

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

CORINNE R. HENSLEY, <i>et al.</i>)	
Petitioner,)	Consolidated Case No. 03-3-0009c
v.)	<i>(Hensley VI, et al)</i>
)	
SNOHOMISH COUNTY,)	
Respondent,)	
)	
MARK VERBARENDSE,)	
Intervenor,)	
)	
YARMUTH – DAVIS)	
PARTNERSHIP,)	ORDER ON MOTIONS
Intervenor,)	
)	
MBA-SCCAR,)	
Intervenor,)	
)	
MAC ANGUS RANCHES, INC.,)	
Intervenor,)	
)	
And)	
)	
SULTAN SCHOOL DISTRICT NO.)	
311 and MARYSVILLE SCHOOL)	
DISTRICT NO. 25,)	
Intervenors.)	

I. Background

A. Petitions for Review

On February 14, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Corinne R. Hensley (**Hensley** or **Petitioner**). The matter was assigned Case No. 03-3-0005, and is hereafter referred to as *Hensley VI v. Snohomish County*. Petitioner challenges Snohomish County’s adoption of Emergency Ordinances 3-001, 3-002, and 3-005. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or the **Act**) and the State Environmental Policy Act (**SEPA**).

On February 27, 2003, the Board received a PFR from Windsong Neighborhood Association (**Windsong, WNA** or **Petitioner**). The matter was assigned Case No. 03-3-0007 and is captioned *Windsong Neighborhood Association v. Snohomish County*. Petitioner challenges Snohomish County's adoption of Emergency Ordinances 3-001 and 3-002. The basis for the challenge is that the Ordinances are noncompliant with several sections of the GMA. Petitioner also challenges Snohomish County's failure to act under SEPA (RCW 43.21C), as required for the Eberth and Fjarlie proposals, adopted as an annual comprehensive plan amendment and rezone.

On March 18, 2003 the Board issued an Order of Consolidation, Notice of Hearing and Order Granting Motions to Intervene, combining cases 03-3-0005 and 03-3-0007.

On March 25, 2003 the Board received a PFR from 1000 Friends of **Washington (1000 Friends** or **Petitioners**). The matter was assigned Case No. 03-3-0009 and is captioned *1000 Friends of Washington v. Snohomish County*. Petitioner challenges Snohomish County's adoption of Ordinances 3-001, 3-002, and 3-005. The basis for the challenge is that the Ordinances are noncompliant with various provisions of the GMA and the SEPA.

On April 3, 2003, the Board issued a Second Order of Consolidation and Order Granting Motions to Intervene, combining Case Nos. 03-3-0005, 03-3-0007 and 03-3-0009. The case will hereafter be known as Hensley, et al. v. Snohomish County, Case No. 03-3-0009c.

B. Motions to Intervene

On March 3, 2003, the Board received a Motion to Intervene on behalf of Mark Verbarendse.

On March 11, 2003, the Board received a Motion to Intervene from Yarmuth Davis Partnership.

On March 18, 2003, the Board granted the two Motions to Intervene.

On March 25, 2003, the Board received a Motion from the Master Builders Association (MBA) and Snohomish County – Camano Association of Realtors (SCCAR) for Amicus Status. At the Prehearing Conference held on March 31, 2003, the attorney representing MBA and SCCAR indicated that the organization would prefer to be granted Intervenor status. The Board orally granted the motion at the Prehearing Conference.

On April 2, 2003, the Board received a Stipulation from MacAngus Ranches, Inc. and 1000 Friends of Washington requesting that the Board grant Intervenor status in this case to MacAngus Ranches, Inc. as to 1000 Friends' issues.

On April 3, 2003, the Board issued an Order granting the motions by MacAngus Ranches, Inc. and by MBA and SCCAR to intervene.

On April 18, 2003, the Board received a Joint Motion to Intervene by the Sultan School District No. 311

and the Marysville School District No. 25.

On April 29, 2003, the Board granted the Joint Motion to Intervene by the Sultan School District No. 311 and the Marysville School District No. 25.

II. MOTIONS TO SUPPLEMENT

A. Background

On April 18, 2003, the Board received Intervenor MacAngus Ranches, Inc.'s Motion to Supplement the Record with seven exhibits (Exhibits A through G).

On April 21, 2003, the Board received Petitioner Hensley's Motion to Supplement the Record with numerous items.

On April 21, 2003, the Board received Petitioner Windsong Neighborhood Association's Motion to Supplement the Record and Memorandum in Support with eight attached exhibits.

On April 28, 2003, the Board received Respondent Snohomish County's Response to Motions to Supplement the Record.

On May 5, 2003, the Board received Hensley's rebuttal to the County's response.

On May 5, 2003, the Board received Windsong Neighborhood Association's Reply Re Windsong's Motion to Supplement the Record.

