

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

MARTIN P. HAYES,	)	<b>Consolidated</b>
Petitioner,	)	<b>Case No. 95-3-0081c</b>
v.	)	<b>(Formerly a part of consolidated case</b>
KITSAP COUNTY,	)	<b>No. 96-3-0011)</b>
Respondent.	)	<b>ORDER GRANTING</b>
	)	<b>MOTION TO DISMISS</b>
	)	
	)	
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**I. Procedural Background**

On December 28, 1995, Martin P. Hayes (**Hayes**) filed three petitions for review with the Central Puget Sound Growth Management Hearings Board (the **Board**) assigned Case No. 95-3-0079, 95-3-0080 and 95-3-0081 and consolidated by the Board on January 5, 1996 as Consolidated Case No. 95-3-0081.

On January 11, 1996, Hayes filed an Amended Petition for Review in the consolidated case.

On January 29, 1996, Hayes filed a Final Amended Petition for Review in the consolidated case; it is the latter petition that the County seeks to dismiss. The County's actions challenged by Hayes, as set forth and characterized in that petition, are: 1) Resolution No. 277-1995 (the **Resolution**), adopted July 24, 1995, dealing with a sewer service rate increase and revenue bonding for a sewage treatment facility; 2) Emergency Ordinance No. 177-1995, Adopting Interim Urban Growth Areas, including Kingston, adopted October 23, 1995, with notice of adoption published November 1, 1995; and 3) Zoning Ordinance adopted October 23, 1995, including a zoning map, and an Interim Critical Areas Ordinance, adopted October 23, 1995.

On February 16, 1996, the County filed copies of Emergency Ordinance No. 177-1995; an Affidavit of Publication of Emergency Ordinances; Ordinance No. 188-1996; an Affidavit of Publication of that ordinance; and Resolution No. 277-1995.

On March 22, 1996, Hayes filed a "Prehearing Brief, Legal Issue No. 1" (the **Hayes Brief**), concerning the Board's jurisdiction to hear and decide that portion of his appeal concerning the

adoption of a resolution setting sewer rates. That issue is the same as the portion of the County's Motion dealing with adoption of the sewer rate Resolution.

On March 28, 1996, Kitsap County (the **County**) filed a "Dispositive Motion to Dismiss Martin Hayes' Final Amended Petition for Review" (the **Motion to Dismiss**), with an attached "Memorandum in Support of Dispositive Motion to Dismiss Martin Hayes' Final Amended Petition for Review" (the **County Memorandum**). In its Motion to Dismiss, the County characterizes the challenged enactments as: 1) certain emergency ordinances adopting Interim Urban Growth Areas, Interim Zoning Code and Map, and Interim Critical Areas Ordinance (the **Emergency Ordinances**); and 2) Resolution No. 277-1995, setting sewer rates for various sewer systems (the **Resolution**). The County asks that Hayes' challenge to the Emergency Ordinances be dismissed as moot, because of the County's subsequent adoption of ordinances repealing them. The County also asks that Hayes' challenge to the Resolution be dismissed because the Board lacks jurisdiction, and the petition for review was not timely filed.

On April 8, 1996, Hayes filed a "Memorandum in Response to Kitsap County's Dispositive Motion to Dismiss Martin Hayes' Final Amended Petition for Review" (the **Hayes Memorandum**).

On April 12, 1996, the County filed "Kitsap County's Reply Memorandum in Support of its Motion to Dismiss" (the **County's Reply Memorandum**.)

Also on April 12, 1996, Hayes file Rebuttal Responses to Kitsap County's Responses to Motions.

## **II. FINDINGS OF FACT**

1. On July 24, 1995, the County adopted Resolution No. 277-1995, A Resolution Amending Resolution No. 366-1994 Setting Rates for Sewer Service for the Central Kitsap Sewer System, the Kingston Sewer System, the Suquamish Sewer System, and the Manchester Sewer System. The Resolution cites RCW 36.94.140 as establishing the requirements for the actions taken in the Resolution. *See* (unnumbered) attachment to County's Memorandum.

