



On July 10, 1995, the Board received a Petition for Review from Kitsap County (the **County**) challenging the City's Comprehensive Plan as failing to comply with the GMA and SEPA.

On July 13, 1995, the Board issued an Order of Consolidation and Amended Notice of Hearing in the above-captioned case.

A prehearing conference was held on August 14, 1995 and a prehearing order entered that established deadlines for filing dispositive motions.

On September 8, 1995, the Board received the "Respondent's Motion to Dismiss Issues Set Forth in Anderson Creek I and II Appeals and the Kitsap County Appeal" (**City's Motion to Dismiss**).

On September 18, 1995 the Board granted Ron Sciepko and Ellen Lunde's (hereafter collectively referred to as **Lunde**) Motion to Request Status as Intervenor. Subsequently, Lunde filed a response brief to the City's Motion to Dismiss on September 25, 1995.

On September 18, 1995, petitioners Anderson Creek I & II and the County filed responses to the City's motion to dismiss.

On September 25, 1995, the City filed a "Reply to Response of Association to Protect Anderson Creek I and II to City of Bremerton's Motion to Dismiss."

As directed in the prehearing order, the Board did not hold a hearing on the City's Motion to Dismiss.

## **II.FINDINGS OF FACT**

In October 1985, the City prepared a Draft Environmental Impact Statement (**DEIS**) for the Bremerton Comprehensive Plan. Exhibit 522-3 to City's Motion to Dismiss.

In January 1986, the City prepared a Final Environmental Impact Statement (**FEIS**) for the City's pre-GMA comprehensive plan. Exhibit 522-3 to City's Motion to Dismiss.

On October 21, 1987, the Bremerton City Council passed Ordinance No. 4119 that annexed an area of land known as the "Utility Lands Annexation" which included a 340- acre property in the Anderson Creek area. Declaration of Ron W. Hough, at 3; Exhibit A to Hough Declaration.

On July 14, 1993, the Bremerton City Council passed Ordinance No. 4422, the City's Critical Lands Ordinance. Notice of adoption of the Critical Lands Ordinance was published on July 17, 1993. Exhibit F to City's Motion to Dismiss.

On July 13, 1994, the Bremerton City Council passed Ordinance No. 4476 which amended the

City's Critical Lands Ordinance. Notice of adoption of this amendment was published on August 7, 1994. Declaration of Ron W. Hough, at 5.

No appeals were filed with the Board within sixty days of publication of the notice of adoption of Ordinance No. 4476.

On January 20, 1995, the City issued a Draft Supplemental Environmental Impact Statement (**DSEIS**) for the "Revised Bremerton Comprehensive Plan." The DSEIS supplemented the DEIS and FEIS. The comprehensive plan revisions were prepared to bring the plan into compliance with the GMA. Exhibit 522-1 - 3 to City's Motion to Dismiss.

The period for commenting on the DSEIS ended on February 21, 1995. The City did not receive any comments during that period. Exhibit 523-3 and -4 to City's Motion to Dismiss.

On February 28, 1995, the City issued a Final Supplemental Environmental Impact Statement (**FSEIS**) for the Revised Bremerton Comprehensive Plan. Exhibit 523-1 to City's Motion to Dismiss.

On March 2, 1995, a Notice of Issuance of the FSEIS was published in *The Sun*. Exhibit 525-1 to City's Motion to Dismiss.

On March 22, 1995, petitioners Helen E. Havens, Dave Della-Rovere, Mike McCuddin, and Susan Dow testified before a Bremerton City Council meeting regarding the proposed use of the Anderson Creek watershed.

On April 5, 1995, the City adopted the Bremerton Comprehensive Plan (the **Plan**) in order to comply with the requirements of the GMA. Declaration of Ron W. Hough, at 2.

On May 9, 1995, the City published notice of adoption of its Plan. Declaration of Ron W. Hough, at 2.

On July 5, 1995, a 76-acre parcel of property owned by Ron Sciepko was annexed into the City. Declaration of Ron W. Hough, at 3.

### **III. DISCUSSION OF LEGAL ISSUES**

#### **Part I of City's Motion to Dismiss**

*Should Anderson Creek II's SEPA issues <sup>[1]</sup> be dismissed on grounds that petitioners failed to exhaust their administrative remedies?*

The SEPA statute requires petitioners to exhaust agency appeal procedures, if any exist, prior to seeking judicial review. RCW 43.21C.075(4) 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...

