

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

KENT CARES, NORTHWEST	)	
ALLIANCE INC., and DON B.	)	<b>Case No. 02-3-0019</b>
SHAFFER,	)	
	)	<i>(Kent CARES II)</i>
Petitioners,	)	
	)	
v.	)	
	)	<b>ORDER ON MOTIONS</b>
CITY OF KENT,	)	
	)	
Respondent.	)	
	)	
	)	

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**I. Background**

On December 4, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Kent CARES, Northwest Alliance, Inc., and Don B. Shaffer (**Petitioner** or **Shaffer**). The matter was assigned Case No. 02-3-0019, and is hereafter referred to as *Kent CARES v. City of Kent*. The short title of this case will be *Kent CARES II*. Board member Joseph W. Tovar is the Presiding Officer for this matter. Petitioners challenge the City of Kent’s (the **City, Kent** or **Respondent**) adoption of Ordinance Nos. 3620, 3622 and 3624 and Resolution No. 1631. The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On December 12, 2002, the Board received a “Notice of Appearance” from the Kent City Attorney’s Office.

On December 13, 2002, the Board issued the “Notice of Hearing” in the above captioned matter.

On December 19, 2002, the Board issued a “Scrivener’s Error Corrections to Notice of Hearing” which clarified that the date for the prehearing conference had been set for 10 a.m. on Wednesday, January 15, 2002.

On January 10, 2002, the Board’s Administrative Officer contacted the parties to this case to

inform them that the starting time for the prehearing conference would be 11:00 a.m. rather than 10:00 a.m.

On January 14, 2002, the Board received “Motion for Change of Hearing Date” from the City.

The prehearing conference was conducted beginning at 11:00 a.m. on January 15, 2003 in Suite 1022 of the Financial Center, 1215 Fourth Avenue, Seattle, WA. Present for the Board was presiding officer Joseph W. Tovar. Representing himself, *pro se*, was petitioner Don Shaffer. Representing the City was Kim Adams Pratt.

The Board issued the “Prehearing Order” (the **PHO**) on January 21, 2003, setting forth the legal issues to be briefed and a schedule for the submittal of motions and briefs.

On February 7, 2003, the Board received from Petitioner a “Motion to Supplement Index and Motion Requesting Board to Exercise its Power of Subpoena” (**Petitioner’s Motion for Supplementation and Subpoena.**) On this same date, the Board received from Kent “Respondent’s Motion to Dismiss for Lack of Jurisdiction and Respondent’s Motion to Supplement Index” (the **City’s Motion re: Jurisdiction and City’s Motion to Supplement Index**); “Respondent’s Motion to Dismiss for Lack of Standing” (the **City’s Motion re: Standing**); and “Respondent’s Amended Index of Documents” (the **Amended Index**).

On February 21, the Board received from Petitioner “Request for One-Day Extension of Deadline for Filing Responses to Motions” (the **Motion for One-Day Extension**) and “Respondent’s Opposition to Petitioner’s Request for One-Day Extension of Deadline for Filing Responses to Motions.” On this same date, the presiding officer orally granted the motion for one-day extension as well as adding a one-day extension for the filing of Rebuttals, and asked the Board’s Administrative Officer, Susannah Karlsson, to inform the parties of this ruling.

On February 21, 2003, the Board received a “Response to Motion to Supplement Index and Motion Requesting Board to Exercise its Power of Subpoena” (the **City’s Response to Motion to Supplement and Subpoena**).

On February 24, 2003, the Board received “Petitioner’s Response to Respondent’s Motion to Dismiss for Lack of Jurisdiction and Petitioner’s Response to Respondent’s Motion to Dismiss for Lack of Standing and Petitioner’s Response to Respondent’s Motion to Supplement Index” (**Petitioner’s Response**).

On March 3, 2003, the Board received “Petitioner’s Rebuttal to Respondent’s Response to Petitioner’s Motion to Supplement Index and “Petitioner’s Rebuttal to Respondent’s Response to Petitioner’s Motion Requesting Board to Exercise its Power of Subpoena” (**Petitioner’s**

**Rebuttal**). Also on March 3, 2003, the Board received “Respondent’s Rebuttal to Petitioner’s Response to Respondent’s Motions” (the **City’s Rebuttal**).

