

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

DAVIDSON SERLES, et al.,)) Case No. 09-3-0007c
)	
Petitioner,)) (<i>Davidson Serles</i>)
)	
v.)	
)	
CITY OF KIRKLAND,)) ORDER ON MOTIONS
)	
Respondent, and)	
)	
TOUCHSTONE CORPORATION,)	
)	
Intervenor.)	
)	

I. BACKGROUND

On February 20, 2009, the Central Puget Sound Growth Management Hearings Board (the **Board**) received two Petitions for Review: Case No. 09-3-0006 was filed by Davidson Serles and Associates, and Case No. 09-3-0007 was filed by T.C. Continental Plaza Corporation (collectively, **Petitioners**). The two matters were consolidated and assigned Consolidated Case No. 09-3-0007c, referred to as *Davidson Serles v. City of Kirkland*.¹

Davidson Serles and Continental Plaza challenge the City of Kirkland’s (**Respondent** or **City**) adoption of Ordinance Nos. 4170 and 4171 amending the City’s Comprehensive Plan and development regulations with respect to an 11.5 acre parcel of land owned by Touchstone Corporation, which has intervened [**Touchstone** or **Intervenor**].² Petitioners are owners of two adjoining pieces of commercial property.

In their Petitions for Review, the two Petitioners assert that only the superior court, and not the Board, has authority to vacate a SEPA determination and to invalidate agency action retrospectively for violation of SEPA.³ The City and Touchstone maintain that the Board has

¹ Edward G. McGuire served as the initial presiding officer in this matter. Upon Board member McGuire’s retirement from state service on April 30, 2009, Board member Margaret A. Pageler became Presiding Officer.

² The challenged ordinances also involve two other proposals referred to as the Orni and Alton proposals.

³ In a separate proceeding in King County Superior Court under Cause No. 09-2-02204-6 SEA, petitioners have challenged the adequacy of the Environmental Impact Statement prepared by the City to support the adoption of Ordinances 4170 and 4171. In that proceeding, petitioners seek invalidity of the two Ordinances as well as of *Davidson Serles v. City of Kirkland* (June 11, 2009)

primary jurisdiction over SEPA challenges to the comprehensive plan and zoning code, but that Petitioners lack standing to bring a SEPA challenge.⁴

On March 17, 2009 the Presiding Officer sent a memo to the parties posing questions to be discussed at the prehearing conference regarding SEPA jurisdiction and standing. At the prehearing conference, convened on March 26, 2009, the Board laid out a briefing schedule and date for a telephonic hearing to consider on motions the following threshold legal issues in the case:

1. *Do the GMHBs have jurisdiction to review SEPA claims, related to a plan or development regulation adoption or amendment, and provide invalidity as a remedy?*
2. *If the GMHBs have jurisdiction to review SEPA claims:*
 - a. *Is GMA standing pursuant to RCW 36.70A.280(2) and (4), sufficient to pursue such SEPA claims before the GMHB; or*
 - b. *Is meeting the SEPA standing test as set forth in *Trepanier v Everett*, 64 Wn. App 380, 824 P.2d 524, review denied, 119 Wn. 2d 1012 (1992) and *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994) necessary to pursue such SEPA claims before the GMHB?*
 - c. *Do Petitioners in this matter have standing to pursue the alleged SEPA claims?*

The following cross-motions, responses, and rebuttals were timely filed:

- Memorandum by Davidson Serles and Continental Plaza on SEPA Jurisdiction and SEPA Standing – [**Petitioners’ Opening**]
- City’s Motion to Dismiss SEPA Claims – [**City Motion – Dismiss**]
- Touchstone Motion to Dismiss SEPA Claims – [**Touchstone Motion – Dismiss**]
- City’s Response to Petitioners’ Memorandum on SEPA Jurisdiction and SEPA Standing [**City Response**]
- Touchstone Response to Petitioners’ Memorandum on SEPA Jurisdiction and SEPA Standing [**Touchstone Response**]
- Reply Memorandum by Davidson Serles and Continental Plaza in Opposition to Motions to Dismiss SEPA Claims [**Petitioners’ Reply**]
- City’s Reply to Petitioners’ Response on SEPA Standing [**City Reply**]
- Touchstone Reply to Petitioners’ Response on SEPA Standing [**Touchstone Reply**]

Ordinance 4172, which adopts design standards for the Touchstone development, and Ordinance 4175, which adopts a planned action ordinance for the Touchstone project.

