

On September 16, 1998, the Board received “North Kitsap Coordinating Council’s (NKCC) Request to Deny Kitsap County’s Motion to Dismiss Our Petition.”

On September 17, 1998, the Board received “Washington Cedar’s Memorandum Opposing Kitsap County’s Motion to Dismiss.”

On September 18, 1998, the Board received “Overton & Associates and Peter E. Overton in Opposition to Kitsap County’s Motion to Dismiss for Lack of Standing” along with a “Declaration of Peter E. Overton in Opposition.”

On September 18, 1998, the Board received from Petitioner Warren E. Posten, Sr. (**Posten**), a “Preliminary List of Exhibits” and a “Stipulation of Relevant Facts.”

On September 21, 1998, the Board received “Posten’s Response to Kitsap’s Motion to Dismiss Posten’s Second Amendment for Petition for Review,” “Posten’s Motion for Extension,” “[Posten’s] Petition For Declaratory Ruling [in 8332c],” “Posten’s Response to Kitsap County’s Partial Motion to Dismiss for Lack of Standing”; “KCRP’s Response to Kitsap County’s Partial Motion to Dismiss for Lack of Standing”; “Suquamish Tribe’s Response to Kitsap County’s Motion to Dismiss for Lack of Standing”; and “S’Klallam Tribe’s Response to Kitsap County’s Partial Motion to Dismiss for Lack of Standing” along with the “Declaration of Philip J. Dorn.”

Also on this date, the Board received from the County: “Declaration of Rick Kimball,” “Declaration of John P. Vodopich in Opposition of Washington Cedar’s Motion for Final Decision,” and “Kitsap County’s Response to Washington Cedar’s Motion for Final Decision and Order.”

On September 22, 1998, the Board received “Association to Protect Anderson Creek and Union River Basin Protection Association’s (collectively, **APAC**) Response to County’s Motion to Dismiss,” with attachments.

On September 23, 1998, the Board received “Washington Cedar’s Reply.”

On September 25, 1998, the Board received “Kitsap County’s Reply in Support of its Partial Motion to Dismiss for Lack of Standing,” along with exhibits, “Kitsap County’s Reply Memorandum on Motion to Dismiss Petition by North Kitsap Coordinating Council,” “Kitsap County’s Motion to Strike Posten’s Stipulation of Relevant Facts,” “Kitsap County’s Reply Memorandum on Motion to Dismiss Petition Filed by Washington Cedar and Supply Company,” and “Kitsap County’s Reply on Motion to Dismiss Posten’s Second Amendment for Petition for Review, and Response to Petition for Declaratory Ruling.”

On September 25, 1998, the Board received “Postens’ Rebuttal to Kitsap County Response,” with 11 attachments.

On October 5, 1998, the Board received “Postens’ Rebuttal to Kitsap County Dispositive Motions.”

II. DISPOSITIVE MOTIONS

A. Motions to Dismiss Petitions for Review as Untimely

The County moved to dismiss the petitions for review (**PFRs**) filed by NKCC and Washington Cedar, claiming they were not timely filed. PFRs must be filed within sixty days after the county publishes notice that it has adopted its comprehensive plan, development regulations, or amendments to its plan or development regulations. RCW 36.70A.290(2). The County published this notice on May 30, 1998. The sixtieth day following the date of publication was July 29, 1998.

1. NKCC Petition for Review

NKCC FAXed its PFR to the Board on July 28, 1998. A mailed original PFR was received by the Board on July 30, 1998. The date the Board received the facsimile of NKCC's PFR is the date the PFR was filed with the Board. *See* WAC 242-02-240. Consequently, NKCC's PFR was filed with the Board on July 28, 1998 – within sixty days of publication by the County.

NKCC's PFR was timely filed and the County's motion to dismiss NKCC's petition as untimely is **denied**.

2. Washington Cedar Petition for Review

As noted *infra*, a PFR challenging the County's adoption of the Plan and development regulations must have been filed with the Board by July 29, 1998. Washington Cedar's PFR was filed on August 10, 1998. On its face, Washington Cedar's PFR seems untimely.

