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

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| ROBERT CAVE and JOHN COWAN,<br><br>Petitioners,<br><br>v.<br><br>CITY OF RENTON,<br><br>Respondent. | ) | **CPSGMHB Case No. 07-3-0012**<br><br>***(Cave/Cowan)***<br><br><br><br>**ORDER ON MOTIONS** |

## I. BACKGROUND

On January 29, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Robert Cave and John Cown (**Petitioners**). The matter was assigned Case No. 07-3-0012, and is referred to as *Cave/Cowan v. City of Renton*. Board member Margaret A. Pageler is the Presiding Officer (**PO**) for this matter[1]. Petitioners challenge the City of Renton's (**Respondent** or **the City**) adoption of Ordinance 5234 rezoning certain properties within the Upper Kennydale area, including those owned by the Petitioners, from Residential 8 units per acre (**R-8**) to Residential 4 units per acre (**R-4**). 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 2, 2007, the Board issued a Notice of Hearing and Intent to Consolidate in the above-captioned case.[2]

On March 1, 2007, the Board conducted the Prehearing Conference (**PHC)** at which the City's "Index of the Record" (**Index**) and a "Restatement of Issues Presented for Resolution" (**Restated Issues**) were received. An Amended Index was filed with the Board on March 13, 2007 (**Amended Index**).

On March 22, 2007, the Board received the City's Motion to Dismiss (**City's Motion**).

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[1] Presiding Officer Pageler was unable to participate in the Motions portion of this case due to illness, and is therefore not a signatory to this Order on Motions.

[2] The Board had intended to consolidate this matter with CPSGMHB Case No. 07-3-0011 *Petersen v. City of Renton*. However, on February 27, 2007, the Board received a voluntary withdraw of the PFR from the Petitioner in the *Petersen* matter. The Board entered an Order of Dismissal for Case No. 07-3-0011 on February 28, 2007.



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On April 5, 2007, the Board received Petitioners' "Response in Opposition to the City of Renton's Motion Response to Dismiss" (**Petitioners' Response**). Included within their response, the Petitioners moved to supplement the record with several documents to support their arguments including a declaration by Petitioner Cowan (**Cowan Declaration**).

On April 12, 2007, the Board received the City's "Reply to the Petitioners' Response and Objection to Supplement the Declaration of John Cowan." (**City's Reply**). In addition, by stipulation of the parties, the City filed a second amendment to the Index, adding three documents (**2nd Amended Index**). [3]

On April 13, 2007, the Petitioners filed a "Motion to Strike 'Attachment D' and related City Arguments" (**Motion to Strike**). With this motion, the Petitioners requested that the Board strike Attachment D to Ordinance 5228 as identified by the City in its Motion to Dismiss and included a Declaration by Petitioner Cave (**Cave Declaration**) and a Declaration by Attorney Gendler (**Gendler Declaration**).

On April 16, 2007, the City requested an opportunity to file a rebuttal to the Petitioners' Motion to Strike. The Board granted this request; and on April 20, 2007 the City filed its response (**City's Rebuttal**). Included within the City's Rebuttal were two declarations – the Declaration of Bonnie Walton (**Walton Declaration**) and the Declaration of Loni Johnson (**Johnson Declaration**) – which the City relies upon to support its argument.

On April 26, 2007, the Petitioners filed a "Reply Memorandum of Petitioners in Support of Motion to Strike" (**Petitioners' Reply**).

The Board did not hold a hearing on the dispositive motions.

## II. DISCUSSION AND ANALYSIS

*Challenged Action and Motions*

On December 1, 2006, the City published a total of 14 ordinances (Ordinances 5228 through 5241) which were adopted by the City Council on November 27, 2006. Index 342, City's Exhibit 12. With these ordinances, the City had effectively adopted the 2006 amendments to its Comprehensive Plan and changed the zoning classification of certain properties within the City. *Id.* The Petitioners' challenge focused on Ordinance 5234. This ordinance outlined the specific boundaries and mapping of properties within the "Upper Kennydale Area" and authorized the rezone of these properties from R-8 to R-4.

