

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

KITSAP CITIZENS FOR RURAL)Case No. **94-3-0005**
PRESERVATION, BETH WILSON,))
CHARLIE BURROW, TOM DONNELLY))
and CHARLOTTE GARRIDO,)ORDER ON KITSAP)COUNTY'S DISPOSITIVE
Petitioners,)MOTION
)
v.)
)
KITSAP COUNTY,))
)
Respondent,))
)
and))
)
PORT BLAKELY TREE FARMS,))
)
Intervenor.))
)

On April 29, 1994, the Central Puget Sound Growth Planning Hearings Board^[1] (the **Board**) received a Petition for Review from Kitsap Citizens for Rural Preservation, Beth Wilson, Charlie Burrow, Tom Donnelly and Charlotte Garrido (collectively referred to hereafter as **Citizens**).The Petition challenged Kitsap County (the **County**) Ordinance No. 93-P-1994 (the **Ordinance** or **Ordinance 93-P-1994**), and the County's alleged failure to designate forest lands and adopt development regulations to assure the conservation of forest lands pursuant to RCW 36.70A.170 and .060 respectively.

The Board held a prehearing conference on Wednesday, June 15, 1994 at which time potential requests for amicus or intervenor status, the composition and filing of the record below and exhibits, the legal issues before the Board and a final schedule of deadlines for filing motions and briefs were discussed.A Prehearing Order memorializing those matters was issued on June 16, 1994.

Subsequently, Port Blakely Tree Farms (**Port Blakely**) filed a Motion to Intervene and on June 24, 1994, the Board entered an Order Granting Port Blakely Tree Farms' Motion to Intervene.

One dispositive motion was filed in this case when the County filed a "Dispositive Motion to Dismiss Petition ..." on May 25, 1994. On June 20, 1994, the County filed an "Amended Motion to Dismiss Petition" (**County's Motion**) that replaced its earlier motion. The County's Motion had two major parts, the first claiming that the Board lacked jurisdiction over Ordinance 93-P-1994, an amendment to the County's zoning ordinance. The second part claimed that the County's document entitled "Strategies for Resource Lands Designations and Interim Development Regulations" (the **Strategies**), constitutes the County's effort to comply with the requirements of RCW 36.70A.170 and .060 for forest lands, and that the statute of limitations for challenging that document had run long before Citizens filed their Petition for Review. The following exhibits were attached to the County's Motion:

Exhibit 1A. Excerpt from Minutes of Board of County Commissioners' April 20, 1992 meeting; and

B. Strategies for Resource Lands Designations and Interim Development Regulations

Exhibit 2 Affidavit of Publication of Interim Development Regulations

Exhibit 2A Kitsap County Ordinance No. 99-B-1992

Exhibit 3 Kitsap County Ordinance No. 93-P-1994 [same as Citizens' Ex. E below]

Exhibit 4 Determination of Nonsignificance (**DNS**) and Supporting Documents

On July 5, 1994, Citizens filed "Petitioners' Response to Kitsap County's Amended Dispositive Motion" (**Citizens' Response**). Five exhibits were attached to Citizens' brief:

Exhibit A1. Kitsap County Ordinance No. 155-1993

2. Kitsap County Resolution No. 349-1993

3. Kitsap County Resolution No. 365-1993

Exhibit B Partial transcript of Board of County Commissioners' February 28, 1994 hearing.

Exhibit C Excerpt from Minutes of Board of County Commissioners' December 13, 1993 meeting

Exhibit D October 4, 1993 Staff Report containing a proposed version of Kitsap County Ordinance No. 93-P-1994

Exhibit E Adopted Kitsap County Ordinance No. 93-P-1994 [same as County's Ex. 3 listed above]

On July 12, 1994, "Kitsap County's Rebuttal Memorandum Regarding Dispositive Motion to Dismiss Petition" (**County's Rebuttal**) was filed with the Board. Port Blakely elected not to file a reply brief.

At 10:30 a.m. on Thursday, July 14, 1994, the Board held a hearing on the County's Motion at Kitsap County Fire District No. 18 headquarters in Poulsbo, Washington. The Board's three members were present: M. Peter Philley, presiding, Joseph W. Tovar, and Chris Smith Towne. David A. Bricklin represented Citizens and Douglas B. Fortner represented the County. Port Blakely did not appear at the hearing. Court reporting services were provided by Duane W. Lodell, CSR of Robert H. Lewis & Associates, Tacoma.

During the hearing, the Board ordered Citizens to file the following documents: pages 334 and

336 of Exhibit C, which were missing from the record before the Board; a clean cover page to Exhibit D; and the original version of the proposal that ultimately was adopted as Ordinance 93-P-1994. The County was ordered to file the audio tapes and/or transcript of the Board of Commissioners' April 20, 1992 hearing as it relates to the Strategies document. On July 15, 1994, the Board entered an Order Requiring Kitsap County to Provide Additional Exhibits that relate to the Strategies document by July 22, 1994. Subsequently, the parties complied with these orders. As a result, the following additional exhibits were filed with the Board:

(County's) Additional Exhibit 1 February 19, 1992 Affidavit of Publication of a March 2, 1992 County Board of Commissioners' public hearing

(County's) Additional Exhibit 2 Agenda for County Board Commissioners' April 20, 1992 Meeting

(County's) Additional Exhibit 3 April 13, 1992 Staff Report regarding Strategies document proposed amendments.

(County's) Additional Exhibit 4A. Four (4) Affidavits of Posting of Board of County Commissioners' Minutes

B. Four (4) County Board of Commissioners' Agendas (March 2, 23, 30 and April 13, 1992)

C. Three (3) Minutes of County Board of Commissioners' Meetings (March 2 and 30, and April 13, 1992)^[1]

(County's) Additional Exhibit 5 Audio tape of the portion of the Board of Commissioners April 20, 1992 hearing relating to the Strategies document.

