

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

JERRY HARLESS,)	
)	Case No. 07-3-0032
Petitioner,)	
)	<i>(Harless III)</i>
v.)	*** CORRECTED ***
)	
KITSAP COUNTY,)	ORDER ON DISPOSITIVE
)	MOTION
Respondent.)	
)	

I. BACKGROUND

On August 1, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jerry Harless (**Petitioner** or **Harless**). The matter was assigned Case No. 07-3-0032, and is hereafter referred to as *Harless III v. Kitsap County*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges Kitsap County’s (**Respondent** or **Kitsap**) failure to adopt regulations to address “private” sanitary sewer facilities in the rural area. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On August 9, 2007,¹ the Board issued a “Notice of Hearing” in the above-captioned case. The Order set a date for a prehearing conference (**PHC**).

On September 17, 2007, the Board conducted the PHC at the Board’s offices in Seattle. Board member Edward G. McGuire conducted the conference. Board members Margaret Pageler and David Earling were present, as was Board Attorney Julie Ainsworth-Taylor. Petitioner Jerry Harless appeared *pro se* and Shelly Kneip represented Respondent Kitsap County. Jim Bolger, Administrative Director of Kitsap County Department of Community Development, attended.

On September 18, 2007, the Board issued its “Prehearing Order” (**PHO**) establishing the Legal Issues and final schedule for this matter. To address the lack of an Index, the Board directed the parties to agree upon and identify stipulated exhibits as the Record. Additionally, since the County indicated it would be filing a dispositive motion questioning the Board’s jurisdiction, the Board directed the County to “brief the

¹ The Board issued a “Corrected Notice of Hearing” on August 16, 2007 that adjusted the date of the prehearing conference to accommodate the parties. The PHC was changed from September 10, 2007 to September 17, 2007.

applicability of RCW 36.70A.100 as it relates to the present dispute [Legal Issue 1]. The applicability of this issue appears to be a threshold question for the Board.” PHO, at 4.

On October 11, 2007, the Board received “Respondent Kitsap County’s Motion to Dismiss Petition for Review” (**Kitsap Motion**), with 11 attached exhibits.

On October 22, 2007, the Board received “Petitioner Harless’ Response to Kitsap County Motion to Dismiss Petition for Review” (**Harless Response**), with one attached exhibit.

On October 30, 2007, the Board received “Respondent Kitsap County’s Reply Regarding Its Motion to Dismiss Petition for Review” (**Kitsap Reply**), with two attached exhibits.

On November 1, 2007, the Board contacted the parties via e-mail and gave notice of a telephonic hearing on the motions, to be held on November 5, 2007 at 10:30 a.m. The purpose of the hearing was to allow the Board to ask several clarifying questions.

On November 5, 2007, the Board conducted the telephonic hearing on motions. Board member Edward G. McGuire convened the hearing. Board members David O. Earling and Margaret A. Pageler were present, as was Julie Ainsworth-Taylor, Board Attorney. The parties participating were: Petitioner Jerry Harless; Respondent representative Shelly Kneip. Larry Keaton and Jim Bolger of Kitsap County were also present with Ms. Kneip. The hearing was recorded.

On November 6, 2007, the Board received, as requested, copies of Resolution 090-1998² and a copy of the proposed draft ordinance.³

II. DISCUSSION OF DISPOSITIVE MOTION

Position of the Parties:

The County moves to dismiss the Harless’ “failure to act” challenge against the County claiming that the County has failed to adopt development regulations to regulate private sewer systems in rural areas. Kitsap Motion, at 1. The County asserts: 1) a failure to act claim under the GMA is only viable when a statutory deadline has been missed, and no statutory deadline has been missed; 2) there is no legal requirement for the County to regulate private purveyors of sewer systems in the rural areas; 3) if there was a deadline, it coincided with the County’s 2006 10-year update and a challenge now is untimely; and 4) if privately-owned facilities are within the GMA’s definition of urban governmental services, there are adequate statutes in place to address GMA compliance. *Id.* at 1-2 and 1-20.