Notwithstanding this filing date, Washington Cedar attended the precompliance hearing conference. At the August 12, 1998 prehearing conference (a concurrent precompliance hearing in *Bremerton* and prehearing conference in *Alpine*), Washington Cedar acknowledged and agreed that the issues raised in its PFR were adequately contained in shared issue S-2, which provides: "With respect to public participation, did the County fail to be guided by RCW 36.70A.020(11) and fail to comply with the requirements of RCW 36.70A.035 and 140?" The statement of issues identified in the Board's

^[1] prehearing order constitute the only issues the Board may determine. *See* RCW 36.70A.290(1). After participating at the precompliance hearing, and in response to the County's motion to dismiss its PFR as untimely, Washington Cedar asserts that its PFR alleges "failure of the County to allow for meaningful participation as required by RCW 36.70A.140 and for the County's failure to provide a mechanism to modify the Plan pending review by the board as required by RCW 36.70A.470." Washington Cedar's Memorandum Opposing Kitsap County's Motion to Dismiss, at 2. Washington Cedar argues that, because it is alleging the County does not comply with the requirements of RCW 36.70A.470 as it pertains to "something . . . that must happen in the future, rather than correcting something that has already happened," it is alleging a failure to act and the sixty-day appeal deadline does not apply. However, Issue S-2 does not include an alleged violation of

^[2] RCW 36.70A.470. Washington Cedar did not object to the language of Issue S-2; Issue S-2 relates to the County's adoption of the Plan and development regulations, not a failure to comply with .470. Washington Cedar cannot now add to or revise agreed-to issues in this case. Consequently, in light of Washington Cedar's untimely filing of its PFR and its participation at the precompliance hearing, the County's motion to dismiss Washington Cedar's PFR is **granted**. Washington Cedar's PFR is

dismissed with prejudice.

Because Washington Cedar's PFR has been dismissed with prejudice, the Board need not and will not rule on Washington Cedar's Motion for Final Decision and Order.

[3]

3. Posten's Second Amendment to PFR

On August 20, 1998, Posten filed with the Board a "Second Amendment for Petition for Review," requesting that its PFR be amended to "include Ordinance 225-1998 and [the] Kitsap County Shorelines Management Master Program when ripe." "A petition for review . . . may be amended as a matter of right until thirty days after its date of filing." WAC 242-02-260(1). Posten's PFR was filed on July 22, 1998 and may be amended as a matter of right until August 21, 1998. Consequently, Posten's PFR is amended by the "Second Amendment for Petition for Review." However, the issues raised by this second amendment are not properly before the Board.

As to Ordinance 225-1998, Posten's second amendment does not allege standing to challenge the adoption of this ordinance, nor has Posten responded to the County's argument that he does not have standing to challenge Ordinance 225-1998. Consequently, Posten's challenge to Ordinance 225-1998 is **dismissed with prejudice.**

As to the shoreline master program, a shoreline master program may be appealed to this Board after "the local government publishes notice that the shoreline master program or amendment thereto has been approved or disapproved by the department of ecology." RCW 36.70A.290(c). Although the County has approved a revised shoreline master program and has submitted it to the Department of

[4]

Ecology (**Ecology**) for approval, Ecology has not yet approved or denied the master program. Consequently, the shoreline master program is not ripe for review by this Board. The Board has no authority to delay resolution of this case by waiting for Ecology's decision and the County's publication of that decision. See RCW 36.70A.300(2). Posten's challenge to Kitsap County's approval of its revised shoreline master program is **dismissed**, since the matter is not ripe for review.

B. Motions to Dismiss for Lack of Standing

1. SEPA Standing

The County seeks to dismiss all issues raised under chapter 43.21C RCW, the State Environmental Policy Act (**SEPA**), for lack of standing. To challenge a SEPA action, a petition for review must assert SEPA standing. *Pilchuck v. Snohomish County [Pilchuck]*, CPSGMHB Case No. 95-3-0047, Order Granting Snohomish County's Dispositive Motion to Dismiss SEPA Claims (Aug. 17, 1995), at 3. A Petitioner's supposedly endangered interest must be within the zone of interests protected by SEPA and Petitioner must allege an injury in fact. 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 (Oct. 23, 1995), at 94-95 (citations omitted); *Buckles v. King County*, CPSGMHB Case No. 96-3-0022, Final Decision and Order (Nov. 12, 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).

a. South Sidney Industrial District (SSID)

SSID's PFR did not contain an allegation of SEPA standing nor did SSID respond to the County's motion to dismiss its SEPA issue for lack of SEPA standing. The County's motion to dismiss SSID's SEPA issue (Issue S-3) is **granted**.