(Citizens') Exhibit F June 7, 1993 Staff Report to planning commission that constituted the initial proposal for what would ultimately be adopted as Ordinance 93-P-1994.

I. FINDINGS OF FACT

Strategies for Resource Lands Designations and Interim Development Regulations

1. The GMA became effective July 1, 1990 and was primarily codified at Chapter 36.70A RCW. Pursuant to RCW 36.70A.170, cities and counties were required to designate natural resource lands (agricultural, forest and mineral resource lands) and, pursuant to RCW 36.70A.060, to also adopt development regulations that assure the conservation of such lands, by September 1, 1991. The Act was subsequently amended, effective July 17, 1991, to authorize the possible extension of the designation and regulation deadlines to March 1, 1992. See RCW 36.70A.380.

2. On March 2, 1992, the Board of County Commissioners held a public hearing to consider the Strategies document:

in order to meet requirements of the Growth Management Act. The purpose of this

document is to designate resource lands and to provide interim controls until a comprehensive plan and development regulations are adopted as required by the Act.

Additional Exhibits 4-B and 4-C^[1] (emphasis added).

Charlotte Garrido, one of the individual Petitioners in this case, testified at the hearing. Additional Exhibit 4-C, at 136.

The Board of County Commissioners, after hearing testimony, continued the hearing until March 23, 1992. Additional Exhibit 4-C, at 137.

3. The March 23, 1992 public hearing on the Strategies document was canceled due to a lack of quorum and continued until March 30, 1992. However, testimony was recorded from persons present, to be included within the record. Additional Exhibit 4-C, at 203.

According to the official minutes of the March 30, 1992 hearing, County staff member John Vodopich testified as follows at the March 23, 1992 hearing:

... the [Strategies] document was formed with direction from the Rural Policy Roundtable and ... the Planning Commission reviewed the document and recommended that the Board [of County Commissioners] adopt it to meet the Growth Management Act requirements. He noted that the Growth Management Act required the County to designate, preserve and protect agriculture and forest lands.... Additional Exhibit 4-C, at 203.

...

John Vodopich responded that the policies being considered today were interim regulations and subject to revision in the comprehensive plan.... Additional Exhibit 4-C, at 204 (emphasis added).

4. On March 30, 1992, the Board of County Commissioners held an additional public hearing on the Strategies document. Additional Exhibits 4-B, at 2, and 4-C, 203-214.

According to the official minutes of the hearing, John Vodopich testified:

These designations are interim in nature in the fact that they will be reviewed and possibly revised before inclusion in the comprehensive plan due July 1, 1993^[1] Since the document before you is interim in nature and contains no regulations, I would suggest that when the public hearings associated with the county-wide comprehensive plan and regulations are scheduled, a mass mailing notifying all property owners in Kitsap County be done.... Additional Exhibit 4-C, at 205 (emphasis added).

After testimony was taken, the hearing was continued to April 13, 1992 for decision only. Additional Exhibit 4-C, at 214.

5. On April 13, 1992, the Board of County Commissioners held a decision-only hearing on the Strategies document that was continued until April 20, 1992 in order to permit County staff to revise the document. Additional Exhibit 4-C, at 222.

6. According to the official minutes, on April 20, 1992, the Kitsap County Board of Commissioners "accepted" the Strategies document together with amendments outlined in the official minutes and in a staff memorandum dated April 13, 1992. Exhibit 1-A.^[1] The actual

language used by the County Commissioners was:

Commissioner Horsley: "I would move these amendments to the Resource Lands document and move approval of the document as amended."

Commissioner Granlund: "Second." Additional Exhibit 5 (emphasis added).^[1]

7. The Strategies document itself is undated. However, on the cover page, it states:

On April 20, 1992, this document was adopted by the Kitsap County Board of Commissioners to fulfill the requirements of the 1990 Growth Management Act to classify and designate natural resource lands and implement interim development regulations.

Exhibit 1-B (emphasis added).

The portion of the Strategies document entitled "Interim Development Regulations" has the following introductory paragraph:

The following policies are adopted to fulfill the interim development regulations requirement of the Growth Management Act for forest resource lands. These policies should be considered in determining appropriate mitigation to minimize the impact of adjacent land uses on forest resource lands ... Exhibit 1-B, at B20 (emphasis added).

Thirteen policies are then specified, each which uses the auxiliary verb "should." Following the thirteen listed policies, the document provides:

With respect to implementation of interim regulations under the Growth Management Act, the following is recommended:

Amend agency SEPA procedures required by Chapter 197-11 WAC and Chapter 43.21C RCW to classify designated forest resource lands as environmentally sensitive until development regulations, as required by RCW 36.70A.120, are adopted. Exhibit 1-B, at B21.

8. On June 29, 1992, a Notice of Decision regarding the Strategies document was published in *The Sun*, a legal newspaper. This legal advertisement stated:

NOTICE IS HEREBY GIVEN that pursuant to RCW 36.70A.290, the Kitsap County Board of Commissioners adopted ... "Strategies for Resource Lands Designations and Interim Development Regulations" on April 20, 1992. Copies ... are available from the Kitsap County Department of Community Development, 614 Division Street, Port Orchard, WA 98366. Exhibit 2 (emphasis added).

9. On November 9, 1992, the Board of County Commissioners adopted Ordinance 99-B-1992, captioned:

An Ordinance Amending the SEPA Ordinance Adding Reference to the Critical Areas and Resource Lands Interim Regulations. Exhibit 2-A.

The first finding of Ordinance 99-B-1992 indicated that the Strategies document had been "adopted." Section 1 of Ordinance 99-B-1992 amends Part 7, Section B(4)(c) of Ordinance 99-A. It indicates that the County adopts by reference as substantive SEPA authority the "policies" in twenty ordinances, plans, rules and regulations that are listed. The Strategies document is one of the twenty listed documents. Exhibit 2-A.

