [Case No. 04-3-0031], which was filed December 30, 2004, on the 61st day after publication.

On February 24, 2005, the Board issued its Order to Supplement the Record, requiring Kitsap County to submit an affidavit of publication of Resolution No. 158-2004.

On March 7, 2005, the Board received Respondent's Response to Board's Order to Supplement the Record, indicating that notice of adoption of Resolution 158-2004 was not separately published, but adoption of the resolution was incorporated by reference in the notice of adoption of Ordinance 326-2004.

Petitioner Harless submitted no response.

Applicable Law

RCW 36.70A.290(2) provides that all petitions to the Board challenging compliance with the GMA “must be filed within sixty days after publication by the legislative bodies of the county or city.” WAC 242-02-220(1).

The sixty day deadline is jurisdictional. See *Torrance v. King County*, 136 Wn. 2d 783, 792, 966 P. 2d 891 (1998); *Palmer, et al., v. City of Lynnwood*, CPSGMHB Case No.03-3-0001, Order on Motions (Mar. 20, 2003). The Board has no statutory authority to review a county ordinance if the challenge to the ordinance is filed past the 60-day deadline. See e.g., *Montlake Community Club et al. v. City of Seattle*, CPSGMHB No. 99-3-0002c, Order on Dispositive Motions (Apr. 23, 1999).

Discussion

Legal Issues 5, 7 and 8: The legal challenges in the Harless PFR were identified in the Prehearing Order for the consolidated case as Legal Issues 5, 6, 7, and 8. Legal Issues 5, 7 and 8 expressly challenge Ordinance No. 326-2004.² A Notice of Adoption of Ordinance No. 326-2004 was published in The Kitsap Newspaper Group on October 30, 2004. Declaration of Opal Robertson, Respondent’s Exhibit A. Harless’s PFR was filed on December 30, 2004. See, Declaration of Service, attached to the PFR. Harless does not dispute these facts.

The Board finds that the PFR was filed on the 61st day after publication of notice of adoption of Ordinance No. 326-2004. Harless’s direct challenges to the Ordinance – Legal Issues 5, 7 and 8 - are untimely and must be dismissed.

Legal Issue 6: Petitioner Harless also included a “failure to act” challenge in his PFR, designated as Legal Issue 6 in the Prehearing Order. Kitsap County did not include Legal Issue 6 in its Motion to Dismiss “since a failure to act challenge may be brought at any time.” Kitsap’s Motion to Dismiss, at 4, fn. 3 (citing WAC 242-02-220(5)).

Harless and Kitsap County are both missing the important “distinction between ‘failure to act’ and action that fails to comply with the GMA.” *Gain v. Pierce County*, CPSGMHB Case No. 99-3-0019, Order on Dispositive Motions, (Jan. 28, 2000), fn.3.

In *Kitsap Citizens for Rural Preservation v. Kitsap County*, CPSGMHB Case No. 94-3-0005, an early case involving some of the same parties now before the Board, the petitioning Citizens appealed Kitsap County’s failure to act to designate forest lands. The County responded that a “Strategies” document, adopted two years earlier, was the County’s action under the GMA. The Board agreed.

² Legal Issue 5: “Does the County adoption of Ordinance No. 326-2004 . . . fail to comply . . .”

Legal Issue 7: “Did Kitsap County fail to comply . . . when it used the Ordinance . . .”

Legal Issue 8: “Did Kitsap County fail to comply . . . when it used the Ordinance . . .”

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The Board holds that the County took an action, adoption of the Strategies document, to comply with the Act's requirements to designate forest lands... Accordingly, a challenge to the Strategies document had to be filed within sixty days of publication of notice of adoption of the Strategies document.

Id., Order on Kitsap County's Dispositive Motion (July 27, 1994), at 10. In so holding, the Board noted:

[A] "failure to act (at all, or procedurally) by a specified deadline" challenge must be distinguished from an appeal challenging a local government for "failing to substantively act in compliance with the requirements of the GMA." . . . Here, the County did take procedural actions meant to comply with the GMA. It provided advance notice of its intent to adopt the Strategies document in order to comply with the GMA's forest lands requirements. The County held two public hearings where persons, including one of the individual petitioners in this matter, could and did testify about the substantive merits of the Strategies document. Finally, after adoption of the Strategies document on April 20, 1992, the County published notice indicating that the Strategies document had been adopted and providing an address where copies of the document could be obtained. The document indicated on the cover page that it had been "adopted" by the Board of County Commissioners.

