

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

RURAL BAINBRIDGE ISLAND,	)	
	)	<b>Consolidated</b>
Petitioners,	)	<b>Case No. 98-3-0030c</b>
	)	
v.	)	<b>ORDER ON</b>
	)	<b>DISPOSITIVE MOTIONS</b>
CITY OF BAINBRIDGE ISLAND,	)	
	)	
Respondent.	)	
_____	)	

**I. Procedural Background**

On July 24, 1998, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Rural Bainbridge Island (**RBI**); the matter was assigned Case No. 98-3-0020.

On July 29, 1998, the Board received a PFR from Andrus, et al.; the matter was assigned Case No. 98-3-0030. On August 27, 1998, the Board received an “Amended Petition for Review (Andrus, et al.)” (the **Amended Andrus PFR**).

On August 3, 1998, the Board issued an “Order of Consolidation and Notice of Hearing,” consolidating the two above-referenced cases as Consolidated Case No. 98-3-0030c, *RBI, et al., v. City of Bainbridge Island*.

The Board held a prehearing conference on August 31, 1998, and issued a Prehearing Order on September 4, 1998, setting forth the schedule and legal issues for the consolidated case.

On September 10, 1998, the Board received a “Stipulation, Motion and Order for Ninety Day Extension of Time for RBI’s Petition from the City and RBI,” and on September 29, 1998, issued an “Order Granting Settlement Extension and Amending Prehearing Order - Final Schedule.”

On September 17, 1998, the Board received a “Preliminary List of Exhibits (Andrus, et al.).”

On September 18, 1998, the Board received “City’s Motion to Dismiss Andrus et al. Petitioners for Lack of Standing” and “City’s Motion to Dismiss Andrus SEPA Issue” with one attachment and an appended “Declaration of Kathy Cook” (**Cook Declaration**), which supported both motions to dismiss.

Also on September 18, 1998, the Board received “Motion to Supplement the Record (Andrus, et al.).”

On September 22, 1998, the Board received a “Preliminary List of Exhibits (Andrus, et al.).”

On September 29, 1998, the Board issued an “Order Granting Settlement Extension and Amending Prehearing Order - Final Schedule.”

On October 6, 1998, the Board received a “Motion by Andrus Petitioners for Leave to File Response to City’s Dispositive Motions Out of Time (By One Day)” with an attached “Affidavit of J. Kirkham Johns,” and “Andrus Petitioners Response to City’s Motion to Dismiss for Lack of Standing and Andrus SEPA Issue.”

On October 9, 1998, the Board received “City’s Reply to Andrus Petitioners’ Response to Motions to Dismiss.”

On October 13, 1998, the Board received “Andrus Petitioners’ Reply to City’s Response to Motion to Supplement Record” with an attached “Affidavit of J. Kirkham Johns.”

## **II. findings of fact**

1. On December 10, 1997, the city issued a Draft Winslow Master Plan with Integrated Final Environmental Impact Statement (**FEIS**). Cook Declaration, at 2.
2. On December 10 and 17, 1997, Notice of FEIS issuance was published. Cook Declaration, at 2.
3. On May 21, 1998, the City Council adopted Ordinance No. 98-11, adopting the Winslow Master Plan as a subelement of the City’s comprehensive plan.
4. Andrus Petitioners Lois Andrus, Steele Coddington, Shirley C. Coddington, Lang Hadley, Mary Hadley, J. Kirkham Johns, Patricia L. Johns, Wini Langdon, Mary Christine Loverich, Glenn Mitchell, Anne Mitchell, James Quitsland, Sabine Quitsland, Charles Schmid, Jan Seslar, Blair Shaw, Janice Shaw, Elizabeth A. Taylor, Robert J. Tomlinson, Norman C. Davis, Birgit Davis, Jessie Hey, David L. Shorett, Alice J. Shorett, Paul S. Zuckerman and Peggie D. Zuckerman assert APA standing pursuant to RCW 36.70A.280(2)(d). PFR, at 10-15; Amended Andrus PFR, at 11.
5. Andrus Petitioners Lois Andrus, Jessie Hey, and Charles Schmid also assert standing pursuant to RCW 36.70A.280(2)(b). Amended Andrus PFR, at 12.

