

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD**

STATE OF WASHINGTON

BREMERTON, et al.,)
)**Consolidated Case No. 95-3-0039**
Petitioners,)
)**ORDER ON COUNTY’S v.) DISPOSITIVE MOTIONS**
KITSAP COUNTY,))
Respondent.)
)

I. PROCEDURAL BACKGROUND

On May 5, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) entered a “Prehearing Order, Order Granting in Part Motions to Intervene, and Motion to Extend Deadline for Filing of Motions to Supplement the Record” (**Prehearing Order**). The Prehearing Order established a deadline for filing dispositive motions and indicated that the Board would not hold a hearing on any such motions.

On May 4, 1995, Kitsap County (the **County**) filed five dispositive motions. Three of those motions were subsequently withdrawn when “Kitsap County’s Withdrawal of Dispositive Motions” was filed with the Board on May 17, 1995.

Dispositive Motions

Two dispositive motions remain before the Board:

1) Kitsap County’s Dispositive Motion and Supporting Memorandum to Dismiss Part of Issue No.

[\[1\]](#)

11 (**County’s Issue 11 Motion**); and

2) Kitsap County’s Dispositive Motion and Supporting Memorandum to Dismiss Petitioners’ Issues Relating to the State Environmental Policy Act (**County’s SEPA Motion**). The County indicated that its SEPA motion involved “all Petitioners’ issues” relating to SEPA, and specifically named Adams (and Kawasaki), Garrido, KCRP I, KCRP II and the Suquamish Tribe. County’s SEPA Motion, at 1.

Responses

County’s Issue 11 Motion:

On May 10, 1995, the “City of Poulsbo’s Response to Kitsap County’s Motion to Dismiss Part of Issue No. 11” (**Poulsbo’s Response**) was filed with the Board.

The County elected not to file a reply to Poulsbo's Response.

County's SEPA Motion

On May 11, 1995, three responses to the County's SEPA Motion were filed with the Board:

- 1) "Suquamish Tribe's Response to Kitsap County's Motion to Dismiss SEPA Issues" (**Suquamish Tribe's Response**). Affidavits of David Fuller, Victoria Selser and Phyllis Meyers were attached to the Suquamish Tribe's Response. In addition, several unnumbered exhibits were attached to the Meyers Affidavit.
- 2) "Adams Response to Kitsap County's Dispositive Motion to Dismiss EIS Issues" (**Adams' Response**). The Adams' Response had one document attached, Exhibit A.
- 3) "Response of KCRP I to Kitsap County's Dispositive Motion to Dismiss Issues Related to the State Environmental Policy Act" (**KCRP I's Response**). An Affidavit of Zane Thomas and two affidavits of Beth Wilson were attached to KCRP I's Response.

On May 17, 1995, the fourth Petitioner named in the County's SEPA Motion responded when the "Response of KCRP II to Kitsap County's Motion to Dismiss SEPA Claims" (**KCRP II's Response**) was filed with the Board. Exhibits A-1 through A-4, B and C were attached to KCRP II's Response as was a Declaration of Nyle Hartley. One exhibit, Exhibit A, was attached to the Hartley Declaration.

The fifth Petitioner specifically named in the County's SEPA Motion, Charlotte Garrido, did not file a response.

On May 17, 1995, "Kitsap County's Reply Memorandum on Dispositive Motion to Dismiss Petitioners' SEPA-Related Issues" (**County's Reply**) was filed with the Board. It replied to all but KCRP II's Response. In addition, the County pointed out that it "inadvertently omitted" the North

Kitsap Coordinating Council (**Council**) ^[2] from the list of Petitioners who had raised SEPA-related issues in this case and asks the Board, on its own motion, to dismiss Council II's SEPA-related issues also.

On May 19, 1995, the Board received a letter from Zane Thomas on behalf of Council II asking the Board not to dismiss its SEPA issues because the County missed the May 3, 1995, deadline for filing a dispositive motion against Council II.

Finally, on May 24, 1995, "Kitsap County's Reply to KCRP II on Dispositive Motion to Dismiss Petitioners' SEPA-related Issues" (**County's Second Reply**) was filed with the Board.

II. FINDINGS OF FACT

No material facts were disputed by the parties. The Board enters the following undisputed facts:

- 1) On August 23, 1994, the County issued a final environmental impact statement (**FEIS**) for the County's proposed comprehensive plan. County's SEPA Motion, at 1.
- 2) On August 24, 1994, a "Notice of Availability of an Environmental Impact Statement" was published in *The Sun*, a newspaper of general circulation and the County's official newspaper. The notice indicated that the FEIS was available for review at designated locations throughout

Kitsap County.Exhibit 1 to County’s SEPA Motion.

3)In August, 1994, copies of the FEIS were mailed to numerous persons and entities, including several parties in this case: the Suquamish Indian Tribe, Washington State Departments of Community Development, Ecology, Fish and Wildfire, Natural Resources, Transportation, the City of Poulsbo, Beth Wilson of the Olalla Community Club, the North Kitsap Coordinating Council in care of Zane Thomas and the Central Kitsap Coordinating Council in care of Nyle Hartley.County’s SEPA Motion, Declaration of Rick Kimball, Jr. and attachment.

