CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

1000 FRIENDS OF WASHINGTON, et al.,	)	
	)	**CPSGMHB Case No. 04-3-0031c**
Petitioners,	)	
	)	***[1000 Friends/KCRP]***
v.	)	
	)	
KITSAP COUNTY,	)	**ORDER ON**
	)	**RECONSIDERATION,**
Respondent,	)	**RESCINDING DISMISSAL OF**
	)	**HARLESS AND AMENDING**
and	)	**BRIEFING SCHEDULE**
	)	
OVERTON & ASSOCIATES, et al.,	)	
	)	
Amicus Curiae.	)	
	)	

I. BACKGROUND[1]

On March 15, 2005, the Board issued an Order dismissing the Petition for Review filed by Jerry Harless in this case. Order on Motions, Dismissing Harless Petition, Ruling on Supplementation and Granting Amicus (**Order on Motions**). Harless filed a timely Request for Reconsideration and Motion to Intervene (**Motion to Reconsider**), and the Board requested a response from Kitsap County. Kitsap County responded, supporting the Board's Order, but upon different grounds. Response to Harless Motion for Reconsideration (**County Response**).

In its Order on Motions, the Board found that on October 30, 2004, the County published a notice of adoption of its 2004 Comprehensive Plan (Ordinance 326-2004) and a Resolution (Resolution 158-2004) identifying "reasonable measures" which had been implemented to address inconsistency between the plan and on-the-ground development. Harless's PFR was filed on the 61st day following publication. The Board's Order on Motions granted Kitsap County's motion to dismiss as untimely Harless's legal issues directly challenging the Ordinance (Legal Issues 5, 7 and 8). Harless does not contest this ruling.

[1] The complete procedural background of this case is appended as Appendix A.

The issue in contention is Legal Issue No. 6, expressed in the Harless PFR as a "failure to act" challenge. The Board on its own motion dismissed Legal Issue 6, ruling that the County in fact has taken action as to which Harless' objections are untimely. The Board's Order on Motions dismissed Legal Issue 6 on the ground that, though posited as a "failure to act" challenge, Legal Issue 6 in fact asserts the non-compliance of various county actions with GMA requirements, and as to those actions, the challenge is untimely or otherwise barred. Harless' Motion to Reconsider is limited to the Board's dismissal of Legal Issue 6.

For the reasons set forth below, the Board **reconsiders** its Order on Motions in part, **reinstates the Harless PFR** as limited herein, and **amends the prehearing briefing schedule** as to the reinstated Harless issue only.

II. DISCUSSION

The Board's Prehearing Order states Legal Issue No. 6 as follows:

> *Legal Issue No. 6.*
>
> *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?*

A. Dismissal on the Board's Motion

Harless requests reconsideration on the grounds that the Board's dismissal of Legal Issue No. 6 on its own motion gives the County relief it has not requested and is unduly prejudicial to Petitioner's interests. Motion to Reconsider, at 2, 8.

The County argues that the Board has "an obligation to dismiss a case when it finds it lacks jurisdiction" and may do so on its own motion, at any time during the proceeding. County Response, at 2.[2]

The County is correct. The Board has no jurisdiction over an untimely PFR[3] and must dismiss, on its own motion if necessary, when the lack of jurisdiction becomes apparent.

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[2] *Citing* WAC 242-02-720(4); *Ullom v. City of Renton*, 5 Wn.2d 319, 321-22, 105 P.2d 69 (1940); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740, 96 Sup.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976).

[3] See, e.g., *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); *Montlake Community*

WAC 242-02-720 provides: "Any action may be dismissed by the board: … (4) *Upon the board's own motion* for failure by the parties to comply with these rules…." (Emphasis added). WAC 242-02-220(1) is the rule that incorporates RCW 36.70A.290(2), the statutory 60-day deadline for GMA challenges.

