

**CENTRAL PUGET SOUND**

**GROWTH MANAGEMENT HEARINGS BOARD**

STATE OF WASHINGTON

ROBISON et al,)Case No. 94-3-0025

)  
Petitioners,)

)ORDER ON DISPOSITIVE  
v.)MOTIONS

)  
CITY OF BAINBRIDGE ISLAND,)

)  
Respondent,)

)  
and)

)  
BAINBRIDGE ISLAND SCHOOL )  
DISTRICT and SOUTH BAINBRIDGE )  
COMMUNITY ASSOCIATION,)

)  
Intervenors.)

\_\_\_\_\_)

On January 24, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) entered a Prehearing Order in the above-captioned matter that set forth a series of legal issues, and established deadlines for the filing of dispositive motions and subsequent responses and replies.

Dispositive Motions

No Dispositive Motions were filed by any of the Petitioners.

On January 30, 1995, the City of Bainbridge Island (the **City**) filed "City of Bainbridge Island's Dispositive Motion to Dismiss Petitioners' SEPA Issues for Failure to Exhaust Administrative Remedies, Lack of Standing, and Statute of Limitations, and Supporting Brief" (**City's SEPA Motion**). Eight exhibits were attached. The motion addresses specific legal issues, as set forth in the Prehearing Order, raised by five Petitioners: Johnson - Legal Issue No. 5; Robison - Legal Issue No. 9; Patterson - Legal Issue No. 8; Port Blakely - Legal Issue Nos. 8 and 9<sup>[1]</sup>; and Tracy -

Legal Issue Nos. 15, 16 and 17.

The City filed a second dispositive motion on January 30, 1995: "City of Bainbridge Island's Dispositive Motion to Dismiss Petition of James C. Tracy for Lack of Standing" (**City's GMA Standing Motion**) and the "City of Bainbridge Island's Memorandum in Support of Dispositive Motion to Dismiss Petition of James C. Tracy for Lack of Standing as to Certain Issues" (**City's GMA Standing Memorandum**). Five exhibits were attached.

Accompanying the City's two dispositive motions was a "List of City's Exhibits to City's Dispositive Motions" dated January 30, 1995. Exhibits C-1 through C-8 of the listed thirteen documents correspond to the eight exhibits attached to the City's SEPA Motion; Exhibits C-9 through 12 refer to the first four of the five exhibits attached to the City's GMA Standing Motion. Exhibit C-13 on the List is described as a "Letter from Tracy to Mayor and council 7/1/94, Index No. 22." However, that exhibit was not attached. The fifth exhibit appended to the City's GMA Standing Motion is a copy of a Washington Court of Appeals decision, *Coughlin v. Seattle School District No. 1*, 27 Wn. App. 888, 621 P.2d 183 (1980).

On January 30, 1995, Intervenor BISD filed a "Motion to Dismiss Claims of Philip Whitener for Lack of Standing" (**BISD's GMA Standing Motion**) involving Whitener's Legal Issues 2 through 8. A "Declaration of Jonathan P. Meier in Support of BISD's Motion to Dismiss Claims of Philip Whitener for Lack of Standing" including four exhibits (Ex. A. Letter dated 7/30/93 from Whitener to City's Planning Commission; Ex. B. One-page document from Whitener, dated March 8, 1994; Ex. C. Memo dated May 6, 1994 to Finance Committee from Marti Stave; and Ex. D. November 9, 1993 letter to Bainbridge Island Planning Commission from Municipal League of Bainbridge) was attached.

On January 30, 1995, the Board received BISD's "Motion to Dismiss Part of Legal Issue No. 4 of Philip Whitener for Failure to Comply with Statute of Limitations" (**BISD's Statute of Limitations Motion**) with an attachment entitled "Chapter 15.28 -- Development Impact on, and Impact Fee Schedule for, Public School Facilities."

On January 30, 1995, Intervenors BISD and SBCA filed a "Motion to Dismiss Claims of Port Blakely and James Tracy for Failure to Exhaust Administrative Remedies" (**BISD's SEPA Exhaustion Motion**). A "Declaration of Jonathan P. Meier in Support of BISD's and SBCA's Motion to Dismiss re: Exhaustion" and three exhibits (Ex. A, City Notice of Action; Ex. B. City Affidavit of Publication; and Ex. C. Notice of Action; and City Ordinance 16.04.170) were attached. This motion addresses Port Blakely Tree Farms Limited Partnership's (**Port Blakely**) Legal Issues 8 and 9, and James C. Tracy's (**Tracy**) Legal Issues 15, 16 and 17.

