

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

KITSAP CITIZENS FOR RURAL)	
PRESERVATION,)	Case No. 05-3-0039
)	
Petitioners,)	<i>(KCRP V)</i>
)	
v.)	
)	
KITSAP COUNTY,)	ORDER ON MOTIONS
)	
Respondent.)	
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I. BACKGROUND

On July 13, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Kitsap Citizens for Rural Preservation (**Petitioner** or **KCRP**). The matter was assigned Case No. 05-3-0039, and is hereafter referred to as *KCRP V v. Kitsap County*. Board member Margaret Pageler is the Presiding Officer for this matter. Petitioner challenges Kitsap County’s (**Respondent** or **County**) adoption of Ordinance No. 336-2005, which amended the Kitsap County Zoning Code, as noncompliant with the Growth Management Act (**GMA or Act**) and the State Environmental Policy Act (**SEPA**).

On August 15, 2005, the Board conducted the Prehearing Conference (**PHC**) at the Board’s office in Seattle and subsequently issued its Prehearing Order, establishing the issues to be decided in this case and setting the schedule for motions and hearing. The Board received Respondent’s Preliminary Index to the Record (**Index**) on August 15, 2005.

On September 8, 2005, the Board received **Kitsap County’s Motion to Dismiss**, with nine exhibits. With the Motion to Dismiss were two Certificates signed by Debbie Meyer, a Legal Assistant with the Kitsap County Prosecuting Attorney’s Office. The Certificates verified transcripts of the November 17, 2003 Board of County Commissioners public hearing indexed as #27852 and the October 15, 2003 Board of County Commissioners public hearing indexed as #27811. The bases for the Motion to Dismiss are timeliness, standing, and failure to exhaust administrative remedies.

On September 21, 2005, the Board received KCRP’s Response to Kitsap County’s Motion to Dismiss. With KCRP’s Response was the Declaration of Thomas F. Donnelly with attached exhibit of excerpts from a document titled “From the Green Flag to the Checkered Flag - We’ll Bring the Project Home.”

On September 21, 2005, the Board also received KCRP's Motion for Leave to File a Motion to Supplement and **KCRP's Motion to Supplement the Record** requesting leave to submit Ordinance 336-2005 and Notice of Adoption of Ordinance 336-2005. On September 28, 2005, the Board received KCRP's Withdrawal of Motions on Supplementation, noting that the items requested for supplementation were already indexed in the record. KCRP also filed an Errata, providing corrected Index citations for certain pages of its Response to Motion to Dismiss.

On September 29, 2005, the Board received Kitsap County's Reply Regarding Motion to Dismiss, with one exhibit. On September 29, 2005, Kitsap County also filed **Kitsap County's Motion to Strike**, seeking to strike the Declaration of Thomas F. Donnelly and attached exhibit.

On October 6, 2005, the Board received KCRP's Response to Kitsap County's Motion to Strike.

In this Order, the Board deals first with the evidentiary motions and then with Kitsap's Motion to Dismiss.

II. DISCUSSION AND ANALYSIS

A. KCRP's Motion to Supplement

Petitioners have **withdrawn** their motion to supplement the record, having found the referenced documents in the County's Index. Petitioners have resubmitted the relevant pages of their brief with the corrected citations by Index Number.

B. Kitsap's Motion to Strike

Kitsap moves to strike the document attached as Exhibit I to the Declaration of Thomas F. Donnelly. The document is titled "From the Green Flag to the Checkered Flag – We'll Bring the Project Home" [**NASCAR Report**], and is a report prepared by the Kitsap Regional Economic Development Council under five signatures, including that of "Patty Lent, Chair, Kitsap County Board of Commissioners." Dated May 3, 2004, the stated purpose of the report is to "describe in detail why the proposed [Kitsap County site] is the ideal location for ISC and NASCAR."

Kitsap asserts that the NASCAR Report is not in the record before the Board, the Petitioners have not moved to supplement the record, and the report is not relevant to the zoning code provision which is the subject of review.

KCRP responds that the Donnelly Declaration and Exhibit I are directed to the question of Petitioners' SEPA standing. KCRP argues that it is entitled to bring in non-record evidence to demonstrate how the County action creates injury-in-fact under SEPA. In most such questions, the evidence would be specific to a petitioner and would not necessarily be in a jurisdiction's record.