4)On September 7, 1994, Moira Kane, on behalf of KCRP and ARR, and Zane Thomas, on behalf of the Council, KCRP and the Kitsap Environmental Action Coalition, filed a “Letter of Record” with the County, challenging the adoption of the FEIS because it was inadequate. Exhibit 2 to County’s SEPA Motion.

5)On September 26, 1994, the County’s Board of Commissioners held a public hearing to consider the FEIS appeal, which was ultimately unanimously denied.Following the denial of the FEIS appeal, the Board of Commissioners continued a public hearing, for decision only, to consider the Kitsap County Planning Commission’s recommendation to approve the proposed comprehensive plan.Exhibit 3 to County’s SEPA Motion, at 199-204.

6)On December 29, 1994, the Board of Commissioners adopted the County’s GMA-based comprehensive plan.County’s SEPA Motion, at 2.

7)Also on December 29, 1994, the Board of Commissioners adopted the County’s Interim Zoning Ordinance, Ordinance No. 168-1994, to implement the comprehensive plan. Declaration of Rick Kimball, at 1, attached to County’s Second Reply.

8)On January 11, 1995, a notice of adoption of the comprehensive plan and related ordinances was published.Exhibit 4 to County’s SEPA Motion.

III.DISCUSSION

A.COUNTY’S ISSUE 11 MOTION

“Old” Legal Issue No. 11 (“amended” Legal Issue 9) asks:

Whether the consistency requirements of RCW 36.70A.110 apply to the portions of a city comprehensive plan that apply outside its borders pursuant to express or implied GMA authority and/or annexation planning pursuant to RCW 35A.14.330?

The County argues that the Board does not have jurisdiction to determine whether RCW 35A.14.330 has been violated.The Board agrees.However, the Board also agrees with Poulsbo that in determining whether RCW 36.70A.110 applies, the Board is free to examine other statutes besides those codified in Chapter 36.70A RCW.Therefore, the County’s request to dismiss all of Legal Issue No. 11 after the word “authority” is **denied**.

B.COUNTY’S SEPA MOTION

1.Exhaustion of Administrative Remedies

RCW 43.21C.075, entitled “Appeals,” provides in part:

...
(4) If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an appeal procedure, such person shall, prior to seeking any judicial review, use such procedure if any such procedure is available, unless expressly provided otherwise by state statute...(Emphasis added).

The Washington State Supreme Court has stated:

It is settled under the SEPA statute [i.e., RCW 43.21C.075(4)] that if an agency accords an aggrieved party an opportunity for administrative review, it must be exhausted *before* judicial review is sought.*State v. Grays Harbor County*, 122 Wn.2d 244, 249, 857 P.2d 1039 (1993) (emphasis in original).

The court referred to this as “... a strict exhaustion requirement in SEPA cases.”*State v. Grays Harbor County*, at 249 (emphasis added).The Board has previously determined that SEPA’s reference to “judicial review” in RCW 43.21C.075(4) includes review by a quasi-judicial growth management hearings board. *Association of Rural Residents v. Kitsap County (Rural Residents)*, CPSGPHB No. 93-3-0010 (Order Granting Dispositive Motions, February 16, 1994), at 6. SEPA’s exhaustion of administrative remedies requirement involves several underlying policies,

[3]

not all of which apply in every case:

(1) prevents premature interruption of the administrative process; (2) allows the agency to develop the factual background on which to base a decision; (3) allows the exercise of agency expertise; (4) provides a more efficient process and allows the agency to correct its own mistake; and (5) insures that individuals are not encouraged to ignore administrative procedures by resort to the courts.*Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 30,785 P.2d 447 (1990) citing *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 78, 768 P.2d 462 (1989).

The County has adopted a procedure for appeals of its SEPA determinations, including the issuance of a Final Environmental Impact Statement (**FEIS**).Kitsap County Code (**KCC**) 18.04.210 is entitled “Appeals.”KCC 18.04.210(a) provides:

The county establishes the following administrative appeal procedure under RCW 43.21C.075 and WAC 197-11-680...Exhibit A to Adams’ Response.

[4]

KCC 18.04.210(a)(1) relates to the adequacy of an FEIS. It provides:

Administrative appeals relating to the adequacy of an FEIS shall be consolidated in all cases with the public hearing on the merits of the proposal.If no public hearing process exists for a proposal, review of the final FEIS shall be heard and determined by the hearing examiner.The procedures for perfecting such an appeal to the hearing examiner shall be those procedures specified for an appeal of a departmental ruling as set forth in Chapter

2.60, as may hereinafter be amended. Exhibit A to Adams' Response (emphasis added). To determine whether the exhaustion requirement bars a SEPA claim, it must be decided:

(1) whether administrative remedies were exhausted; (2) whether an adequate remedy was available; (3) whether adequate notice of the appeals procedure was given; and (4) whether exhaustion would have been futile. *Citizens for Clean Air*, at 26.

a. Garrido

No evidence before the Board indicates that Petitioner Garrido either filed a formal appeal of the FEIS with the County (*compare* with Exhibit 2 to County's SEPA Motion) or that Garrido testified at the public hearing to consider the FEIS appeal that was filed (*see* Exhibit 3 to County's SEPA Motion, at 199-204). Accordingly, Garrido did not exhaust the administrative remedies available to her.

b. Adams & Kawasaki

No evidence before the Board indicates that Petitioners Adams and Kawasaki filed a formal appeal of the FEIS with the County. The only evidence in the record before the Board at this time that such an appeal was filed is the "Letter of Record" filed by Moira Kane and Zane Thomas. Exhibit 2 to County's SEPA Motion.

