

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

CORINNE R. HENSLEY, MARK)
SAKURA, PATRICIA ESTON,)
LINDA GRAY, AARON NOBLE, and)
SNO-KING ENVIRONMENTAL)
ALLIANCE)
)
Petitioners,)
)
v.)
)
SNOHOMISH COUNTY,)
)
Respondent.)

Case No. 02-3-0021

ORDER ON DISPOSITIVE MOTION

I. Background

On December 13, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Corinne R. Hensley, Mark Sakura, Patricia Weston, Linda Gray, Aaron Noble, and the Sno-King Environmental Alliance (collectively, **Sakura** or **Petitioners**). The matter was assigned Case No. 02-3-0021, and is hereafter referred to as *Sakura, et al., v. Snohomish County*. The short title of this case will be *Sakura*. Board member Joseph W. Tovar is the Presiding Officer for this matter. Petitioners allege that Snohomish County (the **County**) failed to comply with the requirements of the Growth Management Act (**GMA** or the **Act**) because it has not designated critical aquifer recharge areas.

On January 9, 2003, the Board received “Snohomish County’s Index of Record.”

The Board conducted the prehearing conference in this matter beginning at 1:30 p.m. on January 15, 2003 in Suite 1022 of the Financial Center, 1215 Fourth Avenue, Seattle, WA. Present for the Board was Joseph W. Tovar, presiding officer. Representing petitioners were Linda Gray, Corinne Hensley and Mark Sakura. Representing the County was Jason Cummings. After a review of the PFR, the tentative schedule and potential motions to be filed, the parties agreed to bifurcate the motions practice portion of the case so that the County could have its dispositive motion handled before any Petitioner Motions to Supplement the Record. The presiding officer also agreed that the parties could serve one another by fax or email, provided that they submitted a stipulation to that effect.

On January 15, 2003, the Board issued the Prehearing Order (the **PHO**) in this matter.

On January 17, 2003, the Board received from the parties a “Stipulation Regarding Service.” On this same date, the Board received “Snohomish County’s Motion to Dismiss” (the **County’s Dispositive Motion**) with Attachments 1 through 4.

On January 27, 2003, the Board received “Petitioners Response to County’s Motion to Dismiss” (the **Petitioners’ Response Brief**) with attached Exhibits A and B.

On January 31, 2003, the Board received “Snohomish County’s Reply in Support of its Motion to Dismiss” (the **County’s Reply**).

II. FINDINGS OF FACT

1. Snohomish County adopted Ordinance No. 92-018 on April 27, 1992, the caption of which reads: INTERIM GROUNDWATER PROTECTION ORDINANCE: AMENDING SNOHOMISH COUNTY CODE TITLE 32. County’s Dispositive Motion, Attachment 1.
2. Section 32.11.020.1 provides: If the evaluation under SCC 32.11.010 identifies significant impacts to critical aquifer recharge areas, the project applicant will be required to document potential impacts and provide a discussion of alternatives by which such impacts could be avoided or prevented. *Id.*
3. Section 32.11.050(9) provides: Interim development regulations – regulations required by the Growth Management Act, as amended, to protect critical areas, including areas with a critical recharging effect on aquifers used for potable water until 1994 when permanent protection measures will be put in place. *Id.*
4. Section 3 of Ordinance No. 92-018 provides: Repealer. This ordinance is hereby repealed on July 1, 1994, unless amended or reenacted prior to that date. *Id.*
5. The County published on July 26, 1992, a “Notice of Enactment of Ordinance” with respect to Ordinance No. 92-018. County’s Dispositive Motion, Attachment 2.
6. The County adopted Ordinance No. 94-054 on June 20, 1994, Section 1 of which provides: Section 3 of Ordinance No. 92-018 as adopted by the County Council on April 27, 1992 is hereby repealed. County’s Dispositive Motion, Attachment 3.
7. The County published Notice of Enactment of Ordinance No. 94-054 on June 30, 1994. County’s Dispositive Motion, Attachment 4.