The Board concurs with KCRP. The NASCAR Report is certainly relevant to the question of SEPA standing. The County cannot claim surprise; County officials were certainly aware of the report or of the matters involved, whether or not they included it in their Index for Ordinance 336-2005.

This Board is frequently faced with petitions for review which challenge local government actions that are specifically associated with particular controversial projects.¹ The Board is experienced at distinguishing the GMA-cognizable issues from the project-specific matters which may be beyond its jurisdiction.

Kitsap's Motion to Strike is **denied**. The NASCAR Report is admitted as Supplemental Exhibit A [**Supp. Ex. A**].

C. Kitsap's Motion to Dismiss

Timeliness

Positions of the Parties

Kitsap County moves to dismiss the KCRP petition as untimely. Kitsap's thesis is that Ordinance 336-2005 is a technical correction of Ordinance 311-2003; therefore any challenge would have had to be brought within 60 days after the publication of Ordinance 311-2003. On December 8, 2003, Kitsap County adopted the South Kitsap Industrial Area (**SKIA**) Sub-area Plan and implementing regulations as part of its annual comprehensive plan amendment process. During that process, on November 17, 2003, the Board of County Commissioners orally passed a motion to amend the zoning code for SKIA to expressly include racetracks as a conditional use in Business Park, Business Center and Industrial zones. KCC 17.370.020.A.13. However, the correction was not included in the final adopted ordinance – Ordinance 311-2003 - and the omission was not discovered by County officials until a year later. Kitsap Motion to Dismiss, at 2.

The County argues that there was a complete public process in 2003, and the racetrack amendment was discussed and received public comment at that time. The County states that these Petitioners filed a timely challenge to the 2003 Ordinance, on other grounds,² and are time-barred from adding racetracks as a new element to their 2003 challenge at this time. *Id.* at 6. Kitsap cites *Orton Farms, et al., v. Pierce County*, CPSGMHB Case No. 04-3-0007c, Final Decision and Order (August 2, 2004), at 41-42, for the proposition that a collateral attack on a previously enacted amendment is untimely if not brought within 60 days of the original enactment.

¹ E.g., *Tahoma Audubon Society v. Pierce County*, CPSGMHB Case No. 05-3-0004c [Park Junction Resort]; *King County v. Snohomish County*, CPSGMHB Cases No. 03-3-0011, No. 03-3-0025, and No. 05-3-0031 [Brightwater sewage treatment plant]; *Bridgeport Way v. City of Lakewood*, CPSGMHB Case No. 04-3-0003 [Wal-Mart]; *Island Crossing v. Snohomish County*, CPSGMHB Case No. 04-3-0019c [Dwayne Lane car dealership].

² *Suquamish Tribe, KCRP, Harless, City of Bremerton, v. Kitsap County*, CPSGMHB No. 04-30009c (**Bremerton II**).

With regard to the NASCAR racetrack, specifically, Kitsap says KCRP's challenge to the 2003 zoning code amendment is too late and any challenge to the NASCAR project itself is too early, as no permit application has yet been filed. Kitsap Reply, at 9.

Petitioner KCRP responds that its challenge is not to Ordinance No. 311-2003 but to the 2005 Ordinance No. 336-2005. As to the 2005 Ordinance, KCRP brings its petition for failure to allow public participation and failure to apply SEPA. Whether the 2005 Ordinance is merely a "corrective ordinance" and is somehow subject to different standards with respect to GMA process is for argument and decision on the merits, Petitioners contend. KCRP Response, at 6-7.

Alternatively, argue Petitioners, even if the code amendment to allow racetracks was "intended" in 2003, it was never published and the 60-day clock never started ticking. The County is contending that KCRP was required to challenge an amendment that did not exist. *Id.* at 8.

Board Discussion

The Board finds that Petitioner KCRP's challenge to Ordinance No. 336-2005 is timely, having been filed within 60 days of publication of the challenged ordinance. The question whether GMA process requirements were satisfied in the enactment of Ordinance 336-2005 will be before the Board in the briefing and hearing on the merits.³

The mechanism of citizen and stakeholder challenge to local-government GMA enactments is a core feature of the Growth Management Act. However, the GMA makes no provision for challenging a local jurisdiction's "intended legislation." The County's Motion to Dismiss appears to rely on the notion that Petitioners were somehow required to challenge an unwritten amendment. The Board agrees with Petitioners that a 2003 challenge to the non-existent racetrack provision would have been futile. The Board will not read RCW 36.70A.290(2) to require a futile act. Kitsap's motion to dismiss the petition as untimely is **denied**.