On January 30, 1995, "Intervenor BISD's Motion to Dismiss Claims of Philip Whitener for Lack of Jurisdiction" (**BISD's Jurisdiction Motion**) was filed with the Board. BISD asks for dismissal of Philip C. Whitener's (**Whitener**) Legal Issues 4 and 5 in their entirety, and a part of Legal Issue 2.

### Responses to Dispositive Motions

On February 3, 1995, Tracy filed "Petitioner's Memorandum in Response to Dispositive Motions of City of Bainbridge Island and the Bainbridge Island School District" (**Tracy's Response**).

On February 3, 1995, Port Blakely filed its "Response to Motions to Dismiss SEPA Claims" (**Port Blakely's Response**). An attached "Declaration of Marco de Sa e Silva" included two exhibits (Ex. 1, a letter dated June 9, 1994 from Port Blakely to the City Council and Stephanie Warren, and Ex. 2, a letter dated April 28, 1994 from W & H Pacific to Stephanie Warren).

On February 7, 1995, Whitener filed a "Response to Motions."

On February 9, 1995, David S. Johnson, Michael L. Silves, and Bainbridge Citizens for Zero Adverse Power filed "Response of Petitioners ... to City of Bainbridge Island's Motion to Dismiss SEPA Claim." These Petitioners indicated that they stipulated to the dismissal of their SEPA claims.

Although the City's SEPA Motion also addressed issues raised by Robison, Martin and Patterson, none of these Petitioners responded to the City's SEPA Motion.

### Replies

On February 8, 1995, the "City's Reply to Tracy's and Port Blakely's Response to City's Motion to Dismiss SEPA Issues (**City's SEPA Reply**)" was filed with the Board. Exhibit C-13 was attached, the Draft Non-Project Environmental Impact Statement containing hand-written comments by Tracy. This document had been previously attached to the City's SEPA Motion but was not labeled with an exhibit number.

Also on February 8, 1995, the City's Reply Memorandum in Support of Its Dispositive Motion to Dismiss Issues 7, 10, 11, 12, 13 and 14 of Tracy's Appeal (**City's GMA Standing Reply**) was filed.

Also on February 8, 1995, BISD filed a "Reply Memorandum in Support of Motions to Dismiss Claims of Whitener for Lack of Standing, Lack of Jurisdiction, and Failure to Comply with Statute of Limitations" (**BISD's Reply to Whitener**).

On February 8, 1995, BISD and SBCA filed a "Reply Memorandum in Support of BISD's and SBCA's Motion to Dismiss Claims of Port Blakely and James Tracy for Failure to Exhaust Administrative Remedies." (**BISD's SEPA Reply**).

### Motion Hearing

The Board held a hearing on these dispositive motions at 10:00 a.m. on Thursday, February 9, 1995, at 1225 One Union Square, Seattle. Two members of the Board were present: Chris Smith Towne, presiding; and M. Peter Philley, as well as Traci M. Goodwin, Hearing Examiner for the Board. The following individuals presented oral argument to the Board: Richard U. Chapin represented the City; Peter J. Eglick represented BISD and SBCA; James C. Tracy represented himself; Marvin L. Gray, Jr. represented Port Blakely; and Philip C. Whitener appeared *pro se*.

Court reporting services were provided by Jean M. Ericksen of Robert H. Lewis & Associates, Tacoma. No witnesses testified. In addition, no material facts were in dispute.

## **I. FINDINGS OF FACT**

1. In 1993, the City adopted Ordinance 93-05, its impact fees ordinance. The codified version of the ordinance, Chapter 15.28 of the Bainbridge Island Code, was published in September, 1993. Attachment to BISD's Statute of Limitations Motion.
2. In May, 1994, the City issued a Draft Non-Project Environmental Impact Statement for its draft comprehensive plan. Attachment to Exhibit C-12 to City's GMA Standing Motion and Exhibit C-13 to City's SEPA Reply.
3. On July 15, 1994, the City issued its Final Environmental Impact Statement for its proposed comprehensive plan. Exhibit C-5 to City's SEPA Motion.
4. On September 1, 1994, the City passed and approved Ordinance No. 94-21, adopting its comprehensive plan. Exhibit C-3 to City's SEPA Motion.
5. Pursuant to Section 4, Ordinance No. 94-21 became effective five days after its passage, approval and publication. Notice of publication was published in the Bainbridge Review on September 7, 1994, so Ordinance No. 94-21 became effective on September 17, 1994. Exhibits C-3, at 4, and C-4 to City's SEPA Motion.