10. The Kitsap County Zoning Ordinance, No. 93-1983 (the **Zoning Ordinance**), was adopted on June 6, 1983.^[1]

11. Effective June 1, 1993, subsection (4) was added to RCW 36.70A.110, pursuant to ESHB 1761 (Laws of 1993, 1st Sp. Sess., ch. 6). Subsection (4) requires counties planning under the Act to adopt development regulations designating interim urban growth areas (**IUGAs**), after compliance with the requirements of subsections (1), (2) and (3) of RCW 36.70A.110, by October 1, 1993.

12. A June 7, 1993 Staff Report from John P. Vodopich, Senior Planner, to the Kitsap County Planning Commission, outlined proposed amendments to several County enactments. One proposal would amend section 14(p) of the Zoning Ordinance (regarding planned unit developments (**PUDs**)). A second would add a new subsection (b) to Section 14 of the Zoning Ordinance (regarding conservation easements and density transfer agreements). In addition, amendments to the 1977 Kitsap County Comprehensive Plan, the 1984 North Kitsap Subarea Plan, the 1983 Central Kitsap Subarea Plan and the 1982 South Kitsap Subarea Plan were proposed. Exhibit F.

13. On June 11, 1993, the County issued a DNS for what would become Ordinance 93-P-1994 that described the proposal as:

Description of Proposal: Proposed Adoption Amendments to the Planned Unit Development (PUD) section of the Kitsap County Zoning Ordinance to include a public benefit rating for use in determining maximum densities in rural planned unit developments and provisions for conservation easements and internal density transfers.

...

COMMENTS: The proposal will not result in more than moderate adverse impacts to the existing environment. The proposed amendments will reduce the maximum density possible, through the Rural Planned Development process, in outlining [sic] areas of the County which are currently designated rural on the County Comprehensive Plan. The reduction in maximum density will result in an overall reduction of impacts associated with development in Rural designated portion of Kitsap County. This may result in a moderate increase in impacts from development in Semi-Urban and Urban designated areas of the County over time. Exhibit 4 (emphasis in original).

The DNS notified interested persons that they could appeal this determination no later than June 29, 1993. Exhibit 4.

14. On June 11, 1993, the County also issued a Notice of the DNS that was virtually identical to the DNS. Exhibit 4.

15. On September 13, 1993, the Board of County Commissioners held an initial public hearing on proposed amendments to the Zoning Ordinance, specifically on conservation easement (Section 6) and on planned unit development (Section 14) amendments. See Exhibit D^[1].

16. On September 20, 1993, the Board of County Commissioners adopted Kitsap County Resolution No. 349-1993, entitled "A Resolution Adopting Interim Urban Growth Areas as Required by the Growth Management Act." The first finding to Resolution 349-1993 provides: WHEREAS, the Board of County Commissioners, pursuant to the requirements of RCW 36.70A.110, Kitsap County is hereby adopting development regulations designating "Interim Urban Growth Areas" with the use of the existing Kitsap County Comprehensive Plan, Subarea Plans, and Environmental Impact Statements before the October 1, 1993 deadline as required by the Growth Management Act." Exhibit A-2.

The resolution portion (second paragraph of the document) provides:

... The designations will be implemented by appropriate regulations contained in the Kitsap County Zoning Ordinance. Exhibit A-2.

17. On October 4, 1993, the Board of County Commissioners adopted Ordinance No. 155-1993, entitled "A Ordinance Adopting Interim Urban Growth Areas as Required by the Growth Management Act." Section 2 of Ordinance 155-1993 provides:

The [IUGAs] designations will be implemented by appropriate regulations contained in the Kitsap County Zoning Ordinance. Exhibit A-1.

18. Also on October 4, 1993, the Board of County Commissioners adopted Kitsap County Resolution No. 365-1993, entitled "A Resolution Adopting Justifications for Adoption of Interim Growth Areas as Required by the Growth Management Act." Numbered paragraph one provides:

The County has adopted regulations using the existing Kitsap County Comprehensive Plan and Subarea Plans.... These designations will be implemented by appropriate land use regulations in the County Zoning Ordinance.... Exhibit A-3.

19. An October 4, 1993 Staff Report was prepared by John P. Vodopich, Senior Planner, to the Kitsap County Board of Commissioners. The report recommended adding a new subsection (m) (regarding conservation easements) to Section 6 and revising Section 14(p)(1)(a) of the Zoning Ordinance (regarding PUDs) in light of public input received at the initial public hearing held by the county commissioners on September 13, 1993. Exhibit D.

20. On October 11, 1993, the Board of County Commissioners held a second public hearing on proposed amendments to the Zoning Ordinance. See Exhibit C.

21. A November 23, 1993 staff report was prepared for the Kitsap County Board of Commissioners regarding the proposed conservation easement amendments. See Exhibit C, at 332-333.^[1]

22. On December 13, 1993, the Board of County Commissioners continued its public hearing (i.e., third such hearing) on the proposed amendments to the Zoning Ordinance. The hearing was limited to a discussion of the proposed conservation easement amendment. The Public Benefit Rating System and design criteria for rural PUDs were to be discussed at a future hearing. Exhibit C, at 332.

23. On February 28, 1994, the Board of County Commissioners again continued the public hearing (i.e., fourth such hearing) on the proposed amendments to the Zoning Ordinance

regarding conservation easements. Exhibit B.

