

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

KENT CARES, NORTHWEST)	
ALLIANCE INC., and DON B.)	Case No. 03-3-0012
SHAFFER,)	
)	<i>(Kent CARES III)</i>
Petitioners,)	
)	
v.)	
)	ORDER ON MOTIONS
CITY OF KENT,)	
)	
Respondent.)	
)	
)	

I. Background

On June 4, 2003, the Central Puget Sound Growth Management Hearings Board (**CPSGMHB** or 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. 03-3-0012, and is hereafter referred to as *Kent CARES III v. City of Kent*. Board member Lois H. North is the

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Presiding Officer (**PO**) for this matter. Petitioners challenge the City of Kent’s (**Respondent** or **Kent**) adoption of Ordinance No. 3639, restricting public participation in response to PUD and Master Plan modifications. The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA** or the **Act**).

On July 3, 2003, the Board received the Respondent’s Index to the Record.

On July 7, 2003 the Board conducted the Prehearing Conference at the Board’s Office, 900 4th Ave., Suite 2470, Seattle. Board member Lois H. North, presiding officer in this matter, conducted the conference. Petitioner Don B. Schaffer appeared *pro se*. Representing the City was Kim Adams Pratt. Also in attendance were the Board’s Legal Externs Simi Jain and Lynette Meachum. After a review of the legal issues, the schedule and other procedural matters, the presiding officer indicated that the prehearing order would be issued by July 10, 2003.

On July 7, 2003 the Board issued the Prehearing Order setting forth the Final Schedule and the

statement of eleven Legal Issues.

On July 14, 2003 the Board received “Respondent’s Motion to Dismiss For Lack of Service of Process, Standing and Jurisdiction.” Four exhibits accompanied the motion.

On July 21, 2003 the Board received “Petitioner’s Response to Respondent’s Motion to Dismiss” with two exhibits.

On July 28, 2003, the Board received “Respondent’s Reply to Petitioners’ Response.”

II. motions to dismiss

The City of Kent has submitted three motions for dismissal:

- Dismissal of the case because petitioners failed to serve the petition for review properly on the City of Kent;
- Dismissal of Northwest Alliance Inc. as a party because it lacks standing; and
- Dismissal of Legal Issues No. 5, 10, and a portion of 11 because the Board lacks jurisdiction over these issues.

Respondent’s Motion to Dismiss, at 1.

A. Motion to Dismiss the Case

1. Position of the Parties

The City maintains that “the PFR should be dismissed because petitioners did not substantially comply with WAC 242-02-230 when they served the City’s law department.” Respondent’s Motion to Dismiss, at 2. “Petitioners messengered delivery to the City’s law department was not service on the City. Petitioners have failed to serve the City with the petition for review as provided in WAC 242-02-230 (1).” Respondent’s Motion to Dismiss, at 3.

Petitioners reply with, “the Petitioners went to extra effort and expense to be certain that the documents not only were received promptly but, in fact, early and that they were received by the individuals at the City who would be responsible for dealing with the issue.” Petitioners argue that they did “substantially comply” with the Board’s rules regarding service. Petitioners’ Response, at 3.

2. Applicable Law and Discussion

The Board's Rules provide for the service and filing for Petitions for Review.

WAC 242-02-230 Petition for review -- Service and filing. (1) The original and three copies of the petition for review shall be filed with a board personally, or by first class, certified, or registered mail. Filings may also be made with a board by telegraph or by electronic telefacsimile transmission as provided in WAC 242-02-240. A copy of the petition for review shall be served promptly upon all other named parties. When a county is a party, the county auditor shall be served in noncharter counties and the agent designated by the legislative authority in charter counties. The mayor, city manager, or city clerk shall be served when a city is a party. When the state of Washington is a party, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law. Proof of service may be filed with the board pursuant to WAC 242-02-340.

(2) A board may dismiss a case for failure to substantially comply with subsection (1) of this section.

The City's Motion to Dismiss included a Declaration of Renee Cameron Regarding Service of Petition for Review (Exhibit 2).

