

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

WEST SEATTLE DEFENSE FUND,)Case No. 94-3-0016

)

Petitioner,)ORDER DENYING WSDF'S

)MOTION FOR

v.)RECONSIDERATION OF

)ORDER GRANTING

CITY OF SEATTLE,)SEATTLE'S MOTION TO

)DISMISS SEPA CLAIM

Respondent.)

)[Legal Issue No. 10]

)

On October 7, 1994, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from the West Seattle Defense Fund (**WSDF**) challenging the City of Seattle's (the **City** or **Seattle**) Comprehensive Plan (the **Plan**) for not complying with the Growth Management Act (**GMA**) and the State Environmental Policy Act (**SEPA**).

On November 23, 1994, the "City of Seattle's Motion to Dismiss SEPA Claim" (**Seattle's Motion to Dismiss**) was filed with the Board asking that Legal Issue No. 10 be dismissed.

The Board held a hearing on Seattle's Motion to Dismiss on Tuesday, December 13, 1994.

Following the hearing, the parties were given the opportunity to submit additional briefs on whether the Board's decision in *Friends of the Law v. King County (FOTL II)*, CPSGMHB Case No. 94-3-0009, applied to this case.

On December 30, 1994, the Board entered an "Order Granting Seattle's Motion to Dismiss SEPA Claim," that dismissed Legal Issue No. 10 with prejudice.

On January 5, 1995, "WSDF's Motion for Reconsideration of Order Granting Seattle's Motion to Dismiss SEPA Claim" (**Motion for Reconsideration**) was filed with the Board. WSDF asks the Board to reconsider its order because the Board's determination on SEPA standing "was neither briefed nor argued to the Board; instead, the parties' arguments focused on whether WSDF had exhausted its administrative remedies." WSDF's Motion for Reconsideration, at 1; emphasis in original; footnote omitted.

WSDF claims that the Board's decision itself was based on a very recent appellate court decision that was not cited by either party or discussed at oral argument by the Board. WSDF also claims it should be given the opportunity to present evidentiary facts regarding the harm caused it by the

inadequate final environmental impact statement and comprehensive plan. WSDF's Motion for Reconsideration, at 2.

Finally, WSDF argues that:

the exhaustion doctrine should not be used as a "gatekeeper" to limit access to the Board in a process that was specifically intended to be "user-friendly." WSDF's Motion for Reconsideration, at 3.

On January 6, 1995, the "City of Seattle's Response to WSDF's Motion for Reconsideration of Order Dismissing SEPA Issue" (**City's Response**) was filed with the Board. Seattle opposes WSDF's Motion for Reconsideration, arguing that standing can be raised by the Board on its own initiative. Seattle also points out that WSDF failed to produce evidentiary facts, in its petition for review or in any declarations or pleadings filed in this case to date, that it had suffered or would suffer any immediate, concrete and specific injury. Seattle's Response, at 2.

Seattle also points out that the recent Court of Appeals decision that the Board quoted merely continued a "straightforward application of a long line of SEPA standing cases which were themselves discussed in the very decision which was the subject of the supplemental briefing," FOTL II. Seattle's Response, at 3; citations omitted.

Finally, Seattle contends that WSDF's Motion for Reconsideration "identifies no new information nor presents any new argument on the exhaustion issue....[and] fails to meet any criterion for granting reconsideration..." Seattle's Response, at 3.

DISCUSSION

WAC 242-02-830^[1] authorizes the filing of a request for reconsideration of the Board's final decision and order. The Board's Order Granting Seattle's Motion to Dismiss SEPA Claim was the Board's final decision and order in this case regarding Legal Issue No. 10. Therefore, it was appropriate for WSDF to file its Motion for Reconsideration at this time rather than waiting until after the Board issued a final decision and order on the remaining legal issues.

Having concluded that it is appropriate for WSDF to file a Motion for Reconsideration, the Board nonetheless concludes that WSDF's motion is without merit.

First, the Board rejects WSDF's claim that Seattle did not raise the issue of SEPA standing.

Although the City did not specifically cite to the SEPA standing statute (RCW 43.21C.075(4)) and its argument focused on the doctrine of exhaustion of administrative remedies, Seattle did allege that WSDF did not have SEPA standing to bring Legal Issue No. 10 before the Board. City of Seattle's Motion to Dismiss SEPA Claim, at 3 lines 15-17.

Second, and more importantly, even if Seattle had not raised the issue of SEPA standing, the Board itself could have. Cases before a growth management hearings board can involve SEPA standing (RCW 43.21C.075(4)) and/or GMA standing (RCW 36.70A.280(2)). Here, the Board has applied the two-part SEPA standing test and concluded that WSDF lacks standing to raise SEPA issues. Consequently, the only SEPA issue before the Board in this case, Legal Issue No. 10, has been dismissed with prejudice.

