CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

KENT C.A.R.E.S., northwest Alliance, Inc., and DON SHAFFER	)	**Case No. 02-3-0015**
	)	***(Kent CARES)***
Petitioners,	)	
v.	)	
CITY OF KENT,	)	**ORDER ON MOTIONS**
Respondent.	)	

I. CASE SYNOPSIS

Petitioner challenged the City of Kent's adoption of a Planned Action Ordinance for the Kent Station area. The City moved to dismiss the Petition for Review, arguing that the Ordinance neither adopted nor amended the City's Comprehensive Plan or development regulations. Therefore, the Board did not have jurisdiction to decide the matter. Petitioner asserted that the planned action ordinance was either a subarea plan or an amendment to one. The Board is not persuaded by Petitioners' arguments and after a review of Ordinance No. 3608 [Kent Station PAO],the Board has concluded that the Kent Station PAO neither adopted nor amended a subarea plan per chapter 36.70A. RCW. Therefore, pursuant to RCW 36.70A.280(1), the Board lacks subject matter jurisdiction to review Ordinance No. 3608 for compliance with the goals and requirements of the GMA – Chapter 36.70A RCW. The Board ***grants*** *the City's motion and the case of Kent C.A.R.E.S. v. City of Kent, CPSGMHB Case No. 02-3-0015, is* ***dismissed with prejudice****.*

II. Procedural history

On September 20, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**)[1] from Kent CARES, Northwest Alliance, Inc., and Don B. Shaffer (**Petitioner** or **Shaffer**). The matter was assigned Case No. 02-3-0015, and is hereafter referred to as *Kent CARES v. City of Kent*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges the City of Kent's (**Respondent**, the **City** or **Kent**) adoption of Ordinance No. 3608, the "Kent Station Planned Action

Ordinance" (**PAO**). The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On September 30, 2002, the Board issued a "Notice of Hearing" in the above-captioned case. The Order set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On October 14, 2002, the PO faxed a memo to the parties regarding "Board Questions and Possible Restatement of Issues[2] for Discussion at the October 24, 2002 PHC."

On October 21, 2002, the Board received Petitioner's "Amended Petition for Review" (**Amended PFR**). Pursuant to WAC 242-0260(1), the Amended PFR, adding 20 legal issues, was timely filed.

On October 24, 2002, the Board conducted the PHC at the Financial Center, Seattle. The next day (October 25, 20020), the Board issued a "Prehearing Order" (**PHO**) setting forth 25 Legal Issues for the Board to decide. The PHO also established the final schedule for motions[3] (with briefing) and schedule for briefing on the merits of the issues to be resolved.

III. MOTIONS

A. Motion to Dismiss All Legal Issues

On November 12, 2002, the Board received, from the City of Kent, "Respondent's Motion to Dismiss all Legal Issues," with four attachments.[4] (**Kent Motion - Dismiss**).

On November 18, 2002, the Board received Shaffer's "Reply to Respondents Motion to Dismiss All Legal Issues" (**Shaffer Response - Dismiss**).

On November 22, 2002, the Board received "Respondent's Rebuttal to Petitioner's Reply to Respondent's Motion to Dismiss All Legal Claims," with two attachments.[5] (**Kent Reply - Dismiss**).

Also on November 22, 2002, the Board received an additional and untimely[6] filing by Petitioner captioned "Petitioners' Rebuttal to Respondent's Motion to Dismiss All Legal Issues." (**Shaffer Additional and Untimely Rebuttal – Dismiss**). Although untimely, the Board notes that the "Shaffer Additional and Untimely Rebuttal – Dismiss," reiterates argument made by Petitioner in the November 18, 2002 "Shaffer Response – Dismiss."

Later that same day, the Board received "Respondent's Motion to Strike Petitioners' November 22, 2002 Brief" (**Motion to Strike**).

B. Motion to Supplement the Record

On October 21, 2002, the Board received Kent's "Respondent's Index of Documents" (**Index**). The Index listed 100 items.

On November 12, 2002, the Board received Kent's "Respondent's Amended Index of Documents" (**Amended Index**). The Amended Index listed 115 items.

On November 12, 2002, the Board received Petitioner Shaffer's "Motion by Petitioners to Supplement Index," no proposed exhibits were attached to the motion.[7] (**Shaffer Motion – Supp**.). The Motion seeks to supplement the record with an additional 30 items.

On November 18, 2002, the Board received Kent's "Respondent's Response to Petitioners' Motion to Supplement the Index" (**Kent Response - Supp**). The City objected to the inclusion of all items, save one, that it indicated was already in the record. The remaining items, the City contended, were not considered in the adoption of the PAO. Kent Response – Supp., at 1-2.