The impetuous for this area-wide rezone appears to have commenced from the request of a single property owner. Located within the Kennydale area is an approximately 3.4 acre parcel of land known as the Kennydale Blueberry Farm. The property owner requested a rezone from Resource Conservation (RC) to *either* R-4 or R-8, asserting that the farm is currently spot zoned; the current RC zoning has failed to protect it from incompatible land use changes in the surrounding area; the Comprehensive Plan Vision directs development at higher density than

[3] Any future reference to the Index shall be to the 2nd Amended Index received by the Board on April 12, 2007.



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allowable within the RC zone; and land use changes in the surrounding area has affected the viability and continued operation of the farm as a business. Index 53, City's Exhibit 5.

Based on this request, the City determined that the rezone of a single parcel of property did not make sense and expanded the rezone to include a larger portion of the Kennydale Area (approximately 49 acres – "Upper Kennydale Area"). This expansion was based not only on the Blueberry Farm but on concerns expressed to the City by area residents in regard to the pressure of more intense development occurring within the area. Index 53, City's Exhibit 5; Index 128, City's Exhibit 8 at 4. At the time the City took this amendment under consideration, this area of the City was designated Residential Single Family (RSF) with R-8 zoning and a proposal was put forth to re-designate the area Low Density Residential (LDR) with R-4 zoning.[4] *Id.* The City based its decision to rezone the Upper Kennydale Area, in part, on the fact that R-4 zoning did not exist when the area was originally designated R-8; the natural features of the land (steep slopes, wetlands, Class 4 stream); the adverse impacts of recent R-8 level development; and the historic large lot estate-style development pattern; R-4 zoning would serve to better preserve and protect the area. *Id.*

- *Motion to Dismiss*

The City moved to dismiss Petitioners entire PFR on jurisdictional grounds, or in the alternative, for the Board to dismiss Legal Issue No. 10 (SEPA) and to issue a final disposition on Legal Issue Nos. 1 and 2 (notice and public participation). Motion to Dismiss at 1. With its Motion, the City argues four points:

1. The issue is moot and the Board cannot provide the relief the Petitioner seeks.
2. The Petitioners are time barred from challenging Ordinance 5228[5] and issues pertaining to comprehensive plan amendments.
3. The Board lacks jurisdiction to hear SEPA challenges for which the Petitioners failed to exhaust administrative remedies and establish standing.
4. The City can demonstrate that it provided adequate notice and substantial opportunity for public participation.

*Id.* at 8.

- *Motion to Supplement the Record*

Within their Response, Petitioners moved to supplement the Record with several items:

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[4] RSF and LDR are both land use designations under the City's Comprehensive Plan's Land Use Element. These land use designations are supported by a variety of zoning designations, as set forth in the Land Use Element, but do not actually assign specific zoning to a parcel of land.

[5] Ordinance 5228 was passed by the City County on November 27, 2006 and published on December 1, 2006. This ordinance amended certain sections of the Capital Facilities, Community Design, Transportation, and Land Use Elements and the Land Use Map of the City's Comprehensive Plan. Motion to Dismiss, City Exhibit 17; Index 245.



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Petitioners' Exhibit 1 – Declaration of John Cowan, dated April 4, 2007
Petitioners' Exhibit 29 – City of Renton Policy & Procedure for Ordinance, Resolutions, and Contracts, effective date January 27, 1992[6]

Petitioners' Response at 3, fn. 3; at 17, fn. 10.

The City objected to the inclusion of the Cowan Declaration asserting that the document does not satisfy the criteria of WAC 242-02-520 for supplemental material nor can the Board take official notice of the declaration (citing *Vashon-Maury v. King County/Quadrant*, CPSGMHB Case No. 95-3-0008c (Order on Motions, 4/4/00) at 4). *City's Rebuttal* at 2-3.

