

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

MAXINE KEESLING,)	Case No. 06-3-0035
)	
<i>Pro Se</i> Petitioner,)	
)	(Keesling V)
v.)	
)	
KING COUNTY,)	FINAL DECISION and ORDER
)	
Respondent.)	
)	
)	
)	

SYNOPSIS

On December 18, 2006, the Central Puget Sound Growth Management Hearings Board received a Petition for Review from Maxine Keesling. The Petition challenged Ordinance 15606, which amended certain sections and added certain sections to KCC Titles 20 and 21A.

The Petitioner’s challenge alleges that several portions of the Growth Management Act have been violated. Included in her complaint are RCW 36.70A.020(9), 36.70A.130(1)(d), and 36.70A.130(6). These provisions of the GMA pertain to open space and recreation and consistency.

The Board found that the Petitioner did not carry her burden of proof to demonstrate that the County was clearly erroneous in its adoption of Ordinance 15606 and dismissed the Petition for Review in its entirety.

I. BACKGROUND¹

On December 18, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Maxine Keesling (**Petitioner** or **Keesling**), challenging King County’s (**Respondent** or the **County**) adoption of Ordinance 15606 on October 2, 2006.² With Ordinance 15606, the County amended certain sections of the King County Code (**KCC**) Titles 20 (Planning) and 21A (Zoning) and added two new sections – KCC 21A.06 and KCC 21A.30. Core Document, Ord. 15606. Petitioner’s challenge focuses on the GMA’s requirement for

¹ See Appendix A for full procedural history.

² The Ordinance was approved by the King County Executive on October 10, 2006.

notice, open space and recreation, consistency, and procedural compliance.³ PFR at 1, Section III.

On April 30, 2007, the Board held a Hearing on the Merits (**HOM**) at the Board's offices. Board Member Dave Earling presided with Board Member Ed McGuire and Law Clerk Julie Taylor in attendance.⁴ Maxine Keesling appeared *Pro Se* and Kristen Wynne, represented the Respondent. Stephen Hobbs of King County was also present. Court Reporter services were provided by Katie Eskew of Byers & Anderson. A transcript of the proceeding was ordered by the Board.

II. PRESUMPTION OF VALIDITY

Petitioner challenges King County's adoption of Ordinance No. 15606, amending certain sections of KCC Titles 20 (Planning) and 21A (Zoning) and adding two new sections – KCC 21A.06 and KCC 21A.30. Pursuant to RCW 36.70A.320(1), Ordinance No. 15606 is presumed valid upon adoption.

The burden is on the Petitioner to demonstrate that the action taken by the County is not in compliance with the goals and requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the actions taken by [King County] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find the County's actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to the County in how it plans for growth, provided that its planning actions or policy choices are consistent with, and comply with, the goals and requirements of the GMA. The State Supreme Court's delineation of this required deference states: “We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a ‘clearly erroneous’ application of the GMA.” *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

³ The PFR set forth three legal issues. Legal Issue 1 was voluntarily withdrawn at the PHC. PHO, at 6; HOM Transcript at 4.

⁴ Board Member Margaret Pageler is the Presiding Officer in this matter. However, Ms. Pageler was unable to attend the HOM due to illness.

The *Quadrant* decision is in accord with prior rulings that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). As the Court of Appeals explained, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent’ with the requirements and goals of the GMA.” *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240 (2005). And *see*, most recently, *Lewis County*, 157 Wn 2d 488, 139 P.3d 1096 (2006) at fn. 16: “[T]he GMA says that Board deference to county decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds.”

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION, PRELIMINARY MATTERS, **and PREFATORY NOTE**

A. BOARD JURISDICTION

Ordinance 15606 was passed by the King County Council on October 2, 2006 and approved by the King County Executive on October 10, 2006. Notice of the County’s action was published in the *Seattle Times* on October 18, 2006. The Board finds, pursuant to RCW 36.70A.290, that the Keesling PFR was timely filed on December 18, 2006; Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amended sections of and added sections to the County’s development regulations, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

Subsequent to the Board’s issuance of its Order on Motions and the filing of the Petitioner’s PHB, the County filed a Motion to Supplement the Record with the *2004 King County Open Space System: Parks, Trails, Natural Areas and Working Resource Land Plan (Parks Plan)*. The County stated that this document was relied upon by the County in taking the action challenged by Petitioner but was inadvertently omitted from the Index of the Record. County Motion to Supplement at 1. The Petitioner did not object to the addition of this document. *Id.* at 3.