2. Notice of (prospective) adoption of the Resolution had been published on July 12, 1995, under the County's policy for non-GMA Ordinances to publish notice ten days prior to public hearing on the proposed action. *See* (unnumbered) attachment to County's Memorandum.

3. On October 6, 1995, the Board issued a Final Decision and Order in *Bremerton, et al., v. Kitsap County*, CPSGMHB Case No. 95-03-0039 [**Bremerton**], declaring the County's comprehensive plan and implementing development regulations invalid, and setting a deadline of April 3, 1996 for the County to adopt a comprehensive plan, including final urban growth areas (**UGAs**), and implementing development regulations.

4. On October 23, 1995, the County adopted the following Emergency Ordinances:  
Emergency Ordinance No. 177-1995, Adopting Interim Urban Growth Areas (**IUGAs**) for the Cities of Bainbridge Island, Port Orchard and Poulsbo; Central Kitsap including the City of Bremerton; and the unincorporated Kingston area.  
Emergency Ordinance No. 178-1995, Adopting an Interim Zoning Ordinance.  
Emergency Ordinance No. 179-1995, Adopting an Interim Zoning Map.  
Emergency Ordinance No. 180-1995, Adopting Interim Development Regulations to Protect Critical Areas and a Map Designating Interim Critical Areas.
5. On January 8, 1996, the County adopted the following ordinances, which it characterizes in its Memorandum as Interim Ordinances which repealed certain Emergency Ordinances, as described below:  
Ordinance Nos. 184-1996, 185-1996, 186-1996 and 188-1996. Each provides for repeal of Emergency Ordinance 177-1995. Ordinance 188-1996 adopts an IUGA for Kingston.  
Ordinance No. 181-1996, which provides for the repeal of Emergency Ordinance 180-1995.  
Ordinance No. 182-1996, which provides for the repeal of Emergency Ordinance 178-1995.  
Ordinance No. 183-1996, which provides for the repeal of Emergency Ordinance 179-1995.  
County's Memorandum, at 3; *see also* County letter, with attachments, dated February 16, 1996.

### **III. EMERGENCY ORDINANCES**

#### **Positions of the Parties**

##### **County's Position**

In its Memorandum, the County asserts that Hayes' challenge to the Emergency Ordinances is moot, because each ordinance has subsequently been repealed. It notes that Washington courts have held: that moot questions should not be decided, citing *Hart v. Dept. of Social and Health Services*, 111 Wn.2d 445, 759 P.2d 1206 (1988); that actions based on repealed statutes are moot and should therefore not be heard, citing *Grays Harbor Paper Co. v Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968); that once an ordinance is repealed, a referendum on that ordinance is moot, citing *City of Yakima v. Huza*, 67 Wn.2d 351, 358, 407 P.2d 815 (1965); and that an appeal becomes moot when a legislative body repeals or substantially amends the challenged enactment, citing *State ex rel. Evans v. Amusement Ass'n of Wash., Inc.*, 7 Wn. App. 306, 307-08, 449 P.2d 906 (1972).

In its Reply Memorandum, the County points to Hayes' request for relief in his final Petition: "Ordinance 177-1995 ... should be declared invalid." In response to Hayes' assertion that the Emergency Ordinances are still in effect, because the Interim Ordinances purporting to repeal the Emergency Ordinances are invalid because they were not enacted in compliance with the State

Environmental Policy Act (**SEPA**), the County asserts that, believing that the Emergency Ordinances do not have any present effect, it is operating under the Interim Ordinances. It further states its belief that the Interim Ordinances are valid, and that Hayes' argument of invalidity is "hypothetical, abstract, and as such, moot." County's Reply Memorandum, at 5. As to Hayes' arguments that the Emergency Ordinances were adopted without public participation, the County returns to its argument that, since those Ordinances are no longer in effect, Hayes' argument is moot.