Also on November 18, 2002, the Board received a filing from Petitioner Shaffer captioned, "Reply to Respondent's Response to Petitioner's Motion to Supplement the Index and Reply to Respondent's Response in Opposition to Petitioners' Motion Requesting Board to Exercise Its Power of Subpoena." There was one attachment. (**Shaffer Reply – Supp. & Subpoena**).

C. Motion Requesting Exercise of Power of Subpoena

On November 12, 2002, the Board received, from Petitioner Shaffer, "Motion Requesting Board to Exercise Its Power of Subpoena," with nine attachments. (**Shaffer Motion – Subpoena**).

On November 18, 2002, the Board received Kent's "Respondent Response in Opposition to Petitioners' Motion Requesting Board to Exercise Its Power of Subpoena (**Subpoena – Kent Opposition**).

Also on November 18, 2002, the Board received a filing from Petitioner Shaffer captioned, "Reply to Respondent's Response to Petitioner's Motion to Supplement the Index and Reply to Respondent's Response in Opposition to Petitioners' Motion Requesting Board to Exercise Its Power of Subpoena," there was one attachment. (**Shaffer Reply – Supp. & Subpoena**).

D. Prefatory Note on Motions

On November 18, 2002, the Board issued a "Board Request for Core Documents." The Order directed the City of Kent to provide copies of Ordinance No. 3398, with attachments and Ordinance No. 3543, with attachments, by November 20, 2002.

On November 19, 2002, the Board received a cover letter and certified copies of the following documents from the City of Kent: Ordinance No. 3398, with attachments and Ordinance No. 3543, with attachments.

Except for Petitioner Shaffer's November 22, 2002 "Petitioners' Rebuttal to Respondent's Motion to Dismiss All Legal Issues," *see supra*, all other motions, responses and replies were timely filed. The Board did not hold a hearing on the motions.

The Board will first address the City's Motion to Dismiss All Legal Issues. Within this discussion the Board will determine whether it has jurisdiction to review the PAO, and if it does, the Legal Issues will then be scrutinized for applicability. Next, Mr. Shaffer's [Kent C.A.R.E.S.] Motions to Supplement the Record and Request to Exercise Power of Subpoena will each be addressed.

IV. Discussion of motions

A. Motion to Dismiss All Legal Issues

Position of the Parties:

The City contends that challenged Ordinance No. 3608 (the Kent Station Planned Action Ordinance or PAO) does not amend the City's Comprehensive Plan or any of Kent's development regulations. Instead the PAO provides "a more streamlined environmental review process at the project stage by conducting more detailed environmental review during planning." (*Citing*: SEPA Handbook, WDOE Publication #98 – 114, § 7.4). Kent Motion – Dismiss, at 1-2. The City asserts that challenges to its Plan and development regulations are untimely. Such challenges should have been brought within 60 days of publication of adoption of those documents. (*Citing*: Montlake Community Club v. CPSGMHB, 110 Wn. App. 731, 43 PO.3d 57 (2002)). Kent Motion – Dismiss, at 3-4. The City then goes on to assert that each and every one of the 25 Legal Issues are not applicable to the PAO since the PAO did not amend the City's Comprehensive Plan or development regulations. Kent Motion – Dismiss, at 5-13.
In response, Petitioner does not dispute that the "Kent Downtown Strategic Action Plan" (**DSAP**) adopted by Ordinance No. 3398 on April 7, 1998, was adopted by the City "as a subarea plan and a supplement to the Kent Comprehensive Plan." Shaffer Response – Dismiss, at 2. However, Shaffer contends the Board has jurisdiction to review the PAO because, "The Kent Station PAO

is a pending revision of the subarea plan that amended the Comprehensive Plan back in 1998." Shaffer Response – Dismiss, at 2. With respect to each of the 25 Legal Issues, Petitioner asserts that the PAO is a "neighborhood plan or a subarea plan" that is subject to the GMA and Board jurisdiction. Shaffer Response – Dismiss, at 2-3.

In reply, Kent counters that the PAO "did not amend the Comprehensive Plan, the DSAP [subarea plan], or any development regulations, and is not a subarea plan itself under RCW 36.70A.080(2). The PAO implements the DSAP, it provides for earlier environmental review, and it encourages economic growth in the City of Kent." Kent Reply – Dismiss, at 3.

Applicable Law and Discussion:

Matters that are subject to Board review are set forth in 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.

(Emphasis supplied.)