- *Motion to Strike*

After filing its Motion to Dismiss, the City submitted "Attachment D- Ordinance 5228" to the Board, stating that although it was referenced in its Motion to Dismiss, the City had inadvertently omitted it as an attachment in Exhibit 17 (Index 245). Subsequent to the filing of all briefs in the Board's motions practice, the Petitioners' moved to strike Attachment D to Ordinance 5228. Motion to Strike at 1. Petitioners argue that Attachment D is not part of Ordinance 5228, asserting that the ordinance consists only of the 3 pages certified by the City Clerk. *Id.* at 1-3. With their motion, Petitioners seek to submit two Declarations in support of the motion:

Cave Declaration, including 2 attachments
Gendler Declaration, including 2 attachments

In reply, the City argues that Ordinance 5228 incorporates by reference Attachments A through E and therefore Attachment D is, in fact, part of the ordinance. City's Reply at 2-3. The City also requests that the Cave Declaration be stricken or given little weight. *Id.* at 4. With their reply to this motion, the City seeks to submit two Declarations in support of its opposition to this motion:

City's Exhibit A – Walton Declaration (City Clerk for the City)
City's Exhibit B – Johnson Declaration (Record Management Specialist for the City)

## ***Board Discussion***

*1. Motions to Supplement/Strike – All Parties*

As noted *supra*, Petitioners seek to supplement the record with the Cowan Declaration, the Cave Declaration, and the Gendler Declaration and, the City seeks to supplement the record with the Walton Declaration and the Johnson Declaration. The Board has reviewed each of these and determines the following:

- *Declarations of Cave, Gendler, Walton, and Johnson*

[6] This document has been included by the City in the Amended Index as No. 344. *See* City's Reply at 8, fn. 10; Amended Index, line item 344.



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All three of these declarations pertain to the City's inclusion of Attachment D within the record. The *Cave Declaration* speaks to Petitioner Cave's actions in response to the City's assertion that Attachment D to Ordinance 5228 was erroneously omitted from Exhibit 17 to the City's Motion to Dismiss. The *Gendler Declaration* addresses the City's submittal of Attachment D and a review of the duties of the City Clerk. The *Walton* and *Johnson Declarations* set forth the City's response to Petitioner Cave's request for certification of Ordinance 5228 during April 2007.

**The Board finds that Attachment D is incorporated by reference within Ordinance 5228 and is therefore already part of the Record.** Index 245, Section I at 2. The mere fact that the City omitted it from the copies submitted to the Board as an exhibit to its motion does not eradicate it as part of the record. The Board will not supplement the Record with declarations that pertain to actions taken *after the adoption*[7] of the challenged ordinance and relate to a document which is unmistakably part of the Record.

**The Petitioners' Motion to Strike Attachment D from the Record is DENIED and the declarations submitted by both the Petitioners (Cave and Gendler) and the City (Walton and Johnson) will not be included within the Record of this matter.**

- *Cowan Declaration – Exhibit 1, Petitioners' Response*

This declaration recites Petitioner Cowan's experiences during the City's amendment process. It speaks to his awareness and participation of meetings and public hearings held and to communication with both council members and City staff. The declaration contains several hearsay statements (e.g. "Ms. Lind told me …" or "The City Attorney stated …"). However, unlike the declarations which the parties submitted with the Motion to Strike, all of the information within this declaration relates to activity occurring prior to the adoption of Ordinance 5234. Nevertheless, all of the information contained within this declaration has not been supported by evidence contained within the Record. The information/arguments contained within this declaration can be presented to the Board within the Petitioner's opening brief and will need to be supported by the Record.

**The Petitioners' request to supplement the Record with the Cowan Declaration is DENIED.**

*2. City's Motion to Dismiss Legal Issue 10 - SEPA*

The City argues, and the Petitioners concede, that the Petitioners did not timely appeal the City's SEPA Determination of Non-Significance (DNS) and that the SEPA issue should be dismissed. Motion to Dismiss at 13; Petitioners' Response at 2.

