

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

MAXINE KEESLING,)	Case No. 97-3-0027
Petitioner,)	FINAL DECISION AND ORDER
v.)	
KING COUNTY,)	
Respondent.)	
)	
)	
)	
)	
)	
)	

I. PROCEDURAL HISTORY

On September 24, 1997, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Maxine Keesling. Petitioner challenges King County’s (the **County**) adoption of Ordinance 12823, amending the County’s development regulations, as failing to comply with the Growth Management Act (the **GMA** or the **Act**). Keesling alleged that certain provisions of Ordinance 12823 violate the Act and that the County violated the Act’s public notice requirements.

The Board held a prehearing conference on November 5, 1997, and issued its Prehearing Order on November 12, 1997, setting a final schedule and the legal issues to be considered.

The Board held its hearing on the merits on February 4, 1998, in Suite 1022, the Financial Center, 1215 Fourth Avenue, Seattle. Board members Edward G. McGuire, Chris Smith Towne, and Joseph W. Tovar, Presiding Officer, participated. Keesling appeared *pro se*; the County was represented by Peter Ramels. No oral testimony was heard. Court reporting services were provided by Robert Lewis.

After oral argument and questions from Board members, the presiding officer authorized the County’s attorney to file additional information to assist the Board in determining the geographic applicability of previous and amended significant tree retention development regulations.

On February 9, 1998, the County filed with the Board “King County’s Request for Extension of Time to Submit Supplemental Maps.” On February 13, 1998, the County filed with the Board “King County’s Clarification and Submission of Supplemental Maps.”

II. FINDINGS OF FACT

1. Significant tree retention p-suffix conditions existed before the County adopted Ordinance 12823. The Northshore Community Plan Development Conditions included condition NCP P-4, "Significant Vegetation Retention." Ex. 18 (Index No. 5102), at 5. The Soos Creek Community Plan Development Conditions included SCP P-7, "Significant Tree Retention." Ex. 18 (Index No. 5102), at 10.

2. The County adopted ordinances 12822, 12823, and 12824 on July 28, 1997. Ex. 12 (Index No. 2001).

3. Ordinance 12823 is titled:

AN ORDINANCE relating to comprehensive planning and zoning; completing the zoning code conversion process from Title 21 to Title 21A by converting p-suffix development conditions to King County Code through the amendment and creation of special district overlay zones

Ordinance 12823 amended development regulations; it did not amend the County's comprehensive plan. Ex. 12, at 2, 30 (Index No. 2001).

4. Section 18 of Ordinance 12823 amended King County Code (**KCC**) 21A.38 by adding a new section entitled "Special district overlay -- Significant Trees." Ex. 12, at 30 (Index No. 2001). This new section provides the text of the County's significant tree SDO conditions.

5. **KCC 21A.38.220 (SO-220)** is a special district overlay that applies significant tree retention conditions to lands included within the overlay. Ex. 13 (Index No. 3001). SO-220 includes more lands than were subject to p-suffix conditions pertaining to tree retention. King County's Clarification and Submission of Supplemental Maps, at 2, 4, and attachments.

6. The County published notice of the Council's May 27, 1997 public hearing on several ordinances, including Proposed Ordinance 96-261 [later adopted as Ordinance 12823], on May 7, 1997. This notice was published in several newspapers and was mailed to some citizens. The mailed notice does not include some language that was included in the newspaper notices. The newspaper notices stated in part:

These ordinances do not amend the King County Comprehensive Plan, nor do they change any underlying base zoning classifications (**such as the number of residential units per acre that is allowed**).

. . .

Proposed Ordinance 96-261 replaces existing area-wide p-suffix conditions that exceed

current code standards with Special District Overlays (SDO). Special District overlays are notations shown on the official zoning map and are used to identify a group of individual properties (or an entire drainage basin) which are allowed or required to use alternative uses or development standards from the general provisions of the King County Code.