B. Positions of the Parties

MacAngus

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Intervenor MacAngus states,

While MacAngus' proposal was on the 2001 Docket, MacAngus prepared and presented materials to the County's Agricultural Advisory Board and the County Council that are directly relevant to its 2002 Docket Proposal (which is exactly the same as its 2001 Docket Proposal). In addition, MacAngus prepared and presented to the County's Planning Commission materials related to its Docket Proposal. As is outlined below, all of these materials would be of 'substantial assistance to the board in reaching its decision' WAC 242-02-540.

MacAngus Motion, at 1 and 2.

The Respondent Snohomish County replies, "As set out in the table above, one document identified by MacAngus is already included in the record and the County does not object to supplementing the record

with the other materials identified by this intervenor.” County’s Response, at 7.

Hensley

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Petitioner Hensley requests that sixteen items be added to the record. “Item One: Staff memo to Larry Springer from Jason Cummings dated October 7, 2002, regarding SEPA Process and Planning Commission Recommendations to Council. The Planning Commission had serious concerns regarding SEPA issues in the 2002 docketing process and this was the response to our numerous questions. 1000 Friends of Washington and Hensley have both requested SEPA review for actions taken in the 2002 docketing.” Hensley Motion, at 1.

The County “strongly objects to the inclusion of the memorandum from the Prosecuting Attorney’s Office Hensley identifies as ‘Item One.’ This document is a legal opinion prepared at the request of the Planning Commission and distributed to Planning Commission members. It is protected from disclosure by attorney-client privilege.” County’s Response, at 5 and 6.

Petitioner Hensley replies:

The Board should please take note that this document (Item One: Memorandum dated October 7, 2002 from Jason Cummings, addressed to Larry Springer) does not state, ‘Confidential – Please do not disclose,’ which is placed on all proprietary documents submitted to the Planning Commission. It is merely a memorandum per the Planning Commission’s request to satisfy a need for information on SEPA timing. It was not given to the Planning Commission as proprietary nor was it discussed as confidential. The public in attendance was aware of these discussions in September 2002 and this memorandum and the foregoing discussions on October 8, 2002 to clarify SEPA and timing issues. If there were privileges (*sic*) that the County now seems to suggest, then perhaps that should have been made clear to the public and planning commission in 2002 through an executive session. The information is in general and only immediately references the Washington Administrative Code and how SEPA is used and timed in this process. The County claims that this is Attorney-Client privilege. However, once the issue is publicly discussed by the Planning Commission that privilege is diminished. Hensley requests that the Board deny the County’s motion to dismiss.

Hensley Rebuttal, at 2.

The County did not object to the additional items for supplementation submitted by Petitioner Hensley.

Windsong Neighborhood Association

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Petitioner WNA requests the addition of eight exhibits because the requested documents are part of the county files on the proposal. WNA states:

Under WAC 242-02-540, the Board should grant the motion because the documents

contained in the files potentially will be of substantial assistance to the Board in determining why County staff changed their recommendation, from negative to affirmative. So far, the documents in the record cited in the County's Index offer nothing in the way of additional studies, analysis or even correspondence between the applicant and the County over this issue. WINDSONG also requests that the Board supplement the record to include the entire collection of environmental documents and studies cited in *Addendum No. 33*, which was the basis for the County's final action on the proposal under the State Environmental Policy Act, RCW ch. 43.21C ("SEPA"). Those documents are official records of the County. The Board may take official notice of those documents, but they would also meet the tests for supplementing the record, since they are cited specifically in the County SEPA Addendum.

WNA's Motion, at 4 and 5.

The County responds:

WNA's motion to supplement primarily identifies categories of documents, not specific documents. As set out in the table above, the County does not object to the inclusion of most categories of documents WNA identifies. However, the County does object to the inclusion of materials from the 2001 docket, because no specific documents have been identified and neither the Board nor the County have had the opportunity to review and determine whether these documents are necessary or of substantial assistance to the Board.

County's Response, at 8.

Petitioner Hensley replies to the County:

There appears to be a double standard of burden going on by the County. MacAngus Ranches requested to submit previous **docketing** and Agricultural Advisory Board information and the County had no objection. WNA requested to submit previous **docketing** including environmental analysis and the County objects. Should a Petitioner (*sic*) have more of a burden to submit previous docketing items to this board for an issue than an intervenor? There is a double standard by the County that biases the ability of petitioners to provide documents that are necessary for a case. This type of standard that the County has created is unfair and takes away the due process of citizens as petitioners to make their arguments, while giving intervening citizens the right to make theirs. WNA's supplements should be admitted.

Hensley Rebuttal, at 1.

C. Applicable Law and Discussion

The Board's Rules of Practice and Procedure establish the standard for admitting new or supplemental evidence in WAC 242-02-540:

WAC 242-02-540 New or supplemental evidence.

Generally, a board will review only the record developed by the city, county, or state in taking the action that is the subject of review by the board. A party by motion may request that a board allow such additional evidence as would be necessary or of substantial assistance to the board in reaching its decision, and shall state its reasons. A board may order, at any time, that new or supplemental evidence be provided.