“On the 4th of June, 2003, I received and signed for, via Assoc. Couriers Inc, an envelope, containing a letter dated May 4, 2003, and three (3) documents. A copy of the May 4, 2003 letter, as well as the envelope with Bill of Lading No. 293763 of Assoc. Couriers, Inc. taped to the front of the envelope are attached. Under the Bill of Lading on the envelope was a label addressed to the City Clerk, however, the instructions on the Bill of Lading Delivery Information are that the envelope is to be delivered to the Kent Legal Department.

In the envelope there were three (3) documents referenced in the May 4, 2003, letter from Don Schaffer, Kent C.A.R.E.S. Representative. Items No. 1 and 2 listed in the letter pertained to a matter on appeal before the Kent City Council. Item No. 2 was due to be delivered to the Law Department on or before June 4, 2003. Item No. 3 was a copy of the Petition for Review in the above captioned matter.”

Declaration of Renee Cameron, paragraph 3.

The Board notes that while the actual delivery of the PFR went to the Kent Legal Department, under the Bill of Lading on the envelope there was a label addressed to the City Clerk. Petitioner Shaffer's PFR was addressed to the City Clerk of the City of Kent. It was covered over with a label addressed to the Law Department. The label was affixed by the delivery company,

Associated Couriers' Inc., and the PFR was delivered to the Kent Law Department on June 4, 2003.

From these facts, it is apparent that Mr. Shaffer made a good faith effort to serve the City Clerk and even correctly addressed the envelope. The error of the messenger service would be analogous to the U.S. Postal Service mis-delivering a correctly addressed letter. In neither occasion would it be fair to penalize the Petitioners.

Thus the Board concludes that Petitioner Shaffer substantially complied with the service requirements of WAC 242-02-230. The City's Motion to dismiss Shaffer is **denied**.

3. Conclusion

The City of Kent's motion to dismiss the case because of failure of proper service procedure is **denied**. The Petitioners substantially complied with the Board's rules regarding service.

B. Motion to Dismiss Northwest Alliance, Inc. as a Petitioner

1. Position of the Parties

The City requests that the Board dismiss Northwest Alliance, Inc. as a Petitioner because it does not have standing. "The City asks the Board to dismiss Northwest Alliance Inc. as petitioner because the City did not receive oral testimony or written comments from Northwest Alliance, Inc. while the city was contemplating Ordinance No. 3639." City's Motion to Dismiss, at 4.

Petitioners maintain that last fall Northwest Alliance Inc. testified in regard to Ordinance No. 3624 which is identical to Ordinance No. 3639. "One need go no further than the first page of subject Ordinance No. 3639 wherein the City admits that Ordinance No. 3639 is identical to Ordinance No. 3624 passed last fall but repealed due to fact that the City failed to comply with the GMA requirement that the proposed Ordinance provide a sixty day notice to the State of Washington . . . Since the City did not raise the issue of participation by Northwest Alliance in the prior Petition they should not be allowed to try to make it an issue now." Petitioners' Response, at 3.

2. Applicable Law and Discussion

The requirement for standing before the Board is provided in RCW 36.70.280(2).

A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (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; (c) a person who is

certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

The Board's rules require that a Petition for Review contain the following in regard to standing:

WAC 242-02-210(2)(d) 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 a participant standing under the act, governor certified standing, standing pursuant to the Administrative Procedures Act, and standing pursuant to the State Environmental Act, as the case may be.

The Petition for Review filed by Petitioners asserts participation standing pursuant to RCW 36.70A.280(2)(b) in that it provides as follows:

4. BASIS OF PETITIONER'S STANDING: The Petitioners, as a long-term Kent business owner, as an individual citizen and as a member of a community action organization have participated orally and in writing concerning the subject matter covered by the Ordinance now being appealed. As an example of subject participation on this issue, please see letter submitted to the City attached as Exhibit B.