On the issue of exhaustion of remedies, 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. It:

(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 City has adopted a procedure for appeals of its some of its SEPA determinations. Bremerton Municipal Code (BMC) 21.12.210 is entitled “APPEALS.” BMC 21.12.210(a) states:

The city establishes [sic] the following administrative appeal procedures under RCW 43.21C.075 and WAC 197-11-680:

(1) Any agency or person may appeal the city’s procedural compliance with Chapter 197-11 WAC for issuance of the following:

(A) A final DNS;

(B) A DS: The appeal must be made to the planning commission/city council within ten days of the date the DS is issued.

BMC 21.12.210 allows for an appeal of a determination of nonsignificance (DNS) and a determination of significance (DS).<sup>[2]</sup> However, nothing in that section of the Bremerton Municipal Code provides for the appeal of an EIS, let alone a FSEIS. At issue in this case is whether the City's FSEIS violates SEPA, not whether its DS did.

The Board holds that petitioners did not fail to exhaust their administrative remedies regarding an appeal of the FSEIS because there was no appeal procedure provided by the City that the petitioners could have exhausted.

## CONCLUSION

Anderson Creek II petitioners did not fail to exhaust administrative remedies regarding SEPA since the Bremerton Municipal Code did not establish a procedure for appealing a FSEIS.

### Part II of City's Motion to Dismiss

#### *Do the Anderson Creek petitioners have standing to assert SEPA?*

The Board has reviewed the question whether a petitioner has SEPA standing in several prior decisions. Under SEPA, any "aggrieved"<sup>[3]</sup> person has standing to assert a claim. To determine whether a person is sufficiently "aggrieved," the Board has applied the two-part SEPA standing test 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).

First, the petitioner must be within the zone of interests protected by SEPA. Second, the petitioner must allege an injury in fact. To meet the evidentiary burden when alleging an injury in fact, the petitioner must show that the government action will cause him or her "specific and perceptible harm" and that the injury will be "immediate, concrete, and specific." *Leavitt*, at 679 citing *Trepanier*, at 382-83; *Bremerton, et al. v. Kitsap County*, CPSGMHB Case No. 95-3-0039, at 11 (1995).

Crucially, to assert SEPA standing, petitioners must show that they are within the zone of interests protected by SEPA and allege an injury in fact in the petition for review. *Robison v. Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order on Dispositive Motions.

... 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.

In this case, petitioners alleged the following in their petition for review, regarding standing in general:

Petitioners have testified orally and/or in writing before the Bremerton Planning Commission and the Bremerton City Council during the development of the Comprehensive Plan.

This statement addresses the GMA standing of Anderson Creek I and II under the appearance standing prong. The Board has 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.

The petitioners have not shown that they are within the zone of interests protected by SEPA and have not alleged an injury in fact in their petitions for review. Therefore, the Board must dismiss their SEPA claims.

## CONCLUSION

Anderson Creek I and II have failed to show in their petitions for review that they are within the zone of interests protected by SEPA and that they have suffered an injury in fact as a result of the City's actions. Therefore, the Board must dismiss the petitioners' SEPA issues.

### Part III of City's Motion to Dismiss

**3. Should Legal Issues Nos. 11 and 12 <sup>[4]</sup> of the Anderson Creek II appeal be dismissed on the grounds that the Board does not have jurisdiction over annexation issues?**

The Board has jurisdiction to hear and determine only petitions for review alleging that a state agency, county, or city is not in compliance with the requirements of Chapter 36.70A RCW, or Chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto adopted under RCW 36.70A.040.

The Board has jurisdiction only over matters specified in RCW 36.70A.280, i.e., only over petitions for review alleging that a state agency, county, or city is not in compliance with the requirements of Chapter 36.70A RCW, or Chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto adopted under RCW 36.70A.040, Chapter 90.58 RCW as it relates to shoreline master programs or office of financial management population projections adopted pursuant to RCW 43.62.035. The Board does not have jurisdiction to determine whether “other statutes have been violated.” *Gutschmidt v. City of Mercer Island*, CPSGPHB Case No. 92-3-0006, Final Decision and Order, at 8.

