

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

SHIRLEY MESHER AND CITIZENS )		
FOR LAND USE PUBLIC )		<b>Case No. 01-3-0007</b>
ACCOUNTABILITY, )		
)		<b>ORDER ON MOTIONS</b>
Petitioners, )		
)		
v. )		
)		
CITY OF SEATTLE, )		
)		
Respondent. )		

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**I. Procedural Background**

On April 30, 2001 the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Shirley Mesher on behalf of herself and Citizens for Land Use Public Accountability (**C-LUPA**). Petitioners allege that the City of Seattle (**Seattle** or the **City**) failed to meet requirements of the Growth Management Act (**GMA** or the **Act**) and the provisions of the State Environmental Policy Act (**SEPA**) when it adopted Ordinance 120267.

On May 3, 2001, the Board issued a “Notice of Hearing” which set May 31, 2001 as the date for the prehearing conference in this matter.

On May 11, 2001, the Board received from the City a “Notice of Appearance.”

On May 24, 2001, the Board received from Petitioners a “Clarification of Action and Initial re-Statement of Legal Issues.”

On May 30, 2001, the Board received an “Addendum to Petition for Review” and from the City a “Notice of Filing Index.”

The Board conducted the prehearing conference in this matter beginning at 10:00 a.m. on May 31, 2001 in Room 1022 of the Financial Center, 1215 Fourth Ave., in Seattle. Present for the Board was presiding officer Joseph W. Tovar. Bernard Glynn represented the City. Shirley Mesher represented C-LUPA and herself *pro se*. After a discussion of the schedule, the record, motions practice and the legal issues, the presiding officer indicated that Ms. Mesher would be

given until the close of business on June 8, 2001 to submit a final re-statement of legal issues.

On June 7, 2001, Petitioner contacted the Board's Administrative Officer, Susannah Karlsson, to request that the due date for the final re-statement of legal issues be moved to June 11, 2001. The Presiding Officer orally granted the request and had Ms. Karlsson relate this decision to the Petitioner.

On June 11, 2001, the Board received from Ms. Mesher "Re-Statement of Legal Issues" (the **C-LUPA's Final Re-Statement of Legal Issues**.) Later on this same date, the Board issued the Prehearing Order (the **PHO**) in this case.

On June 28, 2001, the Board received from the parties a "Stipulation to Amend the Schedule on Motions."

On June 29, 2001, the Board issued an Order Amending Schedule for Briefs and Order on Motions (the **First Order Amending Schedule**).

On July 5, 2001, the Board received "Seattle's Dispositive Motion" (**Seattle's Dispositive Motion**) together with numerous attachments, including the "Glynn Declaration in Support of Seattle's Dispositive Motion" (the **Glynn Declaration**), the "Declaration of Roque Deherrera" (the **Deherrera Declaration**), and the "Declaration of \_\_\_ Beardsley" (the **Beardsley Declaration**).

On July 6, 2001, the Board received Petitioner's "Motion to Supplement Record and For Discovery" (**Petitioner's Motion to Supplement**).

On July 10, 2001, the Board received from the parties a "Stipulation to Amend Schedule on Motion Responses."

On July 16, 2001, the Board received "Seattle's Opposition to C-LUPA's Motion to Supplement the Record and Response to Discovery Request."

On July 17, 2001, the Board received "Petitioner's Response to Seattle's Dispositive Motion" (**Petitioner's Response**) with a number of attachments, one of which was the "Wall Declaration in Support of C-LUPA GMA Standing" (the **Declaration of Irene Wall**).

On July 19, 2001, the Board received "Seattle's Rebuttal in Support of Its Dispositive Motion" (**Seattle's Rebuttal**). Also on this date, the Board received "Petitioner Rebuttal to Seattle's Opposition to Supplement Record and Response to Discovery."

On July 27, 2001, the Board issued the Second Order Amending Schedule for Briefs and Order on Motions (the **Second Order Amending Schedule**)

## **II. Discussion**

### **A. Seattle's Dispositive Motion**

#### **1. Prefatory note**

The City presents four arguments in its Dispositive Motion. The first two arguments, collectively, ask the Board to dismiss portions of the entire case based on standing, while the second two issues presented seek to dismiss certain of Petitioners' legal issues or portions of issues on other grounds.