MacAngus has argued that all of the materials in Exhibits A through G would be of substantial assistance to the Board in reaching its decision. *See* MacAngus Motion. The MacAngus proposal has been before the County Council for more than two years. The materials prepared and presented to the County's Agricultural Advisory Board and the County Council in that time frame are relevant to the present case. Information on the quality of soils on MacAngus' property is appropriate for Board deliberations on this case. Exhibits A through G are **admitted**.

Hensley has argued that all of her requested items would be of substantial assistance to the Board in reaching its decision. The County has no objection to the inclusion of any of the Hensley exhibits in the record, with the exception of Item One. The County has argued that this staff memo is a privileged attorney-client communication. *See* Hensley Motion and County Response. The Board disagrees. Members of the public were in attendance at the meetings of the Planning Commission where the memo was openly discussed. The document was not given to the Planning Commission as proprietary. It was not stamped "Confidential – Please do not disclose." All of the Hensley exhibits for supplementation are **admitted**.

WNA has argued that all of their requested items would be of substantial assistance to the Board in reaching its decision. The "Eberth/Fjarlie" comprehensive plan amendment and rezone has been the subject of four County Council actions over a period of two years. WNA has alleged that significant information is missing from the County Index relating to the change in staff recommendations for commercial development of this site and as to the SEPA process followed by the County. *See* WNA Motion. This information may be necessary or of substantial assistance to the Board in this matter. The Board **admits** all of WNA's proposed exhibits for supplementation to the record.

For ease of reference, the following table shows the documents proposed for supplementation and the Board's ruling on each document. Supplemental Exhibit Nos. are assigned.

PARTY	DOCUMENT	BOARD RULING
Hensley	Staff Memo to Larry Springer from Jason Cummings dated 10/7/02 regarding SEPA process & Planning Commission Recommendations to Council	ADMITTED – Supp. Ex. 1
Hensley	2002 Docket Staff Report	ADMITTED – Supp. Ex. 2

Hensley	10/8/02 Snohomish County Planning Commission Minutes	ADMITTED – Supp. Ex. 3
Hensley	10/22/02 Snohomish County Planning Commission Minutes	ADMITTED – Supp. Ex. 4
Hensley	2002 Final Docket with links to staff reports, draft information, Environmental Review and proposed ordinances	ADMITTED – Supp. Ex. 5
Hensley	Procedural requirements for docketing	ADMITTED – Supp. Ex. 6
Hensley	Monroe UGA Draft Ordinance Planning Commission	ADMITTED – Supp. Ex. 7
Hensley	Gold Bar UGA Draft Ordinance Planning Commission	ADMITTED – Supp. Ex. 8
Hensley	Arlington UGA Draft Ordinance Planning Commission	ADMITTED – Supp. Ex. 9

Hensley	Snohomish County Planning Commission documents including memo, decision matrix for Planning Commission, SEIS, MacAngus Ranches DEIS, Addendum 33 and Draft Planning Commission Ordinances	ADMITTED – Supp. Ex. 10
Hensley	Fact Sheet	ADMITTED – Supp. Ex. 11
Hensley	Areawide Rezone Draft Ordinance	ADMITTED – Supp. Ex. 12
Hensley	Areawide Rezone Draft Ordinance (Planning Commission)	ADMITTED – Supp. Ex. 13
Hensley	8/27/02 Planning Commission Minutes	ADMITTED – Supp. Ex. 14
Hensley	Snohomish County General Policy Plan	ADMITTED – Supp. Ex. 15
Hensley	Snohomish County 2001 Growth Monitoring Report; 2002 Buildable Lands Report and Capital Facilities Planning for 2002	ADMITTED – Supp. Ex. 16
MacAngus Ranches	A. Excerpt from Meeting Summary of 2/21/01 Snohomish County Agricultural Advisory Board Meeting Re: MacAngus Ranches	ADMITTED – Supp. Ex. 17
MacAngus Ranches	B. Notes from 2/21/01 Agricultural Advisory Board Meeting	ADMITTED – Supp. Ex. 18
MacAngus Ranches	C. Excerpt from Meeting Minutes of 2/21/01 Snohomish County Agricultural Advisory Board Meeting	ADMITTED – Supp. Ex. 19
MacAngus Ranches	D. Letter from James A. Carley dated 6/30/1993	ADMITTED – Supp. Ex. 20
MacAngus Ranches	E. MacAngus Ranches Annual comprehensive plan & zoning proposal 3/21/01	ADMITTED – Supp. Ex. 21

