



On January 26, 2007, the Board received a “Motion to Intervene of Overton & Associates LP,” with an attached “Declaration of David Overton.”

The Prehearing Conference (**PHC**) was conducted on February 26, 2007, in the Board’s offices, Suite 2356, 800 Fifth Avenue, Seattle, and the Prehearing Order (**PHO**) was issued February 26, 2007. The PHO set the final schedule for this case and **granted** intervention to Great Western Sports, Inc. and Overton and Associates, limiting Interveners role in any settlement negotiations.

On March 19, 2007, the Board received two motions from Interveners: 1) “Overton’s Motion to Dismiss SEPA Claims and to Clarify Scope of Intervention” (**Overton Motion**) and from Great Western Sports, Inc. 2) “Motions to Dismiss SEPA Issue and to Modify Prehearing Order” (**GWS Motion**). Both interveners requested that their *consent* be required for any settlement in this matter. Overton Motion, at 9-12, and GWS Motion, at 6-7.

On March 30, 2007, the Board received “Petitioners’ Response to Interveners’ Motions to Dismiss and Motions for Reconsideration” (**CHECK Response**) and “Declaration of Thomas F. Donnelly” (**Donnelly Declaration**).

On April 1, 2007, the Board received “Stipulation for Dismissal of Claim” (Stipulation to Dismiss Issue 4). CHECK stipulated to the dismissal of Legal Issue 4 from the PHO – related to the County’s compliance with RCW 36.70A.106.

On April 2, 2007,<sup>1</sup> the Board received “Kitsap County’s Response to Great Western Sports Motion to Modify Prehearing Order and Overton & Associates Motion to Clarify Scope of Intervention” (**County Response**). The County objected to expanding Interveners’ scope of intervention to require their consent in any settlement.

Also on April 2, 2007, the Board received: 1) Overton’s “Rebuttal to Response to Overton’s Motion to dismiss SEPA Claims and to Clarify Scope of Intervention” (**Overton Reply**); and 2) GWS’s “Rebuttal to Petitioners’ and Kitsap County’s Responses to Motions” (**GWS Reply**).

On April 4, 2007, the Board received “Joint Motion for Settlement Extension” (**Settlement Request**). The Settlement Request was signed by representatives of both Petitioners and Respondent, and indicated that the parties are pursuing settlement of this matter and asking for a *ninety-day* settlement extension to the case schedule. The parties also ask the Board to delay its decision on Dispositive Motions {SEPA Claim} until the rescheduled Order on Motions date.

The Board will first address the Stipulated Dismissal of Legal Issue 4; then the Settlement Extension and Schedule; and finally, the Interveners’ Scope of Intervention.

---

<sup>1</sup> An electronic copy of this submittal was received by the Board on March 30, 2007.

## **II. DISCUSSION**

### **Stipulated Dismissal of Legal Issue 4 - Granted**

Petitioner has requested Legal Issue 4 be dismissed. The Board honors the Petitioners' request, the motion is **granted**. Legal Issue 4 is dismissed. **Appendix B** shows the Legal Issues still pending in this matter.

### **Request for 90-day Settlement Extension – Granted**

RCW 36.70A.300(2) provides that the final order of the Board shall be issued within one hundred eighty days of receipt of the petition for review, except that the time may be extended to enable the parties to settle the dispute if an extension for that purpose is requested by all parties or the board determines that a negotiated settlement could resolve significant issues in dispute.

The Board finds that Petitioner CHECK and Respondent Kitsap County have signed the Settlement Request and indicated that they are pursuing settlement of this matter. CHECK and Kitsap County have requested a *ninety-day* extension of the case schedule to allow continued settlement discussions.

Therefore, the Board concludes:

1. Pursuant to RCW 36.70A.300(b), the Board may grant one or more settlement extensions for up to ninety days each.
2. The Petitioner CHECK and Respondent Kitsap County in CPSGMHB Case No. 07-3-0009 have jointly requested an extension of *ninety (90)* days.
3. The request for settlement extension is timely [RCW 36.70A.300(2)].
4. The Board will extend the FDO date by *ninety days* to **October 15, 2007**. This change necessitates revisions to the scheduled deadlines for motions and briefing in Case No. 07-3-0009, as set forth in **Appendix A**.
5. **The Board will additionally require a joint status report from Petitioners and Respondent on July 2, 2007**. The status report may be a brief statement indicating whether issues in the case have been narrowed or resolved, whether an additional settlement extension is requested, or whether settlement has not been achieved and Petitioners will proceed with the case. If an additional settlement extension is requested, the concurrence of Respondent must be indicated.

The joint request for settlement extension, as indicated in the parties' Joint Motion for Settlement Extension, is **granted**. The deadline for the Final Decision and Order in CPSGMHB Case No. 07-3-0009 is hereby changed to **October 15, 2007**.

Note that the Board is also extending the due date for its Order on Motions. Thus, the pending dispositive motion regarding SEPA – Legal Issue 3 – will be issued at the newly scheduled date, absent any additional request for a settlement extension.

07309 CHECK (April 5, 2007)

**07-3-0009 Order Dismissing Legal Issue 4, Granting Settlement Extension, and Denying Expansion of the Scope of Intervention**

**Page 3 of 9**

The amended case schedule in *Appendix A* is established based on this extension.

*Expansion of Interveners' Scope of Intervention - Denied*

The Board's February 26, 2007 PHO granted intervention to Great Western Sports Inc. and Overton & Associates on behalf of Kitsap County. The PHO aligned Interveners' briefing schedule to correspond to that of the County, allowed briefing on all Legal Issues, and allowed the County to share time for oral argument with Interveners. Additionally, the PHO placed the following limitation on Interveners if settlement negotiations were to occur:

Interveners are entitled to notice of any settlement discussions that occur between Petitioners and Respondent, and may participate in such discussions, if any. *However, a settlement to resolve this dispute only requires the agreement of Petitioners and Kitsap County.*

2/26/07 PHO, at 3.

Both Interveners object to this limitation and ask for full participation, including their consent, in settlement discussions. Overton Motion, at 9; GWS Motion, at 6-7. Interveners contend that they have significant and direct property interests in the outcome of this matter and justice requires that they "be permitted to consider and approve any proposed settlement" and "be allowed to fully participate in the proceedings *including any settlement agreement.*" Overton Motion, at 9; GWS Motion, at 6; (emphasis in original).

Intervener Overton also argues that they are "indispensable parties" under CR19(a), arguing that they have "such a significant interest in the action that it would be inequitable for the action proceed in his absence – regardless of the interests of the other parties to the action." Overton Motion, at 10. Additionally, Overton, like GWS, argues judicial economy supports including Interveners in any settlement discussions that occur between CHECK and Kitsap County. *Id.* at 11; GWS, at 7.

GWS argues that "the County might agree to reverse the decisions that are under appeal" and that GWS "understands that the County has already considered a settlement with this effect" and that "such a settlement agreement would directly impact GWS's significant property interests." GWS Motion, at 6.

CHECK counters that Interveners are "essentially arguing that they should be allowed to block a settlement agreement between the County and Petitioners." CHECK Response, at 10. Petitioners continue,

GWS and Overton would have full and complete opportunity to protect their asserted interests even if the settlement they described were reached. Any settlement resolving this matter would involve repealing the

07309 CHECK (April 5, 2007)

**07-3-0009 Order Dismissing Legal Issue 4, Granting Settlement Extension, and Denying Expansion of the Scope of Intervention**

**Page 4 of 9**

expansion of the SKIA UGA and the IMPRA/UHA designation and zoning would have to incorporate a legal process for repealing that action and that process would require proper notice, and opportunity for public comment, and a public hearing prior to consideration of the new action. Overton and GWS would have a full and complete opportunity to appear at the public hearing, submit public comments, and lobby the Board of County Commissioners to protect their interests.

CHECK Response, at 11.

The County's response to Interveners' motions is limited to expanding the scope of intervention. The County contends,

GWS and Overton ask this Board to confer upon interveners the right to accept or reject any settlement agreement that may be reached between Petitioners and Respondent Kitsap County; they are asking for veto authority over settlement agreements. Conspicuously, interveners provide no legal authority from the [GMA], the Boards Rules of Practice and Procedure, or case law to support their position that they should be granted a settlement veto. In fact, the law and common sense run counter to their request and, instead, supports the scope of intervention as set out in the Prehearing Order. [Citations omitted].

County Response, at 2.

The County asserts that the actions taken to resolve GMA-related appeals are legislative actions, not quasi-judicial actions, made by the County Commissioners, and the "Growth Board has no authority to delegate the County's legislative authority to interveners and therefore, the Board cannot expand the scope of intervention to grant such power to GWS and Overton." *Id.* at 2-3. The County also asserts that any settlement would be subject to the GMA's notice and public participation requirements, "including the right to appeal any legislative action they may disagree with." *Id.* at 3. The County also argues that the Board has previously ruled on the relevance of the "indispensable party" rule in GMA cases and found it inapplicable. (*Citing Alberg, et al., v. King County*, CPSGMHB Case No. 95-3-0041c, Final Decision and Order, (Sep. 13, 1995), at 29-36. The County also claims that judicial economy would not be served since any claims brought by Interveners would be different from those brought by Petitioners. *Id.* at 5. Kitsap County forcefully argues

Neither GWS nor Overton could have forced the County to adopt the IMPRA designation for the Overton property. Now they are asking the Board to grant them the authority to prohibit the County from possibly removing this designation for the Overton property. This is an unprecedented request that takes legislative policy decisions out of the hands of elected officials charged with implementing the GMA and places

it in the hands of select property owners. The Board should deny these motions.

*Id.* at 6.

In reply, Overton argues that the Board's rules do not allow a Petitioner to unilaterally withdraw a GMA appeal. Instead Overton argues WAC 242-02-720(1) requires all parties must stipulate to dismissal of an appeal. Overton Reply, at 5-6. The Board notes that it has not received a unilateral requests to withdraw the appeal or dismiss the appeal. Consequently, WAC 242-02-720 is irrelevant. GWS analogizes to intervention in Land Use Petition Act (**LUPA**) cases to suggest that the original parties may not stipulate the rights of an intervener away. GWS reply, at 6. The Board reminds GWS that its review is of a legislative action of the County, not a project action that is subject to LUPA review. To alter any legislative action, an additional legislative action is required, preceded by appropriate notice and the opportunity for public participation, and ultimately the right to appeal. If necessary, Interveners may protect their rights through the legislative process.

**In conclusion, the Board firmly and strongly agrees with the positions argued by CHECK and Kitsap County.** The Board is empowered to limit the scope of intervention, as it has done in the 2/26/07 PHO. WAC 242-02-270(3). The Board **will not alter** the PHO's limitation on GWS or Overton's intervention. Nor will the Board entertain motions that would give Interveners veto power over the legislative decisions of the duly elected officials of Kitsap County. If, settlement were reached, and the County legislative authority reversed or repealed the decision it made that is the subject of the present appeal, Interveners would have the remedy of bringing an appeal of that decision to this Board. This avenue appropriately "serves justice," not the "judicial economy" route offered by Interveners. The Motions of GWS and Overton to modify the scope of intervention in the PHO to allow them to approve, or consent to, any potential settlement agreement between CHECK and Kitsap County is **denied**.

### **III. ORDER**

Based upon review of the Petitioners' Stipulation for Dismissal of Claim [Legal Issue 4], the Joint Motion for Settlement Extension, and the briefing regarding the expansion of the scope of intervention, the relevant law, and the findings and conclusions noted above, the Board enters the following Order:

1. Per the request of Petitioners, Legal Issue 4 is **dismissed**.
2. The joint request for a *ninety-day* settlement extension is **granted**.
3. The Petitioners and Respondents shall file and serve a status report on **July 2, 2007**.
4. A new Case Schedule is established, as indicated in *Appendix A*.

5. The June 11, 2007 Hearing on the Merits for CPSGMHB Case No. 07-3-0009 is **cancelled**.
6. The Hearing on the Merits is rescheduled to **10:00 a.m. September 10, 2007** at the Board's offices.
7. The deadline for the Final Decision and Order in CPSGMHB Case No. 07-3-0009 is hereby changed to **October 15, 2007**.
8. Intervenors' request to expand the scope of intervention to require Intervenors' consent to settlement is **denied**.

So ORDERED this 5<sup>th</sup> day of April, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

---

Edward G. McGuire  
Presiding Officer

---

David O. Earling  
Board Member

---

Margaret A. Pageler  
Board Member

**APPENDIX A**

**AMENDED FINAL SCHEDULE**  
**CPSGMHB Case No. 07-3-0009**  
**CHECK v. Kitsap County**

All documents must be filed with the Board (**one original plus four copies on three-hole punched paper and copied back-to-back**) by **4:00 p.m.** on the designated day, unless otherwise noted. Copies of all documents filed with the Board must be served on all parties, postmarked on the designated day.

<b>DATE</b>	<b>EVENT</b>
January 22, 2007	Petition for Review filed (07-3-0009)
January 25, 2007	Board Notice of and Hearing issued
February 1, 2007	Deadline for seeking Direct Review by Superior Court <sup>2</sup>
<b>February 26, 2007</b>	<b>Prehearing Conference held</b>
	Respondent's Index received
<b>February 26, 2007</b>	<b>Board Prehearing Order issued</b>
March 19, 2007	Motions and Memoranda in Support ( <b>with exhibits</b> ) received [SEPA – Legal Issue 3]
March 30, 2007	Response to Motions ( <b>with exhibits</b> ) received [SEPA – Legal Issue 3]
April 1, 2007	Stipulation for Dismissal of Legal Issue 4 received
April 2, 2007	Rebuttals to Response to Motions received)
April 4, 2007	Joint Motion for Settlement Extension received
<b>April 5, 2007</b>	<b>Board Order Dismissing Legal Issue 4, Granting Settlement Extension and Denying Expansion of the Scope of Intervention issued.</b>
	<b>Settlement Status Report due</b>
<b>July 2, 2007</b>	<b>Board Order on Motions due</b>
<b>July 11, 2007</b>	Deadline for Petitioner's Prehearing Brief ( <b>with exhibits</b> )
August 6, 2007	Deadline for Respondent's Prehearing Brief ( <b>with exhibits</b> )
August 27, 2007	Deadline for Petitioner's Reply Brief (optional)
September 4, 2007	Deadline for Requesting Settlement Extension <sup>3</sup>
<b>September 11, 2007</b>	<b>Hearing on Merits of Petition: 10:00 a.m.-12:30 p.m., location – Board's offices, Suite 2470</b>
<b>October 15, 2007</b>	<b>Final Decision and Order due</b>

<sup>2</sup> See: RCW 36.70A.295.

<sup>3</sup> See: RCW 36.70A.300(2).

## APPENDIX B

### Remaining Legal Issues in CPSGMHB Case No. 07-3-0009

1. *Whether adoption of Ordinance No. 370-2006 approving the Ten Year Update of the Kitsap County Comprehensive Plan (**Plan Update**), expanding the South Kitsap Industrial Area (**SKIA**) UGA and designating land within that UGA as Industrial Multi-purpose Recreational Area – Urban Holding Area (**IMPRA-UHA**) failed to be guided by RCW 36.70A.020(1), (2), (8) and (12), and failed to comply with RCW 36.70A.070, .110, .130 and .215 because the County failed to prepare an adequate Land Capacity Analysis to demonstrate support for the UGA expansion; because there is land within the existing UGA available for large scale industrial projects and/or recreational uses; because the land included within the expanded UGA is not already characterized by urban growth; and because there are not adequate public services necessary to serve the expanded urban development area. [Issue 4.3, PFR, at 3-4.]*
2. *Whether adoption of Ordinance 367-2006, creating the Urban Holding Area (**UHA**) zone and designating land within the newly expanded SKIA UGA as UHA failed to be guided by RCW 36.70A.020(1), (2), (8) and (12) and failed to comply with RCW 36.70A.110 because it is based on the illegal Comprehensive Plan designation in Ordinance No. 370-2006; because it allows urban growth in existing rural forested area that is not already characterized by urban growth; and because there are not adequate public services necessary to serve the urban development area. [Issue 4.4, PFR, at 4.]*
3. *Whether the County's adoption of Ordinances 367-2006 and 370-2006 violated the Washington State Environmental Policy Act (**SEPA**), ch. 43.21C RCW, because the County failed to conduct adequate environmental review of the probable significant adverse environmental impacts of expansion of the SKIA UGA, creation of the new IMPRA designation and UHA zone, and designation of existing rural forested lands as IMPRA and UHA. [Issue 4.5, PFR, at 4.]*
4. ~~*Whether the County's adoption of Ordinances 367-2006 and 370-2006 violated RCW 36.70A.106 because the County failed to notify the Washington State Department of Trade and Economic Development pursuant the requirements of that provision. [Issue 4.6, PFR, at 4-5.]*~~ **Dismissed 4/5/07**
5. *Whether the County's adoption of Ordinance 370-2006 violated RCW 36.70A.100 because the County failed to coordinate, and ensure consistency with the Comprehensive Plan adopted by other counties or cities, such as Mason County, pursuant to the requirements of that provision. [Issue 4.7, PFR, at 5.]*