24. At the conclusion of the February 28, 1994 hearing, the Board of County Commissioners adopted Ordinance 93-P-1994.^[1] The Ordinance amends the Zoning Ordinance by adding a new subsection (m), regarding conservation easements, to Section 6. Section 6 is entitled "Rural, residential, agricultural, forestry and undeveloped land zones." Exhibit 3 or E. The prefatory paragraph of Section 6 of the Zoning Ordinance states:

The following are permitted uses in the resource protection, rural 2.5 acre, rural 1 acre, rural 1 acre waterfront, agricultural, forestry, undeveloped land, R-2, R-2 WF, R-2 MH, R-3, R-3 MH, R-4, R-5, R-5 MH, R-6, R-9, R-12, R-18, R-24 and R-30 zones ... Zoning Ordinance, at 13 (emphasis in original).

Subsections (a) through (l) of Section 6 then follow. The introductory sentence to new subsection (m) provides:

The internal transfer of density through the conservation easement process is allowed in the Rural 2.5 acre and Resource Protection 2.5^[1] acre zones ... Exhibit 3 or E.

II. BACKGROUND

The Board's recitation of the legal issues before it in this case is set forth in the Prehearing Order and broken down into two parts. The first set of legal issues relates to Ordinance 93-P-1994 (Part A below); the second set of legal issues addresses the Strategies document (Part B below). The County's Motion raises four issues, three of which generally correlate to the four legal issues listed below; these three County issues are shown in parentheses immediately beneath the applicable legal issue in Part III below. The County's Motion also raises a fourth issue not covered by the Prehearing Order, dealing with the alleged frivolous nature of Citizens' appeal.

A. Ordinance 93-P-1994

Legal Issue No. A-1, as set forth in the Board's Prehearing Order asks:

Was Kitsap County Ordinance No. 93-P-1994 (the Ordinance) enacted pursuant to the requirements of the Growth Management Act (the GMA or the Act)?

Legal Issue No. A-6 asks:

Did the Petitioners exhaust all administrative remedies below before raising a State Environmental Policy Act (SEPA) challenge of the Ordinance?

B. Forest Land Designations and Interim Development Regulations

Legal Issue No. B-1 asks:

Did the County fail to designate forest lands pursuant to RCW 36.70A.170?

Legal Issue No. B-2 asks:

Did the County fail to adopt development regulations to assure the conservation of forest lands pursuant to RCW 36.70A.060?

III.DISCUSSION

Legal Issue No. A-1

(Board Jurisdiction over Ordinance 93-P-1994)

Was Kitsap County Ordinance No. 93-P-1994 (the Ordinance) enacted pursuant to the requirements of the Growth Management Act (the GMA or the Act)?

Positions of the Parties

The County claims that the Ordinance, by its own terms, is an amendment to the Zoning Ordinance that was adopted pursuant to Chapter 36.70 RCW, the Planning Enabling Act, rather than pursuant to Chapter 36.70A RCW, the GMA. Because the Board's jurisdiction is limited to the Act and SEPA as it relates to the Act, the County contends that the Board does not have the requisite subject matter jurisdiction to review Ordinance 93-P-1994. County's Motion, at 4.

Citizens counter that the Ordinance is in fact a part of the County's GMA implementation because the County:

... has re-adopted its old [pre-GMA] zoning ordinance as its interim development regulations for implementation of the IUGA.... Citizens' Response, at 2.

Citizens then ask the Board to consider Ordinance 93-P-1994 as an amendment to Kitsap County Ordinance 155-1993, the County's IUGAs ordinance enacted pursuant to the GMA. Citing to the comments made by one of the county commissioners, Citizens contend that the County did consider Ordinance 93-P-1994 as part of its GMA implementation effort. Citizens' Response, at 3-4.

Citizens also contend that where the deadline for adopting IUGAs has passed, whether or not the County has passed a valid development regulation implementing its IUGAs (*see in general Association of Rural Residents v. Kitsap County*, CPSGPHB Case No. 93-3-0010 (1994)), the County cannot subsequently adopt a development regulation such as Ordinance 93-P-1994 that encourages urban densities in rural parts of the county, i.e., that is not in compliance with the GMA. Citizens' Response, at 5.

Citizens distinguish the Board's decision in *Happy Valley Associates v. King County*, CPSGPHB Case No. 93-3-0008 (1993) because in that case the relevant GMA deadline had not yet passed, whereas in this case, the deadline to comply with the Act's IUGAs requirements had elapsed. Therefore, the Board should have jurisdiction over any ordinance passed after a relevant GMA deadline, to ensure that such a subsequent ordinance complies with the Act. It does not matter

whether the subsequent action is characterized by the adopting jurisdiction as a "non-GMA" action or pursuant to the GMA -- in either case, the post-GMA deadline enactment must comply with the Act. Citizens' Response, at 5-6.

Finally, during oral argument, Citizens argued that virtually the entire zoning ordinance constituted the "appropriate regulations" to implement the County's IUGAs designations. The County cannot now specify which limited set of land use regulations apply but ignore the remainder of the Zoning Ordinance. For instance, Citizens noted that particularly the PUD portion of the Zoning Ordinance constitutes "appropriate regulations" to implement the IUGAs designations, yet the County did not cite those provisions.

In replying to Citizens, the County argues that Section 2 of Ordinance 155-1993 (which adopted "appropriate regulations in the Kitsap County Zoning Ordinance" to implement its IUGAs designations), applies to only those sections of the zoning ordinance that "effectuate" the IUGAs designations. The County contends that Ordinance 155-1993 did not adopt the entire Zoning Ordinance as a GMA implementing measure and that Ordinance 93-P-1994 does not effectuate or have anything to do with IUGAs. County's Rebuttal, at 1-2. During oral argument, the County further argued that the "appropriate" provisions of the zoning ordinance that applied were only those dealing with areas designated as "urban," "semi-urban," and "manufacturing" that are adjacent to "urban" and "semi-urban" areas. *See also* Section 1 of Ordinance 155-1993 [Exhibit A-1].