MacAngus Ranches	F. MacAngus Ranches, Inc's response to PDS staff Report and Recommendation and Comments dated 9/24/02	ADMITTED – Supp. Ex. 22
MacAngus Ranches	G. MacAngus Ranches, Inc's response to PDS staff Report and Recommendation and Comments submitted to Snohomish County Planning Commission dated 9/24/02	ADMITTED – Supp. Ex. 23
WNA	1.(a) GMA Comprehensive Plan/ GPP EIS dated 4/11/94 (draft EIS)	ADMITTED – Supp. Ex. 24
WNA	1.(b) June 21, 1995 (final EIS)	ADMITTED – Supp. Ex. 25
WNA	1.(c) Documents listed in Addendum No. 33	ADMITTED – Supp. Ex. 26
WNA	2.(a) Eberth/Fjarlie 2002 Docket application and all supporting materials submitted by applicant or its representatives, including without limitation all studies, memoranda, correspondence	ADMITTED – Supp. Ex. 27
WNA	2.(b) Correspondence, memoranda, notes of meetings and conversations and other documents by County staff or officials (Executive, PDS, Council) that are not privileged and that discuss Eberth/Fjarlie 2002 docket application, including without limitation emails and other electronic files	ADMITTED – Supp. Ex. 28
WNA	2.(c) Environmental analysis or other studies concerning the Eberth/Fjarlie property in PDS' 2001 Final docket files	ADMITTED – Supp. Ex. 29
WNA	2.(d) All exhibits related to the Eberth/Fjarlie property omitted from the County Index and submitted at the County Council or planning commission public hearing for 2001 and 2002 final dockets.	ADMITTED – Supp. Ex. 30
WNA	2.(e) All correspondence to the County staff or officials concerning the Eberth/Fjarlie 2002 docket proposal or stormwater exiting the Eberth/Fjarlie property.	ADMITTED – Supp. Ex. 31

D. Conclusions on Motions to Supplement

The Board has determined that all of the exhibits proposed for supplementation to the record by the parties requesting such action would be of substantial assistance to the Board in reaching its decision. **All of the proposed exhibits are admitted to the record.** Reference to these exhibits in briefing shall cite them by the supplemental exhibit number assigned in the table above.

III. MOTIONS TO DISMISS

Filings with the Board:

On April 18, 2003, the Board received “Snohomish County’s Motion to Dismiss,” with four exhibits (**Co. Motion – Dismiss**). On the same day, the Board received “Verbarendse’s Motion to Dismiss” (**Verbarendse Motion – Dismiss**).

On April 28, 2003, the Board received:

- 1) “Hensley Response to Motions to Dismiss Issues” (**Hensley Response**);
- 2) “1000 Friends Response to Snohomish County’s and Verbarendse’s Motions to Dismiss Hensley’s Verbarendse’s Issues” (**1000 Friends Response - GMA**);
- 3) “1000 Friends Response to County’s Motion to Dismiss SEPA Issues for Lack of Standing” (**1000 Friends Response – SEPA**), with attached “Declaration of David Ross Pitkin” (**Pitkin Declaration**);
- 4) “Petitioner Windsong Neighborhood Association’s Response to Snohomish County’s Motion to Dismiss” (**Windsong Response**); and
- 5) Intervenor “School Districts’ Response to County’s Motion to Dismiss” (**School District Response**).

On May 6, 2003, the Board received “Snohomish County’s Reply Memorandum” (**Co. Reply**), and “Verbarendse’s Reply to Motion to Dismiss” (**Verbarendse Reply**).

In brief, Snohomish County moves to dismiss all the SEPA claims^[1] raised by all Petitioners. The County also moves to dismiss Petitioner Hensley for lack of GMA participation standing related to one of the County’s adopted amendments.^[2] Intervenor Verbarendse joins the County in challenging Petitioner Hensley’s GMA standing. The Board will address the SEPA claims first, then the question of Petitioner Hensley’s GMA participation standing.

A. MOTION TO DISMISS SEPA CLAIMS

1. Applicable Law

The legal basis for SEPA standing before the Boards^[3] is found at RCW 43.21C.075(4), “. . . a person aggrieved by an agency action has the right to judicial appeal. . . .” On its face, this section of SEPA suggests that any ‘person aggrieved’ may challenge a jurisdiction’s SEPA determinations. However, the courts have narrowed this seemingly broad grant of the right to appeal by holding, “The term ‘person aggrieved’ was intended to include *anyone with standing* to sue under existing law.” *Trepanier v.*

Everett, 64 Wn. App. 380 (1992), at 382, (emphasis supplied). The courts have gone on to establish,^[4] and this Board has adopted, a two-part test to determine SEPA standing.

The two-part SEPA standing test used by this Board is as follows:

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.

West Seattle Defense Fund v. City of Seattle (WSDF I), CPSGMHB Case No. 94-3-0016, Order Granting Seattle's Motion to Dismiss SEPA Claim [Legal Issue 10], (Dec. 30, 1994), at 7, (emphasis supplied).

Additionally, the Board's Rules of Practice and Procedure indicate how standing allegations must be addressed when filing a PFR.

[The PFR must 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 [Chapter 34.05 RCW], and *standing pursuant to the State Environmental Policy Act* [Chapter 43.21C RCW], as the case may be.

WAC 242-02-210(2)(d), (emphasis supplied). The Board has stated that to establish standing:

Petitioners must describe their standing in the PFR. Petitioners can make the necessary showing by: 1) including a narrative in the PFR itself; 2) attaching a declaration of affidavit to the PFR; or 3) incorporating by reference exhibits from the record below.