Here petitioners allege that the City has failed to comply with certain provisions of Title 35 RCW as they relate to annexations. Title 35 RCW is not one of the statutes that the legislature has given the Board jurisdiction over in RCW 36.70A.280(1). Therefore, the Board has no authority to determine whether the requirements of Title 35 RCW have been met.

### **CONCLUSION**

The Board does not have jurisdiction over Title 35 RCW as it relates to annexation. Therefore, to the extent that Anderson Creek II’s Legal Issue No. 11 as set forth in the Board’s prehearing order asks whether the City violated Title 35 RCW, the Board does not have jurisdiction. In addition, the Board does not have jurisdiction to review Anderson Creek II’s Legal Issue No. 12.

#### **Part IV of City’s Motion to Dismiss**

***Should the Anderson Creek I and II Petitions for Review be dismissed for failure to name an indispensable party?***

The City of Bremerton argues that both Anderson Creek Petitions for Review should be dismissed because the petitioners failed to name Ron Sciepko and Ellen Lunde as parties. The City alleges that Sciepko and Lunde are indispensable parties because they own property that will be affected by the Anderson Creek I and II appeals.

Intervenors Sciepko and Lunde assert that they have been prejudiced by the petitioners’ failure to name them as parties because they were not given notice of the prehearing conference. Because Sciepko and Lunde were not given notice of the petition, they have been precluded from participating fully in this process.

A petition for review will not be dismissed for failure to name an indispensable party. Petitioners are not required to name parties other than the city, county, or state agency taking the underlying action. *Pilchuck Newburg Organization v. Snohomish County*, CPSGMHB Case No. 94-1-0018, Order Denying Dispositive Motions, (February 1, 1995); *Alberg v. King County*, CPSGMHB

## CONCLUSION

The Board will not dismiss the Anderson Creek I and II Petitions for Review for failing to name Sciepko and Lunde as parties, since the indispensable party doctrine does not apply in Board cases.

### Part V of City's Motion to Dismiss

*Should Anderson Creek I Legal Issues Nos. 11, 12, 13, and 16 be dismissed as they relate to Bremerton's Critical Lands Ordinance because the petitioners failed to file a timely appeal of this Ordinance?*

[5]

Anderson Creek I Legal Issues Nos. 11, 12, 13 and 16 address both the City's Critical Lands Ordinance (CLO) and its Plan. The City contends that those issues should be dismissed as they relate to the CLO because the petition for review was not filed in a timely manner. The CLO was initially adopted in 1993 and then amended in 1994. The amendment to the CLO was published on August 7, 1994.

Petitions that relate to whether an adopted comprehensive plan or development regulation is in compliance with the GMA or SEPA must be filed within sixty days after publication of notice of adoption by the legislative body. RCW 36.70A.290(2).

The Board holds that Anderson Creek I failed to timely file its petition for review challenging the CLO or its amendments. This appeal was not filed until July, 1995, well past the sixty-day deadline that started running from the date of publication of the notice of adoption of either the CLO or the amendments to the CLO. Because petitioners did not file a petition for review within the sixty-day limitation prescribed by RCW 36.70A.290(2), they are precluded from raising legal issues now that relate to the CLO.

## CONCLUSION

The Board does not have jurisdiction to review Anderson Creek I's Legal Issues Nos. 11, 12, 13, and 16 as they relate to the CLO and its amendments, since the petitioners failed to timely file a petition for review challenging those enactments.

### Part VI of City's Motion to Dismiss

***Does the Board have jurisdiction to review municipal sales of surplus property?***

[6]

Legal Issue No. 19 of the Anderson Creek I appeal challenges the City's sale of surplus property within the Anderson Creek utility lands pursuant to the Bremerton Municipal Code. Petitioners argue that the issue is one of public notice which is addressable by the Board.

The City argues, and the Intervenors agree, that the issue is solely one of the City's decision to sell surplus property, and because RCW 36.70A.280 does not grant the Board jurisdiction over this action, the issue should be dismissed.

As mentioned above, the Board has jurisdiction to hear and determine only petitions for review alleging that a state agency, county, or city is not in compliance with those matters specified at RCW 36.70A.280. The Board does not have jurisdiction over legal issues regarding whether a municipality sold surplus property.

**CONCLUSION**

The Board does not have jurisdiction to determine whether a city has violated its sale of surplus property provisions.

