CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

DYES INLET PRESERVATION COUNCIL, Petitioner, v. KITSAP COUNTY, Respondent, and ROYAL BAY, LLC, Intervenor.	)	**Case No. 07-3-0021c**[1] ***(Dyes Inlet)*** **FINAL DECISION AND ORDER**

SYNOPSIS

*In late December 2006, Kitsap County completed its review and update of its Comprehensive Plan and development regulations. Shortly thereafter, the County's action was challenged by Dyes Inlet Preservation Council (**DIPC**), an organization founded in the early 1990's to protect and preserve the sensitive shorelines surrounding Dyes Inlet near Silverdale.*

*Although DIPC had been active participants in the County's land use-permitting process near Dyes Inlet, and in various planning advisory groups of the County, this was the first time DIPC had filed a petition for review (**PFR**) before the Board challenging the County's GMA Plan and implementing regulations.*

While DIPC had legitimate concerns about the County's decision to change a land use and zoning designation for a 5-acre parcel near Dyes Inlet to allow substantial development over what had been previously allowed, Petitioner framed its issues in the PFR in an awkward and imprecise way. In briefing, the arguments presented, though

[1] Originally, William J. Reedy's petition for review was consolidated with this matter. However, Mr. Reedy and his PFR were dismissed in the Board's May 3, 2007 Order on Motions. Consequently, Dyes Inlet Preservation Council is the only Petitioner.

sincere, were not within the parameters of the Legal Issues framed in the PFR or the Board's Prehearing Order. Consequently, the Board agreed with the County's assertion that the arguments made in briefing were unrelated and beyond the scope of the issues presented to the Board to decide. Therefore, the Board was compelled to dismiss DIPC's challenge. The matter was ***dismissed.***

I. BACKGROUND[2]

In December of 2006, the Kitsap County Commissioners adopted Ordinance No. 370-2006 (*hereafter* **Plan Update**). This ordinance was one of the primary enactments of the County to complete its Plan Update as required by the Growth Management Act (**GMA** – Chapter 36.70A RCW).

In February of 2007, Dyes Inlet Preservation Council (**DIPC**)[3] filed a petition for review (**PFR**) challenging the County's Plan Update. DIPC's challenge was focused on the reclassification of a 5.5 acre parcel of land near Dyes Inlet. The reclassification allowed more intensive use and development than had previously been permitted. DIPC perceived the County's action as a threat to Dyes Inlet and its shorelines.

The Board issued a Notice of Hearing setting a prehearing conference (**PHC**) in March. Prior to the PHC, Royal Bay LLC moved to intervene on behalf of the County. At the PHC, Royal Bay LLC was granted intervenor status. At the PHC, Petitioner presented a timely "Amended Petition for Review" which added an additional issue to the original four identified in the PFR. Within days of the PHC, the Board issued its prehearing order (**PHO**) setting forth the final schedule and issues to be decided by the Board. A corrected PHO was subsequently issued to reflect modifications to the Statement of the Legal Issues as agreed to by the parties at the PHC.

The record in this matter was largely contained within the Amended Index provided by the County. As part of the record, the Board utilized several Core Documents filed by the County from a prior proceeding. Only one supplementary exhibit was requested and admitted by the Board in its May 3, 2007, Order on Motions. Within this same Order, the Board also dismissed a Legal Issue posed by Petitioner for lack of standing under the State Environmental Policy Act (**SEPA**).

In late May and early June, the Board received the briefing and exhibit submittals of the parties. Hereafter, the briefing is referred to as follows:

- Petitioner Dyes Inlet Preservation Council's Prehearing Brief – **DIPC PHB**
- Respondent Kitsap County's Response Brief – **Kitsap Response**
- Intervenor Royal Bay LLC's Response Brief – **Royal Bay Response**

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[2] *See* Appendix A for the complete procedural history of this case.
[3] DIPC is a nonprofit corporation, apparently composed of property owners in the area and organized in the early 1990's to preserve and protect Dyes Inlet and its shorelines.