² Resolution 090-1998 is assigned OoM Ex. 1.

³ The proposed draft ordinance entitled, “Ordinance Creating Development Regulations for the Application of Community and Large On-site Sewage Disposal Systems in the Rural Areas of Kitsap County” is assigned OoM Ex. 2.

Petitioner Harless asks the Board not to resolve the question on motions and counters: 1) the County had a duty to enact development regulations implementing two specific Plan Policies [LU-18 and RL-12] when it did its 2006 10-year update in December 2006, and it did not do so; 2) the GMA prohibits sanitary sewer service [with very limited exceptions] in the rural area regardless of whether the service is provided by public or private purveyors; 3) the County has the authority and responsibility to regulate private sanitary sewer purveyors in the rural area; and 4) existing state regulations do not absolve the County of its duty. Harless Response, at 1-18.

In reply, the County argues this matter should be resolved on dispositive motions and that there is no GMA duty for the County to enact the development regulations Petitioner desires. The County also questions Petitioner's statutory construction arguments and asserts that while the County has authority to own and operate its own sanitary sewer system [chapter 36.94 RCW], it is not compelled to regulate private systems. Kitsap Reply, at 1-15.

Board Discussion:

Petitioner Harless attempts to pose an issue of first impression for this Board to resolve. Petitioner relies upon RCW 36.70A.040, .070, .110 and .130 to support the issues in his PFR. The primary theory advanced is that the County has not adopted development regulations that are consistent with and implement the County's Plan. The specific question involves whether the County is required to regulate privately-owned and operated sanitary sewer facilities in the rural area. The "sanitary sewer facilities" in question are large on-site septic (**LOSS**) systems. Petitioner asserts that LOSS systems are sanitary sewer systems and such public facilities are prohibited in the rural area by the GMA.

It is not clear to the Board how the issue originally came to the County's attention, whether as the result of an application, inquiry, or as a public policy issue. Nonetheless, the County reacted by adopting a 90-day moratorium on the acceptance of applications for permits on nonconforming lots in the rural area that would rely upon on-site sewage systems for disposal. Ex. 6, Ordinance No. 371-2006. The intent of the moratorium was to give the County the opportunity to review its policies and regulations in light of the growing technological advances in on-site sewage treatment systems and their availability to rural areas and to determine whether additional regulation was needed. *Id.*

A draft ordinance⁴ was prepared by County staff and at a May 2007 Planning Commission (**PC**) meeting, after hearing testimony from stakeholders and the public,⁵

⁴ This is the Ordinance that was the product of the County's review and was considered by the County. OoM Ex. 2.

⁵ Petitioner Harless was among those that testified in opposition to the proposed Ordinance.

the PC chose not to forward the draft proposal to the Board of County Commissioners (BOC). Ex 7, at 84. In July 2007, the BOC referred the matter back to the Department of Community Development (DCD) for further study and requested that the DCD submit a report in six months. Ex. 8, at 180.

Perhaps the precipitating event for this PFR was a July 20, 2007 “Director’s⁶ Interpretation” of how a prior County resolution⁷ and several Comprehensive Plan Policies apply to LOSS. The Plan Policies at issue, which reflect explicit direction provided in RCW 36.70A.110(4), are:

LU-18 – Prohibit extensions or expansion of urban services and facilities in rural areas except in limited circumstances necessary to protect public health, safety and environment, and do not allow extensions or expansions in rural areas to create or encourage urban development outside the designated UGA.

RL-12 – Prohibit extension of sanitary sewer service in the rural area except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development (RCW 36.70A.110(4) or otherwise allowed by GMA.

The Director concluded that LU-18 and RL-12,

[A]re intended to limit the extension of “public” services into rural areas, but as discussed above, a privately owned, operated and maintained LOSS or community on-site sewer system, which is not connected to a public sewer, is not interpreted as public sanitary sewer service.⁸

Ex. 10, 7/20/07 Director’s Interpretation, at 3.