**Part VII of City's Motion to Dismiss**

[7]

***Should Anderson Creek II's legal issue number 11 be dismissed because the Board lacks jurisdiction over impact fees?***

The Board does not have jurisdiction to determine whether the requirements of Chapter 82.02 RCW have been violated. *South Bellevue Partners Limited Partnership and South Bellevue Development, Inc. v. Bellevue and Issaquah School District No. 411*, CPSGMHB Case No. 95-3-0055, Order of Dismissal, at 4-10 (September 20, 1995).

**CONCLUSION**

The Board does not have jurisdiction to determine that portion of Anderson Creek II Legal Issue No. 11 that asks whether Chapter 82.02 RCW has been violated.

**Part VIII of City's Motion to Dismiss**

***Should Kitsap County's Petition for Review be dismissed for lack of jurisdiction because the County Commissioners failed to comply with the requirements of Chapter 36.32 RCW before***

***the appeal of the City's Plan was filed?***

The City argues, and the Intervenors agree, that the County is acting outside of its statutory authority in filing this appeal because the Board of County Commissioners never adopted a resolution that would authorize the County to appeal the City's Plan as required by Chapter 36.32 RCW.

In response, the County asserts that the petition for review was filed pursuant to the GMA and the Board has no authority to determine whether or not the County complied with statutes outside of the GMA in filing its appeal.

The Board does not have jurisdiction to determine whether the County has followed its own statutory requirements separate from the GMA, in bringing this matter. The legislature has not given the Board jurisdiction over Chapter 36.32 RCW.

**CONCLUSION**

The Board does not have jurisdiction over whether the County complied the requirements of Chapter 36.32 RCW prior to filing its petition for review.

**Part IX of City's Motion to Dismiss**

***Does the Association in the Anderson Creek I & II petitions have GMA standing?***

The City argues that the Association to Protect Anderson Creek does not have standing under the GMA because it did not appear before the City. According to the City, the Associations were formed after the City published notice of adoption of its Plan. See Declaration of Ron W. Hough, at 6. The Petitioners do not refute this claim.

RCW 36.70A.280(2) sets forth the GMA standing requirements:

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...

Under the GMA, a "person" is "any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character." RCW 36.70A.280(3).

Therefore, one way for a person to obtain standing is to appear before the county or city regarding the matter on which a review is being requested. This method is called "appearance

standing.” See *Friends of the Law v. King County*, CPSGMHB No. 94-2-003, Order on Dispositive Motions, at 8.

The Board has given guidance as to what actions constitute appearance standing:

Appearance before a local legislative body can be accomplished either [1] by personally appearing at a [public] hearing or meeting at some time during the process, [2] by personally appearing and participating or testifying at a [public] hearing or meeting during the process, or [3] by submitting written comments to the local jurisdiction or its agents... *Twin Falls et al. v. Snohomish County*, CPSGMHB Case No. 93-3-0003 (1993), Order Partially Granting Petitioners’ Motions to Supplement the Record and Order Granting County’s Motion for Limited Discovery, at 6.

In *Friends of the Law*, the Board held that before an organization can have appearance standing, testifying members must identify themselves as representing that organization. If the organization hopes to obtain standing before the Board under the appearance standing standard, it must put the local government it is appearing before on notice that the organization has an interest in the matter.

Although individual members of the Association to Protect Anderson Creek I & II testified orally and/or in writing before the Bremerton Planning Commission and the Bremerton City Council during the development of the Plan, none of them did so in a representative capacity on behalf of the Association. Therefore, the Board holds that the Association does not have GMA standing to pursue its appeal. However, individual petitioners can proceed with their appeals.

## **CONCLUSION**

The Association to Protect Anderson Creek does not have GMA standing to appear before the Board. However, the individual who filed petitions for review do have GMA standing.

## **IV. ORDER**

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

1) Part I of the City’s Motion to Dismiss is **denied**. The Bremerton Municipal Code does not contain any provisions for the appeal of a FSEIS for the petitioners to have exhausted.

2) Part II of the City’s Motion to Dismiss is **granted**. Anderson Creek II Legal Issues Nos. 15 and 16 are **dismissed with prejudice** since these petitioners do not have SEPA standing.

3)Part III of the City's Motion to Dismiss is **granted**.Anderson Creek Legal Issue No. 11 is **dismissed with prejudice** to the extent that it addresses Title 35 RCW.Anderson Creek Legal Issue No. 12 is **dismissed with prejudice** in its entirety since the Board does not have jurisdiction over Title 35 RCW.

