

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

	)	
JERRY HARLESS and the	)	<b>Case No. 02-3-0018c</b>
SUQUAMISH INDIAN TRIBE,	)	
	)	<i>(Harless, et al)</i>
Petitioners,	)	
	)	
v.	)	
	)	<b>ORDER ON MOTIONS</b>
KITSAP COUNTY,	)	
	)	
Respondent,	)	
and	)	
	)	
McCORMICK LAND COMPANY,	)	
	)	
Intervenor.	)	

---

**I. PROCEDURAL HISTORY**

On November 8, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jerry Harless (**Petitioner** or **Harless**). The matter was assigned Case No. 02-3-0017, and is hereafter referred to as *Harless v. Kitsap County*. Petitioner challenges Kitsap County’s adoption of Ordinance No. 269-2002 adopting the South Kitsap UGA/ULID #6 Subarea Plan (including an expansion of the UGA to include “McCormick West”) and a Memorandum of Agreement between Kitsap County and Port Orchard. The basis for the challenge is noncompliance with the Growth Management Act (**GMA or Act**).

On November 22, 2002, the Board received a Petition for Review (**PFR**) from the Suquamish Indian Tribe (**Petitioner** or **Suquamish**). The matter was assigned Case No. 02-3-0018, and is hereafter referred to as *Suquamish v. Kitsap County*. Petitioner challenges Kitsap County’s Memorandum of Agreement (**MOA**) with the City of Port Orchard entitled “Memorandum of Agreement: Between Kitsap County and the City of Port Orchard Establishing the Planning Process for the South Kitsap Urban Joint Planning Area.” Petitioner also challenges Kitsap

County Ordinance No. 269-2002, which adopted the South Kitsap UGA/ULID #6 Subarea Plan, expanding the Urban Growth Area to include the 619-acre “McCormick West” property. The basis for the challenge is noncompliance with the Growth Management Act (**GMA or Act**).

On November 26, 2002, the Board received two Motions to Intervene from the McCormick Land Company: one to intervene in Case No. 02-3-0017 and one to intervene in Case No. 02-3-0018.

On December 3, 2002, the Board received Petitioner Harless’ Response to McCormick Land Company’s Motion to Intervene.

On December 5, 2002, the Board received Petitioner Suquamish Indian Tribe’s Opposition to McCormick Land Company’s Motion to Intervene.

On December 5, 2002, the Board conducted a Prehearing Conference (**PHC**) for Case No. 02-3-0017 and for Case No. 02-3-0018 in Conference Room 1022 of the Financial Center at 1215 Fourth Avenue, Seattle. Present for the Board was Lois H. North, presiding officer in this case. The Petitioner in Case No. 02-3-0017, Jerry Harless, appeared *pro se*. Sue Tanner, of the Kitsap County Prosecuting Attorney’s Office, represented the Respondent, Kitsap County. Darryl Piercy of the Kitsap County Planning Department was also in attendance. Michelle Hansen represented the Petitioner in Case No. 02-3-0018, the Suquamish Indian Tribe. Raj Basi, legal staff for the Suquamish Indian Tribe, was also in attendance. Duana Kolouskova represented the potential Intervenor, McCormick Land Company.

On December 9, 2002, the Board issued a “Prehearing Order, Order of Consolidation, and Order on Intervention.” The Prehearing Order portion set forth the Legal Issues for the Board to decide and established the final schedule for motions, briefing and the Hearing on the Merits. The Order of Consolidation portion effectively consolidated Case Nos. 02-3-0017 and 02-3-0018 into one case. The consolidated case is assigned CPSGMHB Case No. 02-3-0018c and is captioned *Harless, et al. v. Kitsap County*. The Order on Intervention portion **granted** McCormick Land Company’s Motion to Intervene.

## **II. MOTIONS TO SUPPLEMENT**

On December 9, 2002, the Board received Kitsap County’s “Respondent’s Index to the Record.”

On December 23, 2002, the Board received a letter from Kitsap County offering to file four documents as Core Documents with the Board. The Board’s Administrative Officer telephoned the Board’s approval of these documents.

On December 24, 2002, the Board received Kitsap County’s “Supplemental Index to the Record.”

On December 30, 2002, the Board received Petitioner Harless' Motion to Supplement the Record with sixteen items. Sixteen exhibits were attached to the Motion.

On January 8, 2003, the Board received a complete copy of Exhibit M from Petitioner Harless' Motion to Supplement, asking the Board to replace the enclosed as Exhibit M.

On January 13, 2003, the Board received Kitsap County's Motion to Strike and Memorandum in Response to Harless' Motion to Supplement the Record.

On January 13, 2003, the Board received Intervenor McCormick's Response to Petitioner Harless' Motion to Supplement the Record.