⁶ The Director refers to the Director of DCD.

⁷ The enactment in question was Resolution 090-1998. OoM Ex. 1 which establishes the circumstances under which sanitary sewer systems are allowed to be extended outside designated urban growth areas.

⁸ The Board notes that the Director’s interpretation is not based upon the Resolution or the Plan Policies, but on the GMA itself, and the Director’s interpretation is incorrect. Both this Board and the Western Washington Growth Management Hearings Board have concluded that the public services and public facilities referred to in RCW 36.70A.030(20) [defining urban governmental services] are not limited to services and facilities owned and operated by a unit of government. Privately-owned services and facilities providing a public service fall within the rubric of governmental urban services. *See: Bremerton/Port Gamble v. Kitsap County* CPSGHMB Case No. 95-3-0039, 97-3-0024c (Order 9/28/97); *WEAN v. Island County*, WWGMHB Case No. 03-2-0008 (FDO, 8/25/03); *Irondale Community v. Jefferson County*, WWGMHB No. 04-2-0022 (FDO, 5/31/05).

It appears that Petitioner Harless filed this PFR in response to this interpretation. The County, in response, filed its Motion to Dismiss challenging the Board's jurisdiction to review the Harless PFR. *See Kitsap Motion.*

The Board notes that there are two separate issues being confused, misunderstood or misinterpreted in this matter. The first issue is a land-use regulatory issue relating to permissible densities in the rural and urban area; the second is a technical issue related to public health, sanitation and the ability of a particular location to accommodate waste disposal through on-site septic systems.

The County has not relinquished its authority or ability to regulate land use, in fact, the GMA requires the County to determine where urban lands end and where rural lands begin – the Urban Growth Areas (UGAs) [*See* RCW 36.70A.110]. The Court of Appeals recently underscored: “[T]he GMA requires counties and cities to balance and govern growth in urban and rural areas ... These are the GMA's core goals.” *Kitsap County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. App. 863, 874; 158 P.3d 638 (2007). The County has clearly designated UGAs and rural areas on its Future Land Use Map (FLUM), and *it has in place implementing development regulations* in the form of zoning which address densities and lot sizes in the urban and rural areas. Generally, within Kitsap County's rural areas, densities are limited to 1 dwelling unit per five acres – an undisputed rural density. The County's FLUM and zoning map confirm this rural density. *See* Core Document, Kitsap County Comprehensive Plan, Figure 2-1 and 2-2; Kitsap County Code Title 17 – Zoning.

This information is a critical input into any state [Department of Ecology or Department of Health] or local [Health Department] entity's review of the appropriateness of an individual, community, large on-site septic or other waste disposal system. *The permitted land-use densities, as determined by the County in its GMA Land Use Plan and zoning, are the controlling factor in any review for septic systems, even if review is conducted by the state. See* RCW 36.70A.103. The technical capabilities of a septic system, the soil, availability of water, and “minimum lot sizes” *are not the determinative factors* in determining land-use densities.⁹

A confusing aspect of the present situation is the fact that some community septic or LOSS systems are capable of providing sanitation service to multiple lots that are small enough in size to be comparable to urban lots.¹⁰ However, this capability is tempered and subordinate to the land-use density decisions made by the County in its Land Use

⁹ The Board recognizes that owners of **individual** substandard (nonconforming) lots in the rural area may be permitted to develop single family residences with septic systems on these properties, so long as they meet the requisite minimum lot size requirements for health, safety and environmental reasons. But multiple lots pose an entirely different situation, a situation which requires strict enforcement of the County's land use regulations, absent specific regulations to address the LOSS issue.

¹⁰ The County recognizes and acknowledges this problem in the moratorium ordinance. *See* Ordinance No. 371-2006, “Whereas” clauses 7-9, Ex. 6, at 1-2.