## **II. CITY'S SEPA MOTION**

### *City's Position*

The City contends that Petitioners' legal issues relating to the State Environmental Policy Act (**SEPA**) should be dismissed because the Petitioners lack SEPA standing (City's SEPA Motion, at 9-11), failed to exhaust their administrative remedies (City's SEPA Motion, at 3-9), and were barred by the SEPA statute of limitations from bringing their SEPA claims (City's SEPA Motion, at 11-12). The City's SEPA standing contention is based upon a recent Board decision. Because the issue of SEPA standing is determinative, the Board will not address the City's other SEPA arguments.

### *Petitioners' Positions*

Tracy contends that he was injured by the City because:

... he was "frozen out" of meaningful dialogue and deprived of his fundamental right to participate in the SEPA Process, relegated to an arbitrarily segregated sub-class of citizen participants to whom the jurisdictional [sic] responsibilities to respond to proffered comments did not apply.... Tracy's Response, at 5.

Port Blakely contends that it:

... is significantly adversely affected by the EIS because its inadequate scope, inadequate consideration of alternatives to the proposed action, and inadequate analysis of environmental impacts led the City to adopt a harmful, unreasonable, unworkable

Comprehensive Plan.Port Blakely's Response, at 11.

Port Blakely also contends that because it appeared before the City, it has "appearance" standing to challenge the adequacy of the EIS.Port Blakely's Response, at 11.

David S. Johnson, Michael L. Silves, and Bainbridge Citizens for Zero Adverse Power stipulated to a dismissal of their SEPA claims while Petitioners Robison, Martin and Patterson did not respond.

### Discussion

In a recent decision, *West Seattle Defense Fund v. Seattle*<sup>[1]</sup>, the Board reviewed SEPA caselaw to determine whether the petitioners in that case had standing to raise SEPA issues.The Board applied the two-part SEPA standing analysis found in *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994) and *Trepanier v. Everett*, 64 Wn. App. 380, 824 P.2d 524, review denied, 119 Wn.2d 1012 (1992), to conclude that the West Seattle Defense Fund lacked SEPA standing.

The two-part test provides:

*First, the plaintiff's supposedly endangered interest must be arguably within the zone of interests protected by SEPA.Second, the plaintiff must allege an injury in fact; that is, the plaintiff must present sufficient evidentiary facts to show that the challenged SEPA determination will cause him or her specific and perceptible harm.The plaintiff who alleges a threatened injury rather than an existing injury must also show that the injury will be "immediate, concrete, and specific"; a conjectural or hypothetical injury will not confer standing.Leavitt, at 679 citing Trepanier, at 382-83.*

Citing to another recent appellate decision, *Snohomish Property Rights Alliance v. Snohomish County*, 76 Wn.App. 44, \_\_\_ P.2 \_\_\_ (1994), the Board noted that it will be difficult for any petitioner to demonstrate the "specific injury" required by the Leavitt and Trepanier courts when challenging the final environmental impact statement for a comprehensive plan.*WSDF v. Seattle, Order Granting Seattle's Motion to Dismiss, at 7.*

The Board held:

*... 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.WSDF v. Seattle, Order Denying WSDF's Motion for Reconsideration of Order Granting Seattle's Motion to Dismiss, at 4.*

On reconsideration, the Board concluded:

*... 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.WSDF v. Seattle, Order Denying WSDF's Motion for Reconsideration of Order Granting Seattle's Motion to Dismiss, at 4.*

Here, the Board has reviewed the individual petitions for review from those Petitioners who have raised legal issues involving SEPA.<sup>[1]</sup>None of the Petitioners has alleged an injury in fact.The

*petitions for review do not contain sufficient evidentiary facts to show that the challenged SEPA determination will cause specific and perceptible harm. See Trepanier, at 382-383.*

*The Board also rejects Port Blakely's contention that, because it obtained GMA standing by appearing before the City, it also has SEPA standing. In its West Seattle Defense Fund case, the Board stated:*