Pilchuck Audubon Society v. Snohomish County (Master Builders Association and Snohomish County Realtors Association – Intervenors) (Pilchuck II), CPSGMHB Case No. 95-3-0047c, Order Granting Snohomish County's Dispositive Motion to Dismiss SEPA Claims, (Aug. 17, 1995), at 3.

2. Discussion

Hensley:

The County asserts that Petitioner Hensley did not allege SEPA standing, nor attach or reference any relevant declarations or exhibits regarding SEPA standing, in her PFR, as required by Board rule. WAC 242-02-210(2)(d). Co. Motion – Dismiss, at 3-5. The County further notes that, even in her response brief, she “still has not alleged SEPA standing” or “a SEPA injury.” Co. Reply, at 2-3; *referencing* Hensley Response, at 4-5. Review of Hensley's PFR, at 2, and Hensley's Response at 4-5, leads the Board to agree with the County. Petitioner Hensley failed to allege SEPA standing in her PFR or even address this issue in her Response. Petitioner Hensley's SEPA claims, as referenced in Hensley's Legal Issue 3 in the PHO, are **dismissed**.

1000 Friends and Windsong - Generally:

The County argues that neither 1000 Friends nor Windsong meet the governing two-part SEPA standing test (noted *supra*). Co. Motion –Dismiss, at 5-10. The County asserts that even if it assumed that 1000 Friends and Windsong’s interests are within the “zone of interests protected by SEPA” (the first prong of the SEPA standing test), neither party has met the second prong of the standing test, *i.e.*, identified or demonstrated an injury in fact that is immediate, concrete and specific. The County contends any injuries alleged are threatened injuries that are not immediate, concrete and specific. Co. Motion – Dismiss, at 5-11. The County explains that the challenged amendments are non-project actions that did the following:

- 1) amended Comprehensive Plan Policy LU1.A.9 regarding the County’s procedures for expanding an UGA, pursuant to the buildable lands program, to exempt lands used solely for churches or school facilities from LU1.A.9’s UGA expansion procedures;
- 2) changed rural designations by redesignating acreage in the existing rural area (Sultan School District amendment) from Rural Residential – 10 Resource Transition (1 du/10 acres) to Rural Residential (1 du/5 acres) and changed the corresponding rural zoning to match the Future Land Use Map (**FLUM**) amendment; and
- 3) changed urban designations by redesignating acreage in the existing urban area (Eberth/Fjarlie amendment) from Urban Low Density Residential to Urban Medium Density Residential and Urban Commercial, with corresponding zoning changes from R-9,600 and PDR 9,600 to Low Density Multiple Residential and Neighborhood Business.

The County contends that none of these changes cause injury in fact – immediate, concrete and specific injuries - to Petitioners. Co. Motion – Dismiss, at 6-11.

1000 Friends:

In response, 1000 Friends only addresses the first two amendments. 1000 Friends suggests that the County is relying upon, and misinterpreting, a footnote in one of the Board’s prior cases^[5] to suggest that here there are no changes in the fundamental land use categories that could satisfy the “injury in fact” prong of the SEPA standing test. 1000 Friends Response, at 2-3. 1000 Friends contends that this footnote is concerned with “change(s) from less intensive to more intensive allowable use(s).” In the case of the Sultan School District amendment, which would allow a middle school in the designation, it “allows more intensive use of the land than was possible before the amendment.” 1000 Friends continues, this intensification of use is an immediate, concrete and specific injury, that meets the “injury in fact” test. 1000 Friends Response, at 3-4.

Additionally, 1000 Friends argues that “easing the way for schools and churches to expand the UGA significantly affects the environment and injures members of 1000 Friends.” Petitioner continues, “The amendment creates two new categories of uses that are exempt from county UGA expansion criteria.” Such a change “leads to increased pressure on land use currently outside UGAs and potentially moves

significant development to the periphery of the UGA, thereby increasing pressure for future UGA expansion and leapfrog, sprawl development.” This amendment “has resulted in an immediate threat by turning land that before tolerated less intense use to land that now can accommodate more intensive use. Further the injury is not hypothetical but actual.” 1000 Friends refers to an attached “Declaration of David Ross Pitkin to bolster its argument that the Sultan School District amendment and LU1.A.9 amendment cause immediate, concrete and specific injury to Mr. Pitkin. 1000 Friends Response, at 4-6; and Pitkin Declaration, at 1-3.

In reply, the School Districts notes that: 1) the amendment to LU1.A.9 exempts schools and churches from the County’s own criteria for UGA expansion, not the GMA’s; and 2) for the school district to proceed with a school within the Sultan School District amendment area, it “must apply for and obtain a conditional use permit before it can proceed. If the specific school proposal, as set forth in the application for the conditional use permit, causes some specific injury to the interests of 1000 Friends, that can be addressed through the conditional use permitting process and related SEPA process.” School District Response, at 3.