On March 10, 2003, the Board issue an “Order Amending Final Schedule.”

## **II. FINDINGS OF FACT**

1. City of Kent Ordinance No. 3620 was adopted by the Kent City Council on October 1, 2002. PFR, Ex. A.
2. The caption of Ordinance No. 3620 reads: “**AN ORDINANCE** of the City Council of the City of Kent, Washington, relating to the vacation of a portion of the west 576.71 of Temperance Street as dedicated within the plat of Ramsey’s Addition in Volume 16 of plats, page 89 recorded in King County, Washington, except the west 12.88 feet thereof in the City of Kent.” *Id.*
3. The caption of City of Kent Ordinance No. 3622 reads: “**AN ORDINANCE** of the City Council of the City of Kent, Washington, amending section 14.01.080 of the Kent City Code, entitled “Appeal,” to provide for reasonable application and interpretation of the provisions of the Uniform Building Code.” PFR, Ex. B.
4. City of Kent Ordinance No. 3624 was adopted on October 15, 2002. PFR, Ex. C.
5. The caption of City of Kent Ordinance No. 3624 reads: “**AN ORDINANCE** of the City of Kent, Washington, amending section 15.08.400(I) of the Kent City Code, regarding planned unit developments, to provide a process for the modification of master plans located in commercial, office, and manufacturing zones consistent with planned action ordinances and development agreements.” PFR, Ex. C.
6. City of Kent Ordinance No. 3633 was adopted on January 7, 2003. Respondent’s Motion to Supplement the Index, Ex. A.
7. The caption of Ordinance No. 3633 reads: “**AN ORDINANCE** of the City Council of the City of Kent, Washington, repealing Ordinance 3624 regarding the modification of master planned developments located in commercial, office and manufacturing zones.” *Id.*
8. City of Kent Resolution No. 1631 was adopted on October 15, 2002. PFR, Ex. D.
9. The caption of Resolution No. 1631 reads: “**A RESOLUTION** of the City Council of the City of Kent, Washington, adopting the 2002-2008 Six Year Transportation Improvement Plan.” *Id.*

## **II. MOTIONS TO SUPPLEMENT**

Both the City and Petitioner filed motions to supplement the record pursuant to WAC 242-02-540. In addition, a portion of the Petitioner's motion includes a request for discovery and subpoena pursuant to WAC 242-02-410 and 420.

The City's Motion to Supplement the Index proposes adding Ordinance 3624. The Petitioner is in agreement with the City's Motion to Supplement the Index, and does not oppose it. Petitioner's Response Brief, at 15. The Board may take official notice of city resolutions and ordinances pursuant to WC 242-02-660. The City's Motion to Supplement the Index is **granted**.

The Petitioner proposed supplementation of the record with a number of proposed exhibits and requested the Board to authorize discovery and to exercise its subpoena powers pursuant to WAC 242-02-410 and WAC 242-02-420, respectively. The City opposes supplementation of the record with the proposed exhibits, opposes the authorization of discovery and opposes the Board's exercise of its subpoena powers. City's Response to Motion to Supplement and Subpoena, at 1-3. The Board is aware, from the Petitioner's Response to the City's Motion re: Standing, that somewhere in the proffered proposed exhibits, there may be documentary evidence necessary to establish the standing asserted in Petitioner's Response.<sup>[1]</sup> For this reason, the Board will **grant** that portion of the Petitioner's Motion for Supplementation and Subpoena that admits, for the Board's scrutiny, the proposed exhibits attached to that pleading. The portion of Petitioner's Motion for Supplementation and Subpoena that requested authorization of Discovery and for the Board to exercise its power of Subpoena is **denied**.

## **III. MOTIONS TO DISMISS**

### **A. Prefatory Note**

The City has filed two motions to dismiss this case. The City's Motion re: Jurisdiction is directed at all four City actions<sup>[2]</sup> that are challenged by Petitioner. Likewise, the City's Motion re: Standing is directed at all four City actions. The Board will first address the question of jurisdiction.