The Board notes that the compilation of the Record is the burden of the respondent jurisdiction and the Board does not direct the contents of the jurisdiction’s Index; it accepts it as a good faith effort by the jurisdiction to document the record of the proceedings and the materials used by the jurisdiction in taking to the GMA action. *Ramey v. City of*

Seattle, CPSGMHB Case No. 99-3-0002, Order on Remand, at 9 (11/11/00). However, the Record should be finalized *prior to* the submittal of the Petitioner’s pre-hearing brief so that all parties are fully apprised of the evidence that may be relied upon in their briefs. Despite the County’s delinquent finalization of the Record, the Board finds that the Petitioner did not object to the inclusion of the Parks Plan into the Record and that the Parks Plan is an official governmental document of which the Board may take official notice pursuant to WAC 242-02-660. This document was admitted into the Record at the HOM. HOM Transcript at 4.

C. PREFATORY NOTE

The Petitioner originally presented three legal issues in the PFR. PFR at 1, Section III. By agreement of the parties, Legal Issue No. 1, pertaining to the inadequacy of published notice, was withdrawn. PHO at 6; Petitioner’s PHB, Index of Issues. Legal Issue No. 2 asserts violations of RCW 36.70A.130(1)(d), which requires any amendment of a development regulation to be consistent with and implement the comprehensive plan, and RCW 36.70A.020(9), which requires the retention of open space and enhancement/development of recreational opportunities. *Id.* Legal Issue No. 3 asserts a violation of 36.70A.130(6), which requires the County’s review of potential amendments to development regulations be conducted in accordance with self-established time periods. *Id.* All briefing received by the Board was timely. This FDO refers to the briefing received as:

- Opening brief - Petitioners: **Petitioner’s PHB**
- Response brief - Respondent: **County Response**

The Petitioner did not file a Reply Brief.

IV. THE CHALLENGED ACTION AND CONTEXT

On October 2, 2006, King County adopted Ordinance 15606, which amended certain sections of KCC Titles 20 (Planning) and 21A (zoning) and added new two new sections to Title 21A – Sections 21A.06 and 21A.30. Core Document – Ord. 15606. Petitioner’s challenge is specific to Sections 8, 9, and 10 of the Ordinance.

Section 8 adds a new section to KCC 21A.06, and reads as follows:

Recreation, active. Recreation, active: structured individual or team activity that requires the use of special facilities, courses, fields or equipment. Active recreation requires a significant level of development, use and programming. Active recreation includes, but is not limited to, organized sporting events, such as baseball, football, soccer, golf, hockey, tennis and skateboarding, and to large-scale group picnics, gatherings and social events.

Core Document – Ord. 15606 at 15-16.

Section 9 adds a new section to KCC 21A.06, and reads as follows:

Recreation, passive. Recreation, passive: recreational activities that do not require prepared facilities like sports fields or pavilions. Passive recreational activities place minimal stress on a site's resources and are highly compatible with natural resource protection. Passive recreation includes, but is not limited to, camping, hiking, wildlife viewing, observing and photographing nature, picnicking, walking, bird watching, historic and archaeological exploration, swimming, bicycling, running/jogging, climbing, horseback riding and fishing.

Core Document – Ord. 15606 at 16.

Section 10 adds a new section to KCC 21A.06, and reads as follows:

Recreation facilities, passive. Recreation facilities, passive: facilities to support passive recreation that do not involved significant levels of infrastructure and development, including, but not limited to, open fields, trails, children's play equipment and picnic sites for a small number of people.

Core Document – Ord. 15606 at 16.