**The City's motion to dismiss Legal Issue No. 10 is GRANTED.**

*3. City's Motion to Dismiss PFR - Mootness & Requested Relief*

[7] The Board's decision is to be based on the record developed by the a jurisdiction *in taking the action* that is the subject of review by the Board (WAC 242-02-540) and not in actions that occurred subsequent to the action.



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The City argues that absent a finding of compelling considerations of public policy, the Board should find that the issues presented by the Petitioners, based on Ordinance 5234, are moot and dismiss the PFR in its entirety. *Id.* at 8-9 (citing *Hayes v. Kitsap County*, CPSGMHB Case No. 95-3-0081c (April 23, 1996), Order Granting Dismissal at 3)). The basis for the City's argument is the following:

> Petitioners seek to invalidate Ordinance 5234. Assuming *arguendo* that the Board finds that the City violated provisions of the GMA [and 5234 is invalid], the Board's recourse would then be to remand the ordinance back to the City to begin new proceedings. Assuming further that the City then undertakes the process anew, the end result remains unchanged.

*Id.* at 9. In addition, the City argues that an unchallenged ordinance - Ordinance 5228 - designates the Upper Kennydale area as Residential Low Density with permits only three applicable zoning designations – R-4, R-1, and RC. *Id.* at 9, fn. 13. According to the City, the highest zoning possible is R-4 and therefore, because of the limitation on zoning, the City asserts that the remedy the Petitioners seek (which the City asserts is "higher zoning based on personal economic gain") would not be available from the Board. *Id.*

In response, the Petitioners allege that the City is essentially requesting the Board issue an advisory opinion in regard to any remedial actions that the City may enact. Petitioners' Response at 11. Petitioners assert that the Board's motion practice is generally limited to questions of jurisdiction, standing, and timeliness and that a mootness argument is not the type of jurisdictional argument for which the Board's motion practice is provided. *Id.* at 11-12. In addition, Petitioners argue that a variety of remedies are available to both them and the City to cure the issues presented by this appeal. *Id.* at 13-14.

In reply, the City alleges that the Petitioners have failed to present any evidence or support their claim and that it is the Petitioners, and not the City, seeking an advisory opinion. City's Reply at 4.

*Board Discussion*

The Board has previously applied the doctrine of mootness to questions posed to it. In general, the only time mootness has been found to be applicable is when a jurisdiction has repealed the ordinance being challenged and therefore there is no *currently effective* legislative action to challenge. *See McVittie et al v. Snohomish County*, CPSGMHB Case No. 99-3-0016c (FDO, Feb. 9, 2000) at 14; *Gawenka et al v. Bremerton*, CPSGMHB Case No. 00-3-0011, (OoM, Oct. 10, 2000) at 3; *Kent Cares et al v. Kent*, CPSGMHB Case No. 02-3-0019 (OoM, March 3, 2003) at 8*; Giba et al v. Burien*, CPSGMHB Case No. 06-3-0008 (OoM, April 17, 2006) at 3. In this case, the City has not repealed the challenged ordinance – Ordinance 5234 – and it was therefore open to a timely challenge by the Petitioners. Contrary to the City's assertion, the remedy the Petitioners seek from the Board is not the rezone of their property but rather a finding of non-compliance and a determination of invalidity. *See* PFR, Section VII. This relief is available from the Board subject to a finding that the City's actions were clearly erroneous.