### **B. Motion to Dismiss for Lack of Jurisdiction**

#### **1. Positions of the Parties**

##### **a. Ordinance No. 3620 – Temperance Street Vacation**

Kent argues that the Board lacks jurisdiction over the street vacation by pointing to the GMA's provisions that circumscribe the Board's jurisdiction. The City argues that the GMA limits Board review to petitions which allege:

- a. That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter [chapter 36.70A RCW], 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; or
- b. That the twenty-year (20) growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

RCW 36.70A.280, cited in City's Motion re: Jurisdiction, at 1-2.

Kent points out that street vacations are governed by chapter 35.79 RCW, and that this statute is not named in RCW 36.70A.280. *Id.* The City further contends that the street vacation does not purport to amend either the comprehensive plan or development regulations and that it is therefore outside the bounds of RCW 36.70A.280. *Id.*

Petitioner contends that the vacation of a portion of Temperance Street amounts to a *de facto* amendment to the City's comprehensive plan, and therefore argues that the Board does have jurisdiction. Petitioner argues:

. . . Temperance Street, as a through street in the Subarea plan, is also shown as a through-street in the PAO final site plan . . . However, once the City acted to remove Temperance Street as a through street by vacating it under Ordinance 3620, the vacation resulted in an attempt by the City to generate a *de facto* amendment to the Comprehensive Plan.

Petitioner's Response, at 5.

In support of this argument, the petitioner pointed to the 1998 Plan amendment and stated:

Temperance Street is shown as the only through-street connecting Fourth Avenue and First Avenue between Smith Street and James Street. Without Temperance Street, there would be no east-west route for over 1200 feet . . . In addition, Temperance Street, consistent with the Comprehensive Plan, is shown as a through-street connecting First and Fourth Avenue in the "Alternative 2" site plan submitted in the spring of 2002 as the master plan for the Kent Station Planned Action Ordinance . . .

*Id.*

The City disputes Petitioner’s characterization of the Temperance Street vacation as an amendment to the 1998 comprehensive plan amendment, the Downtown Strategic Action Plan (the **DSAP**). City’s Rebuttal, at 1-2. In rebuttal to page v-30 attached as Exhibit A to Petitioner’s Response Brief, the City submitted the entirety of the DSAP and pointed to text appearing on page v-31, arguing:

A review of the text . . . explains what the recommended improvements were for the North Core District and shows that Temperance Street is not even mentioned . . . [it] is shown on Figure v-21 as a street because in 1998 it was an unopened public street. It was not included in any specific plans for the North Core District. Ordinance No. 3620 vacating Temperance Street is not an amendment to the Comprehensive Plan or any of its previous amendments.

*Id.*

b. Ordinance No. 3622 – Amendments to Uniform Building Code Procedures

The City makes a similar argument with respect to Ordinance No. 3622. The City points out that these amendments are governed by Chapter 19, 27 RCW, the State Building Code, and WAC 51-40, 51-42, and 51-47. City’s Motion re: Jurisdiction, at 3-4. Because none of these RCW or WAC provisions are among those named in RCW 36.70A.280, the City argues that the Board lacks jurisdiction to review Ordinance No. 3622.

*Id.*

Petitioner states:

The City claims that the Board does not have jurisdiction over Ordinance 3622 dealing with City construction-permit appeals. Petitioners assert that the City does not currently process its permits in a fair manner, and that Ordinance 3622, if not repealed, will allow the City in the future to operate even more unfairly and with even greater discriminatory practices. Subsection 7 of RCW 36.70A.020 requires that “local government permits should be processed in a timely and fair manner.” Petitioners assert that *the right of citizens to repeal administrative decisions regarding the approval of permits is part of the overall ‘permit process’ and that efforts by the City to restrict the public’s ability to challenge administrative decisions by the City is a violation of the GMA.*

Petitioner's Response, at 9. Emphasis added.

c. Ordinance No. 3624 – Amendments to regulations dealing with master planned developments

The City argues that the Board lacks jurisdiction over Ordinance No. 3624 because it has been repealed by Ordinance No. 3633. City Motion re: Standing, at 2.