- Petitioner's Reply Brief – **DIPC Reply**

On June 28, 2007, the Board held the Hearing on the Merits (**HOM**) in Kitsap County at the Eagles Nest Room at the Kitsap County Fairgrounds, 1200 NW Fairgrounds Road, Bremerton, WA. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present. The Board's Law Clerk, Julie Taylor, and Extern, Linda Jenkins, were also present for the Board. Petitioner Dyes Inlet Preservation Council was represented by David Bricklin and Phil Best. Respondent Kitsap County was represented by Lisa J. Nickel and Andrew S. Lane. Intervenor Royal Bay LLC was represented by Richard B. Shattuck [Rick Cadwell and Craig Huish]. Court reporting services were provided by Barbara L. Brace of Byers and Anderson, Inc. The following persons also attended the HOM to observe: Eric Baker, Angie Silva, Mary Bertrand, Chris Dunagan, Tracy Osborne, Tom Donnelly, John Taylor and Michele McFadden. The hearing convened at 10:00 a.m. and adjourned at approximately 11:45 a.m. The Board did not order a transcript of the proceeding.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions are in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). As articulated most recently by the Supreme Court, "the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance." *Lewis County v. Western Washington Growth Management Hearings Board (**Lewis County**)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

Petitioner challenge Kitsap County's adoption of Ordinance No. 370-2006, Kitsap County's 10-year Plan Update; specifically, Petitioner challenge one Plan designation affecting approximately 5.5 acres of land near Dyes Inlet. Pursuant to RCW 36.70A.320(1), this Ordinance is presumed valid upon adoption. The burden is on the Petitioner to demonstrate that Kitsap County's action is not in compliance with the Act. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the actions taken by [Kitsap County] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the action of Kitsap County clearly erroneous, the Board must be "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, 849 P.2d 646 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to Kitsap County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The Supreme Court has stated: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005). In *Lewis County*, the Court reaffirmed and clarified its holding in *Quadrant*, stating that: "… the GMA says that Board deference to county decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds." 157 Wn. 2d at 506, fn. 16.[4]

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to only those issues presented in a timely petition for review. RCW 36.70A.290(1).

III. BOARD JURISDICTION, PREFATORY NOTE and PRELIMINARY MATTERS

A. BOARD JURISDICTION

The Board finds that Dyes Inlet Preservation Council's PFR was timely filed, pursuant to RCW 36.70A.290(2); DIPC has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amends the County's Comprehensive Plan (the Plan Update), pursuant to RCW 36.70A.280(1)(a).

B. PREFATORY NOTE

The Action Challenged:

Ordinance No. 370-2006 is Kitsap County's 10-Year Comprehensive Plan Update. While the Plan Update made many and various changes to the County's GMA Comprehensive Plan, Petitioner focuses its challenge on the reclassification of approximately 5.5 acres of property (the **Kenlon property**) in the unincorporated

[4] The *Lewis County* majority is in accord with prior rulings that "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). See also, *Cooper Point Association v. Thurston County*, 108 Wash. App. 429, 444, 31 P.3d 28 (2001) ("notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent' with the requirements and goals of the GMA"); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002).

County, but also within the Silverdale Urban Growth Area (**UGA**). The Kenlon property is in close proximity to Dyes Inlet and its shoreline. This property was reclassified on the Future Land Use Map (**FLUM**) from Urban Low Density Residential to Urban Medium/High Density Residential. A corresponding amendment was made to the County's zoning map, changing the designation from Urban Restricted (UR – 1-5 dwelling units per acre) to Urban High Density Residential (UH – 19-30 dwelling units per acre).

Of the five Legal Issues posed for the Board to resolve, only four remain. The Board first addresses Legal Issue 3, pertaining to notice and public participation; then the Board combines its discussion of Legal Issues 1, 2 and 4, pertaining to compliance with the goals of the Act and consistency.

C. PRELIMINARY MATTERS

Oral Rulings at the HOM:

There were no new motions to supplement the record or requests for the Board to take official notice of proposed exhibits attached to briefing.

However, in Petitioner's Prehearing Brief, DIPC did include a "Motion for Reconsideration" pertaining to this Board's May 3, 2007, Order on Motions that dismissed DIPC's Legal Issue 5 for lack of SEPA standing. DIPC PHB, at 37-39. Kitsap County "Answered" in its June 18, 2007, Response Brief. *See* Kitsap Response, at 14-15.

The Board's Rules of Practice and Procedure, at WAC 242-02-832, allow a party to file a motion for reconsideration of a final decision of the Board within 10-days of service of the decision. Here, the final decision at issue, the Board's Order on Motions, was issued and served on May 3, 2007. Petitioner did not file the Motion to Reconsider until the Prehearing Brief was filed on May 24, 2007, past the 10-day filing period. Consequently, DIPC's motion was untimely and the Board **denies** DIPC's motion.