V. LEGAL ISSUES AND DISCUSSION

LEGAL ISSUE NO. 3

The Board's Prehearing Order states the legal issue as follows:

Legal Issue No. 3: Are these enactments [Sections 8, 9, and 10 of Ordinance 15606] non-compliant with RCW 36.70A.130(6)⁵ because the amendments are "substantive changes" according to King County Code 20.18.030.B and therefore subject to KCC 20.18.060 which calls for such changes to be part of the four-year cycle amendment process and thus deferred to the 2008 substantive change process?

⁵ RCW 36.70A.130(6) provides: (Emphasis added)

A county or city subject to the time periods in subsection (4)(a) of this section that, pursuant to an ordinance adopted by the county or city establishing a schedule for periodic review of its comprehensive plan and development regulations, has conducted a review and evaluation of its comprehensive plan and development regulations and, on or after January 1, 2001, has taken action in response to that review and evaluation shall be deemed to have conducted the first review required by subsection (4)(a) of this section. Subsequent review and evaluation by the county or city of its comprehensive plan and development regulations shall be conducted in accordance with the time periods established under subsection (4)(a) of this section.

Position of the Parties

Petitioner's PreHearing Brief argues that KCC 20.18.060 requires substantive changes to the County's Comprehensive Plan to be reviewed on a four-year cycle; the challenged ordinance provisions did not comply with this time period and, therefore, should have been deferred.

In its Response Brief, the County asserts that substantive amendments to development regulations are governed by KCC 20.18.090, not KCC 20.18.030 and 20.18.060 as Petitioner alleges. County Response at 9-10. According to the County, KCC 20.18.090 and .030 apply only to the amendment of *comprehensive plans* and impose no restriction on when *development regulations* may be adopted and/or amended. *Id.* at 10.

At the HOM, the Petitioner acquiesced that she overlooked and failed to cite KCC 20.18.090 which allows King County to – “from time to time” – propose development regulations to further implement the comprehensive plan. HOM Ex. 1; HOM Transcript at 6-8.⁶

Although the Petitioner did agree that KCC 20.18.090 applied, she noted that the notices published by the County did not adequately inform the public of the proposed amendments because the notices referenced “comprehensive plan amendments.” HOM Transcript at 6.

Conclusion

The Board concurs with the County. Ordinance 15606 amended and added to certain sections of the County's development regulations. The procedures applicable to these types of amendments are controlled by KCC 20.18.090 which imposes no time restrictions as to how often amendments may be made. Therefore, the Board finds that the County acted in compliance with its established time period for reviewing and evaluating its development regulations. There was no violation of RCW 36.70A.130(6). **The Board dismisses Legal Issue 3 in its entirety.**

LEGAL ISSUE NO. 2

The Prehearing Order sets forth Legal Issue 2 as follows:

⁶ It should be noted that although Petitioner agreed with the County that KCC 20.18.090 was the applicable section of the KCC, Petitioner asserted that the County should endeavor to more clearly articulate its actions to the public. In this matter, Petitioner notes that the hearing notices were entitled “2006 Comprehensive Plan Updates” and contained no verbiage regarding changes and/or additions to the development regulations. HOM Ex. 1; HOM Transcript at 6-8.

Legal Issue No. 2: Do new sections 8, 9, and 10 of the Ordinance, defining active recreation, passive recreation, and passive recreation facilities, thwart Goal 9 of RCW 36.70A.020 and fail to comply with RCW 36.70A.130(1)(d) by thwarting implementation of 2004 King County comprehensive plan parks policies? (Do these definitions, taken together, preclude and/or hamper recreational uses on Sammamish Valley Park lands which were purchased by King County in the 1960s using Forward Thrust and state Interagency Committee for Outdoor Recreation (IAC) funding that involved deeds calling for public recreation purposes in perpetuity, but which were, as part of the County's 2004 comprehensive plan amendment process, downzoned to Agriculture after having been placed in the Sammamish Valley Agricultural Production district in the late 1970s?)