*... The Board has also previously noted that obtaining standing through the GMA's standing provisions (i.e., RCW 36.70A.280(2)) does not eliminate the SEPA statute's exhaustion requirements for bringing SEPA challenges. Association of Rural Residents, Order on Dispositive Motions, at 12, fn. 10. The Board now so holds. West Seattle Defense Fund, Order on Granting Seattle's Motion to Dismiss, at 10.*

*The Board holds that obtaining GMA appearance standing does not automatically bestow SEPA standing upon a petitioner. The GMA and SEPA are two distinct statutes with their own standing requirements that each must be met by petitioners if they intend to challenge actions for not complying with both statutes.*

### Conclusion

*None of the Petitioners who have challenged the City's SEPA action has made a sufficient showing that the City's adoption of its final environmental impact statement will cause them specific and perceptible harm. Therefore, none of the Petitioners in this case has standing to raise SEPA issues.*

### III. CITY'S GMA STANDING MOTION

#### *City's Position*

*The City contends that Tracy does not have GMA appearance standing to raise Legal Issues Nos. 7, 10, 11, 12, 13 and 14, and therefore those portions of his case must be dismissed. Although conceding that Tracy did submit documents to and appear before the City in its process of adopting its comprehensive plan, the City maintains that a petitioner can only appear before the Board if the legal issues raised in the appeal to the Board were the same ones raised below. The City interprets the word "matter" as found in RCW 36.70A.280(2) to mean "the [legal] issue on which review is requested" rather than the legislative action being reviewed, such as the adoption of a comprehensive plan. City's GMA Standing Memorandum, at 9. Thus, the City claims that "the subject matters contained in the [legal] issues which are the subject of this motion were not mentioned, raised or even alluded to in any of petitioner's communications." City's GMA Standing Memorandum, at 9. Consequently, the City contends that Tracy cannot now raise legal issues about the City's comprehensive plan that he did not raise before the City during its comprehensive plan adoption process. As an example, the City argues that a petitioner cannot complain to a city that a proposed comprehensive plan will not reduce sprawl, and then on appeal to this Board, complain that the adopted comprehensive plan fails to promote historic*

preservation. City's GMA Standing Memorandum, at 9.

The City urges the Board to interpret the word "matter" more narrowly than meaning the actual legislative enactment that was adopted, in this case the City's comprehensive plan, because such a broad definition "would not be in context with and would be inconsistent with the 'enhanced public participation' as it has been interpreted by this Board." City's GMA Standing Memorandum, at 7. The City contends that the Growth Management Act (GMA or the Act) requires a public participation process comprised of meaningful dialog. City's GMA Standing Memorandum, at 9. During oral argument, the City suggested that the more general the document being adopted, the more specific the comments must be to obtain GMA appearance standing. As an example, if a critical areas development regulation ordinance were the subject of review, a petitioner's comments below would not have to be as specific as when the adopted enactment is a broad based policy document, such as a comprehensive plan.

The City also contends that Tracy failed to meet the requirements of specific injury to obtain Administrative Procedure Act standing under the GMA. City's GMA Standing Memorandum, at 9-10.

#### *Petitioner's Position*

Tracy lists several exhibits from the record that illustrate that he appeared before the City on several of the specific issues addressed in his petition for review even if the Board were to adopt the City's narrow interpretation of the word "matter." Tracy's Response, at 2.

Alternatively, Tracy urges the Board to reject the City's proposed definition of the word "matter." He claims that the City utterly failed to respond to his repeated requests for responses to his questions, therefore implying that "meaningful dialog" with the City was impossible. Tracy's Response, at 3. Furthermore, Tracy contends that the City's interpretation violates public policy because it would not permit challenges of actions taken after the close of public participation or challenges where the City asserts it did not understand a petitioner's comments during the adoption process. In addition, the City's proposal would insulate local government from potential challenges and place onerous new burdens on citizens hoping to participate in the GMA process. Tracy's Response, at 3.

#### Discussion

The Board does not accept the City's interpretation of the word "matter." RCW 36.70A.280(2) provides:

*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).*

The Board concludes that the word "matter" refers to the comprehensive plan, development regulation or designation, or countywide planning policy that a local government is required to

adopt pursuant to the GMA.