Plan and zoning. The technical capability of such septic systems is important in the GMA context since they may be appropriately used in the following circumstances: 1) limited areas of more intensive rural development – LAMIRDS – to serve *existing* and infill development permitted under the GMA. See RCW 36.70A.070(5)(d), and RCW 36.70A.030(18); 2) for *existing* development where such systems may be considered in limited circumstances where it is necessary to protect basic public health and safety and the environment where such services are financially supportable at rural densities. See RCW 36.70A.110(4); and 3) GMA-compliant clustered rural developments. RCW 36.70A.070(5)(b).¹¹ *Nonetheless, on-site septic systems [individual, community or LOSS systems] are historically and typically located within rural areas. See RCW 36.70A.030(17).*

Thus, Petitioner’s fear that the County does not have implementing development regulations in place to implement its Plan is misplaced.¹² The County’s Land Use Plan and implementing development regulations – zoning – are in place to determine density. These designations are determinative and controlling for whether LOSS, or other on-site sanitary systems.¹³ may be used in the limited situations noted *supra* for the rural area.

The Board now turns to the arguments presented in briefing on this motion.

The County asserts that a “failure to act” challenge is only appropriate where there is a statutorily-imposed deadline, and the only deadline here is the requirement that the County conduct a GMA compliance review by December 1, 2004, which the County finally accomplished in December 2006. Kitsap Motion, at 10-11; Ex. 1, 2, 3, 4, 5 and 6. Further, the County argues that when it completed its GMA compliance review that action was challenged by Petitioner, but the present issues were not posed. Therefore, the County contends, since the 60-day timeframe for appealing has passed, Petitioner’s PFR is untimely. The Board agrees.

Although Petitioner claims the County is required to have development implementation regulations in place to implement Plan Policies LU-18 and RL-12, such a challenge is more appropriately characterized as a compliance question – one which Petitioner could

¹¹ The County acknowledges the first two situations in Resolution 090-1998. OoM Ex. 1.

¹² Petitioner may want the County to have specific development regulations to implement Plan Policies LU-18 and RL-12, but these decisions are within the County’s discretion. Given the evolving technologies that may be appropriately used in the rural area, the County would be well advised to consider additional clarifying regulations in this area.

¹³ The importance of such innovations is underscored by recent legislation. In 2005, the Legislature determined that local health districts (LHD) represented by the 12 counties bordering the Puget Sound must adopt OSS management plans (OSSMP) in order to address failing septic under their jurisdiction and water pollution issues. *RCW 70.118*. The OSSMP must be developed to coordinate with the comprehensive land-use plan of the entities governing development in the health officer's jurisdiction. *WAC 246-272A-015(1)(i); WAC 246-272A-0015*. Subsequent to adoption by the LHD, the plan is subject to DOH approval and must be distributed to all county agencies involved in land use planning. *WAC 246-272A-0015*.

have challenged at the time the County's 10-year update occurred. He did not. The present challenge comes long after the 60-day window for filing such appeals. Therefore, the Board is required to dismiss the PFR.

The Board notes that the County claims there are adequate existing statutes and regulations in place to address the concerns raised by Petitioner. However, while the existing statutes and regulations that the County refers to are the technical review criteria used by state and local health agencies to review the technologies and siting of on-site septic systems, they do not substitute for the County's authority and duty to establish land-use densities in the rural or urban areas. The existing regulations are to be applied within the context of the County's determination of appropriate land-use densities for both the rural and urban areas.

III. ORDER

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

- Kitsap County's Motion to Dismiss is **granted**.
- Petitioner Harless's PFR (*Harless III v. Kitsap County*, CPSGMHB Case No.07-3-0032) is **dismissed with prejudice**.
- Rural and urban densities are determined by the County's GMA Land Use Plan and consistent implementing development regulations – i.e. zoning – not design capabilities of on-site septic systems.

So ORDERED this 15th day of November, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

David O. Earling
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 242-02-832.¹⁴

¹⁴ 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.

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)