

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

PILCHUCK, et al.,) **Consolidated**

) **Case No. 95-3-0047**

Petitioners,)

) **ORDER GRANTING v.) SNOHOMISH COUNTY'S**

) **DISPOSITIVE MOTION TO**

SNOHOMISH COUNTY,) **DISMISS SEPA CLAIMS**

)

Respondent.)

)

I. PROCEDURAL HISTORY

On July 31, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) entered an Amended Prehearing Order in the above-captioned case that established a deadline for filing dispositive motions.

On July 27, 1995, "Snohomish County's Dispositive Motion to Dismiss Petitioners' Claims Relating to the State Environmental Policy Act" (**County's Motion**) was filed with the Board.

On August 2, 1995, Pilchuck Audubon Society (**Pilchuck**) filed a "Memorandum of Pilchuck Audubon Society in Opposition to County's Motion to Dismiss SEPA Claims" (**Pilchuck's Reponse**). Four exhibits and a Declaration of Ellen Gray were attached to Pilchuck's Response. Also on August 2, 1995, the "Response of the Tulalip Tribes of Washington to County's Motion to Dismiss Claims Based Upon SEPA" (**Tulalip's Response**) was filed with the Board. Tulalip elected to withdraw its SEPA-based claims.

On August 7, 1995, "Snohomish County's Reply Memorandum on the County's Dispositive Motion" (**County's Reply**) was filed with the Board.

On August 10, 1995, the Board held a hearing on the County's Motion at its offices in Seattle. Joseph W. Tovar, Presiding Officer in this case, M. Peter Philley and Chris Smith Towne were present from the Board. David Bricklin represented Pilchuck; James H. Jones, Jr. represented Tulalip; and Gordon W. Sivley represented Snohomish County (the **County**). Also present telephonically were Heidi Downey representing the Master Builders' Association, Janet Garrow representing Snohomish County Realtors Association, Tommy Prud'homme representing the State of Washington and Ellen Gray of the Pilchuck Audubon Society.

II.FINDINGS OF FACT

No material facts were disputed by the parties. The Board enters the following undisputed facts:
1) On September 30, 1994, the County issued a Determination of Non-significance regarding its proposed critical areas ordinances No. 94-108 and 94-109. Exhibits 1 and 2 to Tulalip's Petition for Review.

2) On March 7, 1995, Snohomish County Ordinance No. 94-108 was adopted by the Snohomish County Council. The Ordinance designates and adopts regulations to protect critical areas pursuant to the GMA and adds a new Chapter 32.10, Critical Areas Regulations, to the Snohomish County Code. Tulalip's Petition for Review, Exhibit 2.

3) On March 7, 1995, Snohomish County Ordinance No. 94-109 was adopted by the Snohomish County Council. The Ordinance amends Snohomish County Code Chapter 23.26 relating to substantive environmental authority and adopts Chapter 32.10, Snohomish County Code relating to critical areas regulations as an environmental policy. Tulalip's Petition for Review, Exhibit 1.

III.DISCUSSION

This is the fourth case the Board has heard recently where the SEPA standing of the petitioners has been challenged. As a result, the Board is required to again apply the common-law SEPA standing test developed first by Division One in *Trepanier v. Everett*, 64 Wn. App. 380, 824 P.2d 524, review denied, 119 Wn.2d 1012 (1992), and then adopted by Division Two of the Court of Appeals in *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994). Although the State Environmental Policy Act (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 order to obtain SEPA standing:

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.

In two prior decisions, *West Seattle Defense Fund (WSDF) v. Seattle* ^[1] and *Robison v.*

Bainbridge Island, ^[2] the Board applied the two-part analysis and concluded that the petitioners

lacked SEPA standing. In a split decision in *Bremerton v. Kitsap County*, ^[3] the Board concluded that some of the challenged petitioners did meet the SEPA standing test. The Board remains bound to apply the same test in this case.

Before determining whether Pilchuck Audubon has SEPA standing by applying the *Trepanier/*

Leavitt test, the Board will address the requisite contents of a petition for review. The Board holds that a petitioner must establish a *prima facie* case of standing in the petition for review, be it GMA or SEPA standing or both.