A distinction must be noted. The Board agrees with the City that "matter" must be more narrowly interpreted than meaning the GMA. Therefore, an allegation in a petition for review to the Board simply contending that a local government's enactment fails to comply with the GMA is insufficient; if a statement with sufficient detail is not contained in a petition for review, the Board will require a more specific statement at the prehearing conference indicating precisely which provision of an enactment fails to comply with which section of the Act or SEPA. However, appearance before the local government during its process of adopting a GMA-required ordinance may be readily obtained based upon the same allegation. Furthermore, appearance below does not even require an allegation to the local government that its GMA-required action fails to comply with the Act. Accordingly, the Board will not impose the same high standard on citizens appearing before a local government that it does upon petitioners before this body to specifically articulate legal issues.

In *Friends of the Law et al. v. King County et al (FOTL I) CPSGPHB Case No. 94-3-0003*, the Board first addressed the issue of GMA appearance standing in detail and concluded that the petitioners in that case failed to obtain appearance standing. There, the Board indicated:

*The question becomes how liberally should the GMA's appearance standing provisions be interpreted? FOTL I, Order on Dispositive Motions, at 8.*

The Board then went on to establish what the word "appeared" in RCW 36.70A.280(2) meant in cases where local jurisdictions had taken action:

*In order to appear on a 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 communication 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. FOTL I, Order on Dispositive Motions, at 17.*

The Board observed:

*... 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. FOTL I, Order on Dispositive Motions, at 9 (emphasis in original).*

*Thus, simply put, RCW 36.70A.280(2) is perfectly clear that any person who appeared before the city or county on the matter in question has standing. Regardless of whether that person is an individual or an organization, all that has to be done to obtain standing is to show up at the public hearing or meeting and sign in, or testify at a public hearing, or*

submit a letter.FOTL I, Order Denying Motions for Reconsideration, at 12 (emphasis added).

FOTL challenges the Board's appearance standing ruling by contending that organizations will only submit overly-generalized form letters to comply with the Board's interpretation. This is not a new phenomenon in American decision-making. The use of mass mailings to legislative officials is a long-standing part of our political process, even if often of questionable merit. Nonetheless, the Board agrees that such a form letter (assuming it clearly identifies and addresses the matter in question), will suffice to meet the appearance standing test.

Similarly, the Board agrees that all a member of an organization has to do ... is sign in a public hearing or meeting on the relevant matter as a representative of the organization -- and that person will still meet the appearance standing test. The organization's representative does not even have to testify. FOTL I, Order Denying Motions for Reconsideration, at 14 (emphasis added).

The Board's discussion as to what the word "matter" meant was limited in FOTL I to the petitioners' contention that they had "appeared" before the county regarding a pre-GMA comprehensive plan and community plan, and the county's adoption of its countywide planning policies pursuant to the Act. The Board noted:

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 [pre-GMA] Bear Creek Community Plan and area zoning... or the 1985 [pre-GMA] comprehensive plan. FOTL I, Order on Dispositive Motions, at 11.

The context of this quote should be clear: "appearance" before the local government in question on a non-GMA enactment, or a different GMA enactment than the one in question, does not confer standing to challenge the GMA enactment that is the subject of an appeal. The word "matter" refers to the enactment in question, not the legal issues concerning the enactment. Finally, the Board concedes of the possibility, as suggested by the City, that potential petitioners may "lie in the weeds" and "sandbag" a local government under the Board's ruling. See City's GMA Standing Motion, at 8. Initially, the Board notes that the window of opportunity for any person to challenge a GMA enactment, regardless of motive, is quite limited: a sixty day statute of limitations. See RCW 36.70A.290(2). Nonetheless, admittedly some petitioners theoretically could exert the minimal effort required to obtain GMA appearance standing, remain silent as to any substantive complaints, and then appeal with a great deal of specificity to the Board on issues not raised below. The Board will not, however, alter its interpretation of RCW 36.70A.280 (2) based upon the possibility of bad faith actions by potential petitioners.

As the Board has previously discussed:

However, in neither instance, be it a substantively vacuous form letter, or mere physical

attendance at a meeting, is the person providing information that will help the legislative decision maker reach the appropriate GMA decision. Yet, meaningful public participation is one of the hallmarks of the Act. See RCW 36.70A.020(11) and .140. The Board reluctantly concedes that either of these efforts is the most minimal effort necessary to obtain standing. However, the Board expects a much higher quality of public participation and suggests that such minimal efforts would afford the participant little credibility. More importantly, the Board generally reviews only the record below. See RCW 36.70A.290(4) and WAC 242-02-540. Consequently, if a petitioner intends to rely on just a simple form letter (that was minimally adequate to obtain standing) to substantively attack a local government's decision, that is within that petitioner's discretion. However, the Board will give such a form letter the weight that it deserves. FOTL I, Order Denying Motions for Reconsideration, at 14-15 (emphasis added).