The referenced Exhibit B is a letter dated April 1, 2003 addressed to the Kent City Council. The first sentence of the letter provides that "the purpose of the letter is to state my personal objection and the objection of Kent C.A.R.E.S to the proposed amendments to the Kent City Code." The letter is signed by "Don B. Shaffer, Kent C.A.R.E.S. Representative."

The City asks the Board to dismiss Northwest Alliance Inc. as a petitioner because the City did not receive oral testimony or written comments from Northwest Alliance Inc. while the City was contemplating Ordinance No. 3639. Northwest Alliance, Inc. is not included in the April 1, 2003 letter. Likewise, Northwest Alliance Inc. did not provide oral testimony to the City Council or the land use and planning board.

The Petitioner alleges that because Northwest Alliance testified on Ordinance No. 3624 which is identical to the Ordinance on appeal (No. 3639), Northwest Alliance, Inc. has standing in this case. The Board finds that this does not meet the requirements for standing in the GMA and in the Board's rules. A Petitioner must have submitted comments to the City regarding the Ordinance under appeal while the City was investigating and deliberating the facts pertaining to this matter.

3. Conclusion

The City of Kent's Motion to dismiss Northwest Alliance as a petitioner because it does not have participation standing is **granted**.

C. Motion to Dismiss Legal Issues No. 5, No. 10, and a Portion of 11

LEGAL ISSUE # 5: Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with requirements to "provide the public with timely information and meaningful opportunities for participation" including "site-specific public participation plans" with regard to toxic cleanup efforts within the areas impacted by this Ordinance? [RCW 36.70A.020, WAC 173-340-600, RCW 70.105D, Kent City Code 11.02]

LEGAL ISSUE #10: Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate not to withhold from the general public, public documents pertinent to issues under consideration within said Ordinance? [RCW 36.70A.020, RCW 42.17]

LEGAL ISSUE #11: Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with mandate to protect private property owners from arbitrary and discriminatory actions and/or unconstitutional, non-compensated takings? [RCW 36.70A.370, RCW 36.70A.020(6)]

1. Positions of the Parties

The City argues that:

"Legal Issue No. 5 refers to an alleged requirement to provide information and an opportunity to participate with regard to toxic cleanup efforts within areas impacted by Ordinance No. 3639. There are no Growth Management Act planning goals in RCW 36.70A.020 that reference toxic cleanup. The Board does not have jurisdiction over Chapter 70.105D, Hazardous Waste Cleanup - Model Toxic Control Act. Ordinance No. 3639 did not deal with the public notice and participation requirements in WAC 173-340-600 because the cited provision is a public participation requirement for the Department of Ecology responsible for the Model Toxic Control Act. Ordinance No. 3639 also did not adopt or amend any portion of Chapter 11.02 KCC. The Board should dismiss Legal Issue No. 5."

City's Motion to Dismiss, at 5.

The Petitioner responds with:

"Legal Issue #5 refers to the failure by the City to comply with both State and City regulations with regard to hazardous waste cleanup on the City's only example of PUD within a Planned Action Ordinance area. As is shown in attached Exhibit B the

Washington State Department of Ecology in their certified letter of June 6, 2003 believes that the City of Kent is in violation of the state Model Toxic Control Act with regard to the City's activities in the only PUD in the City's only PAO. Petitioners assert that the City, including the "planning manager" were fully aware of violations regarding toxic cleanup with in the PUD and the PAO and yet allowed the land-use approvals to go forward nevertheless. If Ordinance # 3639 is allowed to go into effect then the public will continue to be at risk due to inadequate review by the City or continued lack of full disclosure with no ability to participate in the process."

Petitioners' Response, at 4.

As to Legal Issue No. 10, the City states:

"Legal Issue No. 10 asks if the City failed to comply with Chapter 42.17 RCW when it adopted Ordinance No. 3639. The legislature has provided for a specific process regarding public disclosure of documents in Chapter 42.17 RCW. Jurisdiction for non-compliance with the chapter is with the superior court rather than with the Growth Management Hearings Boards. RCW 42.17.340. Legal Issue No. 10 should be dismissed by the Board."