The County’s reply argues that 1000 Friends, and Mr. Pitkin’s alleged injuries are not existing injuries, but are “*threatened injuries* that are not immediate, concrete, and specific.” County Reply, at 3 (emphasis added). The County quotes portions of the Board’s (and Court’s) SEPA standing test that states:

The [petitioner] 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.*”

County Reply, at 4; (italics and underlining in Co. Reply), *citing* the Board’s 10/21/03 MBA Order. The County adds that the LU1.A.9 amendment “clarifies a narrow exception from the County’s self-imposed conditions on UGA expansions,” “does not permit any UGA expansion that is not permitted by the GMA,” and “does not expand any UGA and does not identify any specific land for potential UGA expansion.” The County also argues that any UGA expansion for a church or a school must proceed through the County’s docketing and annual Plan amendment process, which has not occurred. Therefore, there is no injury in fact due to this amendment. Co. Reply, at 4-5.

Likewise, the County argues that the Sultan School District amendment merely authorizes schools through the conditional use permit process. “At the time of project review and the conditional use permit process, specific impacts may be identified that could cause injury in fact to 1000 Friends. However, that is not the situation now before the Board. 1000 Friends has not identified an immediate, concrete and specific injury that results from the County’s redesignating and rezoning from one rural use to another rural use.” County Reply, at 6.

Again, the Board agrees with the County that 1000 Friends has not established an injury in fact. LU1.A.9 has not expanded any UGA, nor has the redesignation of the Sultan School District area caused any immediate, concrete or specific injury to 1000 Friends or Mr. Pitkin. Such “threatened” injuries, as Mr.

Pitkin notes, “would in fact be redressed by the County preparing an environmental impact statement to determine the likely adverse impacts to the environment . . . If the county proceeds with these amendments in light of the environmental impact statement, the mitigating measures identified in the statement may also protect my interests.” Pitkin Declaration, at 3.

The Board concludes that the threatened injuries suggested by 1000 Friends, and Mr. Pitkin, are conjectural and hypothetical at this point in the County’s process. If a UGA is expanded, or if a school seeks a conditional use permit, additional site specific environmental analysis will be required; at that point Petitioners may have immediate, concrete and specific injuries. However, that is not the case now. The Board concludes that 1000 Friends lacks standing to pursue its SEPA claims; consequently, 1000 Friends Legal Issue 7 is **dismissed**.

Windsong:

Windsong’s response relates to the Eberth/Fjarlie amendment. Windsong contends that in its PFR “In great detail, Windsong described the relationship of its members to the site that is the subject of the County’s legislative action. Windsong’s PFR alleged that members lived immediately adjacent to and downhill of the site rezoned by the County Council to commercial and multifamily uses.” In short, Petitioner asserts that it “alleged facts sufficient to establish standing.” Windsong Response, at 3.

The County counters that [in its Motion to Dismiss] “the County argued that [Windsong] did not present any facts or evidence to show how *the challenged amendment* created an injury in fact. [Windsong’s] alleged injuries relate, not to the change from one urban use to another urban use, but to the impacts of some potential specific development opposed by [Windsong’s] members. County Reply, at 7.

The County acknowledges that Windsong identifies alleged existing traffic and stormwater problems; however, “Existing problems are not the result of the challenged amendments. Even the possible exacerbation of existing problems is not the result of the challenged amendments. . . . [T]he new urban zoning does not increase traffic or drainage problems. Only a specific development proposal, with calculable traffic generation and impervious surface, can result in specific and perceptible harm.” The County concludes that Windsong has not identified an injury in fact resulting from the challenged Eberth/Fjarlie amendment. County Reply, at 7-8.

Once again, the Board concurs with the County. Allowing potential intensification of urban uses within an urban area is within the County’s discretion. Windsong has identified threatened injuries, but has not established that any injury stemming from the redesignation or rezone has caused any immediate, concrete and specific injury – such injuries are conjectural and hypothetical. The Board concludes that Windsong lacks standing to pursue its SEPA claims; consequently, those portions of Windsong’s Legal Issues 4 and 5 that assert noncompliance with SEPA are **dismissed**.

3. Conclusions Regarding SEPA Claims

Petitioner Hensley failed to allege SEPA standing in her PFR or even address this issue in her Response.

Petitioner Hensley’s SEPA claims, as referenced in Hensley’s Legal Issue 3 are **dismissed**.

The threatened injuries suggested by 1000 Friends and Mr. Pitkin, are conjectural and hypothetical at this point in the County’s process. Petitioner 1000 Friends lacks standing to pursue its SEPA claims. 1000 Friends Legal Issue 7 is **dismissed**.

The threatened injuries asserted by Windsong are conjectural and hypothetical. Petitioner Windsong lacks standing to pursue its SEPA claims. Those portions of Windsong’s Legal Issues 4 and 5 that assert noncompliance with SEPA are **dismissed**.

B. Motion to Dismiss for Lack of GMA Participation Standing

1. Applicable Law

RCW 36.70A.280(2) governs the standing requirements for appearing before the Boards, it provides, in relevant part:

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

(Emphasis supplied).

In *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657 (2000), the Court of Appeals clarified that, to establish participation standing under the GMA, a person must show that his or her participation before the jurisdiction was reasonably related to the person’s issue as presented to the Board.^[6]

2. Discussion

Petitioner Hensley’s Legal Issue 1 challenges the County’s adoption of the Verbarendse amendment as it relates to compliance with RCW 36.70A.020(2) and (12), RCW 36.70A.070(preamble), (5) and (6), RCW 36.70A.120 and RCW 36.70A.210. *See* PHO, at 9.

In its motion to dismiss, the County does not dispute that Petitioner Hensley participated before the County regarding the Verbarendse amendment. However, the County contends that “Hensley did put Council on notice that she was concerned about compliance with the LAMIRD requirements of RCW 36.70A.070(5), but not on notice about concerns with other GMA provisions, comprehensive plan policies, countywide planning policies, or financing issues.” Co. Motion – Dismiss, at 13. The County moves to dismiss those portions of Hensley’s Verbarendse issue beyond RCW 36.70A.070(5) for lack of standing. Co. Motion – Dismiss, at 16. Verbarendse joins the County in this motion. Verbarendse

Motion – Dismiss, at 5-8.

Both the County and Verbarendse assert that Ms. Hensley’s participation as a Snohomish County Planning Commissioner should not count toward establishing GMA participation standing in her individual capacity in this appeal. Co. Motion – Dismiss, at 14-15; and Verbarendse Motion – Dismiss, at 8.

In response, Hensley argues that a Petitioner should not need to write an entire brief to the legislative body prior to a GMA decision since it would be an excessive burden. She continues that the Verbarendse amendment involves compliance with the LAMIRD provisions of RCW 36.70A.070(5) (the rural element requirements); this element must be internally consistent with other elements of a Comprehensive Plan and be guided by the goals of the Act (RCW 36.70A.070(preamble), (6) and .020). Likewise, she asserts, the Plan must be consistent with the County’s Countywide Planning Policies (CPPs) and the County’s planning activities and capital budget decisions must also be consistent with the Plan (RCW 36.70A.120 and .210). Each of the alleged areas of noncompliance are reasonably related to the concern raised with the Verbarendse amendment. Hensley Reply, at 2.

1000 Friends also filed a brief in support of Hensley’s GMA participation standing that focused on her standing as a Planning Commission member. 1000 Friends Response – GMA, at 1-6. In reply, the County moves to strike 1000 Friends brief on this issue arguing that Hensley’s GMA participation standing is not an issue for 1000 Friends. Since the Board need not address Hensley’s role as a Planning Commissioner, *see infra*, the Board **grants** the County’s motion to strike 1000 Friends’ brief on this issue.

In reply, the County argues that the Hensley comments and concerns raised to the Council regarding the Verbarendse amendment were not as detailed as objections she made on other proposed amendments. “Unlike her comments on other proposed amendments where she provided detailed and specific information, her comments on Verbarendse clearly notified the Council that her interests on this proposal were limited to compliance with RCW 36.70A.070(5). County Reply, at 9. Verbarendse echoes the County’s arguments in its reply. Verbarendse Reply, at 1-5.

To resolve this issue the Board need not inquire into Hensley’s role as a Planning Commission member. Simply stated, the issue before the Board is whether by raising concerns about the Verbarendse amendment before the County Council, Petitioner Hensley established, in her own right, GMA participation standing to challenge that amendment for compliance with provisions of the GMA other than RCW 36.70A.070(5). In other words, were Hensley’s concerns with the Verbarendse amendment reasonably related to the GMA noncompliance issues presented to the Board? The Board concludes they were.

Neither the County nor Verbarendse dispute that Hensley voiced her opposition to the Verbarendse amendment before the County Council. In the Board’s *Alpine* decision^[7] the Board stated,

“To have meaningful public participation and avoid ‘blind-siding’ local governments,

members of the public must explain their land use planning concern to local government in sufficient detail to give the government the opportunity to consider these concerns as it weighs and balances its priorities and options under the GMA.”

Alpine, at 7-8.

Here, when Hensley’s appeal was filed, the County was not “blind-sided.” It is undisputed that the County was clearly on notice and aware that Hensley had concerns and opposed the Verbarendse amendment before it acted. The County, acting within its authority, nonetheless adopted the amendment. Further, the County was not “blind-sided” to the fact that the GMA requires Plan amendments to be: guided by the goals of the Act; internally consistent with other elements; consistent with the CPPs; and conduct its planning activities consistently with its Plan. These GMA requirements apply to each and every amendment a jurisdiction chooses to adopt. These requirements were not new to the County. The Board concludes that Petitioner Hensley, by voicing her concerns regarding the Verbarendse amendment, satisfied the GMA participation standing requirement. Hensley’s opposition to the Verbarendse amendment before the County Council is reasonably related to the challenges presented to the Board (*i.e.*, Hensley’s Legal Issue 1). The County and Verbarendse motions to dismiss Petitioner Hensley for lack of GMA participation standing on Hensley’s Legal Issue 1 are **denied**.

3. Conclusions Regarding GMA Participation Standing

Petitioner Hensley, by voicing her concerns regarding the Verbarendse amendment, satisfied the GMA participation standing requirement. Hensley’s opposition to the Verbarendse amendment before the County Council is reasonably related to the challenges presented to the Board (*i.e.*, Hensley’s Legal Issue 1). The County and Verbarendse motions to dismiss Petitioner Hensley for lack of GMA participation standing on Hensley’s Legal Issue 1 are **denied**.

c. Conclusions on Motions to Dismiss

The County’s motion to dismiss the SEPA claims of Petitioners Hensley, 1000 Friends and Windsong is **granted**. The County and Verbarendse’s motion to dismiss portions of Hensley’s Legal Issue 1, pertaining to the Verbarendse amendment, for lack of GMA participation standing is **denied**.

IV. ORDER

Based upon review of the Petition for Review, the briefs and materials submitted by the parties, the Act, and prior decisions of the Courts, this Board and other Growth Management Hearings Boards, the Board enters the following Order:

- The motions to supplement the record filed by Hensley, MacAngus Ranches and Windsong are **granted**, as set forth in Section II of this Order;
- The County's motions to dismiss the SEPA claims of Hensley [portion of Legal Issue 3], 1000 Friends [Legal Issue 7] and Windsong [portions of Legal Issue 4 and 5] for lack of SEPA standing, are **granted**.
- The County and Verbarendse's motions to dismiss portions of Hensley's Legal Issue 1 for lack of GMA participation standing are **denied**.

So ORDERED this 19th day of May, 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 pursuant to WAC 242-02-832.

[1] A portion of Petitioner Hensley’s Legal Issue 3 raises a SEPA claim; a portion of Petitioner Windsong Neighborhood Association’s Legal Issue 4 and all of Legal Issue 5 pose SEPA claims; and 1000 Friends of Washington’s Legal Issue 7 raises SEPA issues.

[2] Hensley’s Legal Issue 1 is the subject of this GMA participation standing challenge.

[3] In *Robison v. City of Bainbridge Island (Robison)*, CPSGMHB Case No. 94-3-0025, Order on Dispositive Motions, (Feb. 16, 1995), this Board stated:

The Board holds that obtaining GMA appearance [participation] standing does not automatically bestow SEPA standing upon a petitioner. The GMA and SEPA are two distinct statutes with their own standing requirements that each must be met by petitioners if they intend to challenge actions for not complying with both statutes.

Robison, at 6-7.

[4] See: *Leavitt v. Jefferson County (Leavitt)*, 74 Wn. App. 668, 678, 875 P.2d 681 (1994) citing *Trepanier v. Everett (Trepanier)*, 64 Wn. App. 380, 382-83, 824 P.2d 524, review denied, 119 Wn. 2d 1012 (1992).

[5] See *Master Builders Association v. Pierce County (MBA)*, CPSGMHB Case No. 02-3-0010, Order on Motion to Dismiss SEPA Claims, (Oct. 21, 2002), footnote 6, at 5-6. Footnote 6 of that Order provides:

Although the Board has opined that the *Trepanier* test is inappropriate for nonproject actions in the GMA context, neither the Legislature nor the Courts have seen fit to alter it. Therefore, the Board must continue to apply the *Trepanier* two-part SEPA standing test strictly. Further, in light of the durability of the *Trepanier* test, the Board now rejects the suggestion offered in *Pilchuck II*, that the Board might apply the *Trepanier* test more “loosely” or “assume” standing when certain GMA actions are challenged. However, the Board notes that a petitioner that challenges a nonproject action that shifted land from one of the GMA’s three fundamental and significant land use categories – Resource, Rural or Urban – to a more intensive land use category, could arguably satisfy a strict application of the *Trepanier* SEPA standing test.

For example, the continuum of intensity and diversity of uses moves from the least intense on Resource lands (agriculture, forestry and mining) to Rural, then possibly to limited areas of more intense rural development (LAMIRDs), and finally to Urban. Shifts from limited and *less* intensive uses to diverse and *more* intensive uses, logically raises the potential for increases in significant adverse environmental impacts. It is a reasonable conclusion to draw that when such shifts occur the *threatened injuries* to protected environmental interests fall within the zone of interests protected by SEPA. Further, assuming the shift involved a concurrent, complete and consistent plan, regulatory and mapping [designation] change, the impact could arguably be: *immediate* [upon the effective date], *concrete* [the intensity and diversity of permitted uses is significantly altered and environmental threats arguably increased], and *specific* [depending upon the relationship of the petitioner to the affected area]. In these limited situations the Board would not be applying the *Trepanier* test “loosely” or “assuming” standing, but merely appropriately applying the test for significant nonproject actions. However, even in these limited situations the Board would continue to require petitioners to demonstrate that any administrative remedies have been exhausted.

[6] The Board notes that SB 5507, codifies in RCW 36.70A.280(4) the *Wells* GMA participation standing test. This bill has been delivered to the Governor for signature.

[7] *Alpine v. Kitsap County (Alpine)*, CPSGMHB Case No. 98-3-0032c coordinated with 95-3-0039c, Order on Dispositive

Motions, (Oct. 7, 1998).