RCW 36.70A.290(3) provides:

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.

The only way the Board can determine whether a petitioner has standing within ten days of receipt of a petition for review is to require petitioners to describe their standing in the petition for review. Accordingly, the Board's Rules of Practice and Procedure at WAC 242-02-210(2)(d) provide that a petition for review shall contain:

A statement indicating the basis of the petitioner's standing before the board;

Petitioners have several mechanisms for alleging that they are within the zone of interests protected by SEPA and for showing that the challenged SEPA determination will cause them specific and perceptible harm. Petitioners can make the necessary showing:

- as a narrative in the petition for review itself;
- by attaching a declaration or affidavit to the petition for review; or
- by incorporating by reference exhibits from the record below.

Here, Pilchuck has not made the necessary showing within its petition for review. Paragraph 4.4 of the petition for review is the only statement that arguably addresses SEPA standing. It provides:

If an adequate EIS had been prepared, the County would have been alerted to the significant adverse impacts which will result from adoption of Ordinance 94-108 which include impacts to the property of Society members in the proximity of critical areas which should be protected and impacts to the ability of Society members to enjoy, study, and use wildlife and fish resources. Pilchuck Audubon Petition for Review, at 4.

This paragraph does not contain "sufficient evidentiary facts to show that the challenged SEPA determination will cause ... specific and perceptible harm" as required by the *Trepanier and Leavitt* courts.

Pilchuck argues that the Board should give petitioners the opportunity to make the requisite showing sometime after filing a petition for review since the purpose of the petition is merely to put the respondent on notice of a pending appeal. The Board rejects this argument. First, as discussed above, both RCW 36.70A.290(3) and WAC 242-02-210(2)(d) make it clear that the purpose of the petition for review is broader than simply putting a local government on notice. It also provides the opportunity for the Board to dismiss a case for lack of standing.

Second, the petitioners could have submitted declarations, affidavits or exhibits from the record below with their petition for review. Moreover, the Board's rules permit petitioners to amend a petition for review "as a matter of right" within thirty days of filing. See WAC 242-02-260(1).

Third, in *West Seattle Defense Fund v. Seattle*, the Board indicated that it had reviewed the petition for review and the declarations, exhibits and attachments subsequently filed. See *WSDF v.*

Seattle, Order Granting Seattle's Motion to Dismiss SEPA Claim, at 7. Pilchuck argues that this means that the Board permitted petitioners to file additional documentation after the petition for review was filed to make the necessary SEPA standing showing. Pilchuck Audubon is incorrect. The Board was merely reciting the fact that the petitioners had filed numerous post-petition documents and that the Board had reviewed them. If there was any confusion caused by this recitation, it was soon thereafter clarified in the same case when the Board held on reconsideration as follows:

Subsection (3) [of RCW 36.70A.290] 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 enactment. 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 cases 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.... 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.... *WSDF v. Seattle*, Order Denying WSDF's Motion for Reconsideration of Order Granting City of Seattle's Motion to Dismiss SEPA Claim, (January 10, 1995), at 3-4 (emphasis added).

Furthermore, in its next SEPA standing case, the Board affirmed its *WSDF* holding. In its review of the petitions for review that had been filed, the petitioners failed to show SEPA standing with satisfactory evidence. Therefore, the Board dismissed the SEPA claims that had been raised. *Robison v. Bainbridge Island*, CPSGMHB Case No. 94-3-0025, (February 16, 1995) Order on Dispositive Motions, at 6.

The Board also rejects Pilchuck's argument that "Snohomish County is attempting to argue factual issues as a matter of law, contrary to the Board's prehearing order limiting such motions to ones 'that address purely legal issues'." Pilchuck's Brief, at 1. The County simply filed a

dispositive motion on the purely legal question whether the petitioners had made a sufficient showing of SEPA standing within their petition for review. In order to reach its determination on this issue, the Board need not ascertain the validity of any allegations of evidentiary facts; instead, the Board must simply determine whether the petitioners have made the necessary factual allegation. Here, the petitioners did not.