...

Amendments initiated by Councilmembers identified as M-1 through M-10 and include the following: . . . **M-8 adopts an area-wide p-suffix condition requiring the retention of significant trees on identified properties within the Vashon Town Plan.** See Ex. 1 (Index No. 5061), Ex. 8 (Index Nos. 2049-2059), and Ex. 9 (Index No. 5062) (language not included in mailed notice is shown in bold type).

iii. introduction

Petitioner Keesling challenges King County Ordinance 12823 (Proposed Ordinance 96-261), which amended the County's zoning code (Title 21A) by replacing p-suffix development conditions applicable to multiple properties with special district overlay (SDO) conditions. P-suffix conditions are generally property-specific development standards. KCC 21A.38.030(A). SDOs are development standards that generally apply to a group of individual properties or to an entire community. KCC 21A.04.160. Ordinance 12823 was one of three ordinances adopted by the County on July 28, 1997, as part of its conversion to its new zoning code. Together, these three ordinances retained, repealed or replaced certain p-suffix development conditions with SDOs. Petitioner alleges the County failed to provide proper notice of its action, and objects to the effect of certain of the SDOs.

Iv. standard of review

The Board "shall find compliance unless it determines that [the County's] action is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). For the Board to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

V. DISCUSSION AND CONCLUSIONS

Petitioner raises four legal issues. Legal Issues 1 and 4 challenge compliance with GMA comprehensive plan requirements.

1. Did the County fail to comply with RCW 36.70A.070(5)(b) when it adopted Ordinance 12823, because § 8 of that ordinance provides for uses that are not appropriate rural uses, that are characterized by urban growth, and that are not consistent with rural

character?

4. Did the County fail to comply with the comprehensive plan internal consistency requirements of RCW 36.70A.070 when it adopted Ordinance 12823, because the open space created by the clustering provisions of § 8 of that ordinance cannot be cleared and used for agricultural purposes even though agricultural usage is strongly encouraged in the Rural Land Use chapter of the 1994 King County Comprehensive Plan?

There is a fundamental flaw in Petitioner’s argument on these two issues: the issues allege violation of GMA comprehensive plan requirements, but the challenged ordinance amends development regulations – it does not amend the County’s comprehensive plan. The Board’s authority to issue opinions is limited to the statement of issues. RCW 36.70A.290(1). ^[1] It makes no difference whether Petitioner, in her briefs, commented that the issues were ill-framed or challenged the “wrong” ordinance.

In this case, the GMA provisions cited in Legal Issues 1 and 4 impose duties on jurisdictions when adopting or amending comprehensive plans. The cited provisions do not apply to development regulations such as the amendments adopted in Ordinance 12823. Petitioner has not challenged the County’s comprehensive plan. Petitioner has not met her burden of proof on Legal Issues 1 and 4. Therefore, the Board concludes that the County’s action was not clearly erroneous.

Conclusions 1 and 4

The statements of legal issues alleged violation of GMA comprehensive plan requirements. The challenged ordinance amended development regulations, not the County’s comprehensive plan. Petitioner has not met her burden of proof on Legal Issues 1 and 4. The Board concludes that the County’s action was not clearly erroneous.

Legal Issue 3 alleges violation of the Act’s review and amendment provisions relating to comprehensive plans and development regulations.

3. Did the County fail to comply with RCW 36.70A.130 when it adopted Ordinance 12823, because the County did not follow its own process as set out in KCC 21A.38 when it adopted the SDOs, and the SDOs were adopted in a process separate from the comprehensive plan amendment process specified in RCW 36.70A.130?

The majority of RCW 36.70A.130 addresses comprehensive plans. However, one provision discusses amendments to development regulations such as Ordinance 12823. RCW 36.70A.130(1) provides that “any change to development regulations shall be consistent with and implement the comprehensive plan.” Petitioner has presented no discernible argument that specific provisions of

Ordinance 12823 are inconsistent with or fail to implement the comprehensive plan.