SEPA Standing

Positions of the Parties

Kitsap moves to dismiss Petitioners' SEPA challenge on the grounds that KCRP failed to exhaust administrative remedies and failed to demonstrate SEPA standing.

First, Kitsap argues that the SEPA challenge is barred because KCRP failed to exhaust administrative remedies. Kitsap states that in October, 2002, in anticipation of the 2003 code changes, it issued a Determination of Significance, Adoption of Existing Environmental Documents and Issuance of an Addendum under SEPA. Index # 24251. At that time, there was

³ The Board expects both parties to provide briefing and authorities with respect to corrective legislation. The Board will be interested in the timing, scope and process of allowable technical amendments, corrections for scrivener's error, municipal or legislative code revision, and the like.

notice of the availability of a SEPA administrative appeal process, but KCRP did not appeal; hence, the County argues, a SEPA challenge is now barred. Kitsap Motion to Dismiss, at 12-14.

In response, KCRP states that it is not challenging the 2003 Ordinance or the October 2002 environmental review. It is challenging Ordinance No. 336-2005, which had no SEPA review at all, not even a DNS. Therefore there is no administrative remedy which it could have pursued; failure to exhaust is not an issue. KCRP Response, at 16-17.

Second, Kitsap contends that Petitioners lack SEPA standing because such standing was not adequately alleged in the petition for review (PFR). Kitsap Motion to Dismiss, at 14-15.

In response, KCRP asserts that, because of the Board's 2004 rule changes to WAC 242-02-210, SEPA standing no longer has to be alleged in detail in PFR's. In any event, KCRP stated the basis for its SEPA standing in Paragraph 5.2 of the PFR. KCRP Response, at 11-13.

Finally, Kitsap argues that KCRP can not meet the "injury in fact" test applied by the Board to determine standing under SEPA. According to Kitsap, to the extent KCRP's alleged injury is based on the proposed NASCAR racetrack, it is merely speculative, not "immediate, concrete, and specific." Kitsap Motion to Dismiss, at 16; Kitsap Reply, at 9.

KCRP responds that KCRP members, as set forth in the Donnelly Declaration, face substantial injury from the NASCAR project – a specific and imminent outcome of the 2005 Ordinance. KCRP argues that the plans for the NASCAR racetrack are specific and concrete; the Ordinance No. 336-2005 changed an outright prohibition of such uses to an allowed use; and the impacts on Tom Donnelly and other KCRP members from the resulting noise, traffic, air and water pollution detailed in the Donnelly Declaration "create a known immediate, concrete and specific change in Tom Donnelly's life." KCRP argues that this meets even the Board's strict *Trepanier* test. Kitsap Reply, at 14-15.

Board Discussion

For the reasons set forth below, **the Board defers decision on the issue of SEPA standing** until its ruling on the merits in this matter.

The issue before the Board on the merits in this case is whether Ordinance No. 336-2005 required a public process under GMA [Legal Issues No. 1-4] and procedural compliance with SEPA [Legal Issues No. 7 and 8], or whether Ordinance No. 336-2005 is a mere technical correction of Ordinance No. 311-2003 [a "housekeeping" matter], for which the County may rely in some fashion on the procedures and analysis connected with that prior enactment. The challenge to KCRP's SEPA standing cannot be resolved without a decision on the issue on the merits. The Board therefore reserves ruling on this matter.

However, inasmuch as both parties have briefed the question of SEPA standing, the Board responds to the issues raised and provides additional authorities.

The Board concurs with KCRP on exhaustion of remedies. In *Bremerton I* the Board set forth four elements to determine whether the exhaustion requirement bars a SEPA claim:

(1) whether administrative remedies were exhausted; (2) whether an adequate remedy was available; (3) whether adequate notice of the appeals procedure was given; and (4) whether exhaustion would have been futile.

Bremerton v. Kitsap County, CPSGMHB No. 95-3-0039c (*Bremerton I*), Order on County's Dispositive Motions (June 5, 1995), at 5-6.