It is well established through Board case law and the Washington Courts that the jurisdiction of the Growth Management Hearings Boards is limited to the review of Comprehensive Plans and development regulations adopted, or amended, pursuant to Chapter 36.70A RCW, for compliance with the GMA. *See*: *Happy Valley Assoc. v. King County*, CPSGPHB 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 (Oct. 25, 1993), at 13-14; *South Bellevue Partners Limited Partnership and South Bellevue Development Inc. v. City of Bellevue and Issaquah School District No. 411,* CPSGMHB Case No 95-3-0055, Order of Dismissal, November 30, 1995, at 6; *Citizens for Mount Vernon v. City of Mount Vernon,* 133 Wn.2d 861, 868 (1997); and *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn. 2d 169, 179 (2000).

It is also decided that in GMA planning jurisdictions, subarea plans, or neighborhood plans, must be incorporated, or amended, into Comprehensive Plans. *See: West Seattle Defense Fund et al., v. City of Seattle*, CPSGMHB Case No. 96-3-033, Final Decision and Order, (Mar. 24, 1997); *Lawrence Michael Investments, Chevron U.S.A. and Chevron Land and Development Company*

v. Town of Woodway, CPSGMHB Case No. 98-3-0012, Final Decision and Order, (Jan. 8. 1999); and *Montlake Community Club v. City of Seattle*, CPSGMHB Case No. 99-3-0002c, Final Decision and Order, (Jul. 30, 1999). Therefore, the adoption, or amendment, of a subarea plan falls within the review jurisdiction of Growth Boards.

Here, the City asserts that Ordinance No. 3608 is a "Planned Action Ordinance" that does not adopt or amend a Comprehensive Plan or development regulation pursuant to Chapter 36.70A RCW; nor is Ordinance No. 3608 itself a subarea plan. Kent Motion – Dismiss, at 1-2; and Kent Reply – Dismiss, at 3. The crux of Petitioner's argument is that the PAO, "is a pending revision of the subarea plan that amended the Comprehensive Plan back in 1998." Shaffer Response – Dismiss, at 2.

The issue of whether the Board has jurisdiction turns on the question: Does the PAO adopt or amend a subarea plan? The Board concludes that the Kent Station PAO [Ordinance No. 3608] neither adopts nor amends a subarea plan per chapter 36.70A. RCW. **Therefore, the Board lacks subject matter jurisdiction to review the PAO for compliance with the GMA. The Board's reasoning and findings are as follows**:

1. In 1995, the City of Kent adopted its GMA Comprehensive Plan that included goals and policies for the downtown area. *See*: City of Kent Comprehensive Plan, Ex. 101 [adopted by Ordinance No. 3222].

2. In 1998, the City of Kent adopted the Downtown Strategic Action Plan and Integrated Supplemental EIS as a subarea plan and an amendment to the Comprehensive Plan. *See*: Downtown Strategic Action Plan, Ex. 93, and Ordinance No. 3398, Section 1.

3. Petitioner points to no reference in the PAO [Ordinance No. 3608], nor could the Board find reference, that the PAO is adopted pursuant to Chapter 36.70A RCW or intended to be a subarea plan itself or an amendment to an existing subarea plan. The PAO does not amend Ordinance Nos. 3222 or 3398. *See*: Kent Station Planned Action Ordinance, Ex. 65, and Ordinance No. 3608.

4. Review of the PAO indicates that it does not purport to guide land use decision-making as a subarea plan. Rather, it implements the City's existing land use policies and development regulations. This PAO is intended to expedite and simplify the land use permit process by relying on Kent's land use plan policies (both the City-wide Plan and the DSAP) and its development regulations. *See*: Ordinance No. 3608, specifically, Sections 1. A-F, 2. C, and 3. E. c and g.

5. Petitioner's characterization and assertion that the PAO "is a *pending revision* of the subarea plan" is not supported by the words of the Ordinance No. 3608 itself. *Compare*: Shaffer Response – Dismiss, at 2, and Kent Station Planned Action Ordinance, Ex. 65, and Ordinance No. 3608.

6. Planned Action Ordinances are authorized and governed by SEPA – specifically, RCW 43.21C.031 and WAC 197-11-164, -168 and –172, not the GMA – Chapter 36.70A RCW.

7. Ordinance No. 3608, the challenged PAO, indicates it is adopted pursuant to RCW 43.21C.031 and associated WACs. *See*: Kent Station Planned Action Ordinance, Ex. 65, and Ordinance No. 3608, at 2, 3, 4, 7, 14, 15 and 16.

8. RCW 43.21C.031(2)(a) provides, "For purposes of this section [RCW 43.21C.031], a planned action means one or more types of *project action* . . ." (Emphasis supplied.) This language suggests that PAOs are more akin to project actions than to the broader legislative actions involved in adopting or amending Comprehensive Plans, subarea plans or development regulations.