RCW 36.70A.290(3) provides:

(3) Unless the board dismisses the petition as frivolous or finds that the person filing the petition lacks standing, the board shall, within ten days of receipt of the petition, set a time for hearing the matter.(emphasis added).

Subsection (3) authorizes the Board to dismiss a petition for review in its entirety if a person lacks standing.No time constraints are imposed upon the Board for doing so.Instead, a Board is required only to set a time for a hearing within ten days of receipt of a petition for review unless it determines that the petitioner lacks standing.The fact that the Board does not dismiss a case but instead issues a Notice of Hearing that sets the time for the hearing, does not preclude the Board on its own from subsequently dismissing a case for lack of standing.

Third, the Board rejects WSDF's request to be provided an additional opportunity to present sufficient evidentiary facts to show SEPA standing.The Board is authorized, upon receipt, to immediately dismiss a petition for review for lack of standing.*See* RCW 36.70A.290(3) above. The legislature is presumed to be aware of relevant judicial rulings regarding its enactments. Therefore, the legislature is presumed to be aware of the cases that created the two-part SEPA standing test: *Leavitt v. Jefferson County*, 74 Wn. App. 668, 678, 875 P.2d 681 (1994) citing *Trepanier v. Everett*, 64 Wn. App. 380, 382-83, 824 P.2d 524, *review denied*, 119 Wn.2d 1012 (1992).Although these case were decided after this section of the GMA was originally enacted in 1991, the legislature subsequently has not altered SEPA's standing provision.Furthermore, since *Leavitt* and *Trepanier* merely applied long-standing injury-in-fact analysis to SEPA, the legislature was at least presumed to be aware of that analysis in its traditional context.

Accordingly, the Board concludes that the legislature intends that petitioners raising SEPA issues to this Board, must allege an actual or threatened injury within their petitions for review. Here, WSDF's petition for review made no allegations of injury in fact or threatened injury. Therefore, WSDF lacks the requisite SEPA standing.Additionally, none of WSDF's pleadings or submittals to date has made such a showing.WSDF's most recent submittal, its Motion for Reconsideration, also fails to do so even though the Board earlier specifically noted that WSDF's petition for review:

...does not meet the two-part standing test imposed by the *Leavitt* and *Trepanier* courts.The Board has reviewed the petition for review, declarations, exhibits, and attachments filed in the case to date.Although WSDF may be within the zone of interests protected by SEPA, WSDF has not presented any evidentiary facts whatsoever to show that the FEIS and/or adoption of the comprehensive plan will cause it any specific and perceptible harm or, if threatened by the action, that the injury will be immediate, concrete and specific.*WSDF v. Seattle*, CPSGMHB Case No. 94-3-0016 (1994), Order Granting Seattle's Motion to Dismiss, at 7.

The Board concludes that petitioners who fail to make a satisfactory evidentiary showing of injury initially in their petition for review are subject to having the Board dismiss their SEPA claims for lack of standing.Here, despite this conclusion, WSDF has had more than ample opportunity to make such a showing subsequent to filing its petition for review and has failed to

do so.^[1]The Board will not provide additional opportunity.

ORDER

Having reviewed the above-referenced documents and file in this case, and having considered the arguments of the parties, WSDF's Motion for Reconsideration is **denied**. The Board's Order Granting Seattle's Motion to Dismiss SEPA Claim stands.

So ordered this 10th day of January, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley, Presiding Officer

Joseph W. Tovar, AICP

Chris Smith Towne

^[1]WAC242-02-830 entitled "Disposition of petition for review--Final decision and order," provides:

- (1) When the hearing on the petition for review has been heard by a majority of a board, a written final decision and order containing appropriate findings and conclusions, that is concurred in by at least two members, may be issued.
- (2) After issuance of a final decision under this section, any party may file a petition for reconsideration with a board. Such petition must be filed within ten days of service of the final decision. The original and three copies of the petition for reconsideration shall be filed with the board. At the same time, copies shall be served on all parties of record. A board may require other parties to supply an answer which shall be served in a like manner.
- (3) The filing of a petition for reconsideration shall suspend the final decision of a board until the petition is denied or a modified decision is entered by the board.
- (4) In response to a petition for reconsideration, the board may deny the petition, modify its decision, or reopen the hearing. A petition is deemed denied unless the board takes action within twenty days of filing of the petition or answer where a board has required other parties to provide such an answer pursuant to subsection (2) of this section.
- (5) A decision in response to the petition for reconsideration shall constitute a final decision and order for purposes of judicial review. Copies of the final decision and order shall be served by the board on each party or the party's attorney or other authorized representative of record.

^[1]In addition to failing to make a sufficient evidentiary showing in its petition for review or in its Motion for Reconsideration, WSDF failed to do so when it filed "WSDF's Response to Motion to Dismiss SEPA Claim" or in the "Supplemental Brief of WSDF Regarding City of Seattle's Motion to Dismiss SEPA Claim."