⁴ Touchstone’s motion to dismiss the superior court proceedings on these grounds is pending. Petitioners’ Opening, at 3.

- Motion to Supplement the Record by Davidson Serles and Continental Plaza – **[Petitioners’ Motion – Supplement]**
- City’s Opposition to Petitioners’ Motion to Supplement Record **[City Opposition – Supplement]**
- Reply by Davidson Serles and Continental Plaza in Support of Motion to Supplement the Record **[Petitioners’ Reply – Supplement]**

The Board conducted a hearing on motions by teleconference on June 1, 2009, from 10:00-11:00 a.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson Serles and David S. Mann represented Petitioner T.C. Continental. Robin Jenkinson represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone Corporation, assisted by Jessica Clawson. A.P. Hurd of Touchstone also attended. The hearing provided the Board the opportunity to explore legal questions in the case.

This order addresses, first, the motion to supplement the record and, second, the motions to dismiss Petitioners’ SEPA challenge. Legal Issues 1 and 2 – threshold issues in this matter – are discussed and decided, with one reservation.

II. THE CHALLENGED ACTION

On December 16, 2008, the Kirkland City Council took action to enable applications for three private developments to proceed in downtown Kirkland. The Council enacted a package of six ordinances. The two challenged here are Ordinance 4170, amending the City’s Comprehensive Plan transportation plan, as well as the text and accompanying diagrams of the Moss Bay Neighborhood (downtown) portion of the Comprehensive Plan, and Ordinance 4171, amending the City’s Zoning Code to implement a new “Central Business District 5A Zone.”

The challenged Ordinances allow development by Touchstone of Parkplace, a mixed-use project on an 11.5 acre tract abutting the properties of the two petitioners in the Kirkland downtown. The Ordinances increase building heights to eight stories from the present range of three to five stories, reduce building setbacks along street frontages, increase allowable lot coverage, and provide for reductions in parking requirements below the requirement of the parking code. The Ordinances allow as much as 1.2 million square feet of office and 592,700 square feet of retail and other commercial space in the Touchstone development. Additionally, a dedicated pedestrian path through Petitioners’ properties to Peter Kirk Park and the waterfront will be routed through a building lobby, and a protected view corridor to the waterfront will be relocated to the detriment of those who currently enjoy the view protection.⁵

III. MOTION TO SUPPLEMENT THE RECORD

Applicable Law

⁵ See generally, FEIS, Declaration of Kenneth Davidson, Exhibit 4.

RCW 36.70A.290(4) provides:

The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

The Board's Rules of Practice and Procedure state at WAC 242-02-540:

Generally, a board will review only the record developed by the city, county, or state in taking the action that is the subject of review by the board. A party by motion may request that a board allow such additional evidence as would be necessary or of substantial assistance to the board in reaching its decision, and shall state its reasons. A board may order, at any time, that new or supplemental evidence be provided.

Positions of the Parties and Discussion

Petitioners have moved to supplement the record with six documents which they obtained in response to a request for public records to the City. Petitioners' Motion – Supplement, at 2-3. Three of the proposed exhibits involve the professional service agreement between the City and the consulting firm which prepared the Draft Environmental Impact Statement (**DEIS**) and Final Environmental Impact Statement (**FEIS**) for the City of Kirkland Downtown Area Planned Action Ordinance. Two of the documents are emails exchanged between City staff and representatives of Touchstone. One of the documents is an email exchanged between City staff.

Petitioners assert that these records “document conscious decisions by the City, with input from Intervenor Touchstone, to limit the EIS's consideration to a single alternative, the specific proposal advanced by Touchstone.” *Id.* They contend that these materials deliberately limiting the alternatives under environmental review are germane to their allegations of SEPA non-compliance. *Id.* at 5.

The City opposes supplementation, first, on the grounds that the materials were not before the City Council when it deliberated and voted on the Ordinances. Second, the City asserts that the adequacy of an EIS should be judged on its face, using the rule of reason and giving deference to the local jurisdiction; the documents sought for supplementation are therefore irrelevant to this undertaking. City Opposition – Supplement, *passim*.