On January 17, 2003, the Board received from the Suquamish Tribe a "Rebuttal to Kitsap County's Motion to Strike and Intervenor's Response to Harless' Motion to Supplement the Record" (**Tribes' Rebuttal**).

On January 17, 2003, the Board received Petitioner Harless' "Rebuttal of County's Motion to Strike, County's and McCormick's Response to Petitioner's Motion to Supplement" (**Harless Rebuttal**).

On January 17, 2003, the Board received "Corrected Kitsap County's Motion to Strike and Rebuttal Memorandum in Support of Motion to Dismiss Petitions" (**County Reply**).

### **III. MOTIONS TO DISMISS PETITIONS FOR REVIEW**

#### **A. Background**

On January 3, 2003, the Board received Kitsap County's "Motion to Dismiss Petitions for Review and Memorandum in Support Thereof." Six exhibits were attached to the Motion. Also on January 3, 2003, the Board received Intervenor McCormick's Dispositive Motion.

On January 13, 2003, the Board received Petitioners' "Response to County's Motion to Dismiss and Intervenor's Dispositive Motion." Eleven exhibits were attached to the Motion.

On January 17, 2003, the Board received "Intervenor McCormick's Reply Regarding Dispositive Motions" (**McCormick's Reply to Disposal**).

On January 17, 2003, the Board received "Corrected Kitsap County's Motion to Strike and

## Rebuttal Memorandum in Support of Motion to Dismiss Petitions” (County’s Reply to Disposal).

### B. Positions of Parties

“Kitsap County asks that the Board dismiss the Petitions for Review filed by Jerry Harless (Harless) and the Suquamish Tribe (Tribe) on three grounds: 1) The Petitions are untimely because the County has not yet adopted a final subarea plan; 2) Petitioners’ issues related to the “buildable lands” process under RCW 36.70A.215 are untimely for the reason that the statute sets no enforceable deadline for action; and 3) to the extent that the Petitions seek review of the Memorandum of Agreement between Kitsap County and the City of Port Orchard Establishing the Planning Process for the South Kitsap Urban Joint Planning Area (MOA), the Board lacks subject matter jurisdiction over them.” (County’s Dispositive Motion, at 1 and 2).

The County continues by stating that the County has not yet adopted a final subarea plan, or corresponding amendments to the County’s comprehensive plan, land use map, zoning code, and zoning map for the subject property. Ordinance 269-2002 adopted a **draft** subarea plan. (Emphasis added). The county commissioners directed their planning staff to merge old and new goals, policies and standards in the new subarea plan, draft corresponding amendments to the comprehensive plan, development regulations, and map designations, and then to send the entire package back through the planning commission for hearing and recommendation. Once that process is complete, the County will adopt a final subarea plan that will be subject to review by this Board.

The County goes on to discuss the two other grounds for dismissal. “Petitioners allege that the County has “failed to act” to meet the requirements of RCW 36.70A.215 are both untimely and contrary to the GMA. The County has met the statute’s requirements to date by publishing its “Buildable Lands Analysis 1995 – 1999” in August of 2002. Nothing in RCW 36.70A.215 requires a jurisdiction to amend its comprehensive plan at any particular time or authorizes such an amendment outside the annual amendment process. Petitioners cannot demonstrate that the County “failed to act” under this statute.

Finally, review of the MOA that Petitioners challenge is outside the scope of the Board’s jurisdiction. The jurisdiction in this type of case is limited to hearing and determining petitions that allege that the county is not in compliance with the GMA as it related to plans, development regulations or amendments adopted under RCW 36.70A.040. RCW 36.70A.280(1)(a). The MOA was executed under Chapter 39.34 RCW, the Interlocal Cooperation Act, and is not a plan, development regulations or amendments thereto adopted under RCW 36.70A.040. Therefore, although the final subarea plan that will emerge as a result of the MOA will be subject to this Board’s review, the MOA itself is not.” County’s Dispositive Motion, at 2 and 3.

In the “Petitioner’s Response to County’s Motion to Dismiss and Intervenor’s Motion,” the Petitioners argue that:

A. The petitions for review were timely made.

1. Kitsap County Ordinance 269-2002 adopted the Subarea Plan and Expanded the UGA and is therefore subject to review.

2. The County’s failure to meet the requirements of RCW 36.70A.215 is a matter ripe for appeal.

B. The MOA is a GMA action, subject to review by this Board.

1. The MOA is a Subarea Plan for purposes of Board review and, in the alternative;

2. The MOA is a Comprehensive Plan Amendment.

C. Population allocation issues raised in the petitions for review are properly addressed by this Board;

D. Reviewing these issues in no way renders the Board’s decision ‘advisory’ or subjects it to excessively duplicative petitions.