4)Part IV of the City's Motion to Dismiss is **denied**.The Board does not have jurisdiction to invoke the indispensable party doctrine.

5)Part V of the City's Motion to Dismiss is **granted**.Anderson Creek I Legal Issues Nos. 11, 12, 13 and 16 are **dismissed with prejudice** as they relate to the City's CLO and its amendments since the petitioners failed to file a timely petition challenging them.

6)Part VI of the City's Motion to Dismiss is **granted**.Anderson Creek I Legal Issue No. 19 is **dismissed with prejudice** since the Board does not have jurisdiction over sale of surplus property provisions.

7)Part VII of the City's Motion to Dismiss is **granted**.That portion of Anderson Creek Legal Issue No. 11 that addresses Chapter 82.02 RCW is **dismissed with prejudice** since the Board does not have jurisdiction over that statute.

8)Part VIII of the City's Motion to Dismiss is **denied**.The Board does not have jurisdiction to determine whether Chapter 36.32 RCW has been violated.

9)Part IX of the City's Motion to Dismiss is **granted**.The Association to Protect Anderson Creek only is **dismissed with prejudice** from this case since it does not have GMA appearance standing.

So ordered this 18th day of October, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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M. Peter Philley  
Board Member

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Joseph W. Tovar, AICP  
Board Member

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Chris Smith Towne  
Board Member

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[1]

Anderson Creek II's SEPA issues are:

15. Did the City of Bremerton in the development of the Final Environmental Impact Statement (FEIS) for its Plan comply with SEPA's public participation requirements at RCW 43.21C.080 and WAC 197-11-502, -535, -550, 560?

16. Does the FEIS for Bremerton's Plan comply with the requirements of RCW 43.21C.031 and WAC 197-11-400 to contain an impartial discussion of significant environmental impacts and reasonable alternatives to avoid adverse environmental impacts?

[2]

Although the record does not indicate when the City issued its DS for its pre-GMA comprehensive plan, it does indicate that the DEIS and FEIS were issued in 1985 and 1986 respectively.

[3]

See RCW 43.21C.075(4).

[4]

Anderson Creek II's issues 11 and 12 are:

11. Does Bremerton's Plan [precise provisions to be specified] violate RCW 36.70A.110(1) and (3), RCW 36.70A.020(1) and (12) and RCW 82.02.050(1)(a), (b), and (4) by allowing the annexation of county land within a final urban growth area and the siting of industrial zoning in an undeveloped watershed without existing public facilities and service capacities to serve such development and without a system of impact fees to pay for such facilities and services?

12. Did the City of Bremerton violate RCW 35.13.005 and RCW 35.14.005 by annexing land beyond urban growth boundaries necessary to accommodate reasonable growth?

[5]

The cited Anderson Creek I legal issues ask:

11. Do Bremerton's Plan [precise provisions to be specified] and Critical Lands Ordinance [precise provisions to be specified] allow land uses and developments which are incompatible with critical areas, and do these enactments fail to prohibit inappropriate actions in violation of WAC 365-190-020?

12. Do Bremerton's Plan [precise provisions to be specified] and Critical Lands Ordinance [precise provisions to be specified] violate RCW 36.70A.020(10), .060, and WAC 365-190-020, -030, 040 and 080 by allowing urban growth and incompatible development in areas with a critical recharging effect on aquifers used for potable water, wetlands, geologically hazardous areas, and fish and wildlife habitat areas of species of local importance, and by not adequately protecting those areas?

13. Do Bremerton's Plan ... and Critical Lands Ordinance...fail to protect the quality and quantity of ground water used for public water supplies as required by RCW 36.70A.070(1)?

16. Are the land use sections of Bremerton's Plan...consistent with Bremerton's Critical Lands Ordinance...as required by RCW 36.70A.060, .130 and WAC 365-190-020 and -040?

[6]

Anderson Creek I's Legal Issue No. 19 states:

19. Did the City of Bremerton negotiate a private sale of public property within the Anderson Creek utility lands (including the Anderson Creek Corporate Campus), an area addressed in Bremerton's Plan [precise provisions to be specified], in violation of RCW 36.70A.020(2), (9), (10) and (11), .060, .140 and .160?

[7]

Supra note 4.