Petitioners reply that the documents were in existence at the time of the City Council's adoption of the Ordinances and should, in fact, have been included in the City's record, as they are similar to numerous other communications in the Index. Petitioners' Reply – Supplement, at 7. Petitioners urge that the requested documents are relevant because the consideration of alternatives is central to EIS analysis (citing RCW 43.21C.030(2)(c)) and the materials show that the City deliberately excluded review of alternatives. *Id.* at 5.

The Board concurs with Petitioners. Under the GMA, the City has an obligation to prepare an index of “all material used in taking the action which is the subject of the petition for review.” WAC 242-02-520. This logically includes staff emails, communication with consultants, and drafts of consultant agreements – whether or not these materials are brought to the attention of City Council for its deliberation. In this case, a public records request was appropriately used by Petitioners to identify documents in the City’s records that were overlooked in compiling the Index for adoption of the challenged Ordinances. The supplemental documents will be admitted.

Conclusion

The Board grants Petitioners’ motion to supplement the record. The following documents are **admitted as supplemental exhibits**.

- **Supp. Ex. 1.** Professional Services Agreement, September 22, 2007, with fee estimate and Scope of Services for project initiation.
- **Supp. Ex. 2.** Professional Services Agreement, November 30, 2007, with fee schedule and Scope of Services for EIS preparation.
- **Supp. Ex. 3.** Email from Angela Ruggeri to Rich Hill, January 17, 2008, scheduling a meeting among representatives of the City, representatives of Touchstone and the EIS consultants to discuss the scope of the EIS.
- **Supp. Ex. 4.** Email from Angela Ruggeri to A.P. Hurd of Touchstone, September 18, 2008, regarding Touchstone review of pre-release draft of the final EIS.
- **Supp. Ex. 5.** Email from Eric Shields to Angela Ruggeri, November 17, 2008, with revised text of letter from Planning Commission to City Council regarding Planning Commission recommendations.
- **Supp. Ex. 6.** Professional Services Agreement, Amendment 1, December 3, 2008, with Scope of Work, amending Professional Services Agreement, November 30, 2007.

The parties are cautioned that **each exhibit** filed with the briefing on the merits **must be relevant** to the issues before the Board. Its listing on the Index as a part of the County’s record, or its admission as a supplemental exhibit, does not necessarily mean that a specific exhibit is relevant to the legal issues, as set forth in the PHO.

IV. THRESHOLD LEGAL ISSUES

Legal Issue No. 1 – SEPA Jurisdiction and Invalidity

In its Prehearing Order, the Board articulated the following threshold question raised by the Petition for Review:

1. *Do the GMHBs have jurisdiction to review SEPA claims, related to a plan or development regulation adoption or amendment, and provide invalidity as a remedy?*

The Board acknowledges that the question, as posed, might appear to call for an advisory opinion.⁶ The issue of invalidity is not ripe for decision until the Board determines (a) whether Petitioners have standing to pursue their SEPA challenge, (b) whether the City's environmental review complied with SEPA, and (c) whether, if non-compliant, the action interferes with the goals of the GMA. Accordingly, the Board **reserves its ruling on the merits** until its final decision and order.

However, because the legal framework has been thoroughly briefed and argued by the parties, the Board provides its legal discussion and analysis in this Order on Motions.

Both Petitioners in this matter assert that the superior court, not the GMHB, has jurisdiction to address SEPA issues in the sense that **only the Court, and not the Boards can grant the relief sought – “invalidation of the action taken.”**⁷ This focus was confirmed at the Prehearing Conference and the parties agreed to brief the SEPA standing issue in a broadened context.

The following language appeared in both the Petitions for Review [*Davidson Serles*, 09-3-0006 and *TR Continental*, 09-3-0007, now consolidated to CPSGMHB Case No. 09-3-0007c]:

Within the superior court action, Davidson Serles also challenges the validity of Ordinances 4170 and 4171 (the plan and zoning amendments) for violation of SEPA, relief that it particularly seeks in superior court because *the GMHB lacks the authority under either RCW 36.70A.300 or .302 to grant such relief under SEPA. Since the court, and not the GMHB, has authority to grant the requested relief under SEPA, principally, a determination of Environmental Impact Statement inadequacy and invalidation of the action taken, primary jurisdiction over the SEPA issue lies before the superior court and not before the GMHB.* Nonetheless, Davidson Serles raises SEPA claims within this appeal in order to fully exhaust any administrative remedies that may exist before this Board.