Harless objects that the Board's action on its own motion denied him a fair opportunity to brief the timeliness question and to participate in the prehearing briefing in the event of reconsideration. The Board finds that the reconsideration process, which Harless timely pursued, provided ample opportunity for briefing the jurisdictional issues. Additionally, the prehearing briefing schedule will be amended as to issues for which reconsideration is granted.

B. "Reasonable Measures"

Harless contends that Resolution 158-2004 does not meet the mandate of RCW 36.70A.215(4) in that the measures identified in the Resolution are "old zoning provisions…[which] … have had no significant corrective effect on the inconsistencies identified in the 2002 BLR" and therefore must be revised, rescinded or new measures adopted. Motion to Reconsider, at 5.

The County asserts that Ordinance 326-2004 and Resolution 158-2004 comprise its action taken to comply with the "reasonable measures" requirements of RCW 36.70A.215. County Response, at 2-3. Harless's challenge is simply untimely.

The Board finds that the Resolution on its face was adopted by the County to comply with the "reasonable measures" requirements of RCW 36.70A.215. Petitioners 1000 Friends of Washington and Kitsap Citizens for Responsible Planning filed a timely PFR challenging the Resolution as substantively inadequate. The PFR filed by Harless was untimely and is not saved by a claim of "failure to act."[4]

C. Review and revision of UGAs

Harless argues that the County's Ordinance 326-2004 was not "the ten-year review and update of its UGAs and urban densities in order to accommodate the subsequent twenty years of growth as required by RCW 36.70A.130(3)." Motion to Reconsider, at 6. Harless states that the Ordinance ostensibly completed the seven-year "compliance review" required by RCW 36.70A.130(1), but did not address the ten-year review, even though new twenty-year population projections were adopted with Ordinance 327-2004, one month after the County amended the plan with Ordinance 326-2004. *Id.*, at 7. Thus,

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Club et al. v. City of Seattle, CPSGMHB Case No. 99-3-0002c, Order on Dispositive Motions (Apr. 23, 1999).

[4] Harless has been granted Intervenor status with respect to the 1000 Friends/KCRP PFR Legal Issues 2, 3 and 4. Order Granting Intervention (Mar. 21, 2005).

Harless argues, the County has not met its affirmative duty under RCW 36.70A.115 to ensure that its Plan includes sufficient capacity for allocated growth. *Id.*

The County acknowledges that the challenged Ordinance is not the ten-year review contemplated by RCW 36.70A.130 but asserts that the December 1, 2004, deadline for action does not apply. County Response, at 4-8. The County contends that the December 1, 2004, deadline under RCW 36.70A.130(4) only applies to the seven-year review required by RCW 36.70A.130(1) and not to the ten-year review of RCW 36.70A.130(3) or to the buildable lands analysis required by RCW 36.70A.215. The County's position is that the ten-year review, in Kitsap's case, means ten years from 1998, the year its Comprehensive Plan was brought into compliance with the GMA. *Id.*, at 6-7.

Because the Board noted that Ordinance 326-2004 in fact made changes to Kitsap County's UGAs, the Board dismissed as untimely Harless's Legal Issue 6 contentions that the County failed to act to review and revise UGAs. Order on Motions, at 6. On reconsideration, the Board finds Harless's argument persuasive. The County by its own admission has not conducted the review and revision required by RCW 36.70A.130(4) to be completed by December 1, 2004.[5] The amendments to Kitsap's UGAs in Ordinance 326-2004 were not undertaken pursuant to the statutory mandate.

In *Bremerton, et al., v. Kitsap County* (**Bremerton II**), CPSGMHB Case No. 04-3-0009c, the Board's Final Decision and Order summarized the GMA requirements for periodic review and revisions of a county's Urban Growth Areas. *Bremerton II*, Final Decision and Order (Aug. 9, 2004), at 34-35, 52-55. Kitsap moved for reconsideration, arguing, *inter alia*, that it should not be subject to the statutory December 1, 2004, deadline with respect to the ten-year UGA update because its UGAs were not approved as compliant with GMA until 1998. In its Order on Reconsideration (Sept.16, 2004), at 8, the Board stated:

> The Board reads RCW 36.70A.130 to require that on or before December 1, 2004 (.130(4)(a)), Kitsap County's planning cycle must be brought into the GMA sequence, using OFM's most recent ten-year population forecast, (.130(1)(a)), evaluating its UGA boundaries and densities, (.130(3)), and applying BLR findings to its UGA decisions (.130(3) and .215).