In addition, the County argues that the Board should not look to the statements of an individual county commissioner unless the Ordinance is ambiguous. The County maintains that Ordinance 93-P-1994 is unambiguous. County's Rebuttal, at 2-3. Furthermore, the County contended that even were the Board to conclude that the Ordinance is ambiguous, Commissioner Granlund's statements were his personal opinion, and were not commented upon by the other commissioners and, in any case, were not binding on the board of county commissioners as a whole. Finally, the County contends that since the Ordinance partially involved a procedure for the internal transfer of density and nothing in the GMA specifically required such a procedure, therefore Ordinance 93-P-1994 could not have been adopted pursuant to the Act. County's Rebuttal, at 3.

Discussion

The Board concludes that it does have jurisdiction over Ordinance 93-P-1994 even though that Ordinance amends the Zoning Ordinance, an enactment that preceded passage of the GMA. The Board reaches this conclusion because the Ordinance amends the Zoning Ordinance, and the appropriate provisions of the Zoning Ordinance have been incorporated by reference into the County's IUGA Ordinance, mandated by the GMA. The Board agrees with the County that normally it would not have jurisdiction over a pre-GMA ordinance, like the Zoning Ordinance. *See* RCW 36.70A.280. However, when the County incorporated the "appropriate" provisions from the Zoning Ordinance by reference (*see* Findings of Fact Nos. 12, 13, and 14) in order to implement its IUGAs designations, the Zoning Ordinance became an enactment adopted to meet

the goals and requirements of the GMA. Accordingly, the Board has jurisdiction over both the Zoning Ordinance and subsequent amendments to it such as Ordinance 93-P-1994. Therefore, the County's Motion regarding the Ordinance will be **denied**.

A denial of the motion does not imply that the Board takes a position on the substantive merits of the Citizens' allegations that Ordinance 93-P-1994 does not comply with the Act. Those substantive issues remain to be briefed and argued by the parties and considered by the Board at the upcoming hearing on the merits of Citizens' Petition for Review. The Board notes, however, that Citizens carry the burden of showing that Ordinance 93-P-1994 sufficiently relates to IUGA matters so that it can be considered an "appropriate" Zoning Code regulation, since neither Resolution No. 349-1993 (Finding of Fact No. 12), Ordinance No. 155-1993 (Finding of Fact No. 13) nor Resolution No. 365-1993 (Finding of Fact No. 14) specifies which regulations in the Zoning Ordinance are "appropriate" for IUGAs.

In conclusion, the Board holds that it has jurisdiction over the Ordinance 93-P-1994 because that ordinance amends the Zoning Ordinance, and unspecified "appropriate regulations" contained in the Zoning Ordinance have been incorporated by reference in Ordinance 155-1993 as implementing the County's IUGAs ordinance. Therefore, the Board need not address Citizens' alternative theory that the Board has jurisdiction over the Ordinance because it does not comply with the GMA since it permits urban densities in rural areas outside the IUGAs. However, Citizens' alternative theory is so important that it merits discussion now.

In order to promote judicial efficiency and economy, it might make sense for the Board to conclude that it has jurisdiction over any enactment adopted after a GMA deadline has expired. For example, RCW 36.70A.110(1) mandates that urban growth cannot occur outside IUGAs. Therefore, under such a holding, any relevant land use planning enactments adopted after mandatory GMA deadlines had expired, whether adopted pursuant to the GMA or other authority such as the Planning Enabling Act,^[1] would be subject to Board jurisdiction if they allegedly permitted urban growth outside IUGAs.

However, this Board cannot reach such a conclusion even though it makes perfect sense. RCW 36.70A.280(1) is the relevant section of the Act dealing with the Board's subject matter jurisdiction. It provides in part:

A growth management hearings board shall hear and determine only those petitions alleging either (a) That a state agency, county, or city is not in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040; or ... (emphasis added)

The Board only has jurisdiction over plans and regulations adopted under RCW 36.70A.040. Therefore, if the County had not incorporated by reference the Zoning Ordinance when it adopted its IUGAs Ordinance, the Board would not have jurisdiction over Ordinance 93-P-1994. All actions must be consistent with the goals and regulations of the Act after the relevant GMA deadline has passed. However, the Board holds that challenges to non-GMA actions taken after GMA deadlines have passed, and alleging failure to comply with requirements of the Act, must be brought before a superior court, unless the legislature subsequently expands the Board's

jurisdictional authority.^[1]

Legal Issue No. A-6

(Exhaustion of Administrative SEPA Remedies)

Positions of the Parties

The County first contends that the Board has no SEPA jurisdiction over Ordinance 93-P-1994 because the Board's SEPA jurisdiction is limited to matters relating to plans, regulations, and amendments thereto adopted under RCW 36.70A.040. *See* RCW 36.70A.280(1). Since the County maintains that the Ordinance was not adopted pursuant to the requirements of the GMA, the County asserts that the Board has no SEPA jurisdiction over it. County's Motion, at 5 and 6; County's Rebuttal, at 7.

The County also argues, citing to the Board's *Rural Residents* case,^[1] that Citizens failed to exhaust their administrative remedies prior to bringing this SEPA appeal to the Board. The County issued a DNS on June 11, 1993 for what would become Ordinance 93-P-1994. Pursuant to

^[1]
Kitsap County Code 18.04.210(3), one must administratively appeal a threshold determination, such as a DNS, within ten days of the mailing of the determination. Accordingly, the County claims that Citizens would have had to appeal by June 22, 1993, yet Citizens never filed such an administrative appeal. County's Motion, at 6-7.