### Hayes' Position

In his Memorandum, Hayes argues that the County's creation of new IUGAs under emergency authority is contrary to the Growth Management Act (**GMA** or the **Act**). He further contends that the Interim Ordinances adopted on January 8, 1996 were amendments to the October 23, 1995 Emergency Ordinances. He asserts that the County failed to hold public hearings for its emergency adoptions, and that the only hearings were those held for the proposed Interim Ordinances. Specifically, he argues that because the Emergency Ordinances were adopted without public notice or effective public hearings, the Kingston IUGA is facially invalid. Hayes responds to the County's citation to the *Grays Harbor* decision by claiming that no substantial changes to the Emergency Ordinances' provisions were made in the interim ordinances, citing to the fact that the Emergency IUGA for Kingston is the same as its Interim UGA. He argues that the terms "interim" and "emergency" are used interchangeably in court decisions, and cites to the requirements for public hearings, at RCW 36.70A.390, for interim zoning controls.

### Discussion

Chapter 36.70A RCW does not specifically address the question of mootness; however, the Board has previously applied this doctrine of judicial economy. *See Tacoma, et al., v. Pierce County*, CPSGPHB Case No. 94-3-0001, Order on Dispositive Motions (March 4, 1994, at 14-16). The requisite compelling reasons for proceeding with the review of moot issues have not been provided here. Furthermore,

Because the County has subsequently enacted Interim Ordinances which repealed and replaced the challenged Emergency Ordinances, the Board **holds that the question of the Emergency Ordinances' compliance with the requirements of Chapter 36.70A RCW is moot.** Absent compelling considerations of public policy, the Board will not hear and decide moot issues. The requisite compelling reasons for proceeding with the review of moot issues have not been provided here. Furthermore, the Board observes that the Interim Ordinances were subject to the filing of petitions for review, and were in fact appealed; the Interim Ordinances, currently in effect, will be reviewed by the Board for compliance with the requirements of the Act.

### Conclusion

The challenged Emergency Ordinances have been repealed. Therefore, the question of whether they comply with the GMA or SEPA is moot. Generally, the Board will not hear issues arising

from actions found to be moot. Hayes' issues dealing with the Emergency Ordinances will be dismissed with prejudice.

#### **IV. Resolution**

##### **Positions of the Parties**

##### **County's Position**

In its Memorandum, the County states that the Board does not have jurisdiction to hear an appeal of an action taken pursuant to the authority and requirements of a statute other than those specified in RCW 36.70A.280(1), and notes that the Resolution in dispute was adopted pursuant to RCW 36.94.140. The County observes that in his brief, Hayes limits his claims of noncompliance to the requirements of the State Environmental Policy Act (SEPA), Chapter 43.21C RCW.

Further, the County asserts that, even if the Board finds subject matter jurisdiction, the petition was untimely, as it was filed over five months after the Resolution was published and adopted. In its Reply Memorandum, the County responds to Hayes' assertion that it is the County's burden to demonstrate that his petition is without merit by pointing out that is not the merits of the petition at issue in the Motion, but rather the Board's jurisdiction to hear the case, and that it is Hayes' burden to establish such jurisdiction. As to the question of whether the Resolution is a development regulation under the GMA, the County points to the definition of "development regulation" in RCW 36.70B.020(4) to demonstrate that the challenged action is not such a regulation.

Finally, assuming that the action is such a regulation, the County points to the GMA's requirement that development regulations are required to be consistent with and implement the jurisdiction's comprehensive plan. The County points out that, while the action authorized by the Resolution is necessary under the County's capital improvement plan, it is the Wastewater Utility Division's capital improvement plan that is at issue here, and not the GMA comprehensive plan.

##### **Hayes' Position**

In his brief, Hayes concedes that "[t]he Hearings Board does not have authority to review under Chapter 36.94.140" and further observes that "sewage rate increases are categorically exempt under SEPA." Hayes Brief, at 1. However, Hayes goes on to assert that the Resolution has the effect of authorizing funding for new or expanded treatment plants, and that this exceeds the authority of RCW 36.94.140. Next, Hayes claims that the Board has authority to review the action under SEPA and the GMA. He then argues that the County's separation of the rate increase action from the future expansion of the Kingston Wastewater Treatment Plant is a violation of SEPA. Finally, Hayes cites to the requirement that judicial review under SEPA shall be of the governmental action together with its accompanying environmental determinations. RCW 43.21C.075.