[5] The Board notes that its pending cases indicate that, of the four counties within the Central Puget Sound Growth Management Hearings Board jurisdiction, all but Kitsap conducted the seven-year review of RCW 36.70A.130(1) and the ten-year review of RCW 36.70A.130(3) concurrently, in recognition of the December 1, 2004, deadline. See *Seattle King County Association of Realtors v. King County*, CPSGMHB Case No. 04-3-0028; *City of Bonney Lake v. Pierce County*, CPSGMHB Case No. 05-3-0016c; *Futurewise v. Snohomish County*, CPSGMHB Case No. 05-3-0020.

The County's contrary arguments are unpersuasive.[6] The Board finds that it has jurisdiction of Harless' "failure to act" challenge with respect to review and revision of Urban Growth Areas. Accordingly, Legal Issue No. 6 is reinstated and restated as follows:

> *Legal Issue No. 6.*
>
> *The effects of Ordinance 326-2004 notwithstanding, did Kitsap County fail to comply with RCW 36.70A.130 when it did not review and revise its Urban Growth Areas (UGAs) to accommodate forecast and allocated growth over the succeeding twenty years?*

The Board **rescinds dismissal** of Petitioner Harless, **reinstates Legal Issue No. 6 as restated**, and **amends the prehearing briefing schedule** as set forth in the table below.

AMENDED SCHEDULE
CPSGMHB Case No. 04-3-0031c
1000 Friends KCRP et al., v. Kitsap County

DATE	EVENT
April 4, 2005	Deadline for Petitioners' Prehearing Briefs (Issues 1-4)
April 11, 2005	Deadline for Harless Brief (Issue 6)
April 18, 2005	Deadline for Respondent's Prehearing Brief (Issues 1-4)
April 22, 2005	Deadline for Respondent's Brief (Issue 6)
April 25, 2005	Deadline for Requesting Settlement Extension[7]
April 25, 2005	Deadline for Petitioners' Reply Briefs (Issues 1-4)
April 29, 2005	Deadline for Harless Reply Brief (Issue 6)
May 2, 2005	**Hearing on Merits of Petitions: 10:00 a.m.-12:30 p.m. - Board's offices**
June 28, 2005	**Final Decision and Order**

III. ORDER

Based upon the GMA, the Board's Rules of Practice and Procedure, case law, prior orders of this Board, the PFRs, briefs and exhibits submitted by the parties, having considered the arguments of the parties and having deliberated on the matter, the Board ORDERS:

[6] The Board's application of the GMA sequence to Kitsap County's planning cycle is one of the issues before the Superior Court on appeal of *Bremerton II*. County Response, at 5.
[7] See: RCW 36.70A.300(2).

- Petitioner Harless's Motion for Reconsideration is **granted in part:** the Board reconsiders and reverses its prior dismissal of Harless's "failure to act" challenge concerning review and revision of UGAs. The Motion for Reconsideration is denied in all other respects.

- The Board's dismissal of Petitioner Harless is **rescinded**.

- Legal Issue No. 6 is **restated** as set forth above.

- The schedule for prehearing briefing set forth in the Prehearing Order is **amended** as indicated in the table above and attached as Appendix B to this Order.

So ORDERED this 31st day of March, 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Margaret A. Pageler
Board Member

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

APPENDIX – A

Chronological Procedural History of CPSGMHB Case No. 04-3-0031c

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 Washington[8] and Kitsap Citizens for Responsible Planning (**Petitioners** or **1000 Friends/KCRP**). The matter was assigned Case No. 04-3-0030, and is hereafter referred to as *1000 Friends/KCRP*. 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] as noncompliant 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 to review and revise its UGAs. 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 Deputy Prosecuting Attorneys Shelley E. Kneip and Lisa J. Nickel, Deputy Prosecuting Attorneys in the Kitsap County Prosecuting Attorney's Office.