Applicable Law

RCW 36.70A.020(9) provides:

Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

RCW 36.70A.130(1)(d) provides:

Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

Position of the Parties

Petitioner argues that with Ordinance 15606, the County has created new restrictive/limiting substantive definitions for active and passive recreation. Petitioner PHB at 2. Petitioner asserts that the County is now limiting recreational activities within the Sammamish Valley Agricultural Production District (SVAPD) to trails, trailheads, and 'conditioned' parks which is contrary not only to the area's purchase funding requirements (public recreation purposes *in perpetuity*) but also relegates recreational land to a severely limited non-conforming use. Petitioner PHB at 2.

According to the Petitioner, the new definitions found in Sections 8, 9, and 10 of the Ordinance are inconsistent with the County's Comprehensive Plan (Chapter 5 – Parks); specifically the philosophy stated on Page 5-1 and the emphasized policies set forth on Pages 5-3 and 5-6.⁷ Since the GMA requires consistency, these definitions are in

⁷ Based on the exhibits presented with the Petitioner's PHB, the Board assumes that the policies which Petitioner alleges the new sections of Ordinance are in conflict with are P105, P117, P118, and P123. This conclusion is based on the "red arrows" which Petitioner has directed at these policies.

violation of RCW 36.70A.020(9) and .103(1)(d). *Id.*; Core Document, 2004 Comprehensive Plan. In addition, Petitioner asserts that the inclusion of large scale group picnics within the definition of “active recreation” would result in the prohibition of using agricultural lands (i.e. Mountain Meadow Farms) for weddings and company picnics. *Id.* at 2-3.

In response, the County argues that Sections 8, 9, and 10 are merely definitions which neither approve nor prohibit any particular use of land. County Response at 16. The County asserts that Petitioner’s real concern is with the zoning of the SVAPD and the related land use table, not with the newly adopted definitions. *Id.* at 18. The County further contends that the Parks Plan has previously categorized group picnics as “active recreation” and the Petitioner has failed to demonstrate how the challenged sections of Ordinance 15606 would prohibit such activities. *Id.* at 19.

Discussion and Analysis

The Comprehensive Plan’s overall goal in regard to parks and open space is to acquire and protect these lands for county residents. Park Element Policies which Petitioner points to provide:

P105: King County shall provide regional parks and recreational facilities that serve many users from many neighborhoods and communities. Regional parks include unique sites and facilities that should be equitably distributed.

P117: King County shall explore incentives, regulations and funding mechanisms to preserve, acquire, and manage valuable park and open space lands.

P118: Parks, trails and other open space lands should be acquired and developed to meet adopted standards with a combination of public funds and dedication or contributions from residential and commercial development, based on their service impacts.

P123: Open space lands shall be classified to identify the primary role in the open space system and purpose of acquisition as active recreation, trails, multiuse, natural area or working resource lands. They will be classified as regional or local and the primary role and purpose of the site will be identified.

Petitioner fails to demonstrate to the Board just how the County’s new definitions for active recreation, passive recreation, and active recreation facilities are inconsistent with the stated policies and thwart the GMA’s goal of retaining, enhancing, and developing parks and recreational facilities. The Board agrees with the County that the challenged provisions are simply definitions that impose no duties or prohibitions. As the Board reads the definitions for “active recreation,” “passive recreation,” and “passive

recreational facilities,”⁸ quoted *supra*, in the context of these Park Element Policies and Goal 9 of the Act, the Board fails to find a conflict or inconsistency. These terms simply define and classify types of recreational activities and facilities. The definitions do not impose any substantive or limiting restrictions preventing the County from achieving the goals it has set for itself.

The Board notes that when applied to a particular zoning district, these definitions may limit those uses which are permitted outright, versus uses which require special permitting. However, a requirement for additional review of proposed recreational opportunities (*i.e.* soccer or baseball field) does not amount to a prohibition which is in opposition to the GMA’s open space/parks goal or the County’s own goals and policies contained within its Comprehensive Plan.

Conclusion

The Board finds that Sections 8, 9, and 10 of Ordinance 15606 do not thwart the GMA’s Goal pertaining to open space and recreation (RCW 36.70A.020(9)). From the Board’s perspective, these definitions only assist in defining the recreational activities of the County in a clear and concise manner and neither permit nor prohibit any type of recreational activities.