The Board assumes that citizens will participate in the GMA process in good faith. Early and continuous citizen participation is fundamental to the GMA, regardless if the opinions voiced by the public are in agreement with the government's or one another's. Disagreement from participating citizens is an inevitable and healthy part of public debate. Ultimately the government will agree with some and not other members of the public. Sound practical and policy reasons bolster this judgment. First, common sense dictates that it is easier to raise a complaint about a proposed legislative enactment before it has been adopted (i.e., at a legislative hearing before the local jurisdiction) than after the action has been taken and the matter appealed. To begin with, the citizen may be persuasive below and achieve a favorable outcome from the legislative body that heard the complaint. Second, although it certainly costs local jurisdictions a great deal of time and money to defend GMA actions, appealing an action to a Board and then, depending on the outcome at the Board level, either further appealing or defending a Board decision, is also a costly proposition for petitioners. The high cost of appeals must be factored in with the burden of proof resting on a petitioner's shoulders and the presumption of validity afforded to local jurisdictions. In short, common sense dictates that potential petitioners voice their complaints before the local elected officials and not wait to do so before the Board. During oral argument, the Board pointed out that it would be difficult for a petitioner to prevail before the Board if that petitioner "sandbagged" the local government on factual issues since the Board usually reviews only the record below and, even when in the rare instances where it permits supplemental evidence, it does so only to assist it and not to overturn a decision below. The Board did acknowledge that on purely questions of law, a petitioner who had remained silent below (but obtained GMA appearance standing) could prevail on an appeal to the Board. The City complains that this is not fair and asks how it can address the issue of whether its action violates the Act as a matter of law, without a citizen below specifically raising the question. City's Motion on GMA Standing, at 8. As a legal matter, the Board again cites to the presumption of validity afforded to local jurisdictions and the burden of proof placed upon petitioners as an indication that some effort must be made by petitioners to prevail even on pure questions of law. Moreover, the Board urges local jurisdictions to have staff and legal counsel carefully review

*GMA proposals before they are adopted in an effort to "catch" any obvious legal errors. In addition, it is expected that known legal errors are pointed out during public hearings by persons acting in good faith to implement the requirements of the Act even though it is not their duty to do so. The final obligation for legal review rests with the jurisdiction charged with taking a GMA action.*

*As discussed by the Board and the parties during oral argument, the action being challenged is a legislative action of local government rather than a quasi-judicial one. As such, a factual record is not required to the degree it would be in a quasi-judicial setting. Instead, legislative hearings invoke the American political process at its finest: a policy debate over what decision is best for the jurisdiction in question.*

*The very nature of a legislative hearing often affords citizens limited opportunity to provide meaningful input to local elected officials. This is especially true in instances where public comment is limited to two to five minutes of testimony per individual. The need to impose such restrictions at a public hearing is understood. Yet the irony of the City's proposed interpretation, requesting citizens to raise specific complaints, has not passed the Board's attention, given the knowledge that time limits are frequently imposed on members of the public at public hearings. As a policy matter, the Board cannot adopt the City's interpretation. It is one thing to demand that petitioners to this Board be capable of articulating specific instances of violations of specific provisions of SEPA or the GMA. It is quite another to expect citizens to be able to articulate similar concerns at a potentially uncomfortable setting like a public hearing before a crowd of people. This is especially true if time restraints have been imposed on testimony. Even without such limits, it is fundamentally unfair and undemocratic to require citizens at a hearing to be lawyerly orators.*

### Conclusion

*Petitioner Tracy appeared before the City during its process of adopting a comprehensive plan pursuant to the requirements of the GMA. He did so by attending public hearings, testifying at such hearings, and submitting written comments on the proposed plan.*

*The Board will not limit the definition of the word "matter" in RCW 36.70A.280(2) to mean that a petitioner before the Board has GMA appearance standing only if that person appeared before the local jurisdiction and specifically articulated complaints that subsequently become the subject of a Board appeal. Instead, the word "matter" refers to the underlying enactment adopted pursuant to the requirements of the GMA that is the subject of a Board appeal, such as a development regulation or comprehensive plan.*