IV. ABANDONED and/or NEW ISSUES

The Board's Rules of Practice and Procedure provide:

> A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue*. Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied).

Additionally, the Board's April 2, 2007 PHO in this matter states: "**Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits**." PHO, at 8 (emphasis in original). *See City of Bremerton, et al., v. Kitsap County*, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5*; and Tulalip Tribes of Washington v. Snohomish County*,, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7.

Also, the Board has stated, "Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned." *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.

Further, RCW 36.70A.290(1) properly constrains the Board's review. It provides, in relevant part,

> *The board shall not issue advisory opinions on issues not presented and to the board in the statement of the issues* [*i.e.* the statement of Legal Issues in the PFR], as modified by any prehearing order.

(Emphasis supplied).

Additionally, WAC 242-02-210(2)(c), *requires* that a PFR contain:

> A *detailed statement of the issues presented for resolution by the board that specifies the provision of the act or other statute allegedly being violated* and, if applicable, the provision of the document that is being appealed.

(Emphasis supplied).

In other words, it is the Legal Issues in the PHO[5] that frame the questions the Board is asked to address. Briefing and argument on issues that are beyond the scope of the Legal Issues presented in the PHO are **new issues** which the Board cannot address, per .290(1). Any such issue and argument that appears in briefing will be ignored by the Board and dismissed. The Board will only address the Legal Issues from the PHO that are briefed by Petitioner. Petitioner must demonstrate (through evidence and argument) that the action challenged does not comply with the specific goals or requirements set forth in the statement of the Legal Issue in the PHO.

[5] Often the Statement of Legal Issues in the PHO merely replicates the statement of issues from the PFR; on occasion, the original statement(s) of issues are modified after discussion at the PHC, and it is the result that is reflected in the Statement of Legal Issues in the PHO.

In the present matter, Kitsap County has argued in its briefing that Petitioner DIPC has abandoned virtually all Legal Issues or raised new issues in briefing that were not within the scope of the PFR or the PHO. The Board addresses these arguments in its discussion *infra*.

V. LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUE NO. 3

The Board's PHO set forth Legal Issue No. 3:

3. *Did the County comply with the public participation and notice provisions of RCW 36.70A.035(1)(a) and (c)?*

Applicable Law

RCW 36.70A.035(1) provides, in relevant part:

> 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 regulations. Examples of reasonable notice provisions include:
>
> a. *Posting the property for site-specific proposals*;
> b. Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
> c. *Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered*;
> d. Placing notices in appropriate regional, neighborhood, ethnic or trade journals; and
> e. Publishing notice in agency newsletters or sending notice to agency mailing lists, including general mailing lists or lists for specific proposals or subject areas.

(Emphasis supplied).

The *italicized* sections noted *supra*, are the provisions of the GMA that Petitioner challenged in its PFR Issue Statement – RCW 36.70A.035(1)(a) and (c). In DIPC's March 22, 2007 Amended PFR, Petitioner explains:

> This issue addresses the failure to post this property as to a site-specific proposal to radically upzone this particular property [5.5 acre Kenlon

> property] from 1-4 DU/Ac to 19-30 DU/Ac and to remove the environmental sensitive protection it had as an Urban Restricted and part of an "Open Space Study Area." It also addresses the failure to notify the Petitioner, Dyes Inlet Preservation Council, which had a known interest in this proposal as a party in prior litigation that resulted in Kitsap County recognizing this parcel as part of a sensitive area included in a designated "Open Space Study Area." A second part of this issue is whether the County may use the ten-year comprehensive plan update as a vehicle for rezoning this particular parcel and bypass the usual notice requirements?

Amended PFR, at 3.

Discussion

Position of the Parties:

The Board notes that Petitioner did not organize its briefing by each of the four Legal Issues. However, Section III of Petitioner's briefing is headed: "The County violated its public participation standards by reclassifying the Kenlon parcel as part of the 2006 ten-year comprehensive plan update." DIPC PHB, at 19.

In its briefing under this heading DIPC argues that: 1) Goal 11 requires the County to encourage citizen involvement in the planning process; 2) .035(2) requires public participation to be provided for amendments to Plans and development regulations; 3) .140 requires the County to establish and broadly disseminate its public participation procedures; 4) the County passed Resolution 045-2006 which laid out its public participation process for the Plan Update and excluded site specific amendments to reclassification requests, such as the Kenlon property, from consideration during the Plan Update process; and 5) although DIPC was aware of and participated in the Plan Update process [in relation to the Kenlon parcel] the County cannot be excused from its faulty notice and public process. DIPC PHB, at 19-22.

In response, the County argues that Legal Issue No. 3 has been abandoned. Kitsap Response, at 10. The County contends that "Nowhere within Section III – in fact, nowhere within the 40-page brief – is there a reference to this provision [RCW 36.70A.035(a) and (c)." *Id*. Therefore, the County asserts the issue must be dismissed. *Id*.

Intervenor Royal Bay LLC "joins the positions outlined in Kitsap County's Prehearing Brief." Royal Bay Response, at 1.

In reply, DIPC asserts that the County and Intervenor are avoiding the merits of its case by relying upon procedural arguments – abandonment and new issues assertions. DIPC Reply, at 2 and 8-14. DIPC then contends that all its argument in briefing falls within its Amended PFR. *Id*. at 2. Petitioner explains that the reclassification is inconsistent with

dozens of policies in the Plan, as evidenced by comment letters in the record. *Id.* [apparently referring to Exs. 29786 and 30029).

Board Discussion:

While it is true that Petitioner discusses its concern with the reclassification of the Kenlon property in the Amended PFR, it is the Legal Issues that frame the questions the Board is asked to address. In short, here Petitioner must demonstrate that the reclassification did not comply with specific goals and requirements of the Act. The Legal Issue here is specific to the GMA's notice provisions contained in RCW 36.70A.035(1)(a) and (c). The Board concurs with the County that DIPC offers no argument at all in its briefing to demonstrate noncompliance with these sections of the Act. The explanation provided by DIPC along with its framing of the issue does not even relate to the issue as framed. In fact, the "examples of reasonable notice provisions" listed in .035(1) are not mandatory components that must be included in each GMA planning jurisdiction's public participation program – they are simply "examples." Consequently, if a jurisdiction does not include any of them, it is not a defect so long as reasonable notice is provided. The Board finds and concludes that Legal Issue 3 is **abandoned** and is **dismissed**.

Additionally, the primary argument offered by Petitioner in its briefing was not within the scope of Legal Issue No. 3. The new issue asserts that the County did not follow the process outlined in Resolution 045-2006 for the Plan Update. While this issue was not properly framed for the Board to decide, the Board notes that: 1) the Kenlon re-classification proposal was initiated in 2005 as part of the Silverdale Sub-area Plan development and review process (*See* Ex. 29875); 2) Resolution 079-2005 established the public participation procedures for that process and stated, "Individuals may request consideration of amendments through the Port Orchard/South Kitsap, Kingston, *Silverdale* and Suquamish sub-area planning processes already underway. . ." (Emphasis supplied, *See*, Ex. 31102); 3) Resolution 045-2006 provides that site-specific requests will not be accepted during the 2006 Plan Update, but reading the provisions in context, it is clear that this provision was directed at *new* proposals, not proposals that were already part of the sub-area plan process, which were explicitly part of the Plan Update (*see* Ex.30741 and Ex. 30639[6]); and 4) DIPC was an involved participant in the Plan Update Process at least in September, well before the County adopted the Plan Update in December of 2006. So even if DIPC had properly brought this issue to the Board, the argument would fail.

Conclusion

Legal Issue No. 3, challenging the County's compliance with RCW 36.70A.035(a) and (c), is deemed **abandoned** and **dismissed**.

[6] This 2-page Executive Summary memo specifically states that, "The 10-year Review and Update will focus on the six main items: [The first item listed is] Incorporation of the Sub-area Plans for Kingston, Port Orchard/South Kitsap and *Silverdale*."

B. LEGAL ISSUE NOS. 1, 2 and 4.

The Board's PHO set forth Legal Issue No. 1, 2 and 4 as follows:

1. *Did Kitsap County (**the County**) fail to be guided by planning goals set forth in RCW 36.70A.020(1) and the facilities and service requirements of RCW 36.70A.070**(1) and (3)**?*

2. *Did the County fail to be guided by environmental and open space planning goals set forth in RCW 36.70A.020(9) and (10)?*

4. *Did the County comply with the mandatory comprehensive plan elements of RCW 36.70A.070**(1), (2) and (3)**, and that they be implemented by appropriate development regulations as required by RCW 36.70A.040?*

4/2/07 PHO, at 8; (emphasis in original).

Applicable Law

RCW 36.70A.020 sets forth the Goals of the GMA. Goal 1 – urban growth – [RCW 36.70A.020(1), Goal 9 – open space and recreation – [RCW 36.70A.020(9)] and Goal 10 – environment – [RCW 36.70A.020(10)] provide:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water and develop parks and recreation facilities.
>
> (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

RCW 36.70A.070 lists the mandatory elements that GMA plans must contain. RCW 36.70A.070(1) details the requirements for a land use element; RCW 36.70A.070(2) details the requirements for a housing element; and RCW 36.70A.070(3) details the mandatory components of a capital facilities element.

The preamble to these sections of RCW 36.70A.070 reads as follows:

> The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, descriptive

> text covering objectives, principles and standards use to develop the comprehensive plan. *The Plan shall be an internally consistent document and all elements shall be consistent with the future land use map*. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.
>
> Each comprehensive plan shall include a plan, scheme, or design for each of the following: [the mandatory elements are listed and described].

(Emphasis supplied).

Discussion

Position of the Parties:

As noted *supra*, the Petitioner did not organize its briefing by each of the Legal Issues stated in the Amended PFR or PHO. Instead, DIPC provided its own headings to each section of briefing. Section IV is titled "Reclassification of the Kenlon Parcel from Urban Restricted to Urban High is Inconsistent with the County's Comprehensive Plan.[7]" DIPC PHB, at 23.

Under this heading Petitioner argues that: 1) the GMA supports designation of the Kenlon parcel as Urban Restricted; and 2) reclassification of the Kenlon parcel to Urban High is inconsistent with the County's Comprehensive Plan. *Id*. at 23, and 26, respectively. The thrust of the first contention is that Dyes Inlet and its shoreline is a critical area that is required to be protected by the GMA and the prior designation permitting lower density affords this protection. *Id*. at 23-26. In the second argument, DIPC cites numerous Silverdale Subarea Plan and County Comprehensive Plan goals and policies and then Petitioner asserts that the reclassification of the Kenlon Parcel does not meet the noted goals and policies, but instead thwarts them. *See* DIPC PHB, at 26- 36

In response, Kitsap County again argues that Petitioner has abandoned all framed issues and briefed new ones. Kitsap Response, at 8. Pertaining to Legal Issue No. 1, the County argues that Petitioner fails to mention, let alone argue, noncompliance with RCW 36.70A.020(1), .070(1) or (3) anywhere in its brief. *Id*. For Legal Issue No. 2, the County contends that the Petitioner has only set forth a conclusory statement that does not explain how the law applies to the facts before the Board and quotes the following from the DIPC PHB as the sum and substance of Petitioner's argument,

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[7] The five headings in the DIPC brief are: **I.** Summary of Argument, **II**. Statement of Facts, **III**. The County Violated its Public Participation Standards by Reclassifying the Kenlon parcel as Part of the 2006 Ten-year Comprehensive Plan Update, **IV**. Reclassification of the Kenlon Parcel from Urban Restricted to Urban High is Inconsistent with the County's Comprehensive Plan; and **V**. This Board Should Reconsider Its Ruling Dismissing DIPC's SEPA Issue. *See* DIPC PHB.

> The Amendments must also be consistent with the GMA goals. RCW 36.70A.130(b). For the reasons identified above in section IV(B), the Kenlon reclassification request is inconsistent with Goals 9 (Opens Space and Recreation) and 10 (Environment). RCW 36.70A.020(9), (10).

Kitsap Response, at 9, citing DIPC PHB, at 37.

Regarding Legal Issue No. 4, the County reiterates its prior assertions – namely, that Petitioner has consistently failed to identify any argument addressing the Legal Issues to be decided by the Board. *Id*. at 11. The County concludes by arguing that DIPC has not identified or presented any argument relating to the RCW provisions cited in the Legal Issue Statements. *Id*. Finally, the County argues the internal inconsistency arguments are new and not within the Legal Issues stated for the Board to resolve. The County points to RCW 36.70A.290(1) which prohibits the Board from issuing advisory opinions on issues not raised in the PFR and stated in the PHO. *Id.*

Again, Royal Bay LLC joins the County's arguments. Royal Bay Response, at 1.

In reply, DIPC again contends that both the County and Intervenor are avoiding the merits of its case and that all its argument in briefing fall within its Amended PFR. *Id*. at 2 and 8-14.

<u>Board Discussion</u>:

To address the question of abandonment, the Board looked to the explanations provided by DIPC for each of the framed Legal Issues. For Legal Issue No. 1, asserting noncompliance with Goal 1 and the requirements for a land use and capital facilities element and capital facilities element (RCW 36.70A.070(1) and (3)), DIPC explains,

> This issue addresses the county creating the most intense urban growth designation of Urban High Residential (19-30 DU/Ac) where the reclassification request evaluation prepared on this particular request by the county's consultant found only Low adequacy of public services and facilities, and Medium suitability as to on-site/off-site effect, and Medium consistency with county policies and goals.

Amended PFR, at 2.

For Legal Issue No. 2, asserting noncompliance with Goals 9 and 10, DIPC explains,

> This issue addresses the requirements to retain open space and protect the environment as to this parcel, which was previously included in an "Open Space Study Area" recognized by Kitsap County, and identified in the prior comprehensive plan and zoning ordinance as Urban Restricted

> because of these factors, including wetlands and a known problematic storm water runoff contributing to highly polluted designation of the north end of Dyes Inlet by health authorities.

Amended PFR, at 3.

For Legal Issue No. 4, alleging noncompliance with the GMA requirements for the land use, housing and capital facilities element (RCW 36.70A.070(1), (2) and (3), and the requirement that development regulations implement the plan (RCW 36.70A.040), DIPC explains,

> This issue addresses the confused discussion and application of apparently conflicting criteria and decisions by the county: (1) the area is evidently within the "Discussion Areas for the Silverdale Sub-Area Plan" which should not have made the request for reclassification not permitted under the county resolution authorizing land use reclassification requests; 2) the Silverdale Sub-Area Plan (Chapter 14 of the Comprehensive Plan) mentions the designation of the Silverdale "Regional Growth Center by the Puget Sound Regional Council . . . in recognition of the future potential residential and commercial growth anticipated in this area," and leaves the property bordering but outside the "Regional Growth Center" boundary.

Amended PFR, at 3.

None of these explanations identify any Silverdale Sub-Area or County Comprehensive Plan policies with which the Kenlon property is allegedly inconsistent. Nor do they explain anything about the RCW requirements included in the statement of the Legal Issues as contained in the PHO. Additionally, the basis for challenges to the internal consistency of Plans is found in the preamble, not within the subsections of RCW 36.70A.070. Further, Petitioner did not object to the Statement of the Legal Issues presented in the April 2, 2007 PHO. The Board's Rules of Practice and Procedure add a measure of assurance that the Legal Issues are adequately represented in the PHO, since WAC 242-02-558(10)[8] allows a party to object to the PHO. DIPC filed no objection to the Statement of the Legal Issues as stated in the PHO. Therefore, the Respondent and the Board are anticipating arguments germane to the Legal Issues as framed in the PHO. Here, DIPC's arguments are far afield from the allegations contained in the Statement of the Legal Issues. Therefore, the Board finds and concludes that Legal Issues 1, 2 and 4 are abandoned and dismissed.

[8] This section of the WAC provides in relevant part, "Any objection to such order [PHO] shall be made in writing within seven days after the date the order is issued."

Conclusion

Legal Issue Nos 1, 2 and 4 challenging the County's compliance with RCW 36.70.020(1), (9), (10), RCW 36.70A.040, and RCW 36.70A.070(1), (2) and (3) are deemed **abandoned** and **dismissed**.

VI. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

> Petitioner Dyes Inlet Preservation Council's Legal Issues 1, 2, 3 and 4 are **dismissed with prejudice**.
>
> The matter of *Dyes Inlet Preservation Council v. Kitsap County*, CPSGMHB Case No. 07-3-0021c is **closed**.

So ORDERED this 20th day of August, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
David O. Earling
Board Member

_____
Edward G. McGuire, AICP
Board Member

_____
Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[9]

[9] Pursuant to RCW 36.70A.300 this is a final order of the Board.

BOARD COMMENT

The Board acknowledges and understands that Dyes Inlet Preservation Council has, for over a decade, been working vigilantly to protect a sensitive tidal area of Kitsap County – Dyes Inlet. DIPC has successfully made its presence known and injected itself into project-specific proposals for years. DIPC has also been an active participant with the County's Planning Advisory Committees. The result of DIPC's participation in project-specific proceedings has been several negotiated agreements with conditions to mitigate potential impacts to Dyes Inlet and its environs.

In short, DIPC has been an active and effective "watchdog" of the County's land use planning activities in the Silverdale area. However, DIPC's initiation into the Board's GMA review process was unsuccessful because of its failure to adhere to the procedural requirements of the Act [RCW 36.70A.290(1)] and follow the Board's procedural rules [WAC 242-02-210(2)(c)]. DIPC should *take heed* to frame its issues carefully and concisely to ensure that its concerns will be decided on the merits. And although the County prevailed in this matter, the County should *take heed* of significant contributions that groups like DIPC make to the County's planning efforts. DIPC has expended significant resources in participating in good faith in the County's planning process, at all levels. Recommendations and proposals such as the "Open Space Study Area" should be taken to heart by the County and seriously considered by the entity that can do something about it – the County - rather than arguing that DIPC never developed and proposed regulations to actually implement such a program. Development of such a program or regulations falls within the realm of County government, not a citizens' group. The Board trusts that the County and DIPC will continue to work closely together to resolve their mutual concerns and interests.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

APPENDIX A

Procedural Background

A. General

On February 20, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from William J. Reedy (**Petitioner** or **Reedy**). The matter was assigned Case No. 07-3-0020, and is captioned, *Reedy v. Kitsap County*. Board member Edward G. McGuire will serve at the Presiding Officer (**PO**) for this matter. Petitioner apparently challenges Kitsap County's (**Respondent, Kitsap** or the **County**) adoption of Ordinance No. 370-2006[10] amending Kitsap County's Comprehensive Plan (the **Plan Update**). Petitioner contends that certain provisions of the County's Plan Update are noncompliant with several provisions of the Growth Management Act (**GMA** or **Act**) and the State Environmental Policy Act (**SEPA**).

Also on February 20, 2007, the Board received a PFR from the Dyes Inlet Preservation Council (**Petitioner** or **DIPC**). The matter was assigned Case No. 07-3-0021, and is captioned *Dyes Inlet Preservation Council* v. *Kitsap County*. Board member Edward G. McGuire will also serve at the PO for this matter. Petitioner challenges Kitsap County's adoption of Ordinance No. 370-2006 amending Kitsap County's Comprehensive Plan – the Plan Update. Petitioner contends that certain provisions of the County's Plan Update are noncompliant with various provisions of the Growth Management Act (**GMA** or **Act**).

On February 22, 2007, the Board issued its "Notice of Hearing and Consolidation" in the above-captioned case. The Order set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case. The two matters were consolidated into CPSGMHB Consolidated Case No. 07-3-0021c and captioned as *Dyes Inlet, et al., v. Kitsap County*.

On March 13, 2007, the Board received "Motion for Intervention by Royal Bay LLC as to the Petition of Dyes Inlet Preservation Council."

On March 22, 2007, the Board conducted the prehearing conference (**PHC**). At the PHC, Petitioner Dyes Inlet Preservation Council (**DIPC**) filed an "Amended Petition for Review" (Amended PFR). The Amended PFR added an additional Legal Issue – No. 5 – pertaining to compliance with the State Environmental Policy Act (SEPA). The filing was timely pursuant to WAC 242-02-260(1). The Board accepted the Amended PFR without argument.

[10] Petitioner Reedy appears to focus on the Port Orchard UGA and subsequent change in designations.

On March 26, 2007, the Board issued its "Prehearing Order and Order on Intervention" (**PHO**). The PHO granted Intervenor status to Royal Bay LLC on behalf of the County, and the PHO established the final schedule and the Legal Issues to be decided by the Board.

On April 2, 2007, the Board received "Motion to Correct Prehearing Order" from Kitsap County. The County's motion noted that Petitioner agreed to clarify Legal Issues 1 to allege a violation of RCW 36.70A.070(1) and (3) and to clarify Legal Issue 4 to allege a violation of RCW 36.70A.070(1), (2) and (3). The Board agreed.

On April 2, 2007, the Board issued a "(Corrected) Prehearing Order and Order on Intervention." The Legal Issues to be decided by the Board are reflected in this Order.