**The City's motion to dismiss the petition on the basis of mootness is DENIED.**



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*4. City's Motion to Dismiss Legal Issue Nos. 3, 4, 5, 6, 7, 8, and 9 - Ordinance 5228*

The City argues that the Petitioners did not challenge the correct ordinance - Ordinance 5228 - and are now time barred from asserting any challenge to the City's land use designation enacted with this ordinance. Motion to Dismiss at 10. According to the City, Ordinance 5228 amended the City's Comprehensive Plan, including the Land Use Map, and Ordinance 5234 implemented this amendment by rezoning properties to be consistent with the land use designations assigned by Ordinance 5228. *Id.*; Index 245 (Exhibit 17); Index 343 (Exhibit 18). The City asserts that Petitioners' Legal Issue Nos. 3 through 9 "deal with aspects which directly correlate to the unchallenged Ordinance 5228, not 5234 which [the Petitioners] challenged" and therefore should be dismissed. *Id.* at 11.

In response, the Petitioners argue that they "can prevail whether or not their petition includes a challenge to [Ordinance 5228] … [and] the petition for review did include a challenge to a Comprehensive Plan amendment [but that Petitioners] were not able to identify a separate amendment by ordinance number due to the City's inadequate and confusing public notices." Petitioners' Response at 1-2. The Petitioners request that because of these procedural inadequacies the Board should allow Petitioners "a reasonable amount of time … to amend their petition to identify by ordinance number the comprehensive plan amendment ordinance identified in the City's motion." *Id.* at 2, fn. 1, 19.

In reply, the City points out the Petitioners' argument, in regard to timeliness, is in direct conflict with the GMA's 60-day appeal timeline. City's Reply at 5. The City further argues that without a timely challenged to Ordinance 5228 the Board lacks jurisdiction to review subsequent attacks to that ordinance and must conclude that Ordinance 5234 complies with the GMA. *Id.* at 7-8.

*Board Discussion*

The two ordinances at issue – Ordinance 5228 and 5234 - were both adopted on November 27, 2006 and were jointly published, in summary format, on December 1, 2006. Index 342 (City's Exhibit 12).

> ORDINANCE 5228: An ordinance of the City of Renton, Washington, adopting the 2006 amendments to the City's 2004 Comprehensive Plan, Maps, and Data in conjunction therewith…
>
> ORDINANCE 5234: An ordinance of the City of Renton, Washington, changing the zoning classification of certain property within the City of Renton (Upper Kennydale Area) from [R-8 to R-4] zoning…

It is undisputed that the Petitioners did not specifically challenge Ordinance 5228. However, in conceding that their petition failed to cite Ordinance 5228, Petitioners assert that their issue statements "did include a challenge to a Comprehensive Plan amendment" thereby including, by inference, the unchallenged ordinance within each legal issue presented.



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Although the Petitioners' Legal Issue 6 does make a generic reference to a comprehensive plan amendment, Section III of the PFR clearly states: "[T]his petition challenges Renton City Ordinance No. 5234" and the Petitioners attached that ordinance as an exhibit. PFR at 2. No specific reference was made to any other ordinance or legislative action. Even though each and every issue statement does not need to specifically reference the challenged ordinance or resolution - so long as the challenged action is cited within the PFR - in order for the Board to review an action by a jurisdiction, it must know *what legislative action it is that a petitioner complains of* and therefore, *the PFR must specifically reference the legislative action* – whether it be an ordinance or a resolution.

In regard to the Petitioners' request that they should be permitted to amend their PFR, the Board notes that the GMA mandates that a jurisdiction's actions be challenged within 60 days of publication. RCW 36.70A.290(2). To grant the Petitioners' request would be in direct violation of .290(2). In addition, the Board finds that not only was Ordinance 5228 adopted and published concurrently with the challenged ordinance but that CPSGMHB Case No. 07-3-0011 *Petersen v. City of Renton*, which was to be consolidated with this matter, *did challenge* Ordinance 5228 and Petitioners had the opportunity to review the ordinance in order to determine if it should be included within their challenge prior to the PHC.

**The Board concludes that the Petitioners' PFR did not specifically challenge Ordinance 5228 within their PFR and, pursuant to 36.70A.290(2), are time barred from raising a challenge to that ordinance now. Therefore, the Petitioners' request to amend their PFR to include this ordinance is DENIED.**

As the noted *supra*, the Petitioners did not challenge Ordinance 5228 and are not allowed to raise any challenges based on this ordinance. However, despite the City's assertion to the contrary, this does not preclude the Petitioners from arguing that the City's adoption of Ordinance 5234 violates the provisions of the GMA as stated within their legal issues.

**The City's motion to dismiss Legal Issue Nos. 3 through 9 is DENIED.**

*5. City's Motion for Final Disposition – Legal Issue Nos. 1 and 2 - Notice and Public Participation*

The City seeks a final disposition on Legal Issue Nos. 1 and 2, asserting that the Record clearly shows substantial and adequate notice along with opportunity for public participation. Motion to Dismiss at 1.

In response, the Petitioners note that the Board generally limits its motion practice to questions of jurisdiction, standing, and timeliness but has considered dispositive motions on public notice procedures only when the "evidence relevant to the challenge is limited." Petitioners' Response at 2-3 (citing WAC 242-02-530(6)). The Petitioners argue that the evidence is this matter is substantial and includes numerous public notices, minutes, and documents. *Id.* at 3. According to the Petitioners, given the evidence in the Record and the fact that public participation is "the GMA's most cherished planning goals" the issuance of a final decision in the City's favor at this point in time is not warranted. *Id.*



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In reply, the City reiterates its assertion that it has complied with the notice and public participation requirements of the GMA for the public as a whole and a final disposition should be granted. City's Rebuttal at 8-9.

*Board Discussion*

WAC 242-02-530 provides that a party may bring a dispositive motion pertaining to notice and public participation. WAC 242-02-530(6) provides:

> Any party may bring *a motion for the board to decide a challenge to compliance with the notice and public participation requirements* of the act raised in the petition for review, provided that the evidence relevant to the challenge is limited. If such a motion is timely brought, the presiding officer or the board shall determine whether to decide the notice and public participation issue(s) on motion or whether to continue those issues to the hearing on the merits.

As the Petitioners correctly note, the Record for this matter is voluminous and the City had not adequately provided the Board with specific documentation to support its assertion that it complied with all aspects of the GMA's notice and public participation requirements throughout the adoption process for Ordinance 5234. Therefore, pursuant to WAC 242-02-530(6), the Board will reserve the final determination of Legal Issue Nos. 1 and 2 for the Hearing on the Merits. The parties will brief these issues in their pre-hearing briefs.

## III. ORDER

Based upon review of the GMA, Board's Rules of Practice and Procedure, briefing and exhibits submitted by the parties, case law and prior decisions of this Board, and having deliberated on the matter, the Board enters the following ORDER:

1. Legal Issue No. 10 is DISMISSED.

2. The City's Motion to Dismiss Legal Issue Nos. 3, 4, 5, 6, 7, 8, and 9 is DENIED.

3. The City's Motion to Dismiss any challenges to or arguments asserting Ordinance 5228 does not comply with the GMA is GRANTED.

4. The City's Motion for to Dismiss the PFR in its entirety based on mootness is DENIED.

5. The City's Motion to Supplement the Record with the Walton Declaration and Johnson Declaration is DENIED.

6. The City's Motion for Final Disposition of Legal Issue Nos. 1 and 2 is DENIED. As provided in WAC 242-02-530(6), the Board continues the final determination of these legal issues the Hearing on the Merits. The parties will brief Legal Issue Nos. 1 and 2 in their pre-hearing briefs.

7. The Petitioner's Motion to Strike "Attachment D" is DENIED.



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8. The Petitioners' Motion to Amend the PFR to include a challenge to Ordinance 5228 is DENIED.

9. The Petitioner's Motion to Supplement the Record with the Cowan Declaration, Cave Declaration, and Gendler Declaration is DENIED.

So ORDERED this 30th day of April, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Edward G. McGuire
Board Member

_____
David O. Earling
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.



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