## **IV. BISD'S GMA STANDING MOTION**

### *BISD's Position*

*BISD asks the Board to dismiss Whitener's Legal Issues Nos. 2 through 8 because Whitener does*

*not have GMA appearance standing. BISS does not dispute that Whitener "appeared" at various public meetings and submitted letters and comments to the City. However, BISS claims that Whitener did not appear "regarding the matter on which review is being requested." BISS's GMA Standing Motion, at 3. BISS also contends that Whitener lacks APA standing to contest GMA actions. BISS's GMA Standing Motion, at 6-7.*

#### *Whitener's Position*

*Whitener's written response did not specifically respond to BISS's GMA Standing Motion. During oral argument, Whitener claimed to have appeared before the City during its process of adopting a comprehensive plan.*

### Discussion

*Before turning to the substance of BISS's GMA Standing Motion, the Board will address BISS's Reply to Whitener. BISS asks the Board to grant its motion because Whitener did not respond in writing and therefore his legal issue should be abandoned. BISS appropriately cited to the Board's decision in *Twin Falls et al. v. Snohomish County*<sup>[1]</sup> where the Board first discussed abandoned legal issues. The Board notes a major distinction. *Twin Falls* related to petitioners raising legal issues but then failing to either address them in writing in their prehearing briefs or to orally argue them. In contrast, the "issue" of Whitener's standing is actually an affirmative defense raised by BISS. It was not set forth in the Board's Prehearing Order as a legal issue for the Board to determine.*

*The Board notes that BISS's GMA Standing Motion contained several exhibits comprised of documents authored by Mr. Whitener. Exhibit A by itself suffices to grant GMA appearance standing to Whitener. It is a three-page letter to the Bainbridge Island Planning Commission, dated September 29, 1993, regarding the "Draft Comprehensive Plan - 7/30/93." Therefore, there was no need for Whitener to respond to BISS's GMA Standing Motion.*

*Because the gist of BISS's GMA Standing Motion is the same as the City's GMA Standing Motion, i.e., based on a request for the Board to define the word "matter" in RCW 36.70A.280(2) more narrowly, the Board's analysis above in discussion of the City's GMA Standing Motion applies equally here.*

### Conclusion

*Petitioner Whitener appeared before the City regarding its proposed comprehensive plan by submitting comment letters. He therefore has obtained GMA appearance standing to challenge the City's comprehensive plan.*

## **V. BISS'S STATUTE OF LIMITATIONS MOTION**

#### *BISS's Position*

*BISD asks the Board to dismiss a part of Whitener's Legal Issue No. 4 relating to City of Bainbridge Island Ordinance 93-05, its impact fee ordinance, because Whitener did not timely appeal that enactment.*

*Petitioner's Position*

*As indicated above, Whitener's Response was basically non-responsive to the motions filed by BISD.*

*Discussion*

*The Board agrees with BISD that it is too late for Whitener or any other petitioner to challenge the City's adoption of Ordinance 93-05.*

*Legal Issue No. 4, as set forth in the Board's Prehearing Order, provides:*

*Does the city's adoption of the Plan require the City to cease collection of school impact fees, authorized by Ordinance 93-05, and return those fees already collected? (see RCW 82.02.050)*

*A codified version of Ordinance 93-05, Chapter 15.28, is attached to BISD's Statute of Limitations Motion. Although it does not indicate the precise date of adoption of Ordinance 93-05, it does clearly indicate that Ordinance 93-05 was adopted sometime in 1993. Furthermore, the code itself indicates "Revised 9/93."*

*Pursuant to RCW 36.70A.290(2):*

*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 or chapter 43.21C. RCW must be filed within sixty days after publication by the legislative bodies of the county or city....*

*The Board takes official notice of the fact that it has been more than sixty days since publication of Ordinance 93-05 in codified form. Therefore, to the extent that Legal Issue No. 4 involves a challenge to Ordinance 93-05, it cannot be permitted to continue for failure of Whitener to timely appeal adoption of that ordinance.*

*Conclusion*

*Legal Issue No. 4 refers to Bainbridge Island Ordinance 93-05. Because Petitioner Whitener did not file an appeal challenging that ordinance in a timely fashion, the Board will not determine whether Ordinance 93-05 complies with the requirements of the GMA. Therefore, the Board will only review Whitener's Legal Issue No. 4 to determine whether the City's comprehensive plan complies with the requirements of the GMA.*

