

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

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| LAKEHAVEN UTILITY DISTRICT; |) | Case No. 97-3-0031 |
| BEVERLY J. TWEDDLE; and |) | ORDER ON |
| RICHARD J. MAYER, |) | DISPOSITIVE MOTIONS |
| Petitioners, |) | (corrected) |
| v. |) | |
| CITY OF FEDERAL WAY, |) | |
| Respondent. |) | |
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I. Procedural Background

On October 21, 1997, the Federal Way City Council passed Ordinance No. 97-302. On October 25, 1997, Federal Way published notice of adoption of Ordinance No. 97-302. Petition for Review, at 2; Ordinance No. 97-302, at 16.

On December 24, 1997, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Lakehaven Utility District, Beverly J. Tweddle and Richard J. Mayer (hereafter referred to as **Lakehaven**). The PFR was timely filed, and the matter was assigned Case No. 97-3-0031. Petitioners challenge the City of Federal Way's (the **City**) adoption of Ordinance No. 97-302 (the **Ordinance**). The grounds for the challenge are noncompliance with various sections of the Growth Management Act (the **GMA** or the **Act**) and the State Environmental Policy Act (**SEPA**).

On January 5, 1998, the Board issued a Notice of Hearing in the above-captioned case.

On January 29, 1998, the Presiding Officer distributed a memo to the parties' representatives, via FAX, noting additional discussion items for the prehearing conference. The memo indicated that from review of the PFR "it is not clear whether the Board has subject matter jurisdiction, thereby enabling the Board to hear and determine the issues presented for review."

On January 30, 1998, the Board received a memo from the City, via FAX, indicating that the City

intended to raise Lakehaven's standing to bring its appeal, as well as the Board's subject matter jurisdiction, at the prehearing conference.

The Board held a prehearing conference on February 2, 1998. Ed McGuire, Presiding Officer, conducted the conference. Blair Burroughs represented Petitioner Lakehaven and Bob Sterbank represented Respondent City of Federal Way. Peter Eglick and Steve Prichards were also in attendance. The subject matter jurisdiction and standing questions were briefly discussed. Lakehaven submitted "Petitioner's Memorandum of Authorities re: Jurisdiction." The Presiding Officer invited briefing on both jurisdictional issues within the timeframe for Dispositive Motions.

On February 4, 1998, the Board issued its "Prehearing Order" setting forth the schedule and issues in the above captioned case.

On February 19, 1998, the Board received "City of Federal Way's Dispositive Motion to Dismiss Petition" and "Petitioners' Memorandum of Authorities re: Jurisdiction and Motion to Remand."

On February 26, 1998, the Board received "Petitioners' Response to City's Dispositive Motion to Dismiss Petition" and "City of Federal Way's Response to Petitioner's Memorandum of Authorities re: Jurisdiction and Motion to Remand."

On March 2, 1998, the Board received "City of Federal Way's Reply on its Dispositive Motion to Dismiss" and "Petitioners' Reply to City of Federal Way's Response to Petitioners' Memorandum of Authorities Re: Jurisdiction and Motion to Remand."

The Board did not hold a hearing on the motions. The Board's decision is based upon review and consideration of the PFR, the briefs and materials submitted by the parties, case law, the Act and prior decisions of this Board.

II. Respondent's Dispositive Motion

Respondent's Motion to Dismiss offers two rationales to support a dismissal: (1) the Board lacks subject matter jurisdiction to hear and determine the issues presented; and (2) the Petitioners lack standing to bring the challenge. City of Federal Way's Dispositive Motion to Dismiss Petition, at 1.

Applicable Law - Subject Matter Jurisdiction

The Board's subject matter jurisdiction derives from RCW 36.70A.280, which provides, in relevant part:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW;

The Board has consistently construed its jurisdiction narrowly. In one of Board's earliest cases regarding subject matter jurisdiction, the Board stated:

The Board's jurisdiction is limited to planning documents, such as comprehensive plans and development regulations, that were adopted in an effort to comply with the requirements of the GMA. As this Board has repeatedly indicated in prior decisions [citations omitted], its subject matter jurisdiction is strictly limited to matters specified in RCW 36.70A.280(1). *Happy Valley Assoc. v. King County*, CPSGMHB Case No. 93-3-0008, Order Granting Respondent King County's Motion to Dismiss and Denying Happy Valley's Motion to Amend Its Petition for Review, (1998), at 13.