6. Neither the original Andrus PFR nor the Amended Andrus PFR asserts SEPA standing.

### iii. discussion

The City moves to dismiss certain petitioners<sup>[1]</sup> for lack of GMA standing and to dismiss the Andrus, et al., Petitioners' SEPA issue for lack of SEPA standing.<sup>[2]</sup> A petition for review must allege the type of standing asserted by a petitioner. *Pilchuck v. Snohomish County*, CPSGMHB Case No. 95-3-0047, Order Granting Snohomish County's Dispositive Motion to Dismiss SEPA Claims (Aug. 17, 1995), at 3. "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. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order on Dispositive Motions (Feb. 16, 1995), at 6-7. Obtaining GMA standing "does not automatically bestow SEPA standing upon petitioner." *Id.*

GMA standing is set out at RCW 36.70A.280(2), which provides:

A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

The Andrus, et al., Petitioners challenged by the City have alleged GMA standing pursuant to RCW 36.70A.280(2)(d), which invokes the standing provisions of the Administrative Procedure Act (APA). APA standing is set out at RCW 34.05.530, which 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 has 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.

The APA standing test is also used to determine SEPA standing. *Kelly v. Snohomish County*, CPSGMHB Case No. 97-3-0012, Order on Dispositive Motions and Motions to Supplement the Record (May 8, 1997), at 5. To have standing under the APA test, a petitioner must be within the

zone of interests protected by the GMA, for GMA standing, or by SEPA, for SEPA standing, and must allege an injury in fact. RCW 34.05.530(1)-(2). To satisfy the evidentiary burden to show an injury in fact, a "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.'" *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008, Final Decision and Order (1995), at 94-95 (citations omitted); *Buckles v. King County*, CPSGMHB Case No. 96-3-0022, Final Decision and Order (1996), at 23. If the injury is merely conjectural or hypothetical, there can be no standing. *Trepanier v. Everett*, 64 Wn. App. 380, 382 (1992). In addition, a petitioner must show that a judgment in his/her favor "would substantially eliminate or redress" that prejudice. RCW 34.05.530(3).

Applying the APA test to determine GMA standing will not necessarily achieve the same result as applying the APA test to determine SEPA standing. One significant reason is that the interests that the local government is required to consider under GMA are not the same as those interests it must consider under SEPA. Petitioners' Response does not provide separate arguments for GMA and SEPA standing. Therefore, the Board reviewed Petitioners' APA argument in the context of both GMA and SEPA standing.

### GMA Standing

The Andrus, et al., Petitioners alleged APA standing in their PFR. Also, there is no dispute that Petitioners' interests are within the zone of interests protected by the GMA. RCW 34.05.530(2). The question is whether the Petitioners whose standing has been challenged have shown that the City's action will cause them specific and perceptible harm and that the injury will be immediate, concrete and specific, not merely conjectural or hypothetical.

Petitioners allege that:

[T]hey have suffered and continue to suffer direct and immediate injury stemming (both individually and cumulatively) from:

- (1) The City's failure to observe and comply with policies and procedures mandated by RCW Chapter 36.70A;
- (2) The City's adoption of the final Master Plan, the Ferry Terminal Overlay District provisions of which are invalid under RCW Chapter 36.70A;
- (3) The final Master Plan's allowance of land uses in the Ferry Terminal Overlay District that are inconsistent and incompatible with provisions of the 1994 Comprehensive Plan and the December 10, 1997 draft Master Plan, including those intended to benefit and protect abutting and adjacent neighborhoods;
- (4) The City's acceptance and processing of applications for permits and approvals

for major development projects in the Ferry Terminal Overlay District that seek to fully exploit – and expand upon – such inconsistent and incompatible uses;

(5) The real and imminent possibility of development projects that exploit such inconsistent and incompatible uses being approved and developed; and

(6) The direct and lasting injury to petitioners resulting therefrom.