Mr. Kawasaki did testify on September 26, 1994 at the County Commissioners' public hearing to consider the FEIS appeal filed by Kane and Thomas. Exhibit 3 to County's SEPA Motion, at 202. The question thus becomes whether Mr. Kawasaki exhausted his administrative remedies under these factual circumstances in light of the County's established FEIS appeals procedures. *Citizens for Clean Air* is the benchmark case regarding the adequacy of administrative appeals procedures. There, it was noted that:

Generally, this court requires exhaustion only when the administrative remedy is *adequate*. *Citizens for Clean Air*, at 27, citing *State v. Tacoma-Pierce County Multiple Listing Service*, 95 Wn.2d 280, 283-84, 622 P.2d 1190 (1980) (emphasis in original).

In addressing the complaint by the citizens group in *Citizens for Clean Air* that Spokane County's SEPA appeals procedure was "poorly defined," the Court held:

While a process for appeal must exist, we have never held that the ordinance describing the procedure must be clear.... To establish that the procedures themselves are so poorly defined that we should excuse exhaustion, the litigant must attempt to appeal. A litigant who makes a sincere effort to clarify ambiguities in the ordinance and to use the appeal process may complain about poorly defined administrative machinery. If we are persuaded that no "clearly defined machinery" exists for resolving specific complaints, we will excuse exhaustion. *Citizens for Clean Air*, at 27-28 (emphasis added).

Lack of a clear procedure can make a remedy inadequate. But the litigants who wish to establish that the procedure is so poor as to be inadequate cannot rely on bad draftsmanship alone. It is not unfair to expect citizens groups to use available administrative procedures. Fairness to the agency requires that would-be litigants try to clarify the ambiguity before going to court.... *Citizens for Clean Air*, at 28 (emphasis added).

The Board concludes that Mr. Kawasaki did exhaust the administrative appeals procedures

supplied by the County. The County's administrative SEPA appeals procedures are, in general, as the County argues "reasonably clear." These procedures involve review by a hearing examiner pursuant to the requirements of Chapter 2.60 KCC (*see* KCC 18.04.210) except for appeals of the adequacy of an FEIS (KCC 18.04.210(a)(1)) or the decision to condition or deny a proposal (KCC 18.04.210(a)(2)). As indicated above, KCC 18.04.210(a)(1) consolidates FEIS appeals with the public hearing on the merits. Unlike the Spokane County Code in question in *Citizens for Clean Air* (which did indicate to whom and when to file an FEIS adequacy challenge), or Kitsap County's procedures for filing appeals with its hearings examiner (which specify how to file an application for a ruling, the cost of filing such an appeal, the time period for filing the appeal and the process for conducting a public hearing) the County's provision for appealing an FEIS is totally vague.

Nonetheless, the fact that Mr. Kawasaki was permitted to testify at the FEIS appeals hearing and present his arguments to the County Commissioners as to why he felt the FEIS was inadequate is

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determinative. Under the County's FEIS appeals procedures, testifying at the consolidated public hearing suffices since the Board is unaware of any other formal appeals procedures and none is listed or referred to in KCC 18.04.210. Moreover, even if such appeals procedures do exist, the County clearly waived them by permitting Kawasaki to testify, even though he did not file a written document like Ms. Kane and Mr. Thomas.

c. Council II

The Board concludes that Council II also exhausted the County's administrative remedies for appealing the adequacy of the FEIS. Not only did Mr. Zane Thomas file a "Letter of Record" on behalf of the Council (*see* Exhibit 2 to the County's SEPA Motion) but the County Commissioner Minutes of September 26, 1994 specify that the purpose of the public hearing was to consider Thomas' appeal on behalf of the Council. In addition, Mr. Thomas did indeed testify at that public hearing. The Board could not find in the record any additional requirements one must meet to administratively appeal the adequacy of a FEIS in Kitsap County.

d. Suquamish Tribe

Nothing in the record indicates that the Suquamish Tribe either filed a formal notice of appeal or testified at the FEIS appeal hearing before the County Commissioners. Thus, the Suquamish Tribe does not meet the first prong of the four-part exhaustion test set forth in *Citizens for Clean Air*. The fact that the County did hold a hearing to consider appeals regarding the adequacy of the FEIS verifies that an adequate remedy was available, satisfying the second prong. The Board has previously ruled that, pursuant to requirements of *Citizens for Clean Air*, the County did provide adequate notice of its appeals procedure by publishing notice of the administrative appeals ordinances. *See Rural Residents, Order Granting Dispositive Motions*. This satisfies the third prong of the exhaustion test.

