

CENTRAL PUGET SOUND

GROWTH PLANNING HEARINGS BOARD

STATE OF WASHINGTON

FRIENDS OF THE LAW and) **CASE NO. 94-3-0003**
BEAR CREEK CITIZENS FOR)
GROWTH MANAGEMENT,)

)
Petitioners,)

)
v.) **ORDER ON DISPOSITIVE**

) **MOTIONS**

) KING COUNTY,)

)
Respondent,)

)
and)

)
BLAKELY RIDGE LIMITED PARTNERSHIP,)

) CITY OF ISSAQUAH, GLACIER RIDGE)

) LIMITED PARTNERSHIP, GRAND RIDGE)

) LIMITED PARTNERSHIP, SUNRISE RIDGE)

) LIMITED PARTNERSHIP, QUADRANT)

) CORPORATION,)

)
Intervenors.)

)
On February 25, 1994, the Central Puget Sound Growth Planning Hearings Board (the **Board**) entered a Prehearing Order in the above-captioned matter that established a briefing schedule for the filing of dispositive motions and corresponding responses. All motions were due on March 18, 1994.

Dispositive Motions

On that date, the Board received three dispositive motions:

Motion to Dismiss and Memorandum in Support of Motion to Dismiss from Sunrise Ridge

Limited Partnership (**Sunrise**) and the City of Issaquah (**Issaquah**).A Certificate of John C. McCullough was attached to the Sunrise Motion (**McCullough Certificate**).It contained one attachment, Exhibit A;

Motion for Disposition on Legal Issue 3 and Memorandum in Support from Friends of the Law (**FOTL**) and Bear Creek Citizens for Growth Management (**BCCGM**) [referred to jointly as **FOTL**].It included Attachments A through E; and

King County's Motion for Partial Summary Judgment.^[1] Exhibits A and B were attached to this motion.

These motions, memoranda and supporting documentation will be referred to as **Sunrise's Memorandum**, **FOTL's Dispositive Motion** and the **County's Dispositive Motion**, respectively.

Responses

On March 25, 1994, FOTL filed Petitioner's Response to Sunrise's Motion to Dismiss.A Declaration of Joseph Elfelt (**Elfelt Declaration**) was also submitted.Attached to it were Exhibits A through O.On the same day the Response of King County to Petitioners' Motion for Disposition of Legal Issue 3 was filed with the Board.Exhibits A through H were attached to this response.Also on March 25, 1994, FOTL filed Petitioner's Response to King County's Motion for Partial Summary Judgment.

Replies

On March 30, 1994, the County filed King County's Reply Regarding Motion for Partial Summary Judgment.Sunrise elected not to submit an optional reply brief that rebutted FOTL's response brief.On March 31, 1994, FOTL filed a Statement of Additional Authority regarding the standing issue raised in the Sunrise Motion.On the same day, FOTL submitted a Reply of Friends of the Law and Bear Creek Citizens for Growth Management in Support of Petitioner's Motion for Disposition of Legal Issue No. 3.

Motion Hearing

The Board held a hearing on the motions at 10:00 a.m. on Wednesday, April 6, 1994, at 1225 One Union Square -- Seattle, Washington.The Board's three members were present: Joseph W. Tovar, presiding; M. Peter Philley and Chris Smith Towne.David A. Bricklin represented FOTL and BCCGM; Kevin Wright represented the County; Thomas A. Goeltz represented Blakely Ridge and Glacier Ridge Limited Partnerships and Quadrant Corporation; John C. McCullough represented Sunrise; and Wayne D. Tanaka represented Issaquah.Court reporting services were provided by Duane Lodell of Robert H. Lewis & Associates, Tacoma.

During the hearing on Sunrise's Dispositive Motion, FOTL made an offer of proof indicating that two of its members had attended the King County Council's October 11, 1993 public hearing on King County Ordinance No. 11110 (**Ordinance 11110**). The presiding officer ordered FOTL to submit a supplemental affidavit to that effect. Sunrise was then given additional time to submit any response to the supplemental affidavit. On April 8, 1994, a Declaration of Joseph Elfelt was filed (the **Supplemental Elfelt Declaration**). Exhibits A through O were attached. On April 12, 1994, Sunrise's Supplemental Memorandum in Support of Motion to Dismiss (**Sunrise's Supplemental Memorandum**) was filed in response to the Supplemental Elfelt Declaration.

I. GENERAL BACKGROUND

In its Petition for Review, FOTL challenged two actions taken by the County. One is King County Motion No. 8496 (**Motion 8496**), which was attached to FOTL's Dispositive Motion as Attachment A, and to the County's Dispositive Motion as Exhibit A. Motion 8496 was entitled:

A MOTION stipulating that King County has completed the preliminary classifications, designations and regulations for its critical areas and resource lands, as required by the Growth Management Acts.

The second contested action is Ordinance 11110, which was attached as Exhibit B to the County's Dispositive Motion. It is entitled:

AN ORDINANCE designating interim urban growth areas under RCW 36.70A.110 as amended and establishing interim development regulations on properties outside the interim urban growth areas.

Sunrise's Dispositive Motion regards only Ordinance 11110. FOTL's Dispositive Motion involves only Motion 8496. The County's Dispositive Motion involves both Motion 8496 and Ordinance 11110.

II. FINDINGS OF FACTS

Motion 8496

1. What would become King County Ordinance No. 9614, the Sensitive Areas Ordinance (**SAO**), was transmitted to the King County Council by the King County Executive in March, 1989 and was the subject of two formal public hearings in 1989. In 1990 seven public meetings were held prior to adoption on the proposed SAO. Exhibit B of the Response of King County to Petitioners' Motion for Disposition on Legal Issue 3, Finding 14.

2. On July 1, 1990, SHB 2929 (Laws of 1990, 1st Ex. Sess., ch 17), commonly referred to as the Growth Management Act (the **GMA** or the **Act**), became effective. It is primarily codified at Chapter 36.70A RCW. The requirement to designate natural resource lands and critical areas was codified at RCW 36.70A.170. The requirement to adopt interim development regulations for such lands and critical areas was codified at RCW 36.70A.060.

3. After a final public hearing in August, the SAO was passed by the King County Council on

August 29, 1990 and approved by the King County Executive on September 10, 1990. Exhibit B of the Response of King County to Petitioners' Motion for Disposition on Legal Issue 3, at 3 -- Finding 14, and at 101 (signature page).

4. It is undisputed that the County did not publish any post-adoption notice indicating that the SAO had been adopted.

5. On July 16, 1991, RSHB 1025 (Laws of 1991, 1st Sp. Sess., ch 32) became effective. In addition to amending existing sections of the GMA, it also added new sections including the creation of the growth planning hearings boards, RCW 36.70A.250 through .340. RCW 36.70A.290(2) added a post-adoption publication requirement for cities and counties taking actions pursuant to the Act.

6. On January 27, 1992, the King County Council passed Motion 8496. Pursuant to Section A of Motion 8496:

King County has made preliminary classifications and designations of its critical areas and natural resource lands and has adopted regulations for the protection of its critical areas and for the conservation of its resource lands, as required by the Growth Management Act (see attachments).

An attachment to Motion 8496, labeled "Designations and Regulations for King County Critical Areas", referred to the SAO on repeated occasions.

7. It is undisputed that the County:

a. did not publish advance notice that the King County Council would consider Motion 8496 at its January 27, 1992 meeting (Petitioner's Response to King County's Motion, at 4; Reply of Petitioners in Support of Dispositive Motion, at 2);

b. did not conduct a public hearing or allow public testimony at the time Motion 8496 was considered by the King County Council on January 27, 1992 (Exhibit A to McCullough Certificate); or

c. did not publish notice of adoption of Motion 8496 (County's Dispositive Motion, at 5).

Ordinance 11110

1. The original version of the GMA (SHB 2929), effective July 1, 1990, contained a provision requiring counties to designate an urban growth area or areas (**UGAs**). This provision was codified at RCW 36.70A.110(1). The Act did not explicitly include a deadline indicating when UGAs had to be designated. *See* Laws of 1990, 1st Ex. Sess., ch 17, §11.

2. On June 1, 1993, ESHB 1761 (Laws of 1993, 1st Sp. Sess., ch 6) became effective. Section two of the bill amended RCW 36.70A.110 by adding a new subsection (4) which requires counties to designate interim urban growth areas (**IUGAs**) on or before October 1, 1993.

3. On September 27, 1993, and October 11, 1993, the King County Council held public hearings on proposed Ordinance 11110. It is undisputed that no one attending either of these two public hearings identified him/herself as representing FOTL. Exhibit A to McCullough Certificate.

4. Two persons who were members of FOTL at the time of the October 11, 1993 hearing (and who continue to be members) did attend that hearing. Supplemental Elfelt Declaration, ¶2, 4, 5

and 7. One, Joanne Klacsan (speaker #5), signed on behalf of the Snoqualmie River Valley Alliance, while the second, Jan Kastning (speaker #30), represented herself. Exhibit A to McCullough Certificate.

5. On November 8, 1993, the King County Council passed Ordinance 11110, which designated IUGAs for the County. It was approved by the King County Executive on November 22, 1993. The County published post-adoption notice on January 12, 1994. FOTL's Petition for Review, at 2, ¶6.

6. FOTL has at least two members living within one half mile of the Quadrant and Port Blakely Master Planned Developments (MPDs), at least one member who lives adjacent to the IUGA line and one who lives "in close proximity" to the line on the East Sammamish plateau, and one member who resides within a quarter to a half mile of the IUGA line east of Issaquah. The five individuals identified "rely on groundwater from an aquifer over which either the two MPDs are proposed to be built ... [or] over which the urban growth area protrudes." Each of these five FOTL members "... would also be impacted by increased congestion on area roads and loss of rural areas, wildlife habitat, and open space." Supplemental Elfelt Declaration, at 3-4, ¶8-10. None of the five members identified as living near the various geographic areas was a member of FOTL at the time of the hearing on the adoption of Ordinance 11110. Supplemental Elfelt Declaration, at 4, ¶13.

III. Sunrise's DISPOSITIVE Motion

Sunrise's Position

Sunrise asks the Board to dismiss all legal issues dealing with Ordinance 11110 because FOTL does not have standing to challenge that ordinance. Sunrise's Memorandum focused on the "appearance prong" of the GMA's standing provision since FOTL claimed in its Petition for

Review that it had standing because it appeared at County proceedings.^[1] Sunrise alleges that FOTL "lack standing before the Board because neither they nor any of their members appeared before the County regarding King County Ordinance No. 11110." Sunrise Memorandum, at 2. Sunrise contends that FOTL had a number of opportunities to appear before the County in order to specifically oppose the adoption of the IUGAs. "No one identified as representing petitioners appeared at these proceedings (i.e., the two public hearings, on September 27, 1993, and October 11, 1993) before King County." McCullough Certificate, at 3, ¶3 "The Board cannot condone petitioners' belated complaints when they failed to avail themselves of their requirement for participation in the process." Sunrise Memorandum, at 3.

Because Sunrise did not file a reply brief that responded to FOTL's Response to Sunrise's Dispositive Motion, Sunrise did not address the Administrative Procedure Act (APA) prong of the GMA's standing provisions until oral argument. Then Sunrise maintained that FOTL could not meet the APA's standing requirements either. Sunrise argued that FOTL failed to meet the first test under RCW 34.05.530 because they could show no prejudice or direct injury to any of

the members of FOTL as a result of the County's IUGA designation. Sunrise contended that there was no evidence indicating where the members of FOTL lived and that the concerns and interest that the FOTL Petition for Review had identified were generalized, rather than specific. Sunrise argued that the FOTL had asserted no interest that the County was specifically required to consider prior to taking the action and that they therefore failed to meet the second test under RCW 34.05.530. Last, Sunrise argued that FOTL failed to meet the third test because the final UGA will not be adopted as a development regulation, but as part of the comprehensive plan. In contrast, the IUGA is an "official control" for the purpose of controlling annexations, Chapter 35.12 RCW. The injury claimed will not be remedied by the relief sought; on the contrary, annexation could occur, exacerbating the alleged harm.

After the Board's presiding officer authorized FOTL to file the Supplemental Elfelt Declaration, Sunrise was permitted to respond to it. Sunrise reiterated that FOTL could not meet the APA's standing test because:

... petitioners' potential grievances do not fall within the zone of interest intended to be protected by Ordinance 11110. The effect of petitioners prevailing in this matter would be an invalidation of Ordinance 11110 and the development regulation it incorporates: a prohibition on annexations outside the urban area. Permitting annexations outside the UGA does nothing to advance or protect the interests petitioners assert. Sunrise's Supplemental Memorandum, at 4.

Sunrise also argued that FOTL had failed to establish a sufficient evidentiary basis for injury-in-fact to one or more of its members. Finally, Sunrise argued that, even if the generalized impacts FOTL alleged would happen were to occur, "... there is no allegation that any of these impacts... would be occasioned by the adoption of Ordinance 11110." Sunrise's Supplemental Memorandum, at 6.

FOTL's Position

FOTL's position is that the GMA includes a "very liberal standing requirement" whereby a petitioner can obtain standing either by "appearing" before the government (RCW 36.70A.280 (2)) or by demonstrating that the petitioner may be adversely affected by the government action (the reference in RCW 36.70A.280(2) to the APA at RCW 34.05.530). FOTL's Response, at 1 and 3. FOTL notes that the GMA requires appearance before a "county" or city, not a "county legislative body."

FOTL also cites case law that stands for the proposition that if at least one member of an organization has standing, so, too, does the organization. Accordingly, because it claims that members of FOTL participated in the "underlying process" that led to the designation of the IUGAs, it also contends that its members have standing before the Board. FOTL Response, at 4-5.

Although FOTL acknowledged not appearing at the County Council's September 27, 1993 public hearing, FOTL claimed that the County was "partially at fault for failing to supply the public more 'widespread' notice of the public hearings..." FOTL Response, at 10.

Alternatively, FOTL argued that even if it were not granted standing under the GMA's "appearance" requirement, it would qualify pursuant to the APA's standing provisions. FOTL Response, at 10-11. FOTL argued that under the first prong of the APA's standing test, its members would be prejudiced because the County's IUGA decision would provide less than adequate protection for environmental, open space and wildlife habitat features within the urban growth area. The second prong was met because the GMA requires local governments to take into account the public's views. Thus FOTL's interests must be considered by the County. Finally, FOTL argued that a Board decision invalidating and remanding the IUGA "would eliminate the very harm which petitioner seeks to avoid...." FOTL Response, at 10-11.

Discussion

The GMA's standing provision is RCW 36.70A.280(2) which provides as follows:

A petition may be filed only by the state, a county or city that plans under this chapter, a person who has either appeared before the county or city regarding the matter on which a review is being requested or is certified by the governor within sixty days of filing the request with the board, or a person qualified pursuant to RCW 34.05.530. (emphasis added).

RCW 36.70A.280(3) defines "person" broadly as meaning:

... any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character.

In effect, then, a person has three potential methods for obtaining standing. The first, is to have appeared before the county or city regarding the matter on which a review is being requested. This method will be called "appearance standing." The second, is when a person has been certified by the governor within sixty days of filing the request for review with the Board. This method is not at issue in this case and will not be discussed further. The third way to obtain standing is for a person to qualify pursuant to RCW 34.05.530. This method will be referred to as "APA standing."

Appearance Standing

The question becomes how liberally should the GMA's appearance standing provisions be interpreted? In order to answer this general question, several more specific questions come to mind. What does "appeared" mean? Does "appeared before the county" mean before the county's legislative body or before any county personnel? Does having appeared before the county legislative body in a non-GMA matter constitute appearance for GMA purposes, if the non-GMA ordinance is incorporated by reference into an ordinance adopted in order to comply with the requirements of the GMA? What if additional GMA public hearings are held to consider "bootstrapping" the non-GMA action into a GMA action: must one appear in the GMA portion, too, or is appearance at the non-GMA action sufficient? And finally, what about members of an organization who appear at a hearing in an individual capacity but fail to identify their relationship with the group -- does the fact that an individual member of an organization has

appeared as an individual confer standing upon the entire organization?

Rather surprisingly, standing has never been the subject of a dispositional motion before this Board. However, in the context of a motion to supplement the record below in another case, the Board gave guidance as to what actions would confer standing upon a person under the appearance standing standard:

Appearance before a local legislative body can be accomplished either [1] by personally appearing at a [public] hearing or meeting at some time during the process, [2] by personally appearing and participating or testifying at a [public] hearing or meeting during the process, or [3] by submitting written comments to the local jurisdiction or its agents.... *Twin Falls et al. v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993), Order Partially Granting Petitioners' Motions to Supplement the Record and Order Granting County's Motion for Limited Discovery, at 6.

Thus, the Board has already determined that appearance before county or city staff, by submitting written comments, does constitute appearance before a city or county as required by RCW 36.70A.290(2). The Board's rationale is straightforward: RCW 36.70A.040 uses the phrase "county legislative authority" on several occasions; RCW 36.70A.210 uses the phrase "the legislative authority of a [or] each county." Therefore, if the legislature intended that a person had to appear before the legislative authority of a city or county only, it would have so specified in RCW 36.70A.280(2) and not used the more general phrase "before the county or city."

The Board now also explicitly holds that *talking* to local government staff or, in the case of elected officials, *talking* to them off the record (i.e., not at a public hearing or meeting), as opposed to communicating in writing to either or talking to elected officials on the record at a public hearing or meeting, does not constitute appearance. The Board considers its GMA appearance standing standard to be quite liberal -- writing one letter will suffice to grant standing. Therefore, the Board will not extend this standard to include any oral communications with staff or any off-the-record oral communications with elected officials.

The Board has reviewed the limited record before it at this time. Although members of FOTL were present and testified at the County Council's October 11, 1993 public hearing on Ordinance 11110, they did not identify themselves as either being members of FOTL, or as appearing on behalf of or as representing FOTL. The Board holds that as a general rule, for purposes of enabling a representative organization or association such as FOTL to obtain standing, a member of the organization must appear and indicate that he or she represents that organization. Simply being a member of an organization and being in attendance at a public hearing without indicating that one represents the organization will not suffice to confer standing upon the organization. Thus, the fact that two persons who happened to be members of FOTL were present before the County Council by signing in and testifying at the hearing does not confer standing upon FOTL,

since they did not indicate that they represented FOTL.^[1] If an organization hopes to obtain standing before this Board under the appearance standing standard, it must put the local government it is appearing before on notice that the organization has an interest in the matter. In

Ms. Klacsan's case, since she signed in as representing the Snoqualmie River Valley Alliance (SRVA), she would have conferred standing upon the SRVA. However, the SRVA has not filed a petition with this Board. Furthermore, both Ms. Klacsan and Ms. Kastning would have standing to appear before the Board as individuals (assuming a timely appeal was filed).

The Board is cognizant of the provisions of the Open Public Meeting Act. RCW 42.30.040 provides that:

A member of the public shall not be required, as a condition of attendance at a meeting of a governing body, to register his name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his attendance.

Accordingly, the Board cannot require that a person sign in at a meeting to prove attendance. However, if a person, be it a representative of an organization or an individual speaking on his or her own behalf, intends to testify before a local government, that is a different matter where identification of the speaker can be required. In any case, if a person elects not to testify at a hearing, that person can still meet the appearance standing test by submitting written comment within the period specified by the county or city, if any, or by signing in as a representative of an organization or on one's own behalf, and providing one's address, if requested.

Although FOTL might argue that the Board's decision is not liberal enough, the Board considers its appearance standing standard quite broad. Rather than providing three means of "appearing" as it has done (*see* the quote from *Twin Falls* above), the Board could have more narrowly defined "appearing" as meaning only testifying at a public hearing. The minimal effort required in writing a letter to a city or county staff member or elected official and identifying the fact that one represents an organization is not asking too much of potential petitioners in order for them to obtain standing. Here, the record is devoid of such proof regarding FOTL and Ordinance 11110. The next question, however, is whether there should be an exception to the Board's general appearance standing rule. Should FOTL obtain appearance standing because some of its members appeared before the County on other matters such as the CPPs and the East Sammamish

Community Plan Update?^[1] The Board holds that it will not create such an exception in this case. RCW 36.70A.280(2) states "... appeared before the county or city regarding the matter on which a review is being requested..." (emphasis added). The County Council held two public hearings regarding its proposal to adopt IUGAs where FOTL could have appeared. FOTL indicates that it failed to attend the September 27, 1993 hearing because the County failed to supply "more widespread" notice. Petitioner's Response to Sunrise's Motion, at 9-10. The Board notes that if inadequate pre-adoption notice is an issue, the matter can be resolved in superior court. However, the record before the Board indicates that the County did at least provide notice through the *Seattle Times*. See Exhibit O to Petitioner's Response to Sunrise's Motion.

Furthermore, all FOTL had to do to obtain appearance standing was to submit a letter to the county regarding proposed Ordinance 11110. Therefore, the Board treats the language "regarding the matter" narrowly to mean the specific matter before the local government. It does not mean the general subject matter such as land use planning or the GMA. In this case, the matter before the County was IUGAs and the pending enactment of Ordinance 11110, not the County's CPPs,

the 1989 Bear Creek Community Plan and Area Zoning, the 1992 East Sammamish Community Plan Update, or the 1985 Comprehensive Plan. Thus, FOTL's testimony might have been right on point concerning the pre-GMA Comprehensive Plan or even the CPPs; however, the County was examining IUGAs when it considered Ordinance 11110.^[1] Times and circumstances change -- therefore, citizens have a **continuing responsibility** to communicate their opinions to government on the current issue before that jurisdiction. Citizens cannot rest long on their laurels.

What may have been good for CPPs may no longer be in context for IUGAs. ^[1] The latter constituted a separate matter and FOTL was required to appear before the County if it wished to obtain standing pursuant to the appearance standing prong of RCW 36.70A.280(2).

One other exhibit merits comment. Joseph Elfelt did send a letter to Council Member Cynthia Sullivan on May 18, 1992, in which he identified himself as the president of FOTL. Exhibit B to Elfelt Declaration. This letter did not specifically involve the proposed IUGAs, although the proposed "rural-urban line" was frequently mentioned. Instead, it addressed vesting concerns involving Port Blakely and Quadrant subdivision applications for a Novelty Hill MPD. See Exhibit B to Elfelt Declaration. Mr. Elfelt did refer to Section 29 of ESHB 1025 -- that deals with final UGAs as opposed to IUGAs. The Board rejects FOTL's argument that a document submitted regarding subdivision applications should confer standing on FOTL to challenge IUGAs well over a year later. While a council member is not required to forget everything he or she considered in a prior action, and may in fact remember something about that prior proceeding, the County cannot be expected to place a May, 1992 letter about a subdivision application into its 1993 IUGAs file. However, this ruling certainly does not preclude a citizen or organization from submitting a copy of a document that had been previously submitted in an earlier matter when appearing before the local government in the new matter.

Importantly, Mr. Elfelt's letter was written well before the 1993 legislature even required the designation of IUGAs. Therefore, Mr. Elfelt or his organization was under the continuing obligation arising from the new GMA requirement to appear before the County during its IUGA process. Nothing in the record before the Board indicates that either did so. Accordingly, appearance standing cannot be granted.

Finally, it is worth noting that the Board considered permitting "prior appearance" on non-GMA or other GMA matters to be "bootstrapped" into granting standing for a present GMA matter if the local jurisdiction incorporates by reference a pre-GMA document. The Board rejected this possibility. Although the earlier appearance may have been totally relevant at the time, the Board determined that persons appearing in GMA proceedings have a duty to continually update the information they provide to local governments. For instance, an organization may have supported the pre-GMA enactment but totally rejected the concept that this pre-existing document could in fact now comply with the Act. The organization has the responsibility to so inform the decision maker. The local government cannot assume that a group's prior support for legislation still remains when viewed in a different context, or that opposition to a prior enactment remains when that action is used to fulfill a different purpose.

APA Standing

The APA's standing provision, RCW 34.05.530, is specifically referred to in RCW 36.70A.280 (2). The former provides as follows:

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. (Emphasis added).

To date, no Washington cases have interpreted this specific provision of the APA, enacted in 1988. That is unfortunate because the reference in RCW 36.70A.280(2) to the APA is quite unusual for the following reasons. "Agency" is defined at RCW 34.05.010(2) as meaning:

... any state board, commission, department, institution of higher education, or officer authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law. (Emphasis added).

"Agency action" means:

... licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.... RCW 34.05.010(3).

Therefore, historically, the APA has only applied to state government and not to local government. Yet, in one fell swoop, RCW 36.70A.280's reference to the APA not only imposed the APA's standing provisions upon local governments but, more specifically, upon the legislative branch of local governments -- an area which is exempt at the state level. Local legislative actions are now subject to the APA's standing requirements because the GMA is implemented through actions of city and county legislative authorities. In addition, the APA's definition of "agency action" involves administrative or quasi-judicial matters but does not readily comport with legislative actions taken by local elected officials.

Thus, the Board is required to ascertain the legislature's intent when it adopted RCW 36.70A.280 (2). Although no case law on RCW 34.05.530 exists, Washington courts have long examined the concept of a person being "aggrieved or adversely affected".

The State Environmental Policy Act (**SEPA**) is codified at Chapter 43.21C RCW. Pursuant to RCW 43.21C.075(4), any "person aggrieved" can obtain judicial review under SEPA.

The term "person aggrieved" was intended to include anyone with standing to sue under existing law. R. Settle, *The Washington State Environmental Policy Act* § 20(b), at 248

(1987); *see also* RCW 43.21C.075(4). The courts apply a 2-part test in determining whether a person or entity has standing to challenge a SEPA determination. First, the interest that the petitioner is seeking to protect must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" *Save a Valuable Env't v. Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 25 L. Ed. 184, 90 S. Ct. 827 (1970)).

Second, the petitioner must allege an "injury in fact," i.e., that he or she will be "specifically and perceptibly harmed" by the proposed action. *Save a Valuable Env't*, at 866 [citing *United States v. SCRAP*, 412 U.S. 669, 37 L. Ed. 254, 93 S. Ct. 2405 (1973)]; *Concerned Olympia Residents v. Olympia*, 33 Wn. App. 677, 683, 657 P.2d 790 (1983); *Coughlin v. Seattle Sch. Dist. 1*, 27 Wn. App. 888, 621 P.2d 183 (1980). In order to show injury in fact, ...[one] must present facts that show he will be adversely affected... His "affidavits [must] collectively demonstrate sufficient evidentiary facts to indicate that he will suffer an 'injury in fact'". *Concerned Olympia Residents*, at 683. Further when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself. *Roshan v. Smith*, 615 F. Suppl 901, 905 (D.D.C. 1985). If the injury is merely conjectural or hypothetical, there can be no standing. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 37 L. Ed. 254, 93 S. Ct. 2405 (1973).

Trepanier v. Everett, 64 Wn. App. 380, 382, 824 P.2d 524 (1992) review denied 119 Wn.2d.

1012 (1992), (emphasis added; footnote omitted).^[1]

In addition, a "bald assertion" that one has standing is insufficient to grant standing, as is an allegation in an affidavit that one will suffer impacts personally on his property. Instead, one must present an affidavit containing evidentiary "facts that show a direct adverse effect." *Concerned Olympia Residents*, at 683.

Unless a litigant can demonstrate a direct stake in the controversy, i.e., that he will be specifically and perceptibly harmed, he cannot invoke judicial intervention. Otherwise, the judicial process will become no more than a vehicle for the vindication of value interests of concerned bystanders. *Concerned Olympia Residents*, at 684 (citation omitted).

The Board rules that it will apply the analysis outlined and applied in the *Trepanier v. Everett* case to determine whether "a person is aggrieved or adversely affected" as that phrase is used in RCW 34.05.530. In particular, the Washington case law analysis as to the status of an "aggrieved or adversely affected" person is useful in determining subsections (1) and (2) of RCW 34.05.530: whether an "agency" action has "prejudiced or is likely to prejudice" a person and whether that "person's asserted interests are among those that the agency was required to consider..."

The Board holds that standing cannot be granted to FOTL pursuant to the APA standing standard. Although the allegations as to where present members of FOTL reside in relation to the IUGA boundary are sufficient to meet the "zone of interests" test discussed in *Trepanier v. Everett*, the allegations raised in the remaining portions of the Supplemental Elfelt Declaration are simply

inadequate to show "injury in fact." An individual or organization attempting to obtain standing through the APA standard must do more than claim that one relies on groundwater from an aquifer, or that traffic congestion will increase. The former is only a non-dispositive fact, while the latter is mere speculation. Instead, "affidavits [must] collectively demonstrate sufficient evidentiary facts to indicate that he will suffer an 'injury in fact'". Further when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself. If the injury is merely conjectural or hypothetical, there can be no standing. *Trepanier v. Everett*, at 382 (emphasis added; citations omitted)

A sufficient showing of evidentiary facts was not shown here. Furthermore, no showing of immediate, concrete and specific injuries was made. As Sunrise indicated:

... there is no allegation that any of these impacts, were they to occur, would be occasioned by the adoption of Ordinance 11110. Sunrise's Supplemental Memorandum, at 6.

The Board is aware that its ruling on APA standing is restrictive. However, several points must be remembered. First, the Board is simply applying long-standing Washington common law that, in turn, is based upon federal court decisions (*see* the citations to federal cases in the quote above from *Trepanier*). As the legislative intent provision of the APA, RCW 34.05.001, indicates:

.... The legislature also intends that the courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government and model acts.

In reviewing the federal APA, codified at Title 5 U.S.C., the United States Supreme Court interpreted that statute's standing provisions. Pursuant to 5 U.S.C. 702, persons seeking review must show that they were "adversely affected or aggrieved" by the challenged agency action.

Accordingly:

... the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the "zone of interests" sought to be protected... *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3186 (1990) (italics in original).

... a regulation is not ordinarily considered "ripe" for judicial review under the [federal] APA until the scope of controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.... *Lujan v. National Wildlife Federation*, at 3190 (emphasis added).

Thus, Washington courts have borrowed heavily from federal case law, and the federal APA standing provision has been interpreted similarly to the way Washington courts have treated standing.

Second, it may be more difficult for a potential petitioner to meet the requirements for specificity of injury set forth in *Trepanier*, given the fact that broad policy-based legislative enactments constitute the "agency actions" that are frequently being challenged, rather than site specific permit applications. Nonetheless, there may be occasions when a petitioner is able to meet the APA injury-in-fact requirements, even though a legislative enactment is at issue. That simply has not happened here. Furthermore, potential petitioners are still protected by the GMA's liberal

appearance standing provisions and the availability of a direct certification of standing from the governor. Finally, as a policy matter, the Board does want to encourage citizens to directly participate in the process through "appearing" rather than remaining silent during the public participation process and then attempting to gain standing by making nebulous, speculative "bald assertions" of being within the zone of interest and having been injured in fact.

Conclusion

Appearance Standing

In order to appear on the specific matter before a county or city that ultimately becomes the subject of an appeal to the Board, an individual or organization simply has to:

Attend a public hearing or meeting;

Participate by testifying at a public hearing; or

Submit a letter (which clearly identifies and addresses the matter in question) to the county or city staff or elected officials.

Oral communications with county or city staff members will not suffice to obtain standing, nor will off-the-record conversations with elected officials. The only oral contact that will confer standing is on-the-record testimony at a public hearing.

When an organization intends to obtain appearance standing, it must have a member appear on the specific matter under consideration by the city or county and that member must identify him or herself as a representative of the organization.

FOTL does not have appearance standing to be before the Board. FOTL failed to appear before the County regarding the matter of IUGAs. The fact that members of FOTL testified before the County about proposed Ordinance 11110 is insufficient to confer standing on FOTL because these members failed to identify themselves as representing FOTL. By itself, being a member of an organization is insufficient to obtain standing. One must represent the organization when making an appearance.

APA standing

The Board adopts the analysis and requirements specified in *Trepanier v. Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992) to determine whether a "person" is "aggrieved or adversely affected" by a local government's action taken to comply with the requirements of the GMA. As such, a person must fall within the zone of interests to be protected or regulated, and be injured in fact.

Here, FOTL does fall within the zone of interests affected by Ordinance 11110. However, FOTL has not shown immediate, concrete and specific injury that it will receive because Ordinance 11110 has been adopted. Therefore, FOTL does not have APA standing to appear before the Board.

Accordingly, none of FOTL's claims involving Ordinance 11110 can be heard because FOTL

does not have standing pursuant to any of the three methods specified in RCW 36.70A.280(2).

IV. FOTL's DISPOSITIVE MOTION

FOTL's Position

FOTL's Dispositive Motion deals only with Motion 8496 and not with Ordinance 11110. The organization contends that the County failed to act to adopt interim natural resource lands and critical areas development regulations. FOTL argues that RCW 36.70A.040 required the County to act, as does the similarly mandatory language in RCW 36.70A.060. In addition, FOTL alleges that the "[P]re-existing plans and regulations are not **automatically** deemed to bring a jurisdiction into compliance with the GMA." FOTL's Dispositive Motion, at 4 (emphasis in original). The Board's *Northgate Mall Partnership v. Seattle* decision is also cited for the proposition that a subsequent legislative enactment is required before a pre-GMA neighborhood plan can become a part of a GMA-required comprehensive plan. FOTL argued that "[W]hat is true for a policy document like a neighborhood plan is also true for a development regulation." FOTL's Dispositive Motion, at 5. FOTL also contends that Motion 8496 is a policy statement that could not satisfy the requirement at RCW 36.70A.060 that development regulations be adopted. FOTL's Dispositive Motion, at 7.

Alternatively, FOTL maintains that Motion 8496 does not comply with the GMA because it does not protect critical aquifer recharge areas.

The County's Position

King County responded that when it passed Motion 8496, it adopted existing designations and development regulations to satisfy the GMA's requirements at RCW 36.70A.170 and .060. Although acknowledging that Motion 8496 was not a development regulation, the County alleges that the regulations cited in the attachment to Motion 8496 are development regulations. The County accused FOTL of being "overly technical". Response of King County..., at 6.

Discussion

FOTL's Standing to Challenge Motion 8496

Legal Issue No. 2, as set forth in the Board's Prehearing Order, stated:

Do the Petitioners have standing to appear before the Board?

In Sunrise's Memorandum, Sunrise challenged FOTL's standing only as it pertains to Ordinance 11110. No party has yet challenged FOTL's standing to appeal Motion 8496, although the issue has been raised. Having ruled upon the standing issue in relation to Sunrise's Memorandum above, the Board will also now independently rule upon whether FOTL has standing to challenge Motion 8496. The Board concludes that FOTL does have such standing.

As the discussion below will reveal, the Board agrees with FOTL's assessment that the County failed to act in order to comply with the requirements of RCW 36.70A.170 and .060. A key to this

conclusion is that the County failed to provide any notice or conduct a public hearing regarding Motion 8496. Therefore, it was impossible for FOTL to appear before the County on Motion 8496. The Board holds that as a matter of law, when a local jurisdiction has failed to act, an individual or non-governmental organization with members who reside or own property within that jurisdiction has standing to bring a "failure to act" challenge. FOTL easily meets this requirement as the record reveals that numerous members reside within King County. This holding is necessary to prevent a jurisdiction from failing to comply with the mandates of the GMA and then arguing that a person did not appear before it, where no hearings or other forms of public participation were provided. The Board will not leave citizens in such a "Catch-22" scenario. FOTL has standing to challenge Motion 8496.

Motion 8496

As originally enacted in 1990, the GMA required counties and cities to designate, where appropriate, agricultural, forest and mineral resource lands (referred to collectively as "natural resource lands") and critical areas by September 1, 1991. RCW 36.70A.170. This section of the Act has not been subsequently amended. In addition to the designation requirement, counties and cities were also required to adopt development regulations to assure the conservation of agricultural, forest and mineral resource lands (RCW 36.70A.060(1)) and to preclude land uses or development that were incompatible with critical areas. RCW 36.70A.060(2). Although subsection (2) was amended in 1991 to require counties and cities to, instead, protect critical areas, the basic mandate to adopt what have subsequently been referred to as "interim development regulations" remains in effect.^[1]

Motion 8496 is the County's attempt to comply with the requirements of RCW 36.70A.170 and .060. It is titled:

A MOTION stipulating that King County has completed the preliminary classifications, designations and regulations for its critical areas and resource lands, as required by the Growth Management Acts. Exhibit A to FOTL's and the County's Dispositive Motion.

Section A of Motion 8496 provides:

King County has made preliminary classifications and designations of its critical areas and natural resource lands and has adopted regulations for the protection of its critical areas and for the conservation of its resource lands, as required by the Growth Management Acts (*see* attachments). Exhibit A to FOTL's and the County's Dispositive Motion.

The attachments to Motion 8496 list several:

"...designations and development regulations which exist within current county ordinances and rules for agricultural, forest and mineral resource lands and critical areas... Exhibit A to King County's Dispositive Motion, at 1, the fifth finding.

The attachments specifically refer to the Sensitive Areas Ordinance (**SAO**), codified at Chapter 21.54 of the King County Code (**KCC**); the SAO Map Folio and Wetlands Inventory; the

County's 1985 Comprehensive Plan; Chapter 21.22 KCC; Chapter 21.23 KCC; Chapter 21.37 KCC; Chapter 21.38 KCC; Chapter 21.42 KCC; the Resource Lands Area Zoning Ordinance (No. 8848) that was adopted in 1989; unspecified community plans adopted since 1985; and unspecified basin nonpoint pollution and other functional plans.

Motion 8496 was passed on January 27, 1992. The County did not provide pre-adoption notice that Motion 8496 would be considered, nor did it conduct a public hearing on Motion 8496 where persons could comment on it, nor did the County publish notice that Motion 8496 had been adopted. The County cited to its charter for the authority not to do any of these things since motions are merely "a declaration of policy which do not have the force of law." King County Charter §240.

The County erred in the way it conducted its activities related to Motion 8496. RCW 36.70A.170 and .060 mandated that certain areas "shall" be designated and that development regulations "shall" be adopted. "Development regulations" are defined at RCW 36.70A.020(7) as:

... any controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances. (emphasis added).

The Board has concluded that when the Act refers to "development regulations" in general, rather than distinguishing between interim and implementing development regulations, it is referring to both interim and implementing regulations. *Tracy v. Mercer Island*, CPSGPHB Case No. 92-3-0001 (1993), at 11. RCW 36.70A.060 requires the County to adopt interim development regulations. The Board holds that a development regulation, whether interim or implementing, must be a binding legislative enactment. The Board is not ruling that a resolution or motion can never be used to comply with GMA critical areas and natural resource lands requirements. The test is whether the public has advance notice providing the opportunity to comment before the matter is adopted; whether a public hearing is held; whether the legislative action has the force and effect of law; and whether notice of adoption is published -- regardless whether the enactment took place by way of ordinance, motion or resolution. This process is precisely the opposite of what the County did in passing Motion 8496.

The Board agrees with the County that Motion 8496 is not a development regulation. Because Motion 8496 does not have the force of law, it cannot be found to comply with the requirements of RCW 36.70A.060 and .170. The Board has previously ruled that a jurisdiction is not automatically precluded from utilizing a pre-GMA enactment to comply with the GMA. For

instance, "the policies in the 1985 Comprehensive Plan^[1] and other community, basin nonpoint pollution and other functional plans" were not adopted pursuant to the requirements of the GMA, but the County nonetheless listed them in the attachment to Motion 8496. The Board has previously ruled that a jurisdiction is not precluded from using a pre-GMA enactment to comply with the Act. However, it must use care and caution when doing so.

As the Board has previously indicated in reviewing an action taken by King County:

Having held that the ESC Plan Update is not a GMA-required document, the Board nonetheless cautions the County about its future actions. If the County modifies any of its

existing adopted pre-GMA community plans, after adopting a comprehensive plan that is intended to comply with GMA requirements, in order to make those community plans consistent with that new comprehensive plan, it must clearly label them as GMA subarea plans to its GMA comprehensive plan. As for the ESC Plan Update, it currently is not a GMA comprehensive plan or subarea plan. It will not become the latter unless the County elects to adopt it as such. Whether an ESC Plan Update, that has been revised after the County adopts its GMA comprehensive plan, ultimately complies with the GMA will be determined by the Board only if and when a petition is filed. *Happy Valley*, at 19 (emphasis added).

In a similar case, the Board reviewed an action by the City of Seattle:

Turning to the question of when and how the Final Northgate Plan will be subject to the requirements of the Act, the Board makes the following observations. At the hearing on the Motion, counsel for the City indicated that Seattle intends to adopt its GMA comprehensive plan in 1994 and, some time thereafter, to review the Final Northgate Plan for consistency with the new citywide comprehensive plan. *See also* Findings of Fact 28. If the City wishes to give the Final Northgate Plan status as a subarea plan pursuant to RCW 36.70A.080(2), it will have to explicitly do so by subsequent legislative enactment. A pre-existing neighborhood or community plan does not automatically become a part of the GMA required comprehensive plan.

The Board also observes that incorporating a pre-existing subarea plan into a GMA required comprehensive plan is much more than a perfunctory exercise. *Northgate Mall Partnership v. Seattle*, CPSGPHB Case No. 93-3-0009 (1993), Order Granting Seattle's Motion to Dismiss..., at 17 (emphasis added).

Because King County adopted Motion 8496 as a motion instead of an ordinance, by the terms of its own charter it was not required, nor did it, advertise pre-adoption notice nor hold a public hearing on the matter. Therefore, it did not enact a GMA regulation. Although the County's legislative body passed Motion 8496, by the terms of the County Charter, a motion does not have the force and effect of law and therefore, is not a GMA enactment. A jurisdiction cannot simply decide without public hearing that a pre-GMA action has suddenly been "blessed" as meeting the requirements of the GMA. Instead, the local government's legislative body, when enacting a GMA regulation, (that therefore has the force of law), must make a specific determination that the pre-GMA action complies with the GMA. This can only be done after permitting the public the opportunity to comment upon the proposal. To hold otherwise would mock the GMA's citizen participation goal at RCW 36.70A.020(11), which states:

Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile differences.

Local jurisdictions are required to consider the GMA's planning goals when adopting development regulations. Although this Board will hold a local jurisdiction to a lesser standard when it must adopt interim natural resource lands and critical areas development regulations (*see*

Gutschmidt v. Mercer Island, CPSGPHB Case No. 92-3-0006 (1993), at 10-17), it cannot permit a local jurisdiction to totally ignore having the public's right to participate in its compliance action.^[1]

In a related vein, the attachments to Motion 8496 refer to several specific development regulations and designations such as the SAO and Chapter 21.22 KCC, for instance. However, the attachments also refer to unspecified community plans, and basin nonpoint pollution and functional plans. Which ones? Any jurisdiction intending to use pre-existing documents enacted prior to the GMA to now comply with the Act must so indicate with a high degree of specificity. Simply referring to "other" community, basin nonpoint pollution and functional plans is totally insufficient. The public must know specifically which documents have been incorporated by reference, both so that they can comment on the appropriateness of such an action prior to the GMA compliance ordinance being adopted, and so they know which pre-existing documents are regulating them pursuant to the GMA after they have been incorporated by reference into the GMA compliance ordinance.

Motion 8496 is not in compliance with the Act for another reason. It was passed approximately six months after the requirement in RCW 36.70A.290(2) to make post-adoption publication took effect (on July 16, 1991). RCW 36.70A.290(2) provides:

All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter must be filed within sixty days after publication by the legislative bodies of the county or city. The date of publication for a city shall be the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations, or amendment thereto, as is required to be published. Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto. The date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto. (Emphasis added.)

Importantly, RCW 36.70A.290(2) requires post-adoption notice of "the comprehensive plan or development regulations, or amendment thereto." It does not distinguish between interim and implementing regulations. The County never published notice of adoption of Motion 8496. The County contends that it was not required to publish notice of adoption of Motion 8496 since Motion 8496 was not a development regulation. Instead, the County points out that pursuant to the King County Charter, motions "do not have the force of law." King County Charter §240. The County repeatedly admits that Motion 8496 is not a GMA development regulation. *See* Response of King County to Petitioner's Motion..., at 5 and 6; County's Dispositive Motion, at 5 and 7. If the County intends to have pre-GMA ordinances and documents listed in the attachment to Motion 8496 meet the RCW 36.70A.060 requirement, procedurally it must do so by a legislative enactment that explicitly incorporates by reference these specific pre-existing documents. Doing this by motion in King County is insufficient for, as FOTL indicated:

... the result is that the County ... [is] able to anoint pre-GMA regulations and planning documents as GMA "interim development regulations" in virtual secrecy. Petitioner's Response to King County's Motion, at 4-5.

Furthermore, as the Board ruled above, attempting to do this by way of a motion, when post-adoption notice is not required by the King County Charter, does not suffice. The County must give post-adoption notice as required by RCW 36.70A.290(2). Otherwise, until and unless such a legislative enactment either adopts new regulations or pre-existing (pre-GMA) regulations to comply with the requirements of RCW 36.70A.060, no action pursuant to the GMA has taken place.

The SAO

King County's SAO was listed in the attachment to Motion 8496 as being an ordinance that satisfied many of the requirements in RCW 36.70A.060 to adopt interim development regulations. It was passed on August 29, 1990 -- less than two months after the GMA's effective date. The County had begun work on the SAO at least as early as March, 1989. Exhibit B to Response of King County to Petitioners' Motion for Disposition on Legal Issue 3, at 3, Finding 14. Nonetheless, in the Preamble to the SAO, the County Council recognized the existence of the GMA and found that:

The 1990 Washington State Legislature approved ESHB 2929 (1990 Wash. Laws 17) which mandates that certain counties and cities within those counties address the protection of critical areas. Critical areas as defined in ESHB 2929 correlate generally with the King County definitions and categories of sensitive areas. This Sensitive Areas Ordinance is designed to meet the challenge and satisfy the requirements of this act with regard to all critical areas except aquifer recharge areas, which will require a different regulatory approach. Exhibit B to Response of King County to Petitioners' Motion for Disposition on Legal Issue 3, at 2, Finding 4.

The County did not publish notice that it had adopted the SAO. The Board cannot fault the County for failing to do so. The requirement to make a post-adoption publication did not take effect until July 16, 1991, when what has been codified at RCW 36.70A.290(2) was enacted. Had the County adopted the SAO after July 16, 1991, the County would have been required to publish a notice pursuant to RCW 36.70A.290(2). However, since the County adopted the SAO eleven months before the effective date of this requirement, post-adoption publication was not necessary.

As this Board has previously noted, the importance of the post-adoption publication:

... in addition to informing the public that an ordinance had been adopted, is to provide notice of the adoption of the ordinance so that a specific date is triggered from which an appeal to a growth planning hearings board can be made. *Gutschmidt v. Mercer Island*, CPSGPHB Case No. 92-3-0006 (1993), at 33 (emphasis added).

The growth planning hearings boards were not created by the legislature until 1991. The boards did not begin operations until May 15, 1992. Obviously, it was impossible to appeal to this Board

any GMA enactment adopted, like the SAO, prior to the existence of the Board! However, potential petitioners were not without redress. In the case of the SAO, a writ of review action could have been brought before the King County Superior Court, and that court would have determined if the SAO complied with the GMA.

The Board rules that FOTL's Petition for Review in this case was not filed in a timely matter to challenge the SAO. Precisely how soon FOTL should have brought a challenge to the SAO after it was adopted is now irrelevant. Although it is not for the Board to decide, the County's analysis that the SAO should have been appealed within "a reasonable time" (i.e., within 30 days) is sound given pre-GMA case law. See County's Dispositive Motion at 8-9 and Part V of this Order ("*County's Position -- Timeliness of Appeal*"). FOTL's Petition for Review in this matter was filed on January 27, 1994. The Board cannot permit FOTL to challenge the SAO two years after that ordinance was adopted.

The Board therefore holds that the SAO did comply procedurally with the requirements of RCW 36.70A.170 and .060 in existence at the time of adoption except, by its own terms, "... with regard to ... aquifer recharge areas, which will require a different regulatory approach." Exhibit B to Response of King County to Petitioners' Motion for Disposition on Legal Issue 3, at 2 -- Finding 4. As for aquifer recharge areas,^[1] during oral argument, the County conceded that it had still not completed this requirement. Accordingly, the Board will order the County to do so. Except in the instance of aquifer recharge areas, the Board's ruling that the SAO procedurally complies with the GMA at the time it was adopted is a technical victory for the County. The Board notes the irony that the County prevails on a technicality even though it has accused FOTL of raising "overly technical" arguments.

Nonetheless, the procedural manner in which the SAO was adopted does cause the Board major concern. According to Finding 4 in the Preamble to the SAO, the ordinance was enacted to comply with the requirements of the GMA. Presumably, this provision gave citizens notice of the fact that the SAO was an action taken pursuant to the GMA.^[1] What is troublesome, however, is that Finding 4 has not subsequently been codified. Section 2 of the SAO, entitled "Purpose," was codified as KCC 21.54.010. The relevant portion of that section fails to refer to the GMA. Instead, it states:

... By regulating development and alterations to sensitive areas this ordinance seeks to:

...

I. Implement the policies of the State Environmental Policy Act, Chapter 43.21C RCW, K.C.C. Chapter 20.44, the King County Charter, the King County Comprehensive Plan and all county functional and community plans. Exhibit B to the Response of King County to Petitioners' Motion for Disposition on Legal Issue 3.

Therefore, if an interested person were to look up the SAO today in the King County Code, absolutely no mention of the GMA would be found. The reader would have no idea that Finding 4 existed. Although it is too late in this case for the Board to do anything about it because of the chronological manner in which the GMA was enacted, the SAO adopted and the Board created,

in the future, any ordinance or other enactment adopted by a local jurisdiction in order to comply with the GMA, must indicate in the body of the document (i.e., the codified portion) that the document is adopted to meet the Act's requirements. Putting such a statement like the SAO's Finding 4 only in a finding of fact, when the finding is not codified, will not suffice. Furthermore, if a local jurisdiction is going to indicate the purpose of the enactment, if it intends the ordinance to be a GMA compliance document, it must so indicate. All the County had to do was repeat the relevant portion of Finding 4 in the Purpose portion of the document. That would have put everyone on notice as to why the ordinance was adopted -- pre- and post-adoption.^[1]

Finally, it must be noted that since an appeal of the SAO was not timely filed, the Board does not take a position on whether the SAO substantively complies with the GMA.

Conclusion

An individual or non-governmental organization with members who reside or own property within a jurisdiction that has failed to act, has standing to bring a "failure to act" challenge before the Board.

King County Motion 8496 is not a development regulation as defined by the GMA. A GMA development regulation is a binding legislative enactment that has the force of law, while Motion 8496 was just the opposite. Because the County did not intend it to be such a regulation, no pre-adoption or post-adoption notice was given nor was a public hearing held regarding Motion 8496. Although Motion 8496 referred to County regulations and designations that existed prior to the GMA, in order for a local jurisdiction to incorporate such regulations and designations as GMA compliance enactments, a public hearing must be held and the local government's legislative authority must pass an enactment that explicitly indicates its intent to use pre-existing regulations to comply with the GMA. In addition, the enactment must specifically identify which documents will be so used. The County's failure to provide post-adoption notice also does not comply with the GMA. Therefore, the Board agrees with FOTL and concludes that the County has failed to act to adopt natural resource lands and critical areas interim development regulations and designations, but for the SAO.

As for the SAO, the Board concludes that FOTL can no longer appeal it two years after it was adopted. The SAO technically complied with the procedural requirements of the GMA in effect at the time it was adopted, except for aquifer recharge areas. By its own terms and based on the County's oral admission, the SAO does not address aquifer recharge areas, which the County explained would "require a different regulatory approach." Since the Board has rejected Motion 8496 for failure to comply with the GMA, and no other enactments have been submitted that might constitute this "different approach," the County must still comply with the GMA by designating aquifer recharge areas and adopting interim development regulations that protect those areas.

Furthermore, were the SAO before the Board for review in a timely manner, the Board would not permit the County to refer to the GMA only in the non-codified Preamble but not in the title

portion or codified "purpose" section of the SAO. If a jurisdiction intends to use a document to comply with the GMA, it must explicitly so note in the codified portion of the document.

V. THE COUNTY'S DISPOSITIVE MOTION

Background

A. The County's Dispositive Motion has four parts. The first deals with the timeliness of FOTL's challenge of Motion 8496. This will be referred to as the "**timeliness of appeal**" issue.

B. The second part of the County's Dispositive Motion deals with whether Ordinance 11110 complies with the Act's public participation requirements at RCW 36.70A.020(11) and .140. Since the Board has determined that FOTL does not have standing to challenge Ordinance 11110, this issue is **moot** and the Board will not consider it further.

C. The third part of the County's Dispositive Motion involves **GMA sequencing** and is addressed in Legal Issue No. 4 as set forth in the Board's Prehearing Order. Since FOTL subsequently **withdrew** Legal Issue No. 4 in its entirety (*see* Petitioners' Response to King County's Motion..., at 6), the Board will not consider this issue further.^[1]

D. The fourth matter raised in the County's Dispositive Motion involves Ordinance 11110 and substantive fiscal analysis. It is covered in Legal Issue No. 5 as set forth in the Board's Prehearing Order. Because the Board has determined that FOTL does not have standing to challenge Ordinance 11110, this matter is also **moot** and will not be discussed further.

The County's Position -- Timeliness of Appeal

The County contends that since the County Council passed Motion 8496 on January 27, 1992, FOTL waited too long to appeal the action when it filed its Petition of Review on January 27, 1994. The County contends that neither RCW 36.70A.060 nor RCW 36.70A.170, the GMA provisions dealing with resource lands and critical areas, contains an explicit statutory limitation period indicating how soon such designations and regulations must be appealed. Therefore, the County turns to Washington common law that provides that in the absence of an explicit limitation period, a challenge to a land use regulation must be brought "within a reasonable time." King County claims a reasonable time:

... is determined by analogizing to the limitation periods applicable to similar types of land use decisions. The explicit limitation period most applicable to the most similar type of land use decision is 60 days. County's Dispositional Motion, at 4.

Although the County explains that challenges to most land use decisions made by local governments must be brought within 30 days, RCW 36.70A.290(2) provides for a sixty day period which is "the most analogous time period." The sixty day period is consistent with the Board's own rules at WAC 242-02-220(3). County's Dispositional Motion, at 9. Therefore, the County argues that FOTL should have appealed Motion 8496 within sixty days. Accordingly, the County contends that FOTL's appeal, two years after the fact, is unreasonable and should be

barred. County's Dispositional Motion, at 3-4, and 9.

However, the County repeatedly takes the position that the sixty day provision in RCW 36.70A.290(2) itself does not apply to challenges to Motion 8496. The County explains that, pursuant to the King County Charter, it was not required to publish Motion 8496 because a motion is not an ordinance but simply a "declaration of policy" which does not have the force of law. Thus, a motion like Motion 8496 could not control development or land use activity. While RCW 36.70A.290(2) requires publication of development regulations, since Motion 8496 was not a development regulation, it did not have to be published. County's Dispositional Motion, at 5. Alternatively, the County contends that RCW 36.70A.290(2) "addresses only permanent regulations and plans, not interim regulations." County's Dispositional Motion, at 7 (emphasis in original).

The County also explained that the underlying regulations referenced in Motion 8496 had been adopted:

... before the passage in 1991 of the bill containing what has been codified at RCW 36.70A.290. It was these enactments that satisfied the requirements of RCW 36.70A.060 and RCW 36.70A.170. Therefore, King County was not required to publish Motion 8496. County's Dispositional Motion, at 6

FOTL's Position -- Timeliness of Appeal

FOTL agrees with the County that Motion 8496 is a non-binding statement over which the Board has no jurisdiction. Petitioner's Response to King County's Motion..., at 3. FOTL further argues that since it agrees with the County's admission that Motion 8496 is not a development regulation adopted pursuant to the GMA, the County has failed to act pursuant to the requirements of the GMA. Therefore, FOTL contends that the 60 day period of RCW 36.70A.290(2) does not apply; a petition for review challenging a local jurisdiction for failing to act pursuant to the requirements of the Act can be filed at any time. Petitioner's Response to King County's Motion..., at 3.

FOTL challenges the County's argument that the Motion should have been challenged within a "reasonable time" by claiming that it invokes an equitable doctrine over which the Board lacks jurisdiction. Petitioner's Response to King County's Motion..., at 4.

Alternatively, FOTL contends that the County failed to provide post-adoption notice that Motion 8496 had been adopted, as required by RCW 36.70A.290(2).

Once the County brings itself into compliance with the post-adoption publication requirements, then the 60 day clock begins to tick down. It is only after the statutory 60 day clock expires that petitions challenging Motion 8496 would no longer be timely.

Petitioner's Response to King County's Motion..., at 6.

Discussion -- Timeliness of Appeal

As the Board's discussion of FOTL's Dispositive Motion indicates, the Board has concluded that, in passing Motion 8496, the County failed to act to meet the GMA's requirement to adopt interim critical areas and natural resource lands development regulations or to designate such areas and

lands. Therefore, because the County had failed to act, FOTL's appeal of Motion 8496 was filed in a timely manner.

As originally adopted by the joint growth planning hearings boards, WAC 242-02-220(3) provided that:

... a petition must be filed with a board within sixty days of the final written decision, order, determination, publication, or action being entered or within sixty days from the failure to act by a specific deadline.

However, the joint boards amended that section by deleting the last phrase in WAC 242-02-220 (3) ["... or within sixty days from the failure to act by a specific deadline"], so that there would be no statute of limitations for filing "failure to act" petitions. This rule amendment became effective on June 17, 1993 and was the rule in effect when FOTL filed its petition.

Accordingly, the Board concludes that FOTL did timely file its Petition for Review challenging Motion 8496.

Subsequently, the joint boards further amended WAC 242-02-220 by adding a new subsection (4) which provides:

A petition relating to the failure of a state agency, city or county to take an action by a deadline specified in the act may be brought at any time after the deadline has passed.

This amendment became effective on April 10, 1994.

Conclusion -- Timeliness of Appeal

King County's enactment of Ordinance No. 9614, the SAO, complies with the procedural requirements of the GMA as they relate to critical areas and natural resource lands, but for aquifer recharge areas. It was adopted on August 29, 1990, nearly a year before amendments to the Act requiring post-adoption publication of notice were enacted. Therefore, FOTL's January, 1994 petition for review, over three years after the SAO was adopted, is not timely. Accordingly, FOTL cannot now challenge the SAO for failing to comply with the GMA.

FOTL's appeal of King County Motion 8496 was filed in a timely manner, since failure-to-act challenges can be filed at any time after a deadline for acting has passed.

VI. EPILOGUE

The Board's disposition of the motions means that the substantive issues raised in this case will not be considered. However, the failure of the County to act pursuant to the GMA to designate and adopt certain of the interim development regulations identified by Motion 8496 because they did so by motion, as opposed to by ordinance, and the failure of FOTL to establish standing, share some common themes which are worthy of note. It is expected that, in the future, each will consider how to remedy the procedural flaws identified in this case. As they ponder that subject, the Board offers the following observations.

The Board notes that the County admitted that it failed to adopt the critical areas aquifer recharge regulations as required by the GMA. The Board also concludes that none of the pre-GMA enactments referenced in Motion 8496 has become a GMA regulation because the County acted by motion rather than by ordinance. Thus, the County has yet to enact a GMA regulation to give the force and effect of law to the matters described in these pre-GMA documents. The Board will order the County to comply with the requirements of RCW 36.70A.170 and RCW 36.70A.060 by binding legislative enactment. This would result in designations and regulations enacted pursuant to the GMA and with the force and effect of law. Just as significantly, however, those regulations would be the product of a **public process** including pre-adoption notice, public hearing(s) and post-adoption publication.

The County should consider such a legislative enactment process as more than mechanical and perfunctory compliance with the letter of the Board's Order. The Board is compelled to make this admonition in view of a previously reviewed King County action. In *Happy Valley*, the Board noted that the County's record was less than stellar in the clarity of its communications with the public:

Meaningful public participation depends upon local government being clear and consistent in the way it characterizes the authority, scope and purpose of proposed planning enactments. In this case, the County will suffer no consequence for its poor performance because the Board has concluded that the ESC Plan Update is not a GMA enactment. *Happy Valley*, Order Granting Respondent King County's Motion to Dismiss, at 19.

In *Happy Valley*, as here, the County failed to clearly convey to the public the purpose of the ostensible GMA enactment. In the former case, it described the ESC Plan Update as both a GMA and a non-GMA enactment. In this case, much of the County's alleged compliance was based on Motion 8496, notice of which was never given, on which no hearing was ever held, and of which no post-action publication was ever made.

The Board did not make lightly the decision that FOTL lacked standing. The Act recognizes the critical importance of public participation in the planning process, and the Board recognizes that the right to file a petition for review is an important part of that process.^[1] RCW 36.70A.020(11) provides as follows:

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts. (Emphasis added).

Some may view as overly restrictive the Board's requirement that, in order to establish standing, organizations as well as individual citizens must explicitly 'appear' during the pending process below. The Board agrees that this ruling places an additional, if minimal, burden on organizations to identify themselves as such during the process prior to adoption of a GMA contested enactment. However, we do not see this as unduly restricting the opportunity for appeal or narrowing the avenues for citizen participation. Quite the contrary, our reading of Goal 11 is that it encourages public participation throughout the process, and although unstated, places a duty on citizens to avail themselves of the opportunity for participation.

While the "appeals process" is important, it necessarily follows "the planning process." For the Board to grant standing pursuant to the appearance standing prong of RCW 36.70A.280(2) to groups and organizations that never took part in "the planning process" would undermine the direction of Goal 11.

The common thread between the County's failure and FOTL's failure might be described as "truth in labeling." When the County initiates or ultimately takes action on a GMA required action, it has a duty to clearly and accurately label what that action is. In King County's case, the adoption of GMA-required enactments by ordinance rather than by motion helps to achieve this. However, the County must also take great care to use concise, clear and unambiguous language in its notices of hearings, its proposed enactments and its post-adoption notices.

Similarly, when citizens or organizations avail themselves of the public participation processes required by the Act, those parties have a **continuing responsibility** to appear before the local jurisdiction on the matter being considered, and to openly and clearly declare their identity. It is difficult for local governments to include in their consideration and balancing of interests the views of parties who do not participate actively and openly in the dialogue prior to adoption. In order for the public participation goal of the Act to be served, both the local governments and the public must engage in an open, clear and active dialogue. Failure to do so by either may result, as in this case, in an adverse ruling by this Board on appeal.

VII. ORDER

Having reviewed the documents listed above that were filed with the Board in support of and in opposition to the dispositive motions before the Board, having considered the oral arguments of the parties, and having deliberated on the matter, the Board enters the following order.

ORDERED:

1. Sunrise's Dispositional Motion, which deals only with Ordinance 11110, is **granted**. **Legal Issue Nos. 1 and 2** as they relate to Ordinance 11110, and **Legal Issue Nos. 4 and 6** in their entirety, as set forth in the Board's Prehearing Order, are **dismissed with prejudice** since FOTL does not have standing to raise these issues.
2. The Board has determined that FOTL does have standing to challenge Motion 8496. Therefore the Board will not consider further that portion of **Legal Issue No. 2** asking whether FOTL had standing to challenge Motion 8496.
3. FOTL's Dispositive Motion, which deals only with Motion 8496, is **granted**. Other than the SAO, the County has failed to act to designate and adopt interim natural resource lands and critical areas development regulations. Therefore, **Legal Issue No. 3** need not be further addressed since the Board has concluded that Motion 8496 does not comply with the GMA.
4. The County's Dispositive Motion regarding Motion 8496 (i.e., part one -- the timeliness of appeal issue) is **denied**. *See also* Order No. 2 above. That portion of **Legal Issue No. 1** that relates to Motion 8496, as set forth in the Board's Prehearing Order, need not be further addressed since the Board has concluded that FOTL did file its Petition for Review challenging Motion 8496 in a timely manner.