Here, *no SEPA process or remedy was provided* in connection with Ordinance No. 336-2005. Even under the County's theory, administrative appeal of the SEPA determination in 2002 for Ordinance No. 311-2003 *would have been futile*, because there was no allowance for automobile racetracks in the proposed ordinance. The Board concludes that KCRP's SEPA challenge is not barred by failure to exhaust administrative remedies.

The Board concurs with KCRP that Paragraph 5.2 of its petition for review adequately states the grounds for SEPA standing, for pleading purposes.

5.2 ... KCRP is a non-profit organization incorporated in the State of Washington that is dedicated to protecting the environmental and economic welfare of Kitsap County. ... The organization's members reside in Kitsap County and, in particular, in areas close to the lands that are the subject of the zoning amendment at issue in this petition. The members will be adversely impacted by excessive noise, traffic, air pollution, degradation of water quality and by decreases in the value of their homes and businesses if an automobile racetrack is allowed as authorized by Ordinance No. 336-2005. Because Kitsap County has not conducted any environmental review of the potential impacts of Ordinance No. 336-2005, there may be additional adverse environmental impacts of an automobile racetrack which will occur but have not been evaluated by either the County or by the members of KCRP.

KCRP PFR, at 5. The Board concludes that the SEPA pleading requirements of WAC 242-02-210 have been met.

However, Petitioners do not appear to have met the evidentiary burden of establishing "specific and perceptible harm." This Board has adopted the judicially-created two-part *Trepanier* test to determine SEPA standing:

First, the plaintiff's supposedly endangered interest must be arguably *within the zone of interests protected by SEPA*. *Second*, the plaintiff must *allege an injury in fact*; that is, the plaintiff must present sufficient evidentiary facts to show that the challenged SEPA determination will cause him or her *specific and perceptible harm*. The plaintiff who alleges

a *threatened injury* rather than an existing injury must also show that the injury will be “*immediate, concrete, and specific*”; a conjectural or hypothetical injury will not confer standing. *Leavitt* at 679, *citing Trepanier* at 382-83.^[4]

Master Builders Association v. Pierce County, CPSGMHB No. 02-3-0010, Order on Motion to Dismiss SEPA Claims (October 21, 2002), at 6 (emphasis in original).

While this Board has frequently acknowledged that the standing requirements under SEPA are particularly difficult to meet in a challenge to a nonproject, legislative enactment, it is still possible where the challenged plan or regulation introduces “a more intensive land use category.” *Id.* at fn. 6.⁵

In *Citizens for Responsible Growth of Greater Lake Stevens v. Snohomish County*, CPSGHB Case No. 03-3-0013, Order on Motions (August 15, 2003), Petitioners sought SEPA standing regarding a City comprehensive plan amendment that changed the implementation schedule for urban build-out in an area already planned and mapped for urban development. Under those circumstances, the Board ruled that Petitioners could show no “specific and perceptible harm.” Because urban build-out had already been acknowledged in the City’s plan, the City’s action in changing the schedule created no previously-unanticipated impacts; SEPA standing was therefore denied. See also, *Hensley VI v. Snohomish County*, CPSGMHB Case No. 03-3-0009c, Order on Motions (May 19, 2003), at 15, (zoning amendment did not cause injury-in-fact because “[a]llowing potential intensification of urban uses within an urban area is within the County’s discretion”).

The present case concerns the South Kitsap Industrial Area. The challenged amendment adds the use “Race track: auto or motorcycle” as a conditional use in the Business Park, Business Center, and Industrial zones. The zones in question are clearly urban; together they accommodate a wide range of intensive uses, from manufacturing to “outdoor amusement enterprises.” Adding racetracks as a conditional use is not *in itself* a “shift from limited and less intensive use to diverse and more intensive uses.”

That being said, the Board must defer its decision on KCRP’s SEPA claims. In actions where *no SEPA threshold determination has been made*, this Board has denied dispositive challenges to SEPA standing. In *Morris v. Lake Forest Park*, CPSGHMB

⁴ *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994); *Trepanier v. Everett*, 64 Wn. App. 380, 824 P.2d 524 (1992).