Therefore, the threshold question is whether Ordinance No. 97-302 was adopted pursuant to, or in an effort to comply with, the requirements of the GMA; or in the context of Petitioners' assertion, whether Ordinance No. 97-302 is an amendment to the City of Federal Way's Comprehensive

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Plan (the **Plan**).

Ordinance No. 97-302 initiates the process of assuming the assets, indebtedness, facilities and operation of Lakehaven by the City of Federal Way. The Ordinance also provides for the dissolution of Lakehaven. The assumption and dissolution of the utility district are accomplished pursuant to, and in accordance with, RCW 35.13A.030 and RCW 35.13A.080, respectively.

Ordinance No. 97-302, at §2 and §6. The effective date of the assumption follows completion of

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the Boundary Review Board's review process. Petitioners' challenge is focused on the assumption provisions of the Ordinance.

There is no indication in the Title, Recitals or Sections of the Ordinance that it was adopted in an effort to comply with any of the requirements of the GMA, or to amend the City's Plan. The very terms of the Ordinance reveal that its purposes are the assumption and dissolution of the utility district, which are being pursued in accordance with Chapter 35.13A RCW, not the GMA.

Consequently, the Ordinance does not amend the City's Plan.

Petitioners argue that, even if Ordinance No. 97-302 is not a comprehensive plan amendment, it is an activity or capital budget decision that is inconsistent with the City's comprehensive plan in violation of RCW 36.70A.120. However, the Board need not determine whether the City's action invokes a challenge under RCW 36.70A.120. As discussed below, the Board determines that Petitioners do not have standing to pursue this petition.

Applicable Law - Standing

Petitions for review must contain "[a] statement specifying the type and the basis of the petitioner's standing before the Board pursuant to RCW 36.70A.280(2). Petitioners shall distinguish between participant standing under the act, . . . standing pursuant to the Administrative Procedures Act (**APA**), and standing pursuant to the State Environmental Policy Act." WAC 242-02-210; *See also, Pilchuck v. Snohomish County*, CPSGMHB Case No. 95-3-

0047, Order Granting Snohomish County's Dispositive Motion to Dismiss SEPA Claims (August 17, 1995), at 3; and *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016, Order Denying WSDF's Motion for Reconsideration of Order Granting Seattle's Motion to Dismiss SEPA Claim [Legal Issue No. 10] (January 10, 1995), at 4. Absent such a statement, the Board may dismiss a PFR. RCW 36.70A.290(3).

Lakehaven's PFR alleges APA standing pursuant to RCW 36.70A.280(2)(d). PFR, at 3. Petitioners' PFR does not allege GMA appearance/participation standing under RCW 36.70A.280(2)(b). Because the PFR failed to allege GMA appearance/participation standing, Petitioners cannot now assert standing pursuant to RCW 36.70A.280(2)(b). See *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, coordinated with *Port Gamble v. Kitsap County*, CPSGMHB Case No. 97-3-0024c, Order on Motions (April 22, 1997), at 4. Thus, the Board will analyze only Petitioners' assertion of APA standing.

To have APA standing, Petitioners must be "aggrieved or adversely affected" by the City's adoption of the challenged ordinance. RCW 34.05.530. ^[3] To determine whether Petitioners are aggrieved or adversely affected, the Board applies the two-part test set out in *Trepanier v. Everett*, 64 Wn. App. 380, 382, *review denied*, 119 Wn.2d 1012 (1992). First, the interest that the petitioner is seeking to protect must be arguably within the zone of interests to be protected or regulated by the statute; and second, the petitioner must allege an injury in fact by demonstrating that the party is "specifically and perceptibly harmed" by the government action. Further, "when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself. If the injury is merely conjectural or hypothetical, there can be no standing." *Friends of the Law v. King County*, CPSGMHB Case No. 94-3-0003, Order on Dispositive Motions (April 22, 1994), at 15. In other words, to meet the evidentiary burden to show an injury-in-fact, the Petitioners must show that the government action will cause "specific and perceptible harm" and that the injury will be immediate, concrete, and specific." *Hapsmith v. Auburn*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996), at 15.