9. It is well settled that the Boards do not have jurisdiction to review land use project permit decisions. *See*: *Hanson, et al., v. King County*, CPSGMHB Case No. 98-3-0015, Order Granting Dispositive Motions (Sep. 28, 1998); *Petersville Road Area Residents v. Kitsap County*, CPSGMHB Case No 00-3-0013, Order on Motions, (Oct. 23, 2000); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868 (1997); and *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 2d 169, 179 (2000).

10. The Board agrees that "Designating specific types of projects as planned action projects shifts the environmental review of a project from the time a permit application is made to an earlier phase in the planning process. The intent is to provide a more streamlined environmental review process at the project stage by conducting more detailed environmental analysis during planning." *See*: SEPA Handbook, WDOE Publication #98 – 114, § 7.4; and City Reply – Dismiss, at 2.

Conclusion:

Petitioner has failed to persuade the Board that Ordinance No. 3608, adopting the Kent Station Planned Action Ordinance, adopted or amended the City's Comprehensive Plan, subarea plans, or development regulations. Upon review of the PAO, the Board concludes that the Kent Station PAO [Ordinance No. 3608] neither adopts nor amends a subarea plan per chapter 36.70A. RCW. Therefore, pursuant to RCW 36.70A.280(1), the Board lacks subject matter jurisdiction to review Ordinance No. 3608 for compliance with the goals and requirements of the GMA – Chapter 36.70A RCW. The Board will **grant** the City's motion and **dismiss with prejudice** *Kent CARES v. City of Kent*, CPSGMHB Case No. 02-3-0015.

B. <u>Motion to Supplement the Record</u>

Having granted Kent's Motion to Dismiss all Legal Issues for lack of Board jurisdiction, **the Board need not and will not, address Petitioner's Motion to Supplement Index**.

However, the Board notes that Petitioner failed to attach copies of the exhibits being proposed as supplements to the record, nor did Petitioner reference any previously submitted attachments, nor explain why such documents would be necessary or of substantial assistance to the Board in rendering its decision.[8] *See*: PHO, at 4, RCW 36.70A.290(4) and WAC 242-02-540. Therefore, since Petitioner failed to provide copies of documents and explain how they would be necessary or of substantial assistance to the Board there is no basis for the Board to decide whether supplementing the record was appropriate.

C. Motion Requesting Exercise of Power of Subpoena

Having granted Kent's "Motion to Dismiss All Legal Issues" for lack of Board jurisdiction, **the Board need not, and will not, address Petitioner's "Motion Requesting Board to Exercise Its Power of Subpoena**."

V. ORDER

Based upon review of the PFR, Amended PFR, Motions and supporting briefs and materials submitted by the parties, the Act, Washington case law, and prior decisions of this Board and other Growth Management Hearings Boards, the Board enters the following ORDER:

- The City of Kent's Motion to Dismiss All Legal Issues is **granted**.
- CPSGMHB Case No. 02-3-0015, *Kent C.A.R.E.S, Northwest Alliance Inc, and Don B. Shaffer v. City of Kent*, challenging the City's adoption of Ordinance No. 3608 [Kent Station Planned Action Ordinance], is **dismissed with prejudice**.
- The February 10, 2003 hearing on the merits in this matter is **cancelled**.

So ORDERED this 27th day of November 2002.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

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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[1] Nineteen attachments were included with the PFR. Petitioner labeled the attachments as "CPSGMHB Exhibits A-S." However, the Board had not received the City's Index of the record or otherwise determined whether these attachments were part of the record below.

[2] The Original PFR contained nine issues. The memo proposed consolidating the nine issues into five issues. The restated issues are included in the PHO as Legal Issue 21-25.

[3] The same schedule was established for dispositive motions and motions to supplement the record.

[4] The attachments are: 1) Ordinance No. 3603 [Index No. 65]; 2) City of Kent Comprehensive Plan [Index No.

101]; 3) RCW 36.70A.130; and 4) Ordinance No. 3622 [adopted October 1, 2002].

[5] The attachments are: 1) Kent Station Planned Action Final Supplemental EIS [Index No. 55]; and 2) SEPA Handbook § 7.4.

[6] The deadline established by the Board's PHO for Responses to Motions was November 18, 2002. *See*: PHO, at 3-5 and 11.

[7] Copies of the exhibits proposed for supplementing the record shall accompany the Motion to Supplement. PHO, Section VI, at 4.

[8] *See*: Footnote 1. Also, in the final brief on the subject, Petitioner suggests "Numerous examples of letters from the Petitioner to the City of Kent have been submitted thus far as exhibits to the Board. [Any such documents were not attached nor referenced in the motion.] Three common themes in these documents are the complaint that *the City will not respond* to the issues raised, that *there are regulatory violations* and that *the City will not agree to meet* and discuss the concerns of Petitioners." Shaffer Reply – Supp. & Subpoena, at 3, (emphasis supplied).