Citizens do not refute the County's factual claim. Although admitting that they did not file an administrative appeal of the County's DNS, Citizens contend that the County had an ongoing duty to revise its threshold determination because the underlying proposal (i.e., Exhibit F) was significantly changed between the time the County issued its DNS on June 11, 1993 and the time it adopted Ordinance 93-P-1994 (i.e., Exhibit 3 or E) on February 28, 1994. Furthermore, Citizens argue that, although the County has an administrative appeals procedure for the initial threshold determination, it does not have such a process for claims that the County has failed to comply with its continuing responsibility to revise a DNS if changes in the proposal warrant a revision. Therefore, no administrative appeals procedure existed for Citizens to exhaust prior to bringing this appeal. Citizens' Response, at 9-12.

In reply, the County maintains that since it did not revise its DNS after changing the initial proposal during the process of adopting Ordinance 93-P-1994, its DNS remains the "final and binding" determination. County's Rebuttal, at 7, citing WAC 197-11-390.

Discussion

The Board concludes that it has jurisdiction to determine whether the County violated SEPA in

adopting Ordinance 93-P-1994.WAC 197-11-390, entitled "Effect of threshold determination," provides:

(1) When the responsible official makes a threshold determination, it is final and binding on all agencies, subject to the provisions of this section and WAC 197-11-340 , 197-11-360 , and Part Six.

(2) The responsible official's threshold determination:

(a) For proposals listed in WAC 197-11-340(2), shall not be final until fifteen days after issuance.

(b) Shall not apply if another agency with jurisdiction assumes lead agency status under WAC197-11-948.

(c) Shall not apply when withdrawn by the responsible official under WAC 197-11-340 or 197-11-360.

(d) Shall not apply when reversed on appeal.

(3) Regardless of any appeals, a DS or DNS issued by the responsible official may be considered final for purposes of other agencies' planning and decision making unless subsequently changed, reversed, or withdrawn. (emphasis added).

In this case, the County's DNS remained the final and binding determination since the County did not withdraw it.WAC 197-11-340(3)(a) is the relevant SEPA Rules provision that discusses the effect of changed circumstances or new information after issuance of a DNS.It provides in part:

The lead agency shall withdraw a DNS if:

(i) There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;

(ii) There is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or ... (Emphasis added.)

Citizens did not invoke the County's administrative appeals process for challenging the issuance of the DNS nor are they at this time challenging the issuance of the DNS.Instead, Citizens contend that the County should have withdrawn its DNS because Ordinance 93-P-1994, as adopted, was substantially different than the initial proposal for which the DNS was issued.The County does not have an administrative appeals process for making challenges that a DNS should be withdrawn.Therefore, no administrative process existed at the County level for Citizens to exhaust.

Accordingly, the Board will **deny** the County's Motion on this issue since Citizens have appropriately raised a SEPA issue as it may relate to a GMA regulation (*see* discussion above on Legal Issue No. A-1).The Board has jurisdiction over such SEPA matters.However, again, Citizens' allegations go to the heart of the substantive issue that the Board has yet to determine, and it will be Citizens' further burden, assuming it proves that Ordinance 93-P-1994 is an "appropriate" IUGAs regulation, to prove that the County should have withdrawn its DNS.

(Statute of Limitations for Appealing the Strategies Document)

Did the County fail to designate forest lands pursuant to RCW 36.70A.170?

and

Did the County fail to adopt development regulations to assure the conservation of forest lands pursuant to RCW 36.70A.060?

Positions of the Parties

The County contends that the Strategies document was adopted on April 20, 1992 in order to comply with the Act's requirements at RCW 36.70A.170 to designate forest lands and at RCW 36.70A.060 to assure the conservation of forest lands. Because the County published notice of adoption of the Strategies document on June 29, 1992, pursuant to RCW 36.70A.290(2), the sixty day statute of limitations for appealing the Strategies document expired on August 28, 1992. Since Citizens failed to file their Petition for Review until April 29, 1994, the County's position is that the statute of limitations for challenging the Strategies document had passed. County's Motion, at 2, 5-6.

Citizens, on the other hand, claim that the Strategies document is merely a statement of policy that does not constitute a development regulation. Citizens contend that the County failed to act to comply with the requirements of RCW 36.70A.170 and .060, and therefore Citizens could file its Petition for Review at any time, since the statute of limitations has not yet begun to run. Citizens' Response, at 6-9.

During oral argument, Citizens conceded, for purposes of arguing the County's Motion, that the County could adopt the Strategies-type document as part of the County's SEPA Ordinance and therefore give the Strategies document substantive effect that would comply with the GMA's requirement to adopt development regulations that assure the conservation of forest lands. However, Citizens carefully articulated that the Strategies document, standing alone, could not constitute a GMA development regulation because it constituted only policies instead of regulations and because it purported to regulate only lands adjacent to forest lands rather than forest lands themselves.

Citizens pointed out that adopting the Strategies document as part of the County's SEPA Ordinance in order to comply with the GMA's forest lands requirements was what was recommended in the Strategies document. *See* Finding of Fact No. 7.

Subsequently, that is precisely what the County attempted to do when it enacted Ordinance 99-B-1992 on November 9, 1992. However, the problem with conferring substantive SEPA authority upon the Strategies document via Ordinance 99-B-1992:

... is that the County never gave notice of the adoption of Ordinance 99-B-1992 as required by RCW 36.70A.290(2). Consequently, the 60 day statute of limitation period never began to run. Citizens' Response, at 8.

The County admitted during oral argument that it did not publish notice, pursuant to RCW

36.70A.290(2), that it adopted Ordinance 99-B-1992. However, the County maintains that such publication was unnecessary since the County did publish notice that it adopted the Strategies document as its forest lands development regulations. Accordingly, the County contends that the Strategies document had to be appealed within sixty days of the post-adoption publication, not sixty days after a subsequent SEPA ordinance, that incorporated by reference the Strategies document, was adopted. As for Ordinance 99-B-1992, the County contends that it is a SEPA ordinance independent of the GMA over which the Board has no jurisdiction. County's Rebuttal, at 6. Finally, during Board questioning, the County took the position that the Strategies document, by itself and without employing substantive SEPA authority, included GMA development regulations.