Petitioners allege the following injuries result from the City's action:

1. Inefficient provision of services. Petitioners' Response to City's Dispositive Motion to Dismiss Petition, at 8-9.
2. District may be dissolved completely or left with only portions of its former facilities. *Id.*
3. Service users may experience service problems and/or increased rates. *Id.*
4. Very real possibility of significant environmental impacts if the City cannot lawfully own and operate the Redondo sewage treatment facility. Petitioners' Response to City's Dispositive Motion to Dismiss Petition, Declaration of Beverly J. Tweddle on SEPA, at 2-3, and Supplemental Declaration of Richard L. Mayer on SEPA standing, at 2-3.

Such allegations are clearly not immediate, concrete or specific; they are conjectural and speculative.

Findings of Fact

The Board finds:

1. Ordinance No. 97-302 was adopted pursuant to Chapter 35.13A RCW; it was not adopted to comply with the requirements of the GMA, Chapter 36.70A RCW.
2. The alleged injuries are not immediate, concrete, or specific.
3. The alleged injuries are conjectural and speculative and are insufficient to establish injury in fact necessary to grant APA standing for Petitioners' claims. [\[4\]](#)

Conclusions of Law

The Board concludes:

1. The City's adoption of Ordinance No. 97-302 is not an amendment to the City's Comprehensive Plan over which the Board has subject matter jurisdiction.
2. Petitioners lack standing to challenge Federal Way's adoption of Ordinance No. 97-302.
3. Because of the Board's disposition of Respondent's motion to dismiss, the Board need not address "Petitioners' Memorandum of Authorities re: Jurisdiction and Motion to Remand."

III. ORDER

Based upon review of the Petition for Review, the briefs and materials submitted by the parties, case law, the Act and prior decisions of this Board, the Board enters the following Order:

Respondent City of Federal Way's Motion to Dismiss Petition is **granted**. The adoption of Federal Way Ordinance No. 97-302 is not an amendment to the City's Plan over which the Board has subject matter jurisdiction. Further, Petitioners lack standing to challenge the City's adoption of Ordinance N. 97-302.

Petitioner's Motion for Remand is **denied**.

The Petition for Review filed by the Lakehaven Utility District, Beverly J. Tweddle and Richard J. Mayer (CPSGMHB Case No. 97-3-0031) is **dismissed with prejudice**.

The hearing on the merits for CPSGMHB Case No. 97-3-0031 scheduled for April 23, 1998 is **canceled**.

So ORDERED this 6th 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

Note: 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.

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The Board has also held that “[i]n the Central Puget Sound region, comprehensive land use planning is now done exclusively under Chapter 36.70A RCW -- the GMA.” *West Seattle Defense Fund and Neighborhood Rights Campaign v. City of Seattle*, CPSGMHB Case No. 96-3-0033, Final Decision and Order (March 24, 1997), at 11. Policies that guide land use decision-making must be incorporated in a GMA plan.

[2]

The Boundary Review Board (**BRB**) review process is set forth in Chapter 36.93 RCW. Ordinance No. 97-302, at §9 and § 10, explains the relationship of the BRB process to the effective date of the assumption of Lakehaven by the City and the dissolution of Lakehaven.

[3]

RCW 34.05.530 provides:

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

- (1) The agency action had prejudiced or is likely to prejudice that person;
- (2) That person’s asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

[4]

As an alternate basis to deny APA standing, the Board agrees with the King County Superior Court that Petitioners have not made a sufficient showing that they are within the zone of interests protected by SEPA. Transcript of January 23, 1998 hearing on Motions to Dismiss (King County Superior Court, No. 97-2-28680-8), at 64 (attachment to City of Federal Way’s Dispositive Motion to Dismiss Petition).