Petitioners’ Response, at 2.

In reply, Intervenor McCormick alleges, “Petitioners’ challenge to Ordinance No. 269-2002 is not yet ripe for review and therefore is untimely. The County has not yet adopted a Subarea Plan and has not formally designated the Urban Growth Area. Until that future action, there is no amendment to the comprehensive plan or development regulations for this Board to review. *See, Wenatchee v. Sportsmen Assoc. v. Chelan County*, 141 Wn. 2d 169, 178, 4 P. 3d 123 (2000).” Intervenor’s Reply, at 2.

Intervenor continues with, “The County did not publish Ordinance 269-2002 because it did not intend for this ordinance to operate to adopt the Subarea Plan and does not intend that the Ordinance, standing alone, create any substantive in the development allowed in the joint planning area. Instead, the County took action to direct staff as to what documents and requirements it wanted staff to compile as the Subarea Plan. Once these documents are put together as the subarea plan, and the necessary amendments to the Comprehensive Plan and development regulations are drafted, the Board of Commissioners will then need to take action to finally adopt the Subarea Plan. McCormick expects that, upon adoption, the County would then publish the ordinance adopting the Subarea Plan. At that point, any party wishing to appeal the Subarea Plan would be able to file a petition for review challenging the County’s actions. The effect of allowing an appeal to proceed at this point is that the Board is being asked to evaluate a proposed planning effort before it has been completed. The Petitioners are asking this Board to rule on the overall legality of a planning process midstream, without benefit of or reference to the full set of documents that will eventually set the planning policies for the area in question.” Intervenor’s Reply, at 4 and 5.

The Intervenor alleges that the Memorandum of Agreement (adopted in Ordinance 269-2002) is not a land use policy plan that guides land use decision-making. Instead, the MOA is an agreement between the County and the City of Port Orchard to undertake a joint planning process, and sets forth the planning approach. “The MOA was adopted under the Interlocal Cooperation Act, Chapter 39.34 RCW; it was not adopted pursuant to the GMA. As it stands, the MOA is not subject to review by this Board.” Intervenor Reply, at 8.

### C. Applicable Law and Discussion

#### *Subject Matter Jurisdiction:*

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 added.)

The Board noted its limited jurisdiction in *Happy Valley Assoc. v. King County (Happy Valley)*, 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 (1993):

[The Board’s] jurisdiction does not apply to all planning documents enacted by a local government. . . . Instead, *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 the matters specified in . . . RCW 36.70A.280(1). This conclusion is bolstered by the legislature’s use of the word “only” in the quote above from the statute, and the fact that RCW 36.70A.300(1) indicates that a board’s final decision “. . . shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, or chapter

43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040 . . .” *Happy Valley*, at 13-14 (emphasis in original).

This Board has also held that “this chapter” as used in RCW 36.70A.280(1) refers to Chapter 36.70A RCW. *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.

In short, this Board has stated that its jurisdiction is generally limited to review of comprehensive plans and development regulations adopted, or amended, pursuant to Chapter 36.70A RCW.

#### D. Conclusion

Petitioners have failed to persuade the Board that Ordinance 269-2002, adopting the South Kitsap UGA/ULID #6 Draft Subarea Plan and a Memorandum of Agreement between Kitsap County and the City of Port Orchard, adopted or amended the County’s Comprehensive Plan, subarea plans, or development regulations. Upon review of the motions and the record in this case, the Board concludes that Ordinance 269-2002 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 269-2002 for compliance with the goals and requirements of the GMA, Chapter 36.70A RCW. The Board will **grant** the County’s and Intervenor’s motion and **dismiss with prejudice** *Harless, et al., v. Kitsap County*, CPSGMHB Case No. 02-3-0018c.

#### **IV. DISCUSSION OF SUPPLEMENTAL MOTIONS**

Having granted Kitsap County’s and Intervenor’s Motions to Dismiss for lack of Board jurisdiction, **the board need not and will not, address Petitioner’s Motion to Supplement Index.**

#### **V. ORDER**

Based upon review of the PFRs, 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:

Kitsap County’s and McCormick’s Motions to Dismiss all Legal Issues is **granted**.

CPSMGHB Case No. 02-3-0018c, *Harless, et al. v. Kitsap County*, challenging the County’s

adoption of Ordinance 269-2002 (South Kitsap UGA/ULID #6 Draft Subarea Plan) is **dismissed with prejudice**.

The March 20, 2003 hearing on the merits in this matter is hereby **cancelled**.

So ORDERED this 12th day of December, 2002.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

---

Edward G. McGuire, AICP  
Board Member

---

Lois H. North  
Board Member

---

Joseph W. Tovar, AICP  
Board Member