Finally, the Board addresses one other issue discussed during oral argument at the hearing on the County's Motion. During oral argument, the County readily conceded that is very difficult, if not virtually impossible, for a petitioner to meet the *Trepanier/Leavitt* SEPA standing test when a nonproject legislative enactment is the underlying SEPA action. The Board itself has repeatedly acknowledged the difficulty for petitioners to demonstrate the "specific injury" required by the *Leavitt* and *Trepanier* courts and thus to obtain SEPA standing. See *Bremerton v. Kitsap County*, Order on County's Dispositive Motions, at 11 citing *Snohomish Property Rights Alliance v. Snohomish County*, 76 Wn.App. 44, 882 P.2d 807 (1994), *Robison v. Bainbridge Island*, Order on Dispositive Motions, at 6; *WSDF v. Seattle*, Order Granting Seattle's Motion to Dismiss, at 7. In addition, the Board has pointed out that the common-law SEPA standing test is "inappropriate" in a GMA context. *Bremerton v. Kitsap County*, Order on County's Dispositive Motions, at 10-11 (see also partial dissent at 16-19). Nonetheless, until the test is modified by the courts, or the legislature amends the SEPA standing statute, this Board is bound by the test. Just as troublesome to the Board as the *Trepanier/Leavitt* test is the interrelationship between the GMA and SEPA. The latter seems to work well in the context of a site-specific, project action. However, as indicated above, when the underlying action is a county or city-wide legislative enactment, applying traditional SEPA analysis (including the common law SEPA standing test) is more difficult. When, as in this case, the underlying legislative enactment is the adoption of the County's Critical Areas Ordinance pursuant to the requirement of RCW 36.70A.060(2) to "adopt development regulations that protect critical areas," the necessity of interplay between SEPA and GMA comes into issue. Why must a local government conduct detailed analysis of the environmental impact of the proposed action pursuant to RCW 43.21C.031, when the very purpose of the proposed action itself is to "protect" the environment?

The Board cannot answer this policy question or adopt a solution to the dilemma. However, the Board will apply the *Trepanier/Leavitt* test in this and future cases as follows. When the underlying action is the adoption of an "environmental protection" piece of legislation such as a critical areas ordinance, the Board will strictly apply the *Trepanier/Leavitt* SEPA standing test to avoid needless duplication with GMA requirements. Whether a critical areas ordinance actually protects the environment can be the subject of GMA legal issues before the Board. It will not be the subject of the Board's SEPA review unless the petitioners have met the two-part SEPA standing test in their petition for review.

When the underlying action is the adoption of a piece of legislation that does not inherently or explicitly involve the direct protection of the environment, the Board will apply the *Trepanier/Leavitt* test more loosely. Examples of such legislation are the capital facilities, transportation or housing elements of a comprehensive plan. Unlike a critical areas ordinance (where the GMA

requirement itself is the protection of the environment), when the protection of the environment is not the specific objective of the underlying nonproject action, the protections afforded the environment by SEPA are more necessary. In those instances, the Board will have the option of applying the *Trepanier/Leavitt* test more loosely -- much like the *Leavitt* court did by “assuming” that a petitioner had SEPA standing. *See Leavitt*, at 679. In this case, because the underlying action taken by the County is the adoption of its Critical Areas Ordinance, the Board strictly applies the *Trepanier/Leavitt* test.

IV. ORDER

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

1) The County’s Motion is **granted**. Therefore, Legal Issues Nos. 5(B), 6 and 7 are **dismissed with prejudice**.

2) Legal Issue No. 5(A) is re-worded as follows:

Did the County, in adopting the provisions of SCC 32.10.060, act inconsistently with the GMA by providing that the protective measures required by Ordinance 94-108 constitute adequate mitigation under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, in all circumstances without engaging in the case-by-case analysis required by SEPA?

So ordered this 17th day of August, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Presiding Officer

Chris Smith Towne
Board Member

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

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

[3] CPSGMHB Case No. 95-3-0039 (June 5, 1995), Order on County’s Dispositive Motions.