First, the City argues that both petitioners lack GMA standing because neither participated orally or in writing before the Council during its consideration of Ordinance 120267; second, the City argues that both petitioners lack SEPA standing because they field to allege in their PFR facts to demonstrate that the challenged text amendment will cause them prejudice or injury in fact. Seattle's third argument is that the Board lacks subject matter jurisdiction over those issues or parts of issues that allege defects outside of the scope of the GMA. The City's fourth argument is that several of the Petitioners' allegations of noncompliance cite sections of the GMA that apply to comprehensive plans, not development regulations such as those at issue here. Seattle's Dispositive Motion, at 1-2.

If the Board were to agree with both of these first two arguments, it would grant the motion and dismiss the PFR in its entirety. If the Board were to disagree with either of these first two arguments, it would then take up the City's third and fourth arguments which are issue specific. For this reason, the Board first addresses the standing issues.

#### **2. Applicable Law**

In order to challenge a local government's compliance with the goals and requirements of the GMA before this Board, an individual or organization must have standing to bring such an appeal. Requirements for standing are provided by the legislature.

RCW 36.70A.280(2) provides in relevant part:

A petition [for review] 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 review is being requested; (c) a person who is certified by the governor within sixty days of filing a request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

RCW 36.70A.280(3) defines “person”:

For purposes of this section “person” means any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private associations, organizations or entities of any character.

The Board’s Rules require that a PFR 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, governor certified standing, standing pursuant to the Administrative procedures Act, and standing pursuant to the State Environmental Policy Act, as the case may be;

WAC 242-02-210(2)(d)

In previous cases, the Board has interpreted the GMA standing provisions regarding “organizational standing.” This was first articulated in *Friends of the Law v. King County*: “For an organization to have participation standing, a member of that organization must identify himself or herself as a representative of the organization when that person testifies at a hearing or submits a letter to the county or city.” CPSGMHB Case No. 94-3-0003, Order on Dispositive Motions (Apr. 22, 1994), at 9; *see also*, *McGowan v. Pierce County*, CPSGMHB Case No. 96-3-0027, Order on Motions (Sept. 5, 1996), at 8; and *Friends of Fennel Creek v. Pierce County*, CPSGMHB Case No. 97-3-0005, Order on Motions (Apr. 22, 1997), at 6.

With respect to SEPA standing for GMA legislative actions, the Board has consistently applied a two-part SEPA standing test originally articulated by the courts in *Leavitt v. Jefferson County* (*Leavitt*), 74 Wn. App. 668, 875 P.2d 681 (1994) and *Trepanier v. Everett* (*Trepanier*), 64 Wn. App. 380, 824 P.2d 524, review denied, 119 Wn.2d 1012 (1992). In *Bremerton, et al., v. Kitsap County, et al.* (*Bremerton*), CPSGMHB Case No. 95-3-0039 (Order on County’s Dispositive Motions), June 5, 1995, the Board explained the two prongs of the test:

First, the plaintiff’s supposedly endangered interest must be arguably within the zone of interests protected by SEPA. Second, the plaintiff must allege an injury in fact; that is, the plaintiff must present sufficient evidentiary facts to show that the challenged SEPA determination will cause him or her specific and perceptible harm. The plaintiff who alleges a threatened injury rather than an existing injury must also show that the injury will be “immediate, concrete, and specific”; a conjectural or hypothetical injury will not confer standing. *Leavitt*, at 679 citing *Trepanier*, at 382-83.

Citing to another recent appellate decision, *Snohomish Property Rights Alliance v. Snohomish County*, 76 Wn.App. 44, 882 P.2<sup>nd</sup> 807 (1994), the Board noted that it will be difficult for any petitioner to demonstrate the “specific injury” required by the *Leavitt* and *Trepanier* courts when challenging the final environmental impact statement for a comprehensive plan. *Robison v. Bainbridge Island*, Order on Dispositive Motions, at 6; *WSDF v. Seattle*, Order Granting Seattle’s Motion to Dismiss, at 7.

*Bremerton*, at 11.

The Board has also held:

Reliance on another person’s participation before the [city or county] as a basis for standing is not supported by RCW 36.70A.280(2)(b). A person (or organization) cannot establish standing based solely on the participation of another.

*Bremerton/Alpine*, CPSGMHB Cases 95-3-0039c/98-3-0032c, Order on Dispositive Motions, October 7, 1998, at 9.