5.The County's Dispositive Motion regarding Ordinance 11110 (i.e., part four -- fiscal analysis) is **moot** since the Board concluded in granting Sunrise's Dispositive Motion that FOTL does not have standing to challenge Ordinance 11110.**Legal Issue No. 5**, as set forth in the Board's Prehearing Order, is therefore **dismissed with prejudice**.The Board will not consider the issue further.

6.Because FOTL has previously withdrawn Legal Issue No. 4 and because the Board concluded that FOTL does not have standing to challenge Ordinance 11110, **Legal Issue No. 4** is **dismissed with prejudice**.The Board will not consider the issue further.

7.The Board has concluded that, other than the SAO, King County has not yet designated and adopted interim development regulations that conserve natural resource lands and that protect critical areas pursuant to the GMA.Because the County has admitted that it has yet to designate and adopt interim development regulations that protect aquifer recharge areas, and since the SAO explicitly did not address such areas, the County is ordered to designate, where appropriate, aquifer recharge areas and adopt by ordinance interim development regulations that protect such designated areas on or before **July 1, 1994**.

If the County, at its discretion, elects to incorporate by reference specific pre-existing ordinances or regulations to now comply with the GMA, it must do so by legislative enactment.Therefore, if the County elects to use such ordinances or other regulations to comply with the GMA, the County shall provide public notice; clearly indicating its intention to do so; specify which pre-existing regulations or ordinances it is relying upon; hold at least one public hearing; and publish notice of the adopted ordinance pursuant to RCW 36.70A.290 (2).

8.As a consequence of this order, no legal issues remain for the Board to determine. Therefore, the hearing on the merits scheduled to take place in this matter on May 26, 1994, is **canceled**.

So ORDERED this 22nd day of April, 1994.

CENTRAL PUGET SOUND GROWTH PLANNING HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Presiding Officer

Chris Smith Towne
Board Member

NOTE:This order constitutes the Board's final order in this case as specified by RCW 36.70A.300, unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

[1]

The Boards' Rules of Practice and Procedure do not authorize motions for summary judgment. Instead, dispositional motions, such as motions to dismiss for lack of jurisdiction, are anticipated. Dispositive motions are similar to a motion for summary judgment but not the same. See WAC 242-02-530(4) and *Twin Falls et al. v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993), Order on Dispositive Motions, at 19-21.

[1]

FOTL's Petition for Review alleged both that its members would be "adversely affected" by the failure of the County to comply with the GMA and that its members appeared before the County. FOTL's Petition for Review, at 6, ¶8.

[1]

The Board does not dispute that a nonprofit organization can obtain standing pursuant to the GMA's appearance standard. The question is merely how such an organization "appears" in order to obtain standing. One should be careful not to confuse the test for a nonprofit organization to obtain standing in a writ of review situation discussed in *Save a Valuable Env't v. Bothell*, 89 Wn.2d 862, 866-67, 576 P.2d 401 (1978) (i.e., that an organization must show that it or one of its members will be specifically and perceptibly harmed by an action) with the test for obtaining "appearance standing" pursuant to the GMA.

[1]

In *Happy Valley*, the County argued and the Board agreed that the East Sammamish Community Plan Update was not adopted pursuant to the GMA. *Happy Valley Associates, et al. v. King County*, CPSGPHB Case No. 93-3-0008 (1993), at 17, 19 and 27.

[1]

The Board notes that FOTL claims that Ellouise Pritchett was a member of FOTL, as was Judy Willman. FOTL's Response, at 5-6. However, in neither case do the referenced documents (one dated May 26, 1992; the other undated) refer to the women as members, much less as representatives, of FOTL. Exhibits C and E to the Elfelt Declaration. In addition, in Ms. Willman's case, she specifically identified herself as the secretary of the King County Exec. Horse Council.

Furthermore, FOTL's claim that Tom Sanderson was a member of FOTL also fails, as nothing in the referenced exhibits indicates that he was either a member of or representing FOTL. FOTL's Response, at 8. See also Exhibits F, G, H, I, J and K to the Elfelt Declaration. The Board also notes that FOTL's claim that Tom Sanderson "is a member of FOTL" (see FOTL's Response, at 8) implied that Mr. Sanderson was a member at the time he wrote the County Council in November, 1992. Subsequently, FOTL clarified that Mr. Sanderson was not a member of FOTL "at the time of the hearing on or adoption of ordinance 11110..." [i.e., September-November, 1993] and was not a member until January, 1994 when FOTL's Petition for Review was filed. Supplemental Elfelt Declaration, at 4, ¶13. Indeed, Mr. Sanderson did not become a member of FOTL until January 24, 1994. See Exhibit K to the Supplemental Elfelt Declaration. Therefore, FOTL asks the Board to grant it standing based partially on a current member's written comments to the County Council on a separate matter nearly a year before the relevant matter (adoption of IUGAs) was required, and before that individual was even a member of FOTL. The Board declines the invitation. FOTL's claim is also based on an October 4, 1993, letter from Ruth A. Kees. Although the date was more relevant, Ms. Kees was commenting upon "proposed Ordinance 93-358." Exhibit M to the Elfelt Declaration. Likewise, a letter from Joanna A. Buehler, dated October 4, 1993, to Council Member Gruger was written on letterhead of Save Lake Sammamish, a nonprofit organization, and signed by Buehler, its president. Exhibit N to the Elfelt Declaration. Again, neither individual indicated that she was a member of FOTL or that she represented FOTL.

[1]

As an example, the King County CPPs (Ordinance No. 10450) were adopted on July 6, 1992 -- long before the legislature ever required IUGAs. Consequently, the CPPs do not mention IUGAs. See generally *Snoqualmie v. King*

County, CPSGPHB Case No. 92-3-0004 (1993).

[1]

The Board notes that while *Concerned Olympia Residents* also involved a SEPA challenge raised by a writ of certiorari, *Save a Valuable Env't* was a statutory writ of certiorari case involving a rezone application, not a SEPA question. As pointed out in a footnote in *Trepanier v. Everett*:

... Further, we note that the court in *Save a Valuable Env't*, a statutory certiorari case, applied the same standing test set forth in constitutional certiorari cases. This test has been consistently applied in cases involving SEPA review. *Trepanier*, at 382-83, fn. 1.

[1]

See *Tracy v. Mercer Island*, CPSGPHB Case No. 92-3-0001 (1993), at 5 and 11.

[1]

In *Happy Valley et al. v. King County*, CPSGPHB Case No. 93-3-0008 (1993), Order Granting Respondent King County's Motion to Dismiss..., the Board considered whether the 1985 King County Comprehensive Plan (KCCP) complied with the GMA. The Board noted:

... Clearly, the existing 1985 KCCP (as amended in 1992) does not comply with the GMA, nor was it intended to. RCW 36.70A.070 lists a series of mandatory elements that a comprehensive plan must contain. As the County itself acknowledged, it does not have a comprehensive plan that complies with these GMA requirements because a GMA plan does not yet exist. *Happy Valley*, at 18.

[1]

The Board is aware that RCW 36.70A.390 enables a city or county to adopt a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing. However, when a public hearing is not held before adoption, it must be held "... within at least sixty days of its adoption." More importantly, this provision, enacted in 1992, does not apply to RCW 36.70A.170 and .060. Thus, if the County in the future attempts to turn documents adopted prior to the GMA into GMA natural resource lands and critical areas enactments, it must still comply with state law and its own charter provisions regarding pre-adoption notice and public hearings.

[1]

RCW 36.70A.030(5) defines "critical areas" to include five categories, one of which is "areas with a critical recharging effect on aquifers used for potable water," here referred to as "aquifer recharge areas."

[1]

Whether the County provided adequate notice prior to adopting the SAO is not an issue before the Board. Such notice would have had to comply with other statutes (besides the GMA) or King County provisions over which this Board does not have subject matter jurisdiction. Furthermore, there is not information in the record presently before the Board that indicates exactly when the fourth finding was added in the process of adopting the SAO. At this point, the Board can only assume that the public knew that the SAO was being adopted as a GMA compliance ordinance because of the language of Finding 4.

[1]

The Board observes that the other King County Ordinances that the Board reviewed referenced the GMA in the title caption and in the main body. The SAO did neither.

[1]

The reference in FOTL's statement of withdrawal to "Issue No. 4" is to Legal Issue No. 4 as set forth in the Board's Prehearing Order. See Petitioner's Response to King County's Motion, at 6.

[1]

The Board has previously held that enhanced public participation is not required of interim regulations such as critical areas. While the same may be true of interim urban growth areas, adoption of final UGAs clearly will be held to a standard of compliance not only with the Planning Goals, but also with RCW 36.70A.140 which provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish procedures

providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed. [1990 1st ex.s. c 17 § 14.]