The Board further finds that Sections 8, 9, and 10 of Ordinance 15606 are not inconsistent with the cited Comprehensive Plan policies (P105, P117, P118, and P123).

The Board concludes that King County’s actions were not clearly erroneous and did not violate RCW 36.70A.020(9) and 36.70A.130(6). **The Board dismisses Legal Issue No. 2 in its entirety.**

ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties and having deliberated on the matter, the Board ORDERS:

⁸ See Core Document, Ordinance No. 15606, sections 8 and 9, respectively.

1. King County's adoption of Ordinance No. 15606 was **not clearly erroneous** and **complies** with the review and amendment cycle set forth in RCW 36.70A.130(1)(d) and KCC 20.18.090. **Legal Issue No. 3 is dismissed with prejudice.**
2. King County's adoption of Ordinance No. 15606 was **not clearly erroneous** and **complies** with the GMA's goal for open space and parks (RCW 36.70A.020(9)) and is not inconsistent with the County's Comprehensive Plan's Parks Element policies (RCW 36.70A.130(6)). **Legal Issue No. 2 is dismissed with prejudice.**

So ORDERED this 13th day of June, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David Earling
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
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 242-02-832.⁹

⁹ Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

APPENDIX A

Procedural History

On December 18, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Maxine Keesling (**Petitioner** or **Keesling**). The matter was assigned CPSGMHB Case No. 06-3-0035 and is hereafter referred to as *Keesling V v. King County*. Board member Margaret Pageler is the Presiding Officer in this matter. Petitioner challenges King County's (**Respondent** or the **County**) adoption of Ordinance 15606.

On December 21, 2006, the Board issued a "Notice of Hearing" (**NOH**) setting a date for a Prehearing Conference (**PHC**) and establishing a tentative schedule for the case.

On January 3, 2007, the Board received a Notice of Appearance from Senior Deputy Prosecutors Kristen Wynne and Stephen Hobbs, on behalf of King County.

On January 18, 2007, the Board received King County's Index of Record (**Index**).

On January 18, 2007, the Board conducted the PHC at the Board's offices in Seattle.

On January 19, 2007, the Board issued its Prehearing Order (**PHO**) establishing the case schedule and the issues to be decided.

On January 31, 2007, the Board received King County's Amended Index of Record (**Amended Index**).

On January 31, 2007, the Board received Petitioner's Motion to Supplement the Record (**Petitioner's Motion to Supplement**).

On February 20, 2007, the Board received King County's Response to Petitioner's Motion to Supplement (**County Response – Motion**).

On February 27, 2007, the Board received King County's Core Documents – the County's 2004 Comprehensive Plan and Ordinance 15606.

On February 28, 2007, the Board issued its Order on Motions (**Order**), denying the Petitioner's request to supplement the Record.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

On March 12, 2007, the Board received the Petitioner's Pre-Hearing Brief (**Petitioner PHB**) with 14 attachments.

On March 22, 2007, the Board, by letter, advised the parties that the HOM needed to be rescheduled to April 30, 2007.

On March 29, 2007, the Board received King County's Motion to Supplement the Record (**County Motion to Supplement**).

On April 5, 2007, the Board issued an Order changing the date of the HOM to April 30, 2007.

On April 10, 2007, the Board received King County's Pre-Hearing Brief (**County Response**) with 10 attachments.

On April 24, 2007, the Board received King County's Second Amended Index of Record (**2nd Amended Index**).

The Petitioner did not file a Reply Brief.

On April 30, 2007, the Board held a Hearing on the Merits (**HOM**) at the Board Offices at 10:00 AM. Board Member Dave Earling presided, with Board Ed McGuire and Law Clerk Julie Taylor in attendance. Petitioner Maxine Keesling appeared *Pro Se* and Kristen Wynne represented King County. Court Reporter services were provided by Katie Eskew of Byers & Anderson. A transcript of the proceedings was ordered.

On April 30, 2007, the Board received Petitioner's Statement (**HOM Ex. 1**) and excerpts of the KCC submitted by King County (**HOM Ex. 2** – KCC 21A.06; **HOM Ex. 3** - KCC 20.18).

On May 7, 2007, the Board received the transcript of the proceedings.