Davidson Serles PFR, at 2-3; (emphasis supplied).

TR Continental Plaza Corp. seeks relief in superior court to invalidate each of those ordinances [4170 and 4171] for violation of SEPA. In particular TR Continental Plaza Corp. seeks invalidation in superior court of the plan and zone amendments, because *the GMHB lacks the authority under RCW 36.70A.300 or .302 to grant such relief under SEPA.*

⁶ See Touchstone Motion – Dismiss, at 3.

⁷ Interestingly, both Petitioners request the Board to invalidate the challenged ordinances in their Petitions for Review in their prayer for relief and as a separate issue to be resolved. See Davidson PFR, at 4-5; and TR Continental PFR, at 5-6. Invalidity is also framed as an issue in the Prehearing Order. See PHO, at 10.

Since the court and not the GMHB has authority to grant relief under SEPA, whether by a determination of EIS invalidity or by invalidation of the action taken, TR Continental Plaza Corp. maintains that resolution of SEPA issues continues to lie before the superior court and not before the GMHB. Nonetheless, TR Continental Plaza Corp. challenges the plan and zoning amendments (Ordinances 4170 and 4171) on SEPA grounds in this proceeding to be sure that any administrative remedies regarding SEPA are fully exhausted.

TR Continental PFR, at 2-3; (emphasis supplied).

None of the parties to this case disputes that the Board has jurisdiction to hear and determine SEPA claims pursuant to RCW 36.70A.280(1), which provides:

A growth management hearings board shall hear and determine only those petitions alleging either:

- (a) That a state agency, county, or city planning under this chapter *is not in compliance with the requirements of this chapter*, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, *or chapter 43.21C RCW* as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW

(Emphasis supplied). This section of the Act is clear that the Boards have jurisdiction to deal with SEPA claims where the underlying action, as it is here, is the adoption or amendment of a plan or development regulation.

RCW 36.70A.300 addresses “Final Orders” and indicates that the Board shall issue a final order “based exclusively on whether or not [a jurisdiction] is in compliance with the requirements of this chapter ... or chapter 43.21C RCW...”⁸ In a final order, the Board may find compliance “with the requirements of this chapter ... or chapter 43.21C RCW,” or may find that the jurisdiction is not in compliance “with the requirements of this chapter ... or chapter 43.21C RCW...” and remand the matter to the jurisdiction.⁹ This same section provides that “Unless a board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand.”¹⁰ So it is clear that the Board can find noncompliance with SEPA and remand to the jurisdiction.

With respect to an order of invalidity, the relevant sections of RCW 36.70A.302 provide as follows:

⁸ RCW 36.70A.300(1).

⁹ RCW 36.70A.300(3).

¹⁰ RCW 36.70A.300(4).

- (1) A board may determine that part or all of a comprehensive plan or development regulations is invalid if the board:
- a. Makes a *finding of noncompliance* and *issues an order of remand* under RCW 36.70A.300;
 - b. Includes in the final order a determination, supported by *findings of fact and conclusions of law*, that the continued validity of part or parts of the plan or regulation would *substantially interfere with the fulfillment of the goals of this chapter*; and
 - c. Specifies in the final order the particular part or *parts of the plan or regulation that are determined to be invalid*, and the *reasons* for their invalidity.

Here the Board has been given the authority to invalidate plans and regulations if the Board:

- 1) makes a finding of noncompliance;
- 2) remands;
- 3) makes a determination supported by findings and conclusions that the continued validity of the plan or regulation will substantially interfere with the fulfillment of the goals of this chapter [GMA]; and
- 4) specifies the portion of the action that is invalid and explains why.