In his Memorandum, Hayes asserts that the rate increase authorized by the Resolution will have the effect of a four-fold increase in sewage flow at the Kingston Plant. He argues that, because there was no effective public notice of adoption of the Resolution, he cannot be found to have failed to timely file his petition for review, and states that the “appeal clock is still ticking.” Finally, Hayes argues that the Resolution implements a capital budget decision under RCW 36.70A.120 and is therefore an implementing development regulation, and, as such, requires enhanced public participation under RCW 36.70A.140.

### Discussion

The Board’s jurisdiction is set forth at RCW 36.70A.280(1)<sup>[1]</sup>, which authorizes the Board to hear and determine only those petitions alleging noncompliance with:

... the requirements of this chapter, chapter 90.58 RCW [the Shoreline Management Act] as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW [SEPA] as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.

The Board **holds that it does not have jurisdiction to review an action of a county legislative authority acting pursuant to RCW 36.94.140.**

The Board has previously addressed similar issues. In *Hensley v. Snohomish County* CPSGMHB Case No. 94-3-0029 [*Hensley*], Order Granting Snohomish County’s Dispositive Motion (1995), the Board examined whether it had jurisdiction to review the County’s approval of a sewer district plan under the authority of Chapter 56.08 RCW. It relied on an earlier holding in *Robison v. Bainbridge Island*, CPSGMHB Case No. 94-3-0025, [*Robison*], Order Granting BISD’s Dispositive Motion re: Jurisdiction (1995), to conclude that it lacked jurisdiction to hear and decide the appeal in *Hensley*.

In *Robison*, the Board had analyzed the jurisdictional provisions of RCW 36.70A.280, specifically the meaning of “this chapter” in subsection (1)(a), and concluded that the term referred solely to Chapter 36.70A RCW. Therefore, the Board dismissed those issues in the case which challenged actions taken under statutes other than Chapter 36.70A RCW.

The Board further **holds that it does not have independent SEPA jurisdiction where it lacks subject matter jurisdiction over the underlying action.**

Under the provisions of RCW 36.70A.280(1)(a), the threshold question in determining the Board’s jurisdiction is whether the action challenged in a petition for review was taken pursuant to the authority and requirements of one or more of the statutes set forth in that subsection, the GMA chapter, or certain actions under the Shoreline Management Act, or SEPA “as it relates” to a GMA action..

If, as here, where the Board has found that the action was taken under Chapter 36.94 RCW, the answer is “no” --the Board does not have jurisdiction to consider whether the agency taking the challenged action met the requirements of SEPA in taking the action. To fall within the Board’s jurisdiction, the challenged SEPA action must have been taken in relationship to “plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58

RCW.”

While Hayes is correct in observing that SEPA requires that an appeal of actions taken under that statute must accompany the appeal of the underlying action, that provision does not confer jurisdiction on the Board to hear an appeal of the underlying action, where jurisdiction is not otherwise conferred by RCW 36.70A.280(1)(a). Rather, it requires that, when the appropriate venue for appeal has been determined, the issues concerning the substantive enactment, and SEPA actions taken for that enactment, must be considered together.

Because the Board has held that it lacks jurisdiction to hear the matter of the Resolution, it need not and will not determine whether the petition for review was timely filed.

### Conclusion

The Board does not have jurisdiction to review the County’s sewer rate-setting actions taken pursuant to requirements found at Chapter 36.94 RCW. That portion of Hayes’ consolidated petition for review dealing with the County’s adoption of Resolution 277-1995 will be **dismissed with prejudice**.

### V. ORDER

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

The County’s Motion is **granted**. The Board does not have jurisdiction to review the Resolution. The challenged Emergency Ordinances are moot and all hearing dates are stricken. Therefore, Hayes’ Final Amended Petition for Review **is dismissed with prejudice**.

So ORDERED this 23rd day of April, 1996.

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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[\[1\]](#) RCW 36.70A.280 was amended in 1995, to include master program adoption and amendments under the Shoreline Management Act within the boards’ jurisdiction. The Board’s rulings in *Robison* and *Hensley*, discussed below, were made prior to the 1995 amendment, but are not affected by the amendments.