The Board has determined that the County acted to comply with the Act's forest lands requirements and rejects Citizen's arguments that the County failed to act. Whether the County's actions in adopting the Strategies document substantively comply with the GMA's requirements is not before the Board at this time because Citizens failed to file a timely petition for review. Challenges to substantive compliance must be made within the requisite statute of limitations period if the procedural notice and hearing requirements have been met.

Id., at 11 (citations to the record omitted throughout).

Harless states Legal Issue 6 as follows:

The effects of Ordinance 326-2004 notwithstanding, did Kitsap County fail to comply with RCW 36.70A.110, RCW 36.70A.115, RCW 36.70A.130 and RCW 36.70A.215 and fail to be guided by RCW 36.70A.020(1) and (2) when it *did not implement measures reasonably likely to increase consistency with its plan targets* (i.e., increase the proportion of growth locating in UGAs, increase urban densities and decrease rural densities) and *did not review and revise its Urban Growth Areas* (UGAs) to accommodate forecast and allocated growth over the succeeding twenty years? (Emphasis supplied.)

Legal Issue No. 6 alleges failure to comply with the Act and failure to be guided by GMA goals. The specific non-compliance is spelled out as (1) not implementing reasonable measures and (2) not reviewing and revising UGAs.

Resolution No. 158-2004, subtitled “Providing an Addendum to the Buildable Lands Analysis Report for Reasonable Measures,” was adopted by Kitsap County concurrently with Ordinance 326-2004. *See*, Response to Board’s Order to Supplement the Record, at 3. The October 30, 2004, publication of adoption of the Ordinance incorporated the reasonable measures Resolution by reference and gave directions for obtaining copies of the resolution. *Id.*, Attachment A. The notice stated:

With respect to reasonable measures, the BCC finds [sic] that Kitsap County has adopted 18 reasonable measures intended to promote growth and density in Urban Growth Areas, which were recognized by separate resolution.

While Harless may be right that the measures in the Resolution are not sufficient to meet the goals of the GMA, the Board finds that *the County has acted* with respect to reasonable measures and that notice of the action was published on October 30, 2004. Characterizing the challenge as a “failure to act” does not confer Board jurisdiction over an untimely petition.

As to the Issue 6 claim that the County failed to “review and revise its UGAs,” the Board notes that Harless’s Legal Issue 5 describes Ordinance No. 326-2004 as “establishing adjusted and expanded Urban Growth Areas.” Again, the Board finds that *the County has acted* to revise its UGAs, though not in the way Harless would prefer. Characterizing the challenge as a “failure to act” does not cure the untimeliness of the petition.

Finally, Petitioner Harless raises the County’s failure to amend Countywide Planning Policies (CPPs) to address inconsistencies.³ Harless cites RCW 36.70A.215(4): “If necessary, a county, in consultation with its cities as required by RCW 36.70A.210, shall adopt amendments to county-wide planning policies to increase consistency.” Again, in a process concurrent with its Comprehensive Plan review, *the County has acted* by adopting an ordinance - Ordinance 327-2004 – updating Countywide Planning Policies. *See*, Kitsap County’s Core Documents, *supra*, at 3. Harless is barred from challenging the CCPs by RCW 36.70A.210(6) (only cities and the governor may appeal adopted CPPs). However salient Harless’s concerns may be, he cannot convert a barred action into a valid appeal by characterizing his challenge as a “failure to act.”

Conclusion

The Board concludes that the Harless PFR was untimely. The PFR was filed on the 61st day after publication of notice of adoption of Ordinance 326-2004, which notice incorporated Resolution 158-2004. Harless’s challenge is not saved by characterizing one of his legal issues as a “failure to act” when the County in fact adopted legislation under

³ *See*, Harless Rebuttal, at 4; Harless PFR, at 12.
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the GMA concerning reasonable measures, UGAs and CPPs. *Harless v. Kitsap County*, CPSGMHB Case No. 04-3-0031 is therefore **dismissed**.

IV. MOTION TO SUPPLEMENT

Background

On February 15, 2005, the Board received Petitioner Harless' Motion to Supplement the Record, with nine attachments (**Motion to Supplement**).

On February 28, 2005, the Board received Kitsap County's Response to Petitioner Harless' Motion to Supplement the Record, with seven attachments (**County Response**).

On March 7, 2005, the Board received Petitioner Harless' Rebuttal of Kitsap County's Response to His Motion to Supplement the Record (**Harless Rebuttal**).

Discussion

Petitioner Harless's PFR has been dismissed as untimely and his Motion to Supplement the Record is therefore moot and is **denied**.