The fourth part of the test is whether exhaustion would have been futile. The Suquamish Tribe contends that it would have been futile for it to have appealed the County's FEIS. If exhaustion of remedies would be futile, litigants are not required to do so and their SEPA claim will not be

barred. However, the policies underlying exhaustion impose a substantial burden on a litigant attempting to show futility. *Citizens for Clean Air*, at 30.

The Suquamish Tribe bases its futility claim on two grounds. First, it contends that:

... The final Plan adopted by Kitsap County in December 1994, established a different land use designation than any of the four alternatives evaluated in the FEIS. It would have been futile for Petitioner to appeal the August 23, 1994 FEIS because the Plan that was adopted on December 29, 1994 was not among those evaluated.... Suquamish Tribe's Response, at 2.

This first futility argument is similar to one the Tribe raised in its Petition for Review:

4.13 Whether Kitsap County failed to comply with RCW 43.21C and WAC 365-195-610 which require SEPA environmental review and evaluation when adopting comprehensive plans and development regulations pursuant to the Growth Management Act by establishing a different land use designation than any of the four alternatives evaluated in the FEIS approved August 23, 1994 thereby failing to evaluate the probable significant, [6]

adverse environmental impacts of its adopted plan. Petition for Review, at 6-7. [7]

Ascertaining the Tribe's intent is difficult on the face of these statements. On the one hand, the Tribe implicitly is arguing that it was satisfied with the County's FEIS when that document was adopted in August, 1994. Subsequently, when the County adopted the comprehensive plan in December, 1994, the Tribe became dissatisfied with the FEIS, contending that the comprehensive plan contained alternatives not analyzed by the FEIS and that therefore a Supplemental FEIS should have been prepared. On the other hand, the Tribe may be arguing that the FEIS itself is inadequate.

The County argues:

... To the extent that issues 64 and 66, (as well as issue 26 as it relates to SEPA), refer to the FEIS issued on the comprehensive plan, however, the Tribe has failed to exhaust available, adequate administrative remedies and has demonstrated no basis for a finding of futility. County's Reply, at 6.

The Board faces the dilemma of determining whether the Tribe's SEPA challenge is to the adequacy of the FEIS or for failure to adopt a Supplement to the FEIS. The Board concludes that to the extent the Suquamish Tribe is challenging the adequacy of the FEIS, it did not exhaust its available administrative remedies. Nothing in the record indicates an attempt by the Tribe to either appeal the adequacy of the FEIS administratively or to testify at the FEIS appeals hearing. Therefore, Legal Issues Nos. 64 and 66 will be dismissed with prejudice.

However, the facts contained in Legal Issue No. 64 (or in paragraph 4.13 of the Tribe's Petition for Review) are sufficient to place a legal issue before the Board asking whether the County should have prepared a Supplement FEIS. Therefore, a new, more narrow, legal issue will be added, **Legal Issue No. 64A**, that asks:

Was the County required to prepare a Supplement to its FEIS, pursuant to WAC 197-11-600(4)(d), when it adopted its comprehensive plan?

As in *Kitsap Citizens for Rural Preservation v. Kitsap County*,^[8] where the Board held that a citizens group challenge of the County's failure to withdraw a determination of nonsignificance (DNS) should not be dismissed for failure to exhaust, since the County did not have an appeals procedure for DNS withdrawals, here, the County also does not have an appeals procedure for claims that a Supplemental EIS should have been prepared. Therefore, no County administrative appeals process existed for the Suquamish Tribe to exhaust its claim that the County should have prepared a supplemental environmental document. Accordingly, the only adequate remedy for the Tribe to raise such a claim is in an appeal to this Board.

The Tribe raised a second futility argument:

In the alternative, the Tribe alleges that Kitsap County has continuously ignored concerns of the Suquamish Tribe provided during testimony over the past several years. Because our arguments with the County's SEPA analysis contain these same concerns, the Tribe had reason to believe an appeal would have been futile. (See Affidavit of Phyllis Meyers, Fisheries Biologist ... and Affidavit of Tribal Geohydrologist, David Fuller) Suquamish Tribe's Response, at 2.

The Board rejects the Tribe's second futility argument. Nothing in the affidavits or their attachments confirms the allegation that Tribal concerns had been "continuously ignored" by the County. Furthermore, even if the allegation that the County had ignored the Tribe's concerns were historically true, past history does not mean that the County would continue similar conduct. Our system of government relies upon the basic assumption that elected officials will act in good faith. The Suquamish Tribe had a duty to bring its concerns to the attention of the County Commissioners by appealing the FEIS if it felt that document was inadequate. The County Commissioners had to be given the chance to correct any perceived mistake. This is one of the fundamental purposes of the exhaustion requirement. See *Citizens for Clean Air*, at 26. The Tribe has not shown that making such an effort would have been futile. This is particularly true when one of the commissioners who decided the FEIS appeal was relatively new to the position.