The Petitioner argues that the City “has ‘temporarily’ repealed Ordinance No. 3624 . . .” and that the City has stated its intent to re-adopt the same language within 60 days. Petitioner's Response, at 3. Petitioner declares his intent to challenge such a future re-adoption and argues that it would be more efficient to address these issues now rather than later. *Id.*

d. Resolution No. 1631 – Amendments to the Transportation Improvement Program

The City argues that the Board lacks jurisdiction to review the City's amendments to its Transportation Improvement Plan because the adopting Resolution, No. 1631, was done under the authority of Chapter 35.77 RCW, rather than the GMA. City Motion re: Jurisdiction, at 4.

Petitioner asserts that the Board does have jurisdiction because the TIP “... acts to update the City's prior Six-Year Transportation Plan in that it both adds transportation projects and subtracts transportation projects from the prior plan.” Petitioner's Response at 11-12. Petitioner further argues: “A major change in the transportation facilities from what is described in detail in the existing Comprehensive Plan is not a decision that can be made without thorough public review and comment.” *Id.*

## 2. Analysis and Conclusions

a. Ordinance No. 3620 – Temperance Street Vacation

The Board agrees with the City that the Temperance Street Vacation is governed by a statute, Chapter 35.79 RCW, which is not one of those named in RCW 36.70A.280. The Board concludes that the street vacation is outside the scope of the Board's authority to review. Therefore, the Board concludes that the portions of the City's Motion re: Jurisdiction that seek to dismiss Legal Issues 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 as to alleged noncompliance of Ordinance No. 3620 should be and are **granted**.

b. Ordinance No. 3622 – Amendments to Uniform Building Code Procedures

The Board agrees with Kent that the City's amendments to its appeal procedures regarding the Uniform Building Code are outside the Board's jurisdiction. The Petitioner has raised an

interesting and important question regarding the duty of local governments to comply with RCW 36.70A.020(7). This is not a question that has been raised in many prior cases and the Board has therefore not substantively addressed it. Here, the Board is not persuaded that the “permit processes” contemplated by RCW 36.70A.070(7) include life/safety codes, such as the Uniform Building Code or Fire Safety Codes, as opposed to development regulations such as those explicitly named at RCW 36.70A.030(7)<sup>[3]</sup>. Indeed, by its specific terms, that GMA definition excludes “a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.”

Therefore, the Board concludes that the portions of the City’s Motion re: Jurisdiction that seek to dismiss Legal Issues 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 as to alleged noncompliance of Ordinance No. 3622 should be and are **granted**.

c. Ordinance No. 3624 – Amendments to regulations dealing with master planned developments

The Board agrees with the City that the repeal of Ordinance No. 3624 means that it is no longer before the Board. While the Board understands Petitioner’s concern that it appears that this issue will be litigated again in the future, the fact remains that the challenged action here is moot. Moreover, there is no guarantee that the City will take the anticipated action, nor that the record presently before the Board will be the same record that supports such a potential future action. The Board concludes that the portions of the City’s Motion re: Jurisdiction that seeks to dismiss Legal Issues 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 as to alleged noncompliance of Ordinance No. 3624 should be and are **granted**.

d. Resolution 1631 – Amendments to the Transportation Improvement Program

The Board does not agree with the City that it lacks jurisdiction to review a challenge to a Transportation Improvement Program or Plan. In a prior case, the Board determined that, while a TIP is a discrete document apart from the Transportation or Capital Facilities Element of a comprehensive plan, a challenge to a TIP or an amendment to a TIP is not beyond the scope of the Board’s jurisdiction. The Board stated:

... for Petitioners to sustain a challenge as to whether the County is making its capital budget decisions in conformity with its plan, as it pertains to roads, Petitioners must challenge the County’s TIP, which Petitioners have not done.

*McVittie v. Snohomish County*, CPSGMHB Case No. 99-3-0016c, Final Decision and Order, February 9, 2000, at 20.

Consequently, the Board will decline to grant the portion of the City's Motion re: Jurisdiction that speaks to Resolution No. 1631.