### 3. Positions of the Parties

The City first cites to the portion of RCW 36.70A.280(2)(b) upon which Petitioners rely for their GMA standing:

A petition may be filed by: . . . (b) a person who has *participated* orally or in writing before the county or city regarding the matter on which review is being requested . . . (Emphasis added).

The City then recites the history of original <sup>[1]</sup> and amended public notice <sup>[2]</sup> and the City Council hearing <sup>[3]</sup> on the proposed amendment to the development regulations. The City points out that there is no evidence in the record that either C-LUPA or Mesher participated in the legislative process before the Council. *Seattle’s Dispositive Motion*, at 6-8. The City argues:

Because Mesher and C-LUPA failed to *participate* before the City Council either by submitting written comments on the proposed special exception or by testifying at the August 9, 2001 public hearing, they lack GMA standing and the appeal should be dismissed. (Emphasis added).

*Seattle’s Dispositive Motion*, at 14.

With respect to SEPA standing, the City argues that the Petitioners never asserted facts in the PFR [4] to meet the requirements of the two-prong standing test articulated in *Bremerton* and affirmed in several cases, including *Anderson Creek* [51], wherein the Board held:

Crucially, to assert SEPA standing, petitioners must show that they are within the zone of interests protected by SEPA and allege an injury in fact in the petition for review.

*Anderson Creek*, at \_\_\_\_.

In response, Petitioners express surprise at the City’s challenge to standing, stating

During the prehearing conference, Counsel for the City twice responded a firm “NO” when directly asked by the Presiding Officer if the City were going to challenge “standing.” At that time, Petitioner still was within the time limits that allowed for an amendment to their petition as of right, and certainly would have reconsidered all of those factors if there was any question concerning this. To now move to dismiss based on this seems highly suspect and out of order, and has placed us under undue pressure.

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If this were to be allowed, and any question remains either as to SEPA or standing in general, then Petitioner respectfully requests that they be allowed to amend their Petition.

Petitioners’ Response, at 2.

Ms. Mesher states that she did attend the hearing on August 9, 2000.

The notice stated the starting time was 5:30 p.m.; Ms Mesher, . . . , representing herself and C-LUPA – arrived well before 5:45 p.m. She signed in, but when she entered the Council Chambers was startled to find them already closing down the meeting and the few there began exiting.

Petitioners’ Response, at 2.

Petitioners cite a number of conversations that Ms. Mesher had with City staff and individual Council members regarding the proposed code amendment and argues that the “City” was well

aware of her interest and concerns about the matter. *Id.*, at 3. Petitioners also make reference to the participation in the proceedings by Irene M. Wall, who states that:

I assisted Shirley Mesher in establishing Citizens for Land Use and Public Accountability (C-LUPA) and consider myself a member of that organization. On August 9, 2000, I came to the chambers of the Seattle City Council intending to offer public comments on this Ordinance [120267] at a hearing scheduled for 5:30 p.m. However, when I arrived at 5:50 p.m., the chambers were dark. I was told by DCLU staff member Roque Deherrera that Council member Jim Compton had already closed the hearing since few people signed up to testify.

Delcaration of Irene Wall, at 2.

Much of the balance of Petitioners' brief argues the merits of the case rather than the subject of standing specifically.

In rebuttal to the Petitioners' arguments, Seattle states:

In their July 16, 2001 Response, Mesher and C-LUPA admit that they failed to participate orally at the hearing before the City Council during its consideration of Ordinance 120267. Likewise, petitioners fail to point to any written comment that they provided to the City Council on the substance of the proposed text amendment.

Seattle's Rebuttal, at 1.

The City disputes the Petitioners' complaint that counsel for Seattle had some duty to disclose the challenge to standing during the prehearing conference. The City argues:

[P]etitioners do not deny that they failed to allege in their Petition for Review facts to support the proposition that the text amendment will cause them prejudice or injury in fact . . . Instead, petitioners seem to argue that the City should have told them that their Petition was deficient so that they could amend it. But petitioners point to no authority for the proposition that the City has a duty to help them perfect their petition and the City is aware of none.

Seattle's Rebuttal, at 2.

The City points out that the Board has consistently ruled that informal communications, such as speaking with members of local government staff does not establish GMA standing and argues that C-LUPA may not "piggy-back" on the participation of Irene Wall:

While it is undisputed that Ms. Wall made a number of substantive written comments that are on the record, it is equally undisputed that Ms. Wall is not a petitioner before the Board in this case. Nor can Ms. Wall's participation confer GMA standing on C-LUPA. . . . Irene Wall states that she considers herself a member of C-LUPA. Wall Declaration at 4. . . . The Board has held that an organization can obtain appearance standing only if one or more of its members makes it clear that he or she is testifying on that organization's behalf.