2. SEPA Standing

Although SEPA grants standing to any "person" (see RCW 43.21C.075(4)), the legislature placed a condition on SEPA standing that such a person be "aggrieved." In two fairly recent decisions,

West Seattle Defense Fund v. Seattle^[9] and *Robison v. Bainbridge Island*,^[10] the Board was bound by precedent to review SEPA appellate caselaw to determine whether the petitioners in those cases were sufficiently aggrieved to obtain standing to raise SEPA issues. The Board, although it considers the test inappropriate, nonetheless applied a 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 determine whether a person was "aggrieved." In both cases, the Board concluded that the petitioners 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, 882 P.2d 807 (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. *Robison v. Bainbridge Island*, Order on Dispositive Motions, at 6; *WSDF v. Seattle*, Order Granting Seattle's Motion to Dismiss, at 7.

... To the extent that GMA policy documents, including comprehensive plans, are broad, do not apply to specific parcels of land and do not narrowly direct specific regulatory outcomes, it will be difficult to demonstrate specific injury, and therefore it will be more difficult to establish SEPA standing. The *Snohomish County Property Rights Alliance* decision underscores this more difficult standing test.

This does not mean, however, that it will never be possible to establish SEPA standing to challenge a GMA policy document. For example, to the extent that certain comprehensive plan policies apply with particularity to unique parcels of land, and narrowly direct specific regulatory outcomes, it will be less difficult to demonstrate immediate, concrete and specific injury. In such an instance, it may be possible to establish SEPA standing ... *WSDF v. Seattle*, Order Granting Seattle's Motion to Dismiss, at 8.

In addition, in *West Seattle Defense Fund*, 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.

In *Robison*, the Board further held:

... 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. *Robison v. Bainbridge Island*, Order on Dispositive Motions, at 6-7.

In this case, the County readily concedes that all petitioners who raised SEPA issues are within the zone of interests protected by SEPA. However, the County contends that "none of the Petitioners in this case has presented sufficient evidentiary facts to show that the challenged

SEPA document will cause them specific and perceptible harm.”County’s SEPA Brief, at 5.The question that remains before the Board is whether the specific Petitioner has successfully alleged an injury in fact.

a.Garrido

Because Petitioner Garrido failed to exhaust the administrative remedies available to her, the Board need not examine whether she has SEPA standing.

b.Adams

Adams claims that the County’s comprehensive plan fails to reduce sprawl.As a result of “rural sprawl” being permitted, Ms. Adams contends that the petitioners will be directly harmed by “the degradation to the environment caused by sprawl” and “the added infrastructure costs associated with sprawl.”Adams’ Response, at 4.

The Board holds that Adams has not shown injury in fact.Although she has made a serious allegation as to the County’s substantive compliance with the requirements of the GMA, Ms. Adams has not overcome the threshold for obtaining SEPA standing.No showing of specific and perceptible harm to the petitioner was made.Therefore, Adams does not have SEPA standing before the Board.

c.KCRP I

KCRP I contends that it will be easier for it to show SEPA standing because:

... As part of its Comprehensive Plan, Kitsap adopted a Land Use Element and a Land Use Map which together apply with great particularity and specificity to all of the lands in Kitsap County which lie outside of city boundaries.On the Land Use Map and in the Comprehensive Plan itself each parcel, again excluding the cities, has specific types of uses identified.The Comprehensive Plan is very specific with regard to unique parcels of land...

KCRP I’s Brief, at 2.

KCRP I then contends that because the FEIS analysis was inadequate, this poses “an immediate, concrete, and specific threat to our interests and our properties.” KCRP I’s Response, at 4.Again, such a blanket assertion is unsupported by any showing of specific and perceptible harm.

However, the Affidavits of Zane Thomas and Beth Wilson attached to KCRP I’s Response do constitute a showing of specific and perceptible harm.

For instance, Mr. Thomas indicates that by designating his five acres of property and surrounding properties in Kitsap County with densities up to one unit per acre, this will have a direct adverse impact on the property owner’s ability to provide wildlife habitat on the property.Thomas Affidavit, at 1.Thomas also claims that by designating densities of property surrounding his land at up to one unit per acre, this will place his groundwater source at risk of overuse or pollution. Thomas Affidavit, at 2.

Therefore, the Board concludes that KCRP I has shown injury in fact and accordingly, does have SEPA standing.

d.KCRP II

KCRP II, even more than KCRP I, attempts to show how the comprehensive plan applies with great particularity to specific parcels of property, thus easing the group’s burden of showing

injury in fact. KCRP II's Response, at 1-5. KCRP II attaches a Declaration of Lyle Hartley, with attachments, to show that specific injury will occur. Hartley declares that he lives in the immediate vicinity of a proposed gas station/convenience store on a site that is currently heavily wooded. He contends the area is presently developed at a "light rural density" and that "[I]ntrusion of a commercial development into this otherwise rural area will create incompatibilities and conflicts including aesthetic, traffic, light, and noise impacts." Hartley Declaration, at 2. KCRP II alleges that its property and interests will be directly impacted by the County's inadequate FEIS. The Board concludes that KCRP II's allegations, although possibly documented (to the extent that a Staff Report attached to the Hartley Declaration so documents the injury), are "speculative." However, like the *Leavitt* court that "assumed" that speculative and undocumented impacts nonetheless established SEPA standing, the Board concludes that KCRP II's claimed impacts are within the interests protected by SEPA. See *Leavitt*, at 679. Therefore, the Board will assume that KCRP has established standing for purposes of review.

e. Suquamish Tribe

The Suquamish Tribe alleges that it will be specifically and perceptibly harmed by the County's comprehensive plan because no SEPA document analyzed the impacts to the Tribe in the area of water, natural and human resources. Suquamish Tribe's Response, at 4. The Affidavit of David Fuller attached to the Tribe's Response indicates that:

Among the water issues not addressed in the Plan are the evaluation of critical aquifer recharge areas for both quality and quantity and the impact to Suquamish federally reserved water rights. Fuller Affidavit, at 1-2.