iii. MOTION TO DISMISS

The County's Dispositive Motion seeks to have the Board dismiss the Sakura PFR because the County has already adopted ordinances to satisfy the GMA requirements to designate and protect critical aquifer recharge areas. County's Dispositive Motion, at 1. The County points out that it adopted interim regulations protecting critical aquifer recharge areas in 1992 and rendered those regulations as permanent regulations in 1994. *See* Finding of Facts No. 1 and 4. The County argues that the published notice for these actions were in 1992 and 1994. *See* Finding of Fact Nos. 5 and 7. The County argues that the present PFR is time-barred because challenges to the GMA compliance of the County's critical aquifer recharge areas Ordinances had to have been made within 60 days of publication of notice. County's Dispositive Motion, at 1. The County cites to the Board's holdings in *Gain v. Pierce County*^[1] in support for its motion to dismiss. County's Dispositive Motion, at 2.

The County points to ordinances 92-18 and 94-54 as evidence that it has complied with the requirement to adopt development regulations to protect critical aquifer recharge areas. The County also contends that the Board has previously acknowledged the County's adoption of same, citing a 1994 case:

The motion is granted; the County has not yet designated critical areas and adopted interim development regulations that protect critical areas, *other than aquifer recharge areas*, pursuant to the GMA. Accordingly, the County has not "failed to act."

Id., at 3, citing *Pilchuck Audubon Society and Snohomish Wetlands Alliance v. Snohomish County*, CPSGMHB Case No. 94-3-0002, Dispositive Order Granting Stipulated Motion, May 16, 1994, at 2. Emphasis by Respondent.

Sakura responds that the County not only had a GMA duty to protect critical areas under RCW 36.70A.060, but to designate them pursuant to RCW 36.70A.170. It is this latter duty that Petitioners contend the County has breached. Petitioners' Response Brief, at 1. Sakura argues:

The County took actions in 1992 through 92-018 to protect groundwater in the interim and then again in 1994 through 94-054 regarding the repealer. The protection measures were adopted through RCW 36.70A.060 . . .

The County arguably took actions to **protect** CARAs. But they did no take actions to **designate** CARAs as required in RCW 36.70A.170 and RCW 36.70A.040(3) . . . GMA requires actions to both designate and to protect as separate measures to be taken in order to comply with the Act.

Petitioners' Response Brief, at 2. Emphasis in original.

The County counters that Sakura has abandoned part of its original argument and is wrong on its remaining argument. The County argues:

. . . Petitioners abandon their contention that the County has failed to protect CARAs . . . [h]owever, Petitioners continue to erroneously assert that the County has failed to designate CARAs pursuant to RCW 36.70A.040(3) and .170(1)(d) . . . This argument flies in the face of reason and prior decisions of the Board.

County's Reply, at 2.

The County goes on to cite several Board decisions for the proposition that the duty to designate pursuant to RCW 36.70A.170 does not require that the critical areas be mapped: *Gutschmidt v. City of Mercer Island*, (*Gutschmidt*) CPSGMHB Case No. 92-3-0006, Final Decision and Order, March 16, 1993, at 12; also, *Pilchuck v. Snohomish County* (*Pilchuck II*), CPSGMH Case No. 95-3-0047, Final Decision and Order, Dec. 6, 1995, at 19.

The Board affirms its holdings in *Gutschmidt* and *Pilchuck II*. Contrary to Petitioners' assertions, it is incorrect to state that "GMA requires actions to both designate and to protect as separate measures to be taken in order to comply with the Act." Petitioners' Response Brief, at 2. The County's approach, to rely on identification of CARAs on a site-by-site basis, is within the range of choices available to local governments to satisfy the designate and protect mandates for critical areas. The County's Dispositive Motion is therefore **granted** and PFR 02-3-0021 is **dismissed with prejudice**.

Conclusion

Snohomish County has complied with the GMA duty to designate and protect critical aquifer recharge areas. The County's Dispositive Motion is **granted**. PFR 02-3-0021 is **dismissed with prejudice**. The briefing schedule and the hearing on the merits noted in the PHO are **stricken**.

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 County's Dispositive Motion is **granted**. PFR 02-3-0021 is **dismissed with prejudice**.

So ORDERED this 12th day of February 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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.

[\[1\]](#) CPSGMHB Case No. 99-3-0019, Order on Dispositive Motions, Jan. 28, 2000, at 2.