Discussion

The Board holds that the County took an action, adoption of the Strategies document, to comply with the Act's requirements to designate forest lands and to adopt development regulations to assure the conservation of those lands. Accordingly, a challenge to the Strategies document had to be filed within sixty days of publication of notice of adoption of the Strategies document. Since Citizens did not file their Petition for Review within the requisite sixty day period, the County's motion will be **granted** and the portion of Citizens' Petition for Review challenging the County for failing to act to meet the requirements of RCW 36.70A.060 and .170 and corresponding legal issues will be **dismissed**.

In so concluding, an important distinction was made. Citizens alleged that the County failed to act to meet the Act's requirements regarding forest lands at RCW 36.70A.060 and .170. The Board concurs that when a local jurisdiction has failed to act (i.e., to take any steps to procedurally comply with the GMA), an appeal can be filed at any time -- even beyond the sixty day statute of limitations specified by RCW 36.70A.280(2). *See also* WAC 242-02-220(4).

However, a "failure to act (at all, or procedurally) by a specified deadline" challenge must be distinguished from an appeal challenging a local government for "failing to substantively act in compliance with the requirements of the GMA." Thus, for instance, if a county or city adopts an ordinance in response to specific GMA requirements but fails to publish notice of adoption, a failure-to-act petition for review could be brought at any time since the jurisdiction has not procedurally complied with the Act. However, if the notice has been published, a challenge alleging that the local jurisdiction has substantively failed to comply with the requirements of the Act must be brought within sixty days.

To summarize, the Board holds that until a jurisdiction complies with the Act's procedural requirements, a failure to act challenge can be brought at any time. Once the Act's procedural requirements are met, substantive challenges to an enactment must be brought within the sixty day statute of limitations.

Here, the County did take procedural actions meant to comply with the GMA. It provided advance notice (*see* Additional Exhibits 1, 2, 4-A and 4-B) of its intent to adopt the Strategies document in

order to comply with the GMA's forest lands requirements. The County held two public hearings where persons, including one of the individual petitioners in this matter, could and did testify about the substantive merits of the Strategies document. *See* Additional Exhibit 4-C. The County held two "decision only" meetings before adopting the Strategies document. ^[1] *See* Additional Exhibit 4-C and Exhibit 1-A. Finally, after adoption of the Strategies document on April 20, 1992, the County published notice indicating that the Strategies document had been adopted and providing an address where copies of the document could be obtained. Exhibit 2. The document indicated on the cover page that it had been "adopted" by the Board of County Commissioners.

[\[1\]](#)

Exhibit 1-B.

The Board has determined that the County acted to comply with the Act's forest lands requirements and rejects Citizens' arguments that the County failed to act. Whether the County's actions in adopting the Strategies document substantively comply with the GMA's requirements is not before the Board at this time because Citizens failed to file a timely petition for review. Challenges to substantive compliance must be made within the requisite statute of limitations period if the procedural notice and hearing requirements have been met.

Frivolous Nature of Appeal

The County also contends that two of Citizens' allegations are frivolous: challenging the Ordinance on SEPA in light of the Board's decision in *Rural Residents*, and contending that the County failed to act regarding forest lands when two years earlier the County had adopted its Strategies document. While noting that the Board does not have explicit authority to impose monetary penalties as a sanction, the County does cite to WAC 242-02-120 which authorizes the Board to decline to permit a person to appear before the Board if that person is not abiding by the rules of professional conduct. However, the County asks only that the Board issue a "strong statement ... that it will not tolerate frivolous petitions designed solely to harass local government ..." County's Motion, at 8.

Citizens did not directly respond to the County's allegation that the former's claims were frivolous.

Discussion

The Board has concluded above that it does have jurisdiction to review Ordinance 93-P-1994. Therefore, Citizens' challenge to Ordinance 93-P-1994 was not frivolous.

Although the Board will grant the County's Motion regarding the Strategies document, Citizens' claim that the County had failed to comply with the Act's requirement to designate forest lands and then adopt development regulations to assure the conservation of those lands was not frivolous. In order to reach its conclusion regarding the running of the statute of limitations, the Board closely examined the Strategies document itself. The Board will not reach the question of

the substantive compliance of the Strategies document, but reminds the County that a valid GMA development regulation must actually constitute a **specific control**, not simply policies, designed to assure the conservation of forest lands -- not just lands adjacent to forest lands.

Moreover, the record itself reveals some confusion as to what the County actually did regarding the Strategies document. On the one hand, the agendas of county commissioner meetings were clear about the intent of the Commissioners to adopt the Strategies document to comply with the GMA. On the other hand, the County's lead staff person stated that the document "contains no regulations." Finding of Fact 4. Furthermore, rather than "adopting" the Strategies document, the county commissioners "approved" or "accepted" it (Finding of Fact 6). Whether there is a significant difference between "accepting or approving" and "adopting" the Strategies document is immaterial because of the Board's conclusion above, made in light of the entire record before the Board, regarding the running of the statute of limitations. However, the Board notes that on at least some occasions, the County Commissioners "adopt" resolutions rather than "approve" them (*see* Additional Exhibit 4-C, at 137), yet Ordinance 93-P-1994 uses the word "approval." Exhibit 3, at 3. In any case, Citizens cannot be faulted for bringing these inconsistencies to the Board's attention.