The Affidavit of Phyllis Meyers, the Tribe's biologist, indicates that the comprehensive plan: ... allows for a density of 1DU/Acre throughout the county. Buildout to such a degree will result in a significant increase in impervious surface. Meyers Affidavit, at 1.

Referring to an attachment to her affidavit, Ms. Meyers states that the information:

... shows that more than 10-12% impervious surface in a watershed typically results in an irreversible loss of aquatic system function. Such a loss equates to loss of salmon habitat. Chico Creek supports one of the most important salmon populations on the Kitsap Peninsula.

b. Increasing impervious surfaces on and near creeks, including Chico Creek, by the removal of forests and buildout at a density of 1DU/Acre and FCC's in current forest lands, will result in significant degradation and adverse environmental impact to the Chico Creek salmon and treaty-reserved resources. Meyers Affidavit, at 1-2.

The Board concludes that the Suquamish Tribe has made a satisfactory showing of injury in fact to obtain SEPA standing.

f. Council II

The County inadvertently omitted Council II from its SEPA Motion thereby missing the deadline for filing a dispositive motion against Council II. Council II therefore could not respond to the County's SEPA Motion since that motion named other petitioners. However, Council II subsequently opposed the request in the County's Reply for the Board to dismiss Council II on its

own motion for lack of SEPA standing. In light of the fact that the Board has denied much of the County's SEPA Motion relating to standing, the Board will not consider the County's request regarding Council II at this time. The County, if it chooses, can challenge Council II's SEPA standing when it files its prehearing brief. If the County elects to pursue its SEPA standing challenge against Council II, Council II can respond when it files its reply brief.

IV. ORDER

Having reviewed the above-referenced documents and the file in this case and having deliberated on the matter, the Board enters the following order.

- 1) The County's Issue 11 Motion is **denied**.
- 2) The County's SEPA Motion in regards to Petitioner Garrido is **granted** as Ms. Garrido failed to exhaust the administrative remedies available to her. Therefore, **Legal Issues Nos. 64 and 70** as they relate to Garrido are **dismissed with prejudice**.
- 3) The County's SEPA Motion in regards to Petitioners Adams and Kawasaki is **denied** as these petitioners did not fail to exhaust the administrative remedies available to them.
- 4) The County's SEPA Motion in regards to Council II is **denied** as these petitioners did not fail to exhaust the administrative remedies available to them.
- 5) The County's SEPA Motion regarding the Suquamish Tribe for failing to exhaust its administrative remedies is partially **granted**. **Legal Issues Nos. 64 and 66** as set forth in the Board's Prehearing Order and Order Granting Motions to Intervene **are dismissed with prejudice**. However, the Board's Prehearing Order is **amended** to add a new issue, **Legal Issue No. 64A**, which asks:
Was the County required to prepare a Supplement to its FEIS, pursuant to WAC 197-11-600(4)(d), when it adopted its comprehensive plan?
- 6) The County's SEPA Motion regarding Petitioner Adams' SEPA standing is **granted**. Therefore, **Legal Issue No. 62** as it relates to Adams is **dismissed with prejudice**.
- 7) The County's SEPA Motion regarding Petitioner KCRP I's SEPA standing is **denied**.
- 8) The County's SEPA Motion regarding Petitioner KCRP II's SEPA standing is **denied**.
- 9) The County's SEPA Motion regarding Petitioner Suquamish Tribe's SEPA standing is **denied**.
- 10) The County's SEPA Motion regarding Petitioner Council II's SEPA standing is **denied**.

So ordered this 5th day of June, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

Partial Dissent

I fully agree with the majority regarding the dismissal of the County's Issue 11 Motion, and as to whether the relevant petitioners failed to exhaust their administrative remedies. However, I respectfully dissent from the majority opinion as it relates to the petitioners' SEPA standing. In applying the injury-in-fact prong of the two part SEPA standing test established by two divisions of the Washington Court of Appeals (*see Trepanier and Leavitt*), I conclude that none of the petitioners has met the test.

KCRP I

The Zane Thomas Affidavit, although containing interesting allegations, does not include sufficient evidentiary facts to show that he will be harmed. No immediate, concrete and specific injury has been shown. The fact that the comprehensive plan may someday allow for increased densities is certainly not the requisite immediate injury. No one knows if or when the projected maximum densities will ever occur. In addition, Mr. Thomas made no showing how simply permitting up to one dwelling unit per acre on a parcel of property will affect either wildlife in general or wildlife on his five acre parcel in particular. Although Mr. Thomas raises serious contentions, such as the claim that allowing increased densities will place his groundwater source at risk of overuse or pollution, this allegation remains nothing but a conjectural, albeit serious, injury since it is unsupported by evidentiary facts.