Nonetheless, the Board determines that three of the documents submitted with the Motion are necessary or may be of substantial assistance to the Board in its decision on the merits of the legal issues that remain. These documents are Attachments D, E, and F to the Motion to Supplement. The documents are county staff reports of vacant parcels and acreage in Kitsap County [D], residential construction from 1999 to 2003 [E], and city and county-wide residential permit totals [F]. The documents all carry the notation "BCC Request on 9-27-04 CPP Public Hearing," indicating that they were prepared in response to Board of County Commissioners requests in connection with public hearings on the update of the Countywide Planning Policies. County Response, at 8.

The County objects to inclusion of these documents because they were prepared in connection with updating the CPPs, a separate process, though concurrent with the Comprehensive Plan update. County Response, at 6. The County further objects that the documents are merely "rough numbers" that may cause confusion. *Id.*, at 9.

The Board finds that the information was before the County when it adopted Ordinance 326-2004 and Resolution 158-2004. The Board further finds that the information is relevant to Legal Issues 2 and 3, each of which addresses "inconsistency between the county's comprehensive plan, development regulations and on-the-ground development that has occurred since their adoption." The Board therefore **admits** and renumbers as supplemental exhibits Harless's proffered exhibits D, E, and F.

Conclusion

Petitioner Harless's Motion to Supplement the Record is moot and is therefore **denied**. However, the Board has determined that three of the exhibits proffered with the motion are necessary or may be of substantial assistance to the Board in its determination of this case. The following supplemental exhibits are **admitted**:

- Supp. Ex. No. 1.** Vacant Residential Parcels 9/27/04 (6 pages)
- Supp. Ex. No. 2.** Residential Construction 9/27/04 (1 page)
- Supp. Ex. No. 3.** City and County Residential Permit Totals 9/27/04 (2 pages)

V. MOTION TO APPEAR AS AMICUS

Background

On February 17, 2005, the Board received a Motion to Appear as *Amicus Curiae* from Overton & Associates, Alpine Evergreen Company, Inc., and Olympic Property Group (**Overton** or **Amicus**). None of the parties responded or objected to the *amicus* request.

Applicable Law

WAC 242-02-280 provides as follows:

- (1) Any person whose interest may be substantially affected by a proceeding before a board may by motion request status as an *amicus* in the case.
- (2) A motion to file an *amicus curiae* brief must include a statement of:
 - (a) Applicant's interest and the person or group applicant represents;
... and
 - (d) Applicant's reason for believing that additional argument is necessary on these specific issues. . . .
- (3) If the person qualifies for *amicus*, the presiding officer may impose conditions upon the *amicus*'s participation in the proceedings, either at the time that *amicus* status is granted or at any subsequent time.

Overton has requested leave to participate as *amicus curiae* with respect to Legal Issues 2, 3, 4, and 6 in the PFRs of CPSGMHB Case No. 05-3-0031c. Overton proposes to focus on "appropriate planning and development regulations for the rural areas," in the event rural area measures are advocated by Petitioners in their Prehearing Briefs. Overton asserts that "none of the parties currently present in this appeal can speak for or understand the interests of the Rural Wooded landowners."

Conclusion

Having received no objections to the request of Overton, the Board hereby **grants** the motion for *amicus* status.

Amicus Overton may file a brief in accordance with the briefing schedule set forth for Respondent Kitsap County in the PHO [April 18, 2005]. *Amicus* may brief Legal Issues 2, 3, and 4 as stated in the PHO [Issue 6 is dismissed] and will address only Petitioners' arguments concerning appropriate planning and development regulations for rural areas. *Amicus* will not participate in oral argument.

VI. ORDER

Based on the GMA, Board rules, submittals by the parties, Washington case law and prior decisions of this Board and other Growth Management Hearings Boards, and having deliberated on the matter, the Board enters the following Order:

- The Board having found that the Petition for Review filed by Petitioner Harless was untimely, the matter of *Harless v. Kitsap County*, CPSGMHB Case No. 04-3-0031 is **dismissed**.
- The Motion to Supplement is moot and is **denied**.
- The Board supplements the record as indicated in this Order. The items admitted as supplemental exhibits, as discussed and noted in the summary table *supra* [at 8], have been determined to be necessary or may be of substantial assistance to the Board in reaching its decision.
- The *Amicus Curiae* Motion of Overton, et al., is **granted**. The terms and conditions of the *amicus* participation are as set forth in this Order.

So ORDERED this 15th day of March 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Margaret Pageler, Presiding Officer
Board Member

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Note: This Order constitutes a final order in CPSGMHB Case No. 04-3-0031 as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.