⁵ “... Shifts from limited and *less* intensive uses to diverse and *more* intensive uses, logically raise the potential for increases in significant adverse environmental impacts.... Further, assuming the shift involved a concurrent, complete and consistent plan, regulatory and mapping [designation] change, the impact could arguably be: *immediate* [upon the effective date], *concrete* [the intensity and diversity of permitted uses is significantly altered and environmental threats arguably increased], and *specific* [depending upon the relationship of the petitioner to the affected area]. In these limited situations the Board would not be applying the *Trepanier* test “loosely” or “assuming” standing, but merely appropriately applying the test for significant nonproject actions.” *Id.*

Case No. 97-3-0029c, Order Denying Dispositive Motions (January 9, 1998), the Board explained:

Lake Forest Park challenges Petitioners' standing to raise Legal Issue No. 5, and requests that Legal Issue No. 5 be dismissed. The City argues Petitioners lack standing because their interests are not within the zone of interests protected or regulated by SEPA and they have not alleged sufficient injury in fact.

Petitioners allege that *the City has not performed the procedural step of conducting a threshold determination as required by SEPA*. The City has not disputed Petitioners' claim. Petitioners' further assert that, as residents and property owners within the City, they have standing to challenge the City's lack of procedural compliance with SEPA. ...

This legal issue raises a "failure to act" question. The crucial question presented is quite limited -- whether the City failed to conduct the required environmental review and issue notice? *It remains a question of fact whether the City performed any SEPA analysis prior to adopting the Ordinance*. ...

Id. at 2 (emphasis supplied).

More recently, in *MBA/Camwest v. City of Sammamish*, CPSGMHB Case No. 05-3-0027, Final Decision and Order (August 4, 2005), the challenge revolved around whether the SEPA exemption for emergency legislation applied to a six-year enactment. As in *Morris*, in *MBA/Camwest* it was undisputed that no SEPA threshold determination had been made; in fact, the City characterized the ordinance as subject to a SEPA exemption:

According to Petitioners, SEPA requires the City to issue, at a minimum, a threshold determination that would identify potential impacts to the physical environment and to such factors as affordable housing. *Id.*

The City denies that SEPA analysis is required. City Response, at 17. The City further contends that the SEPA challenge is barred because MBA failed to file a SEPA appeal to the City's hearing examiner and therefore has not exhausted administrative remedies. *Id.*

The Board agrees with Petitioners.... It is undisputed that the City *failed to conduct any SEPA analysis* prior to extending its six-year moratorium.

Id. at 17-18 (emphasis supplied). Relying on the Washington Supreme Court reasoning in *Byers v. Board of Clallam County Commissioners (Byers)*, 84 Wn.2d 796, 800, 529 P.2d 823 (1974) (holding that an "interim zoning" ordinance effective for four years is a "misnomer" and should have been adopted pursuant to the procedural requirements of the Planning Enabling Act [pre-GMA] and SEPA) the Board ruled that SEPA procedural requirements must be met.

In the present matter, the dispute at the heart of the case is whether Ordinance No. 336-2005 stands on its own as a zoning code amendment subject to GMA and SEPA procedural requirements or whether it is a “corrective ordinance” or housekeeping measure such that the county can rely on the public process and SEPA review conducted in connection with Ordinance No. 311-2003. KCRP’s challenge to Ordinance No. 336-2005 is essentially a “failure-to-act” challenge – a question to be decided on the merits. At this stage of the Board’s review, “*It remains a question of fact whether the City performed any applicable SEPA analysis prior to adopting the Ordinance.*” *Morris, supra*, at 2. The Board’s therefore **defers its ruling** on the motion to dismiss for lack of SEPA standing.

Conclusion

The Board finds that KCRP’s challenge to Ordinance No. 336-2005 is timely. Kitsap’s Motion to Dismiss the petition as untimely is denied.

The Board takes under advisement Kitsap’s Motion to Dismiss for lack of SEPA standing, together with the related briefs and exhibits submitted by the parties and **defers its ruling** concerning SEPA until hearing and decision on the merits.

III. ORDER

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

- Petitioner’s Motion to Supplement has been **withdrawn**.
- Kitsap County’s Motion to Strike is **denied**. The Board supplements the record as indicated in this Order, *supra* [at 3].
- The Board having found that the Petition for Review filed by Petitioner KCRP was timely, Kitsap County’s motion to dismiss the petition as untimely is **denied**.

The Board takes under advisement the briefs and exhibits of the parties with regard to SEPA standing and defers its ruling on the pending portion of Kitsap County’s motion to dismiss for lack of SEPA standing until hearing and decision on the merits.

So ORDERED this 20th day of October, 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Margaret Pageler
Board Member

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member