Generally, RCW 36.70A.130 provides for comprehensive plan amendment “no more frequently than once every year.” RCW 36.70A.130(2)(a). Petitioner argues that the County should have adopted Ordinance 12823 (amending development regulations) in concert with the County’s annual comprehensive plan amendments. Petitioner states: “The zoning and reclassification process is part of the comprehensive plan amendments process to be done once a year.” Petitioner’s Brief on Legal Issues, at 3. Petitioner does not cite the GMA to support this assertion, and such an assertion is not supported by RCW 36.70A.130.

Petitioner also argues that the County failed to “follow its own process as set out in KCC 21A.38.” This code provision relates to p-suffix conditions; it does not relate to SDOs. Petitioner asserts that, since SDOs “sprang” from p-suffix conditions, KCC 21A.38 impliedly applies to SDOs. The Board is not persuaded.

Petitioner has not met her burden of proof on Legal Issue 3. Therefore, the Board concludes that the County’s action was not clearly erroneous.

Conclusion 3

Petitioner has not shown how the County violated the requirements of RCW 36.70A.130. Petitioner has not met her burden of proof on Legal Issue 3. The Board concludes that the County’s action was not clearly erroneous.

Legal Issue 2 alleges violation of GMA public participation requirements.

2. Did the County fail to comply with RCW 36.70A.140 when it adopted Ordinance 12823, because public notices and council committee briefings were misleading by stressing the easing of development rules brought about by the removal of most p-suffix conditions and describing replacement SDOs as area-wide and pertaining only to originating community plan areas?

GMA public participation procedures “shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.” RCW 36.70A.140 (emphasis added). Petitioner concedes that the County broadly disseminated the proposed amendments. Petitioner challenges the effectiveness of the County’s notice. The Act requires notice procedures to be “reasonably calculated to provide notice to property owners and other affected and interested individuals.” RCW 36.70A.035(1). ^[2]

Regarding Ordinance 12823, the County’s May 7, 1997 notice provided:

Proposed Ordinance 96-261 [adopted as Ordinance 12823] replaces existing area-wide p-suffix conditions that exceed current code standards with Special District Overlays (SDO). Special District Overlays are notations shown on official zoning map and are used to identify a group of individual properties (or an entire drainage basin) which are allowed or required to use alternative uses or development standards from the general provisions of the King County Code.

Ex. 8. The notice also directed the public to p-suffix information on the County's Internet site. Amendments to the proposed ordinances were listed on the notice, including proposed amendment M-8, which provided:

M-8 adopts an area-wide p-suffix condition requiring the retention of significant trees on identified properties within the Vashon Town Plan. This p-suffix condition was inadvertently left out of the Vashon Town Plan, even though the policy direction for tree retention was adopted.

Ex. 8.

Petitioner asserts that the County's notice was misleading and that the public cannot be expected to participate "when [SDOs] are publicized as pertaining to a particular planning area" but are applied elsewhere. Petitioner's Brief on Legal Issues, at 2. Petitioner argues that the notice's description of the proposed amendment (M-8) regarding the retention of significant trees within the Vashon Town Plan was the only notice to citizens regarding significant tree retention. Petitioner contends "[t]here was no notice or publicity whatsoever about this change from VASHON applicability to county-wide applicability (at Council option), nor that the Council opted . . . to apply [this provision] to the Northshore and Soos Creek community planning areas." Petitioner's Brief on Legal Issues, at 2.

Regarding retention of significant trees, the County took two actions: (1) the County adopted Ordinance 12823, making text additions to the County's development regulations; and (2) the County adopted Ordinance 12824, adding maps applying the text additions of Ordinance 12823 to geographic locations. *See* Findings of Fact 4 and 5. As Legal Issue 2 is limited to Ordinance 12823, the Board is limited to determining compliance of the adoption of the text amendments of Ordinance 12823 with the GMA. *See* RCW 36.70A.290(1).