Thus, [the challenged] petitioners have been and are likely to be further prejudiced by the challenged action; their interests are among those that the City of Bainbridge Island was required to consider when it took such action; and a determination in their favor will substantially eliminate or redress the prejudice to them caused by such action.

Petitioners' Response, at 4 (citing Amended Andrus PFR).

Although this list identifies the sources of Petitioners' alleged injuries, nowhere do Petitioners identify an injury in fact. Petitioners' attorney, J. Kirkham Johns (one of the challenged Petitioners), submitted an affidavit along with Petitioners' Response. This affidavit does not identify an injury. Petitioners assert that the City's actions caused "real and present threats to the characteristics and attributes of the established residential areas abutting and adjacent to the FTOD in which Petitioners reside and own property . . . and real and present threats to Petitioners [sic] continued enjoyment of their residency and ownership of property in those neighborhoods."<sup>[3]</sup> Petitioners' Response, at 11-12. Such vague assertions do not establish "specific and perceptible harm" and do not demonstrate "immediate, concrete, and specific" injury.

Without injury in fact there is no prejudice as required by RCW 34.05.530(1). The challenged Petitioners have failed to demonstrate APA standing; therefore, they have failed to demonstrate GMA standing. The City's motion to dismiss certain Andrus, et al., Petitioners<sup>[4]</sup> is **granted**. The challenged Petitioners are **dismissed from this case**.

Because the Board finds that the challenged Petitioners stated no injury in fact, the Board is unable to determine whether a judgment in Petitioners' favor would substantially eliminate or redress prejudice to the challenged Petitioners.

### SEPA Standing

The Andrus, et al., Petitioners do not allege SEPA standing in their PFR. That reason is alone sufficient to grant the City's motion to dismiss the Andrus, et al., Petitioners' SEPA issue. In addition, nowhere do Petitioners argue that the interests they seek to protect are within the zone of interests protected by SEPA. *See* RCW 34.05.530(2). Finally, as discussed above, Petitioners identify only the sources of alleged injuries; they do not identify injuries in fact. *See* RCW 34.05.530(1). The City's motion to dismiss the Andrus, et al., Petitioners' SEPA issue, Legal

Issue 7, is **granted**.

Because the Board finds that the challenged Petitioners stated no injury in fact, the Board is unable to determine whether a judgment in Petitioners' favor would substantially eliminate or redress prejudice to the challenged Petitioners.

#### **IV. Conclusion**

1. The Board concludes that the challenged Petitioners have failed to demonstrate APA standing; therefore, they have failed to demonstrate GMA standing. The City's motion to dismiss certain Andrus, et al., Petitioners<sup>[5]</sup> is **granted**. The challenged Petitioners are **dismissed from this case**.

2. The Board concludes that the challenged Petitioners have failed to demonstrate SEPA standing. The City's motion to dismiss the Andrus, et al., Petitioners' SEPA issue, Legal Issue 7, is **granted**.

#### **V. ORDER**

1. The City's motion to dismiss certain Andrus, et al., Petitioners<sup>[6]</sup> is **granted**.

2. The City's motion to dismiss the Andrus, et al., Petitioners SEPA issue, Legal Issue 7, is **granted**.

So ORDERED this 16th day of October, 1998.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member

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Joseph W. Tovar, AICP  
Board Member

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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.

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[1] The City moves to dismiss the following Petitioners for lack of GMA standing: Steele Coddington, Shirley C. Coddington, Norman C. Davis, Birgit Davis, Lang Hadley, Mary Hadley, J. Kirkham Johns, Patricia L. Johns, Wini Langdon, Mary Christine Loverich, Glenn Mitchell, Anne Mitchell, James Quitsland, Sabine Quitsland, Jan Seslar, Blair Shaw, Janice Shaw, David L. Shorett, Alice J. Shorett, Elizabeth A. Taylor, Robert Tomlinson, Paul S. Zuckerman and Peggie D. Zuckerman.

[2] RBI Legal Issue 7 is the SEPA issue.

[3] There is no dispute that the challenged Petitioners live within the FTOD.

[4] *See* note 1, *supra*.

[5] *See* note 1, *supra*.

[6] *See* note 1, *supra*.