**VI. BISD/SBCA'S SEPA EXHAUSTION MOTION**

*Discussion*

*Because the Board has concluded that none of the Petitioners who raised SEPA issues has standing to do so, the Board need not determine whether Petitioners Port Blakely and Tracy exhausted their administrative remedies below before raising SEPA issues on appeal. See Board's discussion of City's SEPA Motion above.*

### Conclusion

*The Board will not determine BISD/SBCA's SEPA Exhaustion Motion because the issue of exhaustion of administrative remedies is moot given the Board's determination that none of the Petitioners has SEPA standing.*

## VII. BISD'S JURISDICTION MOTION

### *BISD's Position*

*It is BISD's position that the Board lacks jurisdiction over any petitions contending that Chapter 82.02 has been violated. BISD maintains that the references in RCW 36.70A.280(1) and .300(1) to "this chapter" mean only Chapter 36.70A RCW, or Chapter 41.23C RCW as it relates to Chapter 36.70A RCW. Therefore, BISD asks the Board to dismiss Whitener's Legal Issues Nos. 4 and 5 in their entirety and that part of Legal Issue No. 2 that challenges the City's compliance with RCW 82.02.050 et seq.*

### *Whitener's Position*

*Whitener did not respond to BISD's Jurisdiction Motion.*

### Discussion

*The Board's Presiding Officer has given the parties additional time to respond to legal questions raised by the Board in regards to BISD's Jurisdiction Motion.*

### Conclusion

*Because the parties have been given additional time to brief this question, the Board will issue a separate order responding to BISD's Jurisdiction Motion.*

## VIII. ORDER

*Having reviewed the above-referenced documents, having considered the oral arguments of the parties, and having deliberated on the matter, the Board enters the following order.*

*1. The City's SEPA Motion is **granted**. The following legal issues are **dismissed with prejudice**:  
Merrill Robison Legal Issue No. 9*

*Port Blakely Tree Farms Legal Issues Nos. 8 and 9*

*David S. Johnson, Michael L. Silves, and Legal Issue No. 5*

*Bainbridge Citizens for Zero Adverse Power*

*James C. Tracy Legal Issues Nos. 15, 16, and 17*

*David L. Martin and Michael A. Patterson Legal Issue No. 8*

2. *The City's GMA Standing Motion is **denied**. Petitioner Tracy does have GMA standing to raise legal issues before the Board challenging the City's comprehensive plan.*

3. *BISD's GMA Standing Motion is **denied**. Petitioner Whitener does have GMA standing to raise legal issues before the Board challenging the City's comprehensive plan.*

4. *BISD's Statute of Limitations Motion is **granted**. The Board will not review and decide that portion of Whitener's Legal Issue No. 4 that may challenge the validity of Bainbridge Island Ordinance 93-05. At the hearing on the merits, the Board will review only that portion of Whitener's Legal Issue No. 4 that asks whether the Bainbridge Island comprehensive plan complies with the requirements of the GMA.*

5. *BISD's SEPA Exhaustion Motion is **moot** since the Board has concluded that all of the Petitioners who raised SEPA issues lack standing to do so. Therefore, the Board need not determine BISD's SEPA Exhaustion Motion.*

6. *BISD's Jurisdiction Motion is **deferred** pending additional briefing, and further consideration by the Board.*

*So ORDERED this 16th day of February, 1995.*

## **CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD**

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*M. Peter Philley*

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*Joseph W. Tovar, AICP*

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*Chris Smith Towne*  
*Presiding Officer*

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[1] *On February 3, 1995, the Board entered an Amended Prehearing Order that listed Port Blakely's legal issues related to SEPA that had been inadvertently omitted from the Prehearing Order and amended the wording of Tracy's Legal Issue 15.*

[1] *CPSGMHB Case No. 94-3-0016, Order Granting Seattle's Motion to Dismiss SEPA Claim, and Order Denying WSDf's Motion for Reconsideration of Order Granting Seattle's Motion to Dismiss SEPA Claim (1995).*

[1] *In addition, none of the Petitioners have alleged sufficient evidentiary facts showing specific and perceptible harm in their subsequent filing of pleadings with the Board. Although Tracy claims that he has received actual harm by being frozen out of the process, this does not constitute adequate specific and perceptible harm to grant SEPA standing.*

[\[1\]](#) *CPSGPHB Case No. 93-3-0003 (1993).*