Although the Board cannot direct the County in this case to correct any substantive errors in the Strategies document, it will not sanction Citizens for bringing an appeal that brought these deficiencies and mixed signals to the Board's attention. In light of the Board's determinations above, it would be inappropriate to either issue a strong statement to Citizens that the Board will not tolerate frivolous petitions, or to impose sanctions upon Citizens for filing their Petition for Review. Although Citizens may or may not prevail on the remaining legal issues before the Board, their actions have not been frivolous. Accordingly, the County's Motion on this point will be **denied**.

III. ORDER

Having reviewed the above-referenced documents, having considered the parties' arguments, and having deliberated on the matter, it is ORDERED that:

- 1) The County's Motion to dismiss Legal Issue No. A-1 because it claims the Board lacks jurisdiction over Kitsap County Ordinance 93-P-1994 is **denied**.
- 2) The County's Motion to dismiss Legal Issue No. A-6 because it claims that Citizens failed to exhaust their administrative SEPA remedies is **denied**.
- 3) The County's Motion to dismiss Legal Issues B-1 and B-2 because the statute of limitations for appealing the Strategies document expired before Citizens filed their appeal is **granted**. *Legal Issues Nos. B-1 and B-2 are dismissed with prejudice.*
- 4) The County's Motion requesting that the Board consider sanctioning Citizens because of the frivolous nature of Citizens' Petition for Review is **denied**.

So **ORDERED** this 27th day of July, 1994.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Presiding Officer

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

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[1]

Effective June 9, 1994, the Board's name was changed to Growth Management Hearings Board. *See* ESSHB 2510.

[1]

The Board of Commissioners' March 23, 1992 hearing was canceled due to a lack of quorum. Additional Exhibit 4-C, at 203.

[1]

Each subsequent County Commissioners' agenda and official minutes that discusses the Strategies document uses the same language.*See* Additional Exhibits 2, 4-B and 4-C and Exhibit 1-A.

[1]

When Mr. Vodopich testified, the Act required comprehensive plans to be adopted by July 1, 1993.RCW 36.70A.040.This deadline was subsequently extended one year pursuant to ESHB 1761 (Laws of 1993, 1st Sp. Sess., ch. 6, §1).

[1]

The official minutes provided:

No further discussion being heard, a motion was made by Commissioner Horsley and seconded by Acting Chairman Granlund that the Board [of County Commissioners] accept the document entitled, "**Strategies for Resource Lands Designations and Interim Development Regulations**" together with the amendments as outlined above and in staff memorandum dated April 13, 1992.Motion carried. Exhibit 1-A, at 233 (emphasis in original).

[1]

Because the third county commissioner was not present at this meeting, the Board of County Commissioners did not vote on the motion.*See* Exhibit 1-A.

[1]

The Board takes official notice of the Kitsap County Zoning Ordinance, No. 93-1983, as last amended on March 1, 1990 by Ordinance 93-M-1989; this ordinance is not a part of the record before the Board at this time.

[1]

Exhibit D refers to "staff's September 13, 1993 recommendation" that is not a part of the record before the Board at this time.

[1]

The November 23, 1993 staff report is not in the limited record before the Board at this time.

[1]

Although Exhibits 3 and E are undated, a copy of the Ordinance attached to Citizens' Petition for Review is dated February 28, 1994.During oral argument, the County confirmed that the Ordinance 93-P-1994 was adopted on February 28, 1994.*See also* Exhibit B.

[1]

Pursuant to Section 4(a) of the Zoning Ordinance, all unincorporated land in Kitsap County is divided into one of twenty-nine zones including: ... (20) Resource Protection 2.5 acre (RP-2.5); (21) Resource Protection 10 acre (RP-10); and (22) Resource Protection 20 acre (RP-20) ...Zoning Ordinance, at 11.

[1]

The Board recognizes that the legislature did not repeal the Planning Enabling Act, Chapter 36.70 RCW, when it enacted the GMA.Thus, the Planning Enabling Act continues to exist. Because the legislature has not addressed the relationship of the GMA and the Planning Enabling Act, it is theoretically possible that a local jurisdiction could continue to plan and regulate land use under both.There is no statutory prohibition against two alternative zoning maps and development codes, one set adopted pursuant to RCW 36.70 and one set adopted pursuant to RCW 36.70A. At best, this would be redundant and confusing and at worst, eviscerate the Growth Management Act.

Such a result can only be precluded by legislative action to reconcile the two Acts. The legislature could clarify that, where the GMA speaks definitively on a subject, it supersedes the Planning Enabling Act. This approach could leave intact certain provisions of RCW 36.70 on which the GMA is silent, such as the requirements for the authority, structure and operation of planning commissions, boards of adjustment and hearing examiners.

[1]

The Board is troubled by the bifurcation of potential appeals alleging non-compliance with GMA. This situation is likely to be confusing for both the adopting local government and for members of the public who need to know where, when and how to exercise rights to an appeal. Nevertheless, only the legislature can cure this situation.

[1]

Order Granting Dispositive Motions, at 3-13.

[1]

The Board takes official notice of this provision of the County Code.

[1]

Citizens point out that the County adopted the Strategies document by motion rather than by ordinance, presumably in an effort to invoke the Board's reasoning in *Friends of the Law v. King County*, CPSGPHB Case No. 94-3-0003 (1994). Citizens' Response, at 7. However, Citizens confuse a formal document, a Motion, authorized for adoption by the King County Charter, with a "motion" to adopt a document in Kitsap County, be it a Strategies document, ordinance or resolution. The former is an official legal document in King County, while the latter is a procedural mechanism for taking action in Kitsap County.

[1]

The Board takes official notice that an appeal was filed within the sixty day statute of limitations that challenged the County's Strategies document in general, and its "Interim Regulations" in particular, for not containing a "block size" definition. See *Manke Lumber Company, Inc. v. Kitsap County*, CPSGPHB Case No. 92-3-0002. The case was ultimately dismissed with prejudice before any substantive hearings were held by the Board.