### **C. Motion to Dismiss for Lack of Standing**

Having concluded, *supra*, that it will dismiss the challenges to Ordinances Nos. 3620, 3622 and 3624 due to a lack of Board jurisdiction, the Board need not and will not address the portion of the City's Motion re: Standing that addresses those actions. Instead, the Board will address only the portion of the motion that goes to Resolution No. 1631.

#### **1. Positions of the Parties**

#### **Resolution No. 1631 – Amendments to the Transportation Improvement Plan**

Kent argues that the Petitioners failed to establish standing because they did not participate orally or in writing when the Kent City Council considered Resolution No. 1631. The City asks the Board:

. . . to dismiss the PFR because the city did not receive oral testimony or written comments from Mr. Don Shaffer as an individual, any person representing Northwest Alliance, Inc., or any person representing Kent C.A.R.E.S. while the city was contemplating the Resolution . . . under appeal .

City's Motion re: Standing, at 2.

The City points to the minutes of the City Council hearing on the Six-Year Transportation Improvement Plan which show no indication that the Petitioners in any capacity participated. *Id.*, at 3.

In response, Petitioners assert:

As is illustrated in attached hereto, and the Exhibit's [sic] attached Petitioners Motion to Supplement Index, for the last couple of years, the Petitioners have spent hundreds of hours writing letters to the City on subjects covered by the Resolution and Ordinances referenced in Case No. 02-3-0019, with virtually no written response ever received back from the City concerning these same matters. It is impossible for the City to argue that they were unaware of Petitioner's interest concerning each of these matters, yet no effort was made to notify Petitioners, even though City was fully aware that Petitioner's mailing address was not in Kent, but in Seattle.

Petitioner's Response, at 14.

## 2. Analysis and Conclusions

The Board has reviewed the exhibits that were attached to the Petitioner's Response, as well as the voluminous proposed supplementary exhibits that were attached to the Petitioner's Motion for Supplementation and Subpoena. These exhibits corroborate the Petitioners' claim that he has been extensively engaged in communication with the City on a variety of matters surrounding the questions of land use, transportation and facilities in downtown Kent. This involvement, however, extensive as it was, does not confer standing on Petitioner in the present matter nor does it impose a duty on the local government to provide to such an individual a personal or special notice of a pending legislative action.

After scouring the referenced exhibits, the Board could find no evidence that the Petitioners commented on the amendment to the City's Six Year Transportation Improvement Plan that was effectuated by Resolution No. 1631. The only exhibit that even mentions the City's Six Year Transportation Improvement Program is Exhibit K attached to the Petitioner's Response; however this is not a comment or communication of any kind from Petitioner. Rather, it is a description of a project from the T.I.P. Thus, there is no documentary evidence that the Petitioner participated in the City's deliberation and adoption process relative to Resolution No. 1631. The Board agrees with the City that Petitioner has failed to establish standing to challenge the GMA compliance of Resolution No. 1631.

The Board concludes that the portion of the City's Motion re: Standing that seeks to dismiss Legal Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 as to alleged noncompliance of Resolution No. 1631 should be and is **granted**.

### **iV. order**

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

The portion of the City's Motion re: Jurisdiction regarding Ordinance Nos. 3620, 3622 and 3624 is **granted**. The portion of the City's Motion re: Standing regarding Resolution No. 1631 is **granted**. Consequently, all issues set forth in the PHO are **dismissed**, and the entirety of PFR 02-3-0019 is **dismissed with prejudice**. The briefing schedule and the hearing on the merits noted in the PHO are **stricken**.

So ORDERED this 14<sup>th</sup> day of March 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member

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Lois H. North  
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.

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[1] Petitioner asserts that :

As is illustrated in attached hereto, and the *Exhibit's [sic] attached [to] Petitioners Motion to Supplement Index, . . .* Petitioners have . . . [written] letters to the City *on subjects covered by the Resolution . . .* in Case No. 02-3-0019, . . . Petitioner's Response, at 14, emphasis added.

[2] The four actions are the City's adoption of Ordinances Nos. 3620, 3622, 3624 and Resolution No. 1631.

[3] RCW 36.70A.030(7) provides:

“Development regulations” or “regulation” means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendment thereto. *A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.*

Emphasis added.