Thus the statute on its face grants the Board the authority to determine compliance with SEPA as it relates to a plan or development regulation; and if noncompliance with SEPA is found, the Board has the authority to invalidate the actions taken, which is the relief requested here.¹¹

It seems that Petitioners simply have it wrong – the Board has authority to review SEPA claims and determine whether the provisions of RCW 43.21C were complied with as it relates to a plan or regulations. Further, if the Board finds noncompliance with RCW 43.21C, it is empowered to invalidate the action taken – the plan or development regulation ordinance. Admittedly, the Board’s determination of invalidity applies to the Ordinances themselves and not to the SEPA document, and invalidity is not retroactive.

Apparently none of the Growth Management Boards has ever invalidated an ordinance based *solely* upon a finding of noncompliance with SEPA. Sometimes a SEPA-noncompliant ordinance is invalidated for noncompliance with other requirements of the GMA. See, e.g., *Cascade Bicycle Club v. City of Lake Forest Park*, CPSGMHB Case No. 07-3-0010c, Final

¹¹ Davidson PFR, at 2-3, “Since the court, and not the GMHB, has authority to grant the requested relief under SEPA, principally, a determination of Environmental Impact statement inadequacy and *invalidation of the actions taken*, primary jurisdiction lies before the superior court and not the GMHB.” (Emphasis supplied).

TR Continental PFR, at 3, “TR Continental Plaza Corp. seeks relief in superior court to invalidate each of those ordinances for violations of SEPA. In particular TR Continental Plaza Corp. *seeks invalidation in superior court of the plan and zoning amendment*, because the GMHB lacks the authority under RCW 36.70A.300 or .302 to grant such relief under SEPA.” (Emphasis supplied).

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Decision and Order (July 23, 2007); *MBA/Camwest v. City of Sammamish*, CPSGMHB Case No. 05-3-0027, Final Decision and Order (August 4, 2005). However, the language of .300 or .302 does not limit invalidity to a finding of noncompliance with 36.70A – it just refers to a finding of noncompliance. If the Board finds a plan or development regulation is noncompliant, there are steps the Board must take to enter a finding of invalidity.

Petitioners focus on a single sentence in RCW 36.70A.300(3)(b) to assert that, on remand after a finding of noncompliance, the Board cannot require a jurisdiction to comply with SEPA: “The Board shall specify a reasonable time not in excess of one hundred eighty days ... within which the [jurisdiction] shall comply with the requirements of this chapter.” Petitioners argue that SEPA is not “a requirement of this chapter [GMA],” and that remand from the Board therefore cannot provide adequate remedy. The Board finds Petitioners’ reading of the statute unduly strained. We know from RCW 36.70A.280(1) and SEPA, that all adoptions and amendments to plans and regulations must be accompanied by some degree of environmental review. Environmental review of plans and regulations is clearly part of the GMA [.280 is part of “this chapter”]. Additionally, RCW 36.70A.280(1) does not limit the Board’s jurisdiction just to the GMA; we have authority to review for compliance with “this chapter. . .or chapter 43.21C RCW. . .” Again, there is no limitation to a finding of noncompliance with just one of the GMA’s “requirement” provisions.

Finally, the Board notes that, to find invalidity, it must determine that continued validity of the SEPA-noncompliant ordinance would “substantially interfere with the fulfillment of the goals” of the GMA. Goal 10 is one of the most directive goals of the GMA, it states: “**Protect the environment** and enhance the state’s high quality of life, including air and water quality, and the availability of water.” RCW 36.70A.020(10). The language is not “promote the protection of the environment,” “encourage the protection of the environment,” it is simply “protect the environment!”¹² It appears to the Board that, on the appropriate facts, it would be no great stretch to find that failure to properly conduct the required environmental review for a city or county action (SEPA con-compliance) interfered with fulfillment of the GMA’s environmental goal, and on such a finding, the ordinance might be invalidated.

Conclusion

The issue of invalidity is not ripe for decision until the Board determines (a) whether Petitioners have standing to pursue their SEPA challenge, (b) whether the City’s environmental review complied with SEPA, and (c) whether, if non-compliant, the action interferes with the goals of the GMA. Accordingly, the Board **reserves its ruling on the merits** until its final decision and order.

Legal Issue No. 2 – SEPA Standing

In its Prehearing Order, the Board articulated a second threshold question raised by the Petition for Review:

¹² Similarly, a SEPA non-compliant ordinance might interfere with a GMA goal related to asserted impacts, such as Transportation Goal 3.

2. *If the GMHBs have jurisdiction to review SEPA claims:*

- a. *Is GMA standing pursuant to RCW 36.70A.280(2) and (4), sufficient to pursue such SEPA claims before the GMHB; or*
- b. *Is meeting the SEPA standing test as set forth in *Trepanier v Everett*, 64 Wn. App 380, 824 P.2d 524, review denied, 119 Wn. 2d 1012 (1992) and *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994) necessary to pursue such SEPA claims before the GMHB?*
- c. *Do Petitioners in this matter have standing to pursue the alleged SEPA claims?*

The Board addresses, first, the requirements for standing to assert a SEPA challenge and, second, whether Petitioners' meet that standard.

Should the Board apply its long-standing two-part test for SEPA standing? YES

Petitioners contend that the Central Board should abandon its application of the “aggrieved person” analysis and should allow standing to assert SEPA challenges to any petitioner who can demonstrate participation in the jurisdiction’s public process.¹³ The Petitioners rely on rulings of the other two Growth Management Hearings Boards and on *Thurston County v. Western Washington Growth Management Hearings Board (Thurston County)*, 137 Wn. App. 781, 791-93, 154 P.3d 959 (2007).

The City and Touchstone contend that there is no basis for the Board to reverse 15 years of consistent application of the two-part SEPA standing test.¹⁴

The two-part SEPA standing test used by this Board is as follows:

First, the plaintiff’s supposedly endangered interest must be arguably within the zone of interests protected by SEPA. Second, the plaintiff must allege an injury in fact; that is, the plaintiff must present sufficient evidentiary facts to show that the challenged SEPA determination will cause him or her specific and perceptible harm. The plaintiff who alleges a threatened injury rather than an existing injury must also show that the injury will be “immediate, concrete, and specific”; a conjectural or hypothetical injury will not confer standing.

MBA/Brink v. Pierce County, CPSGMHB No. 02-3-0010, Order on Motion to Dismiss SEPA Claims (Oct. 21, 2002) (emphasis in original, internal citations omitted).

¹³ Petitioners’ Opening, at 12-17.

¹⁴ City Reply, at 2; Touchstone Reply, at 4-5.

The Board's position is based on the legislative provisions in the State Environmental Policy Act defining the basis for appeal of a SEPA determination. RCW 43.21C.075, entitled "Appeals," is the controlling provision in SEPA regarding standing to challenge environmental review.¹⁵ Subsection (4) provides in part:

... a person aggrieved by an agency action has the right to judicial appeal ...

The Washington appellate courts have clarified the reach of the language. A "person aggrieved" who seeks judicial review of a SEPA determination must meet a two-part test to establish standing. *Leavitt v. Jefferson County*, 74 Wn. App. 668, 678, 875 P.2d 681 (1994); *Trepanier v. Everett*, 64 Wn. App. 380, 382-83, 824 P. 2d 524, review denied, 119 Wn.2d 1012 (1992). This is the two-part test the Board applies.

In its early cases where this question was raised, this Board reasoned that, inasmuch as its jurisdiction included determining compliance with SEPA and with the GMA, it was bound by the differing standing requirements under the two different statutes.¹⁶ In *Robison v. Bainbridge Island*, CPSGMHB Case No. 94-3-0025c, Order on Dispositive Motions (February 16, 1995), at 6-7, the Board reasoned

... that obtaining GMA appearance standing does not automatically bestow SEPA standing upon a petitioner. The GMA and SEPA are two distinct statutes with their own standing requirements that each must be met by petitioners if they intend to challenge actions for not complying with both statutes.

The Board continues to find this reasoning persuasive.

In another of its earliest cases, the Board read the SEPA prerequisites for *judicial* review as necessarily applicable to *quasi-judicial* review,¹⁷ otherwise petitioners could essentially bypass the "aggrieved person" requirement and back-door their SEPA issues into court by appealing first to the Growth Boards on the basis of mere participation. The Board does not read the appellate court's analysis in *Thurston County*, *supra*, as contrary. The *Thurston County* case involved a challenge to GMA compliance; the court ruled that the petitioner need show only GMA participation and that APA standