CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

DYES INLET PRESERVATION COUNCIL AND WILLIAM REEDY,	)	**Case No. 07-3-0021c**
Petitioners,	)	***(Dyes Inlet)***
v.	)	
KITSAP COUNTY,	)	**ORDER on MOTIONS**
Respondent,	)	
ROYAL BAY, LLC,	)	
Intervener.	)	

I. PROCEDURAL HISTORY

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 I** or **Reedy**). The matter was assigned Case No. 07-3-0020, and is captioned, *Reedy v. Kitsap County*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner apparently challenges Kitsap County's (**Respondent, Kitsap** or the **County**) adoption of Ordinance No. 370-2006[1] 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 II** 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 is also the PO for this matter. Petitioner II also 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 GMA and SEPA.

[1] Petitioner Reedy appears to focus on the sections of this Ordinance that impact Port Orchard UGA and subsequent change in designations.

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**), and on March 26, 2007, the Board issued its "Prehearing Order and Order on Intervention" (**PHO**).[2] 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 24, 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]; and 2) "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: 1) "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**); and 2) "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 27, 2007, the Board received: 1) "Reply in Support of DIPC's Motion to Supplement" (**DIPC Reply - Supp**); and 2) "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.

II. DISCUSSION OF DISPOSITIVE MOTIONS

Motion to Dismiss Petitioner Reedy: - **Granted**

The County moves to dismiss Petitioner Reedy for lack of standing, asserting that Petitioner did not: 1) assert a basis for standing in his PFR; 2) did not establish GMA participation standing; and 3) cannot satisfy the basis for SEPA standing. Kitsap Motion – Dismiss, at 1-5. *Pro se* Petitioner Reedy did not respond to the County's Motion. Lacking such a response, the County asserts that the County's claims against Mr. Reedy

[2] Pursuant to a motion by the County, the Board issued a "Corrected PHO" on March 29, 2007, that included agreed upon clarification of the Legal Issues discussed at the PHC. The Legal Issues to be decided by the Board, are those reflected in the March 29, 2007 Corrected PHO.

are un-rebutted; therefore, the Board must dismiss Mr. Reedy's PFR. Kitsap Reply – Dismiss, at 2.

Pro se Petitioner Reedy filed a "letter" as his PFR. The letter was not in the form required by the Board's Rules of Practice and Procedure. *See* WAC 242-02-210. Nonetheless, the Board has reviewed what appeared to be Mr. Reedy's PFR to discern if the necessary components are included. WAC 242-02-210(2)(d) requires the Petitioner to include in a PFR, "A statement specifying the type and basis of the petitioner's standing before the board pursuant to RCW 36.70A.280(2)." The Board finds that there is no such statement in the document submitted by Mr. as his petition to the Board.

The County also contends that Petitioner Reedy "did not participate, either orally or in writing, in the public participation process surrounding [the County's Plan Update]. Kitsap Motion – Dismiss, at 3; and Silva Declaration. In its motion, the County anticipates a response from Petitioner claiming that notice of the County's pending action was lacking; however, the County counters that extensive notice of the Plan Update was provided "in both the legal newspapers of Kitsap County as well as to over 32,000 individual property owners within and adjacent to the land use alternatives." *Id*. Despite this, the County has found no indication that this Petitioner participated before the County. *Id*. at 3-4. The County also claims that Petitioner "acknowledges this lack of participation by making no allegation of standing in his PFR." *Id*. at 4.

The Board is compelled to agree with the County. The GMA requires that for a petitioner to appear before the Board, a petitioner must have "standing" to bring a challenge to a jurisdiction's compliance with the GMA. Here Petitioner Reedy has offered no basis for standing or even attempted to rebut the County's arguments. In essence, Petitioner Reedy has abandoned his claims. Consequently, the Board finds and concludes that Petitioner Reedy lacks standing to pursue his claims. Therefore, Petitioner Reedy, his PFR, and Reedy Legal Issues 1 and 2, are **dismissed with prejudice** from this consolidated proceeding.

The Board notes that at the PHC, Mr. Reedy and the representatives of the County were exploring other avenues to address Mr. Reedy's concerns and situation. The Board encourages the County, as well as Mr. Reedy, to continue discussions to resolve their dispute by means other than litigation.

Motion to Dismiss DIPC's Legal Issue No. 5: **Granted**

DIPC's Legal Issue No. 5, as stated in DIPC's 3/22/07 Amended PFR, and reflected in the Board's 4/2/07 Corrected PHO, states:

> ***5.*** *Did the County comply with the requirements of the State Environmental Policy Act [SEPA] as it pertains to a programmatic EIS and a more specific analysis of*

the environmental impacts of reclassification and development of the Kenlon Property?

The County argues that although DIPC alleged a SEPA violation in Legal Issue No. 5, DIPC did not allege SEPA standing in the Amended PFR, nor does DIPC meet the test for establishing SEPA standing. Therefore, the County contends, DIPC's Legal Issue No. 5 must be dismissed. Kitsap Motion – Dismiss, at 4, 6-9.

Petitioner claims to have established GMA participation standing, pursuant to RCW 36.70A.280, and by virtue of that fact, asserts DIPC can include Legal Issue No. 5 among the challenged issues. DIPC Response – Dismiss, at 1.

For well over a decade, this Board has disagreed with DIPC's interpretation of RCW 36.70A.280. In *Robison v. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order on Dispositive Motions, (Feb. 16, 1995), at 6-7, this Board held,

> [O]btaining GMA appearance [participation] standing does not automatically bestow SEPA standing upon a petitioner. The GMA and SEPA are two distinct statutes with their own standing requirements that each must be met by petitioners if they intend to challenge actions for not complying with both statutes.

The Board has been directed to nothing that indicates SEPA's standing requirements were amended by the GMA. Neither the Legislature nor the Courts have altered this Board's view of SEPA standing in the context of GMA appeals. Therefore, to challenge a SEPA action, related to a GMA action, SEPA standing must be demonstrated.

DIPC does not dispute that it *did not allege SEPA standing in the Amended PFR.* However, Petitioner notes that in a prior Board case,[3] Petitioner was allowed to cure that deficiency through attachments to briefing when Petitioner's SEPA standing was challenged. "DIPC alleges that its submittals with this brief are likewise enough to allow the Board to reach the SEPA standing issue." DIPC Response, at 3.

It is clear from the Board's review of DIPC's Amended PFR that there is no allegation specifying SEPA standing. *See* 3/22/07 Amended PFR, Section IV, at 4; and WAC 242-02-210(2)(d). However, in DIPC's Response to the County's motion, Petitioner attaches a Declaration of Robert Best and four additional exhibits, at least one of which is identified by Index number from the record below. DIPC Response – Dismiss, Attachments: Best Declaration and Exhibits 1-4. The Board will accept these four submittals as a *pro forma* allegation of SEPA standing. This still leaves the question of whether DIPC has established SEPA standing unanswered.

[3] *MBA/Brink*, 10/21/02 Order, fully cited *infra* in this Order.

The Board's SEPA standing test is based upon the Washington State Court's decisions in *Leavitt*[4] and *Trepanier*.[5] The Board has articulated the test as follows:

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

MBA/Brink v. Pierce County (***MBA/Brink***), CPSGMHB Case No. 02-3-0010, Order on Motion to Dismiss SEPA Claims, (Oct. 21, 2002), at 2 and 6, (emphasis in original).

The County appears to assume that DIPC's interests fall within the zone of interest protected by SEPA; and focuses it challenge on the second prong of the SEPA standing test, *i.e.* DIPC has not identified any existing or threatened injury. Kitsap Motion – Dismiss, at 7-8. In response, DIPC claims that it "will suffer immediate, concrete and specific harm from a reclassification of the Kenlon Property from Urban Restricted to Urban High Density, with a resulting *potential* of 165 dwelling units where only one [dwelling unit] exists now." DIPC Response – Dismiss, at 3; (emphasis supplied).

The Board finds that DIPC acknowledges that there may be "potential" environmental impacts, if development does in fact occur as permitted under the reclassification. The Board further finds and concludes that this reclassification from one land use designation to another may be a threatened injury, but environmental impacts or injuries are not immediate, concrete or specific when such a reclassification occurs; they are conjectural and hypothetical and dependent upon whether any subsequent development occurs.[6] Petitioner DIPC has not satisfied the second prong of the SEPA standing test, and lacks standing to raise Legal Issue No. 5.

The Board notes that "DIPC invites the Board to consider this case in light of footnote 6 to the *MBA/Brink decision*." DIPC Response – Dismiss, at 3. DIPC quotes a portion of that footnote [emphasized *infra* by <u>underlining</u>] here, the Board quotes, in its entirety, footnote 6 states:

> Although the Board has opined that the *Trepanier* test is inappropriate for non-project actions in the GMA context, neither the Legislature nor the Courts have seen fit to alter it. Therefore, the Board must continue to

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[4] *Leavitt v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994).

[5] *Trepanier v. Everett*, 64 Wn. App. 380, 382-383, 824 P.2d 524, *review denied*, 119 Wn.2d 1012 (1992).

[6] The Board notes that project specific environmental review typically occurs at that phase of the development process.

> apply the *Trepanier* two-part SEPA standing test strictly. Further, in light of the durability of the *Trepanier* test, the Board now rejects the suggestion offered in *Pilchuck II*, that the Board might apply the *Trepanier* test more "loosely" or "assume" standing when certain GMA actions are challenged. However, the Board notes that a petitioner that challenges a non-project action that shifted land from one of the GMA's three fundamental and significant land use categories – Resource, Rural or Urban – to a more intensive land use category, could arguably satisfy a strict application of the *Trepanier* SEPA standing test.
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> For example, the continuum of intensity and diversity of uses moves from the least intense on Resource lands (agriculture, forestry and mining) to Rural, then possibly to limited areas of more intensive rural development (LAMIRDs), and finally to Urban. Shifts from limited and *less* intensive uses to diverse and *more* intensive uses, logically raises the potential for increases in significant environmental impacts. It is a reasonable conclusion to draw that when such shifts occur, the *threatened injuries* to protected environmental interests fall within the zone of interests protected by SEPA. 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 the 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 non-project actions. However, even in these limited situations the Board would continue to require petitioners to demonstrate that any administrative remedies have been exhausted.

MBA/Brink, 10/21/02 Order, footnote 6 at 5-6.

DIPC ignores the Board's major premise in this footnote, namely that **shifts from one of the three fundamental and significant land use categories – Resource, Rural or Urban** – could arguably satisfy the strict application of the *Trepanier* test. Here, the shift from Urban Restricted to Urban High Density is *between different Urban designations*, all *within the UGA*. *See* DIPC Response – Dismiss, Best Declaration, at 1-3. The reclassification shift is not between any of the three fundamental and significant GMA land use categories. Consequently, DIPC's attempt to apply footnote 6 in the *MBA/Brink* case to the present matter and meet the *Trepanier* SEPA standing test, is off point.

Petitioner DIPC has not satisfied the second prong of the SEPA standing test, and lacks standing to raise Legal Issue No. 5. DIPC's Legal Issue No. 5 is **dismissed with prejudice**.

III. DISCUSSION OF MOTION TO SUPPLEMENT

DIPC's Motion to Supplement the Record: **Granted**

DIPC asks that nine items be included in the record – attached proposed Exhibits 1, 2, 3a, 3b, 3c, 4a, 4b, 4c and 4d. DIPC Motion – Supp., at 1-4, with attachments.

In response, the County submits an Amended Index that includes proposed Exhibit 1 as Index # 31102 and adds proposed Exhibit 3a as Index # 31103. The County also notes that proposed map Exhibits 3b, 3c, 4a, 4b, 4c, and 4d are already in the record.[7] Kitsap Response – Supp., at 1-5. Regarding proposed Exhibit 2, the County points Petitioner to a similar and updated and modified matrix used by the County in its Plan Update. The County identifies this item as Index # 30984, Appendix E in the DEIS. *Id*. at 4.

In reply, Petitioner acknowledges that the County has either amended the Index to include the propose Exhibits or identified the location of such exhibits in the existing record. However, DIPC still requests that proposed Exhibit 2 be included in the record. DIPC Reply – Supp., at 2-4.

The proposed Exhibit 2 attached to DIPC's motion is entitled "Silverdale Sub-Area Planning Process Land Use Reclassification Requests." It is a matrix showing the type of amendments to be considered in the *County's* 2005 Comprehensive Plan Amendment process. *See* proposed Ex. 2, at 1. The Board notes that Petitioner has challenged the County's [10-year] Plan Update as adopted on December 11, 2006. Nonetheless, Petitioner contends the proposed Exhibit "relates directly to an historical understanding of how the County had decided to process land use reclassification requests in the Silverdale area." DIPC Reply – Supp., at 2.

The Board notes that the "matrix" is merely a list, which includes: 1) the project name; 2) requester; 3) current comprehensive plan designation and zoning ["current" is undefined]; 4) requested comprehensive plan designation and zoning; 5) total acreage; and 6) parcel numbers. *See* proposed Ex. 2. There is no explanation as to how these *2005* proposals were addressed, if at all, by the County. However, some historical context may be important to the Board in addressing DIPC's appeal. Therefore, the Board finds that this document *may be* necessary or *may be* of substantial assistance to the Board in reaching its decision. It will be up to Petitioner to demonstrate the relevance of this Exhibit, if any. Consequently, the Board will **grant** DIPC's request to include this document in the record. Proposed Ex. 2, entitled, "Silverdale Sub-Area Planning Process Land Use Reclassification Requests [for 2005]" is **admitted** to the record as **Supplemental Exhibit 1**.

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[7] The County locates the proposed exhibits as follows: proposed Exhibit 3b is in Chapter 3 of the DEIS, at 3.7; proposed Exhibit 3c is in Chapter 3 of the DEIS, at 3.2-3; and proposed Exhibits 4a, 4b, 4c and 4d are in Appendix N of the DEIS, at 43, 56, 46 and 49, respectively.

IV. ORDER

Based upon review of the Petitions for Review, the briefs and materials submitted by the parties, the GMA, the Board's Rules of Practice and Procedure, and prior decisions of this Board and other Growth Management Hearings Boards, the Board enters the following Order:

- Kitsap County's Motion to Dismiss Petitioner Reedy, and his PFR, for lack of standing, is **granted**. Petitioner Reedy, PFR No. 07-3-0020, and Reedy Legal Issues 1 and 2, are **dismissed with prejudice** from this consolidated proceeding.

- Kitsap County's Motion to Dismiss Petitioner DIPC's Legal Issue No. 5, for lack of SEPA standing, is **granted**. DIPC's Legal Issue No. 5 is **dismissed with prejudice** from further consideration in this proceeding.

- Dyes Inlet Preservation Council's Motion to Supplement the Record with proposed Exhibit 2 is **granted**. The "Silverdale Sub-Area Planning Process Land Use Reclassification Requests [for 2005]" is **admitted** to the record as **Supplemental Exhibit 1**.

So ORDERED this 3rd day of May, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
David O. Earling
Board Member

_____
Edward G. McGuire, AICP
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.