b. Posten

Posten's PFR did not contain an allegation of SEPA standing. In "Postens' Response to Kitsap County's Partial Motion to Dismiss for Lack of Standing," Posten states that his purpose is not to challenge "the County's actions during its planning and adoption of its SEPA EIS." Postens' Response to Kitsap County's Partial Motion to Dismiss for Lack of Standing, at 6. Instead, "Postens ['] intent is to show that the environment in which we have legally operated our business . . . has been adversely affected by the County's down zone action . . ." *Id.*

Not only has Posten not shown he has SEPA standing, he has stated that he is not challenging SEPA compliance. The County's motion to dismiss Posten's SEPA issue (part of Issue 10) for lack of SEPA standing is **granted**. Posten may argue Issue 10 except as it relates to an allegation of noncompliance with chapter 43.21C RCW.

c. S'Klallam Tribe

The S'Klallam Tribe's PFR did not contain an allegation of SEPA standing. In "S'Klallam Tribe's Response to Kitsap County's Partial Motion to Dismiss for Lack of Standing," Petitioner attempts to establish SEPA standing. Alleging SEPA standing for the first time in a responsive brief is not sufficient. *See Pilchuck*, at 3-4. The County's motion to dismiss S'Klallam Tribe's SEPA issue (Issue S-3) for lack of SEPA standing is **granted**.

d. Alpine Evergreen and Overton (Alpine)

Alpine's PFR contained an allegation of SEPA standing. The interest allegedly endangered by the County's action is Alpine's interest in "being able to provide land to serve a reasonable amount of the growth for which Kitsap County must plan at densities which do not deplete the County's ground water resources." Alpine's PFR, at 4. Alpine states its alleged injury as "The County's decision to funnel as much growth as possible into urban, sewerred areas, causing depletion of County ground water, has actually and substantially injured [Alpine's] interests . . ." *Id.*

The County argues that Alpine's interest is economic and not within the zone of interests protected by SEPA. The Board agrees with the County. Alpine's declared desire to develop its land in an environmentally sustainable manner is laudable. However, the interest endangered is Alpine's interest in developing its land – an economic interest not protected by SEPA. *See, e.g., Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52, *rev. denied*, 125 Wn.2d 1025 (1995); *DeWeese v. City of Port Townsend*, 39 Wn. App. 369, 375 (1984) ("SEPA concerns broad questions of environmental impact, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources"). The County's motion to dismiss Alpine's SEPA issue (Issue S-3) for lack of SEPA standing is **granted**.

Because the Board finds that no Petitioners have SEPA standing, Issue S-3 is **dismissed** in its entirety.

2. Participation Standing

The County seeks to dismiss issues (Legal Issues 22, 31, 56, 63, 65, and 67) it claims were not raised before the County in its adoption of the challenged actions. The County urges the Board to accept an issue-specific standing requirement. To the extent the County urges the Board to require petitioners to have raised before the County the specific issues now before the Board, the Board again rejects the County's urging. *See Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Order on Motions (Apr. 22, 1997). Nonetheless, a review of the record and briefing on this issue supports dismissal of several issues for lack of standing.

The GMA provides four different methods to obtain standing before the Board. *See* RCW 36.70A.280 (2). Three of these methods do not require participation before the local government during its adoption or amendment of its GMA plans or development regulations. Only the method that requires participation is the subject of the present dispositive motion; the Board's analysis is limited to this "participation standing." That GMA provision states that:

A petition may be filed only by: . . . (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requestedRCW 36.70A.280(2)(b).

The authorization for participation standing is consistent with the GMA mandate for "early and continuous public participation," RCW 36.70A.140, and with the Legislature's intent that local governments "balance priorities and options . . . in full consideration of local circumstances," RCW

[5]

36.70A.3201 . To have meaningful public participation and avoid "blind-siding" local governments, members of the public must explain their land use planning concerns to local government in sufficient detail to give the government the opportunity to consider these concerns as it weighs and balances its priorities and options under the GMA.

Since the County has challenged the participation standing of several petitioners, the Board will determine whether the challenged petitioners have sufficiently participated before the County to raise and argue an issue now before the Board. To do this, the Board will review the issue, as set forth in

[6]

the Board's prehearing order , and will examine the PFR, the briefing and the record to ascertain the nature of the petitioner's participation before the County. If a petitioner's participation is reasonably related to the petitioner's issue as presented to the Board, then the petitioner has standing to raise and argue that issue; if the petitioner's participation is not reasonably related to the petitioner's issue as presented to the Board, then the petitioner does not have standing to raise and argue that issue.