On January 5, 2005, the Board issued a Notice of Hearing and Potential Consolidation for 1000 Friends/KCRP and Harless III, setting a Prehearing Conference and a tentative case schedule.

On January 13, 2005, the Board received a Notice of Association of Simi Jain as co-counsel for 1000 Friends of Washington, requesting to be designated as the attorney for petitioners in Case No. 04-3-0030.

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

[8] 1000 Friends of Washington has changed its name to Futurewise.

and by County Planner Angie Silva. Attorney Lawrence A. Costich, Graham & Dunn, attended on behalf of potential intervenors.

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. The Board discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The Board reviewed its procedures for the hearing, including the composition and filing of the Index to the record below; exhibits, core documents, and supplemental exhibits; dispositive motions; the Legal Issues to be decided; and a Final Schedule.

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 15, 2005, the Board received Petitioner Harless' Motion to Supplement the Record, with nine attachments.

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

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.

On February 17, 2005, the Board received "Kitsap County's Motion to Dismiss Legal Issues 5, 7 and 8", accompanied by an Affidavit of Publication affirming the publication of notice of adoption of Ordinance 326-2004 on October 30, 2004. Legal Issues 5, 7 and 8, submitted in the Harless PFR, challenge Ordinance 326-2004. Kitsap's Motion to Dismiss was based on the untimely filing of the Harless PFR, 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 February 28, 2005, the Board received Kitsap County's Response to Petitioner Harless' Motion to Supplement the Record, with seven attachments.

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

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 the resolution was incorporated by reference in the notice of adoption of Ordinance 326-2004.

Petitioner Harless submitted no response to Kitsap County's Motion to Dismiss.

On March 15, 2005, the Board issued its Order on Motions, Dismissing Harless Petition, Ruling on Supplementation and Granting Amicus (**Order on Motions**). The Order on Motions granted Kitsap County's Motion to Dismiss Harless Legal Issues 5, 7 and 8 as untimely. The Order further dismissed Legal Issue 6 on the ground that, though posited as a "failure to act" challenge, Legal Issue 6 in fact asserts the non-compliance of various County actions with GMA requirements, and as to those actions, the challenge is untimely or otherwise barred.

On March 21, 2005, the Board received Petitioner Harless' Request for Reconsideration and Motion to Intervene, requesting reconsideration of the Board's order dismissing Legal Issue 6 and, alternatively, requesting status as an intervenor with regard to Legal Issues 2, 3 and 4 as petitioned by 1000 Friends/KCRP.

On March 21, 2005, the Board issued its Order Granting Intervention and Shortening Time to Respond to Motion for Reconsideration.

On March 28, 2005, the Board received Kitsap County's Response to Harless Motion for Reconsideration.

On March 31, 2005, the Board issued its Order on Reconsideration.

APPENDIX - B

AMENDED SCHEDULE
CPSGMHB Case No. 04-3-0031c
1000 Friends KCRP et al., v. Kitsap County

DATE	EVENT
April 4, 2005	Deadline for Petitioners' Prehearing Briefs (Issues 1-4)
April 11, 2005	Deadline for Harless Brief (Issue 6)
April 18, 2005	Deadline for Respondent's Prehearing Brief (Issues 1-4)
April 22, 2005	Deadline for Respondent's Brief (Issue 6)
April 25, 2005	Deadline for Requesting Settlement Extension[9]
April 25, 2005	Deadline for Petitioners' Reply Briefs (Issues 1-4)
April 29, 2005	Deadline for Harless Reply Brief (Issue 6)
May 2, 2005	**Hearing on Merits of Petitions: 10:00 a.m.-12:30 p.m. - Board's offices**
June 28, 2005	**Final Decision and Order**

[9] See: RCW 36.70A.300(2).