KCRP II

Again, the attached affidavit, in this case of Mr. Hartley, contains interesting claims that permitting a gas station/convenience store to be built is incompatible with the rural character of the area. Although I am sympathetic to Mr. Hartley's concerns, his statements do not qualify as a sufficient showing of specific and perceptible environmental harm.

Suquamish Tribe

I would also conclude that the Suquamish Tribe lacks SEPA standing. The Affidavit of David Fuller is nothing more than an undocumented speculative statement. For such a statement to confer SEPA standing upon the Tribe, it must contain facts of specific and perceptible harm. The Affidavit of Phyllis Meyers comes closer to meeting the injury-in-fact test. Her contention that more than 10-12% impervious surface in a watershed typically results in an irreversible loss of aquatic system function is certainly an evidentiary fact of perceptible harm. However, I would still not grant the Tribe SEPA standing based upon this information. The Tribe did not show that the County's policies would permit such an irreversible loss or that the County's environmental analysis did not consider the possibility. I assume that the County has critical area regulations that will protect its watersheds, especially its salmon bearing ones. Moreover, the "facts" Ms. Meyers provided do not indicate how close to the watershed the irreversible loss will take place if over 10-12% impervious surfaces are allowed, or if any mitigating measures such as setbacks, limitations on total impervious surfaces, etc., will resolve the problem. For that matter, nothing indicates whether the County will even allow 10-12% impervious surfaces in a watershed. Thus, with additional information and analysis, I might have concluded that the Tribe indeed met the injury

in fact requirement. However, based on the information before the Board, the Tribe did not meet the *Trepanier/Leavitt* test.

A Policy Discussion

Although I disagree with the majority on the application of the *Trepanier/Leavitt* SEPA standing test to the facts in this particular case (since I conclude that none of the petitioners has SEPA standing), I do concur with the majority that the Board is bound to apply the *Trepanier/Leavitt* test, and also that the test itself is inappropriate. My conclusion that the Board is required to apply an improper test is based on several reasons. First of all, the fact that the courts have ruled that a conjectural or hypothetical injury will not confer standing makes it virtually impossible to obtain standing at the comprehensive plan stage. Until a project is actually built, no one will know for certain whether the injury is in fact immediate, concrete and specific. In effect, then, all allegations are speculative until after a project is completed. However, by then it may be too late

[\[11\]](#)

to avoid environmental damage.

Secondly, especially in light of the 1995 legislature's efforts (*see* ESHB 1724) to place a greater emphasis on an EIS prepared for the underlying policy document, the comprehensive plan, and its implementing development regulations, rather than on a site specific, project-by-project EIS, the *Trepanier/Leavitt* test is overly restrictive. As the Board has repeatedly indicated in applying the *Trepanier/Leavitt* test, it should be (and, until this case, it was) rather difficult to obtain SEPA standing to challenge the environmental analysis for a comprehensive plan. Sound public policy dictates that if a greater emphasis is going to be placed on nonproject action EISs, the ability to challenge the adequacy of those EISs should be less restrictive than the current two-part SEPA standing test.

Third, I question the utility of the test in light of the way at least Division Two of the Court of Appeals has applied it. The *Leavitt* court went to great lengths to adopt the *Trepanier* court's analysis and test. *Leavitt*, at 678-679. It is a restrictive standard. It is surprising for a court to adopt such a strict test and then to turn around, conclude that the petitioner's alleged impacts are "speculative and undocumented" and nonetheless "assume" that a party has met the test. *Leavitt*, at 679.

Despite my criticism of the test, this is not to say that SEPA standing should be automatically conferred upon anyone. I would continue to strictly enforce the exhaustion of administrative remedies requirement. Strict enforcement of the exhaustion doctrine will force would-be challengers to complain up-front, at the EIS preparation stage, rather than hold back relevant information until the appellate stage. Local governments would then have the ability to correct any errors they had been advised of through the local administrative process.

Unfortunately, until either the courts modify the *Trepanier/Leavitt* test or the legislature amends SEPA, potential petitioners will have a difficult time obtaining SEPA standing. For instance, the courts could retract the *Trepanier/Leavitt* test by holding that the "person aggrieved" language of

RCW 43.21C.075(4) means any person who has exhausted his or her administrative remedies (since it takes a great deal of time and effort to exhaust one's remedies). The legislature could indicate that the GMA's standing requirements apply to both SEPA and the GMA, or could create a specific SEPA standing section similar to the GMA's standing provisions, or modify what is arguably the existing SEPA standing subsection, RCW 43.21C.075(4), by deleting the word "aggrieved" from the "person aggrieved" language.

Making it difficult to obtain SEPA standing should not be either the court's or the legislature's goal, as long as the exhaustion of administrative remedies doctrine continues to be strictly enforced (which it should be) in light of the policy rationale for SEPA. RCW 43.21C.010 lists the purposes of SEPA:

The purposes of this chapter are: (1) To declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation..