City's Motion to Dismiss, at 6.

"The Petitioner agrees that the Board may not have jurisdiction on this subject" (Legal Issue No.10). Petitioner's Response, at 4.

The City alleges that the portion of Legal Issue No. 11 dealing with the constitutionality of Ordinance No. 3639 and takings claims should be dismissed for lack of jurisdiction:

"The Board has previously held that it 'has jurisdiction to consider a petition for review alleging that private property rights have not been property (*sic*) considered, or have been considered in an arbitrary or discriminatory manner. However, the Board does not have jurisdiction to consider or resolve questions regarding the specific impact of plans or regulations on individual property.' *Gutschmidt v. City of Mercer Island*, CPSGMHB No. 92-3-0006, Order on Prehearing Motions (December 31, 1992). The Board lacks authority to determine whether Ordinance No. 3639 is unconstitutional because it violates the rights of private property owners. The city asks that Issue No. 11 be dismissed to the extent that it is inconsistent with the Board's authority."

City's Motion to Dismiss, at 6.

The Petitioner replies that:

“Under 3639 the public and adjacent property owners are being asked to rely on what can only be categorized as someone’s crystal-ball guesses based only on broad assumptions as to adverse impacts that are anticipated to take place many years off in the future. Under this ordinance the City wants to increase its power to absolute by allowing the City the ability to revise that plan over the ten years without any input whatsoever by the people most impacted by the development proposed in the PUD. Petitioners argue that Ordinance # 3639 would be a bad idea (and in violation of the most essential elements of the GMA) even in a jurisdiction of maximum talent and high integrity.”

Petitioners’ Response, at 5.

2. Applicable Law and Discussion

RCW 36.70A.020 spells out the planning goals of the GMA in relation to Legal Issue No. 5. There are no goals in the GMA that speak to toxic cleanup. The cited WAC 173-340-600 is a provision for public participation requirements for the **Department of Ecology** in regard to the Model Toxic Control Act. The Board does not have jurisdiction over Chapter 70.105D, Hazardous Waste Cleanup – Model Toxic Control Act.

Although Ordinance No. 3639 is an amendment to a development regulation over which the Board has jurisdiction, Legal Issue No. 5 includes issues and legal citations over which the Board does not have jurisdiction.

As for Legal Issue No. 10, jurisdiction for noncompliance with Chapter 42.17 RCW is with the superior court rather than with the Growth Management Hearings Board.

As for the portion of Legal Issue No. 11 dealing with the constitutionality of Ordinance No. 3639 and takings claims, the Board dismisses this portion because it does not have jurisdiction over such claims.

3. Conclusion

The City of Kent’s Motion to Dismiss Legal Issues No. 5, 10, and a portion of 11 because the Board lacks jurisdiction over these issues is **granted**.

Legal Issue No. 11 will read:

“Did the City of Kent in its adoption of Ordinance No. 3639 fail to comply with the mandate to protect private property owners from arbitrary and discriminatory actions? [RCW 36.70A.370, RCW 36.70A.020(6)]”

The Legal Issues will be renumbered from 1 to 9. Legal Issue No. 11 will become Legal Issue No. 9.

III. ORDER

Based upon review of the Petition for Review, the motions, responses 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 City of Kent’s Motion to Dismiss for Lack of Service of Process is **denied**.

The City of Kent’s Motion to Dismiss Northwest Alliance, Inc. for Lack of Participation Standing is **granted**.

The City of Kent’s Motion to Dismiss Legal Issues No. 5, No. 10, and a portion of No. 11 for Lack of Jurisdiction is **granted**.

The title of CPSGMHB Case No. 03-3-0012 shall hereafter be captioned *Kent C.A.R.E.S. and Don B. Shaffer, Petitioners v. City of Kent, Respondent*.

So ORDERED this 31st day of July 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

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As of August 1, 2003, Joseph W. Tovar will become the PO for this case. Ms. North is retiring effective that date.