Seattle's Rebuttal, at 2-3. Footnotes omitted. Citations omitted.

Finally, the City argues that Petitioners' participation in the SEPA appeal do not create standing to challenge the GMA sufficiency of the legislation. The City argues:

The hearing held in association with a SEPA appeal is not on the merits of the proposed action (in this case the special exception) and is not before the decision maker – the City Council. The Hearing Examiner process is separate and distinct from the legislative hearing held by the City Council . . . In this case, the legislative hearing took place on August 9, 2000. Mesher and C-LUPA failed to participate in this hearing or to comment on the proposed special exception in writing.

Seattle's Rebuttal ,at 4-5.

#### **4. Discussion and Conclusions**

The record clearly shows that, while Ms. Mesher and C-LUPA attempted to attend the August 8, 2000 public hearing, by their own admission they arrived after the close of the hearing. There was no allegation that the notice was inadequate or that the 5:30 p.m. starting time was not clear, nor an argument that the City was somehow obligated to keep the hearing open until all interested citizens arrived. Instead, there is an admission on the record that the Petitioner did not arrive before the close of the hearing. This fact, coupled with Petitioners' lack of written comment prior to the well-publicized deadline, was fatal to her claim to participation standing pursuant to RCW 36.70A.280(2)(b).<sup>[6]</sup>

The Board understands Petitioners disappointment that the Counsel for the City did not alert her to the standing challenge until the filing of the dispositive motion. Had both the City and the Petitioners indicated at the prehearing conference that neither intended to file motions of any sort, the motions practice portion of the schedule would have been omitted from the prehearing order. However, there is nothing in the GMA nor the Board's Rules to suggest that the City waived its right to bring a dispositive motion simply because it did not, at the time of the prehearing

conference, declare its intention to file such a motion.

Seattle's Dispositive Motion is **granted**.

B. Petitioner's Motion to Supplement and for Discovery

Because the Board grants the City's dispositive motion, it need not and does not rule on Petitioner's Motion to Supplement and for Discovery.

**III. ORDER**

Based upon review of the Petitions for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

The City of Seattle's Dispositive Motion is **granted**. The C-LUPA PFR is **dismissed with prejudice**.

ORDERED this 3<sup>rd</sup> day of August, 2001.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD <sup>[7]</sup>

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Edward G. McGuire, AICP  
Board Member

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Joseph W. Tovar, AICP  
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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<sup>[1]</sup> On July 26, 2000, notice was published in the *Seattle Daily Journal of Commerce* that the a City Council committee would hold a public hearing on the proposal on August 9, 2001 at 5:30 p.m. and that the City would accept written comments on the proposal until August 11, 2000. Deherrera Declaration, at 7.

<sup>[2]</sup> On September 7, 2000, a Notice of Revisions to Draft Text Amendment was published in the *Seattle Daily*

*Journal of Commerce*, describing possible changes to the proposal under consideration by the Council and extending the period for written comments on the proposal until September 18, 2000. Deherrera Declaration, at 8.

[3] The Council Finance, Budget, and Economic Development Committee held a public hearing on proposed Ordinance 120267 on August 9, starting at about 5:30 p.m. Beardsley Declaration, at 6.

[4] Petitioners' PFR identifies the type and basis of Petitioner's standing as being participant standing, pursuant to RCW 36.70A.280(2)(b). No other basis for standing is alleged. The original PFR filed on \_\_\_\_\_, provides: Standing BLAHBLAHBLAHBLAH PFR, at \_\_\_\_\_. C-LUPA's Amended PFR, filed on \_\_\_\_, provides: 4) Standing: BLAHBLAH BLAH BALH. Amended PFR, at ----.

[5] *Association to Protect Anderson Creek, et. al, v. Bremerton, et. al, (Anderson Creek)* CPSMGHB Case No. 95-3-0053, Order on Bremerton's Dispositive Motions, October 18, 1995.

[6] The City is correct that informal, off the record discussions with City staff does not constitute comment on the public record. The same is true of such communications within individual council members, whether orally or in writing.

[7] Board Member North was unavailable to review the pleadings in this case and did not participate in this decision.