Furthermore, RCW 43.21C.020 declares the continuing policy of the state, including:

(3) ... that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

The *Trepanier/Leavitt* test makes it extremely difficult to obtain SEPA standing, even if one has exhausted all available administrative remedies. Such a high threshold does not allow each person to fulfill the responsibility to contribute to the preservation and enhancement of the environment if that person feels the environmental analysis that has been conducted is inadequate. The courts or the legislature should reconsider the requirements for obtaining SEPA standing. Making changes like those suggested will not "open the floodgates" -- it is a time-consuming and costly proposition to perfect a SEPA appeal. The recommended changes would streamline the system by making it clear that anyone has SEPA standing. However, those persons would have to first exhaust their administrative remedies and, furthermore, SEPA's substantial deference to the decision of the governmental agency would continue. *See* RCW 43.21C.090.

M. Peter Philley, Presiding Officer

[1] The County's Issue 11 Motion referred to a prior set of numbers corresponding to each legal issue that was amended by the Board's Prehearing Order. "Old" legal issue 11 is now Legal Issue No. 9. Since the caption to the County's motion refers to old legal issue no. 11, the Board will continue to refer to the issue as issue 11 for purposes of this order only.

[2] The Council filed two separate petitions for review in this consolidated case, referred to in the Prehearing Order as Council I and Council II. Issues raised in the Council II case are addressed in the County's Reply.

[3]

SEPA's exhaustion requirement at RCW 43.21C.075(4) should not be confused with what the court has referred to as SEPA's "linkage" requirement of RCW 43.21C.075(1) and (2)(a). The exhaustion requirement forces a dissatisfied party to act relatively quickly by appealing a SEPA determination within the relevant local time frame, using the internal administrative appeals procedures of the agency making the SEPA decision. On the other hand, the linkage requirement forces a party dissatisfied with a SEPA determination, who has exhausted the internal administrative SEPA appeals procedures, to wait until the underlying substantive decision (e.g., to grant or deny a permit, or to take a legislative action) has been made before appealing to a quasi-judicial growth management hearings board, or to the courts. See *State v. Grays Harbor County*.

[4]

The Board has previously reviewed KCC 18.04.210(3) dealing with the issuance of a determination of nonsignificance (DNS). The County's procedures for appealing the issuance of a DNS involve a detailed procedure before a hearing examiner. See *Rural Residents*, Order Granting Dispositive Motions, at 5-6.

[5]

Contrary to the County's position that "[N]othing in the notes of Mr. Kawasaki's testimony indicates what the substance of his objection to the FEIS was" (County's Reply, at 3), the appeals hearing minutes indicate that Mr. Kawasaki stated "he felt that a supplemental EIS was needed" and should "be done before the final comprehensive plan was adopted." Furthermore, he referenced his prior written comments on the draft EIS and indicated that there was inadequate time to submit comments on the FEIS. Exhibit 3 to County's SEPA Brief, at 202.

[6]

The Washington State Department of Community, Trade and Economic Development's Procedural Criteria at WAC 365-195-610, "State Environmental Policy Act (SEPA)," provides:

Adoption of comprehensive plans and development regulations are "actions" as defined under SEPA. This means that SEPA compliance is necessary. When a complete new plan is being written, in most instances, the preparation of an environmental impact statement (EIS) will be required prior to its adoption. SEPA compliance should be considered as part of the planning process rather than as a separate exercise. Indeed, the SEPA analysis and documentation can serve, in significant part, to fulfill the need to compile a record showing the considerations which went into the plan and why one alternative was chosen over another. SEPA compliance for development regulations should concentrate on the impact difference among alternative means of successfully implementing the plan. Detailed discussion of SEPA compliance is contained in Department of Ecology Publication No. 92-07, "The Growth Management Act and the State Environmental Policy Act, A Guide to Interrelationships."

[7]

The Board re-worded this issue in its Prehearing Order as Legal Issue No. 64 which provides:

Whether the County failed to comply with Chap. 43.21C RCW and WAC 365-195-610 by establishing a different land use designation than any of the four alternatives evaluated in the Final EIS, thereby failing to evaluate the probable significant adverse environmental impacts of its adopted plan?

[8]

CPSGMHB Case No. 94-3-0005 (July 27, 1994), Order on Kitsap County's Dispositive Motion, at 16.

[9]

CPSGMHB Case No. 94-3-0016 (December 30, 1994), Order Granting Seattle's Motion to Dismiss SEPA Claim.

[10]

CPSGMHB Case No. 94-3-0025 (February 16, 1995), Order on Dispositive Motions.

[11]

I reject the argument made by petitioners that the Board's rules of practice and procedure preclude them from making the necessary showing of evidentiary facts in their Petition for Review. Although WAC 242-02-210(2)(c) does require "a detailed statement of issues presented for resolution by the board" that this Board has indicated it prefers in the form a question, WAC 242-02-210(2)(d) simply requires "a statement indicating the basis of the petitioner's standing before the board." Neither that subsection or a prior Board ruling precludes a petitioner from

listing instances of injury in fact if the petitioner is hoping to obtain SEPA standing before the Board.