The County's notice advises citizens of two proposals: (1) existing area-wide p-suffix conditions may be replaced by an SDO for the same purpose on the same lands; and (2) an area-wide p-suffix condition, including one requiring the retention of significant trees, may be adopted for the Vashon Town Plan. Therefore, the public was reasonably notified that any existing p-suffix condition requiring the retention of significant trees might be replaced by SDOs; and a tree-

retention requirement may be added to properties within the Vashon Town Plan.

Petitioner has not shown how the County failed to provide adequate notice of the text amendments adopted by the challenged ordinance, Ordinance 12823. Petitioner has not met her burden of proof on Legal Issue 2. Therefore, the Board concludes that the County's action in adopting Ordinance 12823 was not clearly erroneous.

However, the County itself has identified a problem with the adoption of Ordinance 12824. Prior to the adoption of Ordinances 12823 and 12824, portions of the Northshore and Soos Creek Community Planning Areas had p-suffix conditions requiring retention of significant trees. Ex. 18 (Northshore, NSP-P4; Soos Creek SCP-P7). The tree retention p-suffix conditions for the Northshore area were replaced by an SDO, with the SDO applicable to the same geographic area as the p-suffix conditions. Ex. 12 (SO-220). On the other hand, the SDO applicable to the Soos Creek area not only replaced existing tree retention p-suffix conditions, it added a substantial amount of land to the applicability of the SDO beyond the area covered by the p-suffix conditions, applying tree retention conditions to certain lands for the first time. King County's Clarification and Submission of Supplemental Maps, attachments. The County explained:

[W]hen King County prepared the maps [showing p-suffix and SDO areas] for the Board it discovered that contrary to the County Council's apparent intent, the Significant Tree Retention SDO in Soos Creek applies to a larger geographic area than the prior Significant Tree P-suffix condition in Soos Creek. . . . The amendment was intended to "replace the areawide P-suffix conditions for significant tree retention that applied in the Northshore and Soos Creek Community Planning Areas." [citation omitted] The apparent effect in Soos Creek, however, was to expand the coverage of the significant tree retention standards. King County's Clarification and Submission of Supplemental Maps, at 2.

Notwithstanding the County's intent at the time that Ordinances 12823 and 12824 were under consideration, the public did not receive reasonable notice that tree retention restrictions might be expanded to apply to previously unrestricted lands. Those property owners not subject to the previous tree retention p-suffix conditions would not have known that the County was considering expanding tree retention requirements to their properties.

As to Ordinance 12824, the public did not receive adequate notice of the potential expansion of tree retention requirements to lands not previously subject to tree retention p-suffix conditions. Because Ordinance 12824 was not challenged by Petitioner, the Board does not have the authority to find the County's action out of compliance with the GMA. Nonetheless, the Board encourages the County to correct its admitted error.

Conclusion 2

Petitioner has not shown how the County failed to provide adequate notice of the text amendments adopted by the challenged ordinance, Ordinance 12823. Petitioner has not met her burden of proof on Legal Issue 2. Therefore, the Board concludes that the County's action in adopting Ordinance 12823 was not clearly erroneous.

Vi. ORDER

Based upon review of the Petition for Review, the briefs and materials submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter, the Board orders:

The challenged portions of Ordinance 12823 **comply** with the requirements of the Growth Management Act.

So ORDERED this 23rd day of March, 1998.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

NOTICE: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

[1] RCW 36.70A.290(1) provides in relevant part: "The board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order."

[2] RCW 36.70A.035 became effective on July 27, 1997 – one day prior to County adoption of Ordinance 12823. The notice requirements of section .035 apply to the challenged action. RCW 36.70A.035(3) ("This section is prospective in effect and does not apply to a comprehensive plan, development regulation, or amendment adopted before July 27, 1997.")