B. Motions to Supplement the Record and Amend the Index

On March 22, 2007, the Board received Kitsap County's "Ten-Year Comprehensive Plan Update – Index to the Record" (Index). The Index contains 73 pages with approximately 25 items listed on each page.

Core Documents: The Board agreed to use the Core Documents, labeled A through G, in a prior case [CPSGMHB Case No. 06-3-0007] involving Kitsap County's 10-year Plan Update. The Core Documents, received January 11, 2007, included: the County's 10-year Plan Update, DEIS, FEIS, amendments to the Kitsap County Code [development regulations and zoning] and four "approval matrices."

On April 12, 2007, the Board received: 1) "DIPC's Motion to Supplement" (**DIPC Motion – Supp.)**, with 9 attached proposed exhibits [Exs. 1, 2, 3a, 3b, 3c, 4a, 4b, 4c, and 4d].

On April 24, 2007, the Board received "Kitsap County's Response to DIPC's Motion to Supplement" (**Kitsap Response – Supp.**), including a "Ten Year Comprehensive Plan Update – Index to the Record – Amended" (**Amended Index**).[11]

On April 27, 2007, the Board received: 1) "Reply in Support of DIPC's Motion to Supplement" (**DIPC Reply – Supp.)**

The filings were timely. The Board did not hold a hearing on the motion to supplement.

On May 3, 2007, the Board issued its "Order on Motions" **granting** Petitioner's motion to add an Exhibit – Supplemental Exhibit No. 1. The Order summarized the items comprising the record in this case.

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[11] The County noted that all items sought to be added to the record by Petitioner were included in the Amended Index. However, one item was an updated version of a proposed Exhibit [No. 2] by Petitioner. Nonetheless, in reply, Petitioner asked that the older proposed Exhibit 2 be added to the record.

C. Dispositive Motions

On April 13, 2007 the Board received "Kitsap County's Motion to Dismiss Petitioner Reedy and Petitioner Dyes Inlet's Issue No. 5" (**Kitsap Motion – Dismiss**), including a Declaration by Angie Silva.

On April 24, 2007, the Board received "DIPC Response to Kitsap County's Motion to Dismiss DIPC's Issue No. 5" (**DIPC Response – Dismiss**). The Board did not receive any response to the County's motion from Petitioner Reedy.

On April 30, 2007, the Board received "Kitsap County's Rebuttal Re Motion to Dismiss" (**Kitsap Reply – Dismiss**).

All filings were timely. The Board did not hold a hearing on the motions.

On May 3, 2007, the Board issued its "Order on Motions" **granting** the County's motion to **dismiss** Petitioner Reedy for lack of standing and **dismiss** DIPC's Legal Issue 5, also for lack of standing.

D. Briefing and Hearing on the Merits

On May 24, 2007, the Board received "DIPC's Opening Brief" (**DIPC PHB**), with a list of exhibits and 16 tabbed exhibits [2 Appendices(A – B), 13 record exhibits and one supplemental exhibit.]

On June 18, 2007, the Board received "Kitsap County's Prehearing Brief" (**Kitsap Response**), with a list of exhibits and two attached tabbed record exhibits.

On June 18, 2007, the Board received "Intervenor Royal Bay, LLC's Prehearing Brief" (**Royal Bay Response**), with a list of exhibits and eight untabbed record exhibits.

On June 21, 2007, the Board received "DIPC's Reply in Support of Opening Brief" (**DIPC Reply**), not exhibits were attached.

On June 28, 2007, the Board held a hearing on the merits (**HOM**) in Kitsap County at the Eagles Nest Room at the Kitsap County Fairgrounds, 1200 NW Fairgrounds Road, Bremerton, WA. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present. The Board's Law Clerk, Julie Taylor, and Extern, Linda Jenkins, were also present for the Board. Petitioner Dyes Inlet Preservation Council was represented by David Bricklin and Phil Best. Respondent Kitsap County was represented by Lisa J. Nickel and Andrew S. Lane. Intervenor Royal Bay LLC was represented by Richard B. Shattuck [Rick Cadwell and Craig Huish]. Court reporting services were provided by Barbara L. Brace of Byers and Anderson, Inc. The following persons also attended the HOM to observe: Eric Baker, Angie Silva Mary Bertrand, Chris Dunagan, Tracy Osborne, Tom Donnelly, John Taylor and Michele McFadden. The

hearing convened at 10:00 a.m. and adjourned at approximately 11:45 a.m. The Board did not order a transcript of the proceeding.