Of the six issues now challenged by the County, petitioners' participation on Issues 56 and 63 were presented sufficiently before the County to be reasonably related to the issues posed for this Board to resolve.

Issues 22 and 31

The Association to Protect Anderson Creek (APAC) raised Issues 22 and 31, which provide:

22. Is the Plan inconsistent with the plans of Mason and Jefferson Counties and the Cities of Port Orchard and Bremerton, with which the County has common borders or related regional issues, contrary to the requirements of RCW 36.70A.100?

31. Does the plan fail to be guided by the economic development planning goal RCW 36.70A.020(5) because it fails to take into account the economic value of the extensive natural aquatic resources surrounding Kitsap County and the economic importance of maintaining and enhancing water quality in these areas of national significance?

The County seeks to dismiss Issue 22, as it relates to the plans of Jefferson and Mason Counties, and Issue 31 in its entirety. APAC responds that it, and others, have sufficiently informed the County of their concerns with regard to these issues. However, of the numerous Index items APAC references, only one, a November 9, 1997 letter to the Board of County Commissioners (Index No. 18055), was a comment by APAC. That letter contains no mention of Plan consistency with Mason and Jefferson Counties. Nor does that letter contain any reference to the economic value of aquatic resources. APAC's participation before the County, as exhibited in the November 9 letter, is not reasonably related to these issues before the Board.

Also, APAC's reliance on other persons' participation on matters before the County as a basis for its standing is not supported by RCW 36.70A.280(2)(b). That subsection provides that "a person who has participated . . . regarding the matter on which review is being requested" may file a petition. APAC itself must have participated "regarding the matter" it wants the Board to review; it cannot establish standing based solely on the participation of another. The County's motion to dismiss Issue 22, as it relates to the plans from Jefferson and Mason Counties, and Issue 31, in its entirety, is **granted**.

Issue 56

The S'Klallam Tribe raised Issue 56, which provides:

Do the requirements of RCW 36.70A.070 and .130 apply when a county adopts a UGA after the deadline for adopting a Plan, and if so, does the Port Gamble UGA fail to comply with these requirements?

The County argues that the Port Gamble "UGA" is actually an IUGA, and that the S'Klallam Tribe did not participate in the adoption of the ordinance adopting the Port Gamble IUGA. The S'Klallam Tribe responds that it "repeatedly raised written objections to the Port Gamble urban growth area designations." S'Klallam Tribe's Response to Kitsap County's Partial Motion to Dismiss for Lack of Standing, at 6. Specifically, Petitioner sent a letter, dated January 21, 1998, to the Kitsap County Planning Commission. *Id.*, at Ex. 1 (Index No. 16468). The letter states:

[W]e have concern with the urban growth designation for the Port Gamble townsite – just across Port Gamble Bay from our community. . . . We cannot support the designation of Port Gamble as an urban growth area at this time.

...

If adequate justification is provided and Port Gamble is designated an urban growth area, the Tribe advises a tight but logical urban boundary line around only those limited growth areas capable of being served by the existing [sewer and water supply] system. *Id.*

This letter sufficiently informed the County of the S'Klallam Tribe's concern with urban growth

designation of the Port Gamble area, regardless of whether the County adopted an interim or final urban growth designation. The S'Klallam Tribe's participation before the County is reasonably related to the issue before the Board. The County's motion to dismiss Issue 56 is **denied**.

Issue 63

The Suquamish Tribe raised Issue 63, which provides:

Is the Plan internally inconsistent between the natural systems policies of the Plan and the Land Use Element, and does it thereby fail to comply with RCW 36.70A.070(preamble) and are the critical areas ordinance and zoning inconsistent with the Plan's natural systems policies and do they thereby fail to comply with RCW 36.70A.040(3)?

The County seeks to dismiss this issue in its entirety. The Suquamish Tribe responds that it briefed this issue during the Board's review of the 1994 and 1997 Plans. The County should not be surprised by the Tribe's posing this issue since the record for this case includes the Suquamish Tribe's briefing and argument during this Board's review of the County's 1994 and 1997 Plans. The Suquamish Tribe's participation before the County on this issue is reasonably related to the issue before the Board. The County's motion to dismiss Issue 63 is **denied**.

Issues 65 and 67

NKCC raised Issues 65 and 67, which provide:

65. Does the Transportation Element of the Plan fail to comply with the requirements of RCW 36.70A.070(6) by failing to accurately forecast internal and external traffic for the 20-year planning period?

67. Did the County fail to be guided by RCW 36.70A.020(3) by failing to adequately plan for multimodal transportation?

The County seeks to dismiss these issues in their entirety. NKCC did not respond to the County's motion. However, Kitsap Citizens for Rural Preservation (**KCRP**) did respond. Issues 65 and 67 are

not issues raised by KCRP, as identified in the prehearing order. [\[8\]](#) Consequently, KCRP may not argue the proposed dismissal of these issues as to NKCC; their response to the County's motion is not relevant. NKCC failed to respond to the County's motion, thus failing to explain to the Board how it has standing to raise these issues. The County's motion to dismiss Issues 65 and 67 is **granted**.

C. Other Motions

1. County's Motion to Prohibit Argument on Issues Not Raised Before the County

The County moved for the Board to "issue an order on motions that prohibits Petitioners from arguing issues not raised before the County when they brief their generalized issues." Kitsap County's Partial Motion to Dismiss for Lack of Standing, at 20. This motion is **denied**.

2. Posten's Motion for Extension [to Respond to County's Partial Motion to Dismiss for Lack of Standing]

Posten's Motion for Extension is **denied**.

3. County's Motion to Strike Posten's' Stipulation of Relevant Facts

Kitsap County's Motion to Strike Posten's' Stipulation of Relevant Facts is **granted**.

III. Order

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

Kitsap County's Motion to Dismiss NKCC's PFR is **denied**.

Kitsap County's Motion to Dismiss Washington Cedar's PFR is **granted**. Washington Cedar's PFR is **dismissed with prejudice**.

Posten's Second Amended PFR, specifically the challenge to the County's adoption of Ordinance 225-1998 is **dismissed with prejudice**; and the challenge to the County's approval of its revised shoreline master program is **dismissed**.

Kitsap County's Motion to Dismiss SSID's SEPA issue (Issue S-3) is **granted**.

Kitsap County's Motion to Dismiss Posten's SEPA issue (Issue 10 -- partial) is **granted**.

Kitsap County's Motion to Dismiss the S'Klallam Tribe's SEPA issue (Issue S-3) is **granted**.

Kitsap County's Motion to Dismiss Alpine's SEPA issue (Issue S-3) is **granted**.

Legal Issue S-3, in its entirety, is **dismissed** from this case.

Kitsap County's Motion to Dismiss Legal Issues Nos. 22, 31, 65 and 67 is **granted**; Legal Issues 22, 31, 65 and 67, in their entirety, are **dismissed** from this case.

Kitsap County's Motion to Dismiss Legal Issues Nos. 56 and 63 is **denied**.

Kitsap County's Motion to Prohibit Argument on Issues Not Raised Before the County is **denied**.

Posten's Motion for Extension is **denied**.

Kitsap County's Motion to Strike Posten's' Stipulation of Relevant Facts is **granted**.

So ORDERED this 7th day of October, 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 is a final order for purposes of appeal. Pursuant to WAC 242-02-832, a Motion for Reconsideration may be filed within ten days of service of this final order.

[1]

The prehearing order in this case is the August 18, 1998 "Third Order of Consolidation and Order on Motions to Intervene in the *Alpine* Case and Notice of Amended Concurrent Schedules for Briefing and Hearing in *Bremerton* and *Alpine* Cases" as amended by the September 4, 1998 "Order Granting Motions to Intervene in *Alpine* and Order Correcting *Alpine* and *Bremerton* Legal Issues Set Forth in the Third *Alpine* Order of Consolidation and Prehearing

Order.”

[2] RCW 36.70A.470 provides in part:

(2) Each county and city planning under [the GMA] shall include in its development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.

[3] *See*: Notice of Decision Not to Issue Declaratory Ruling, CPSGMHB Case No. PDR 98-3-0001, October 7, 1998.

[4] *See*: Resolution 094-1998.

[5] The Board has previously identified the reciprocal duty that the local government and members of the public share.

In order for the public participation goal of the Act to be served, both the local governments and the public must engage in an open, clear and active dialogue. Failure to do so by either party may result, as in this case, in an adverse ruling by this Board on appeal.” *Friends of the Law v. King County*, CPSGPHB Case No. 94-3-0003, Order on Dispositive Motions, April 22, 1994, at 33.

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

[7] Co-petitioners with the Association to Protect Anderson Creek are the Union River Basin Protection Association, Helen Havens-Saunders, and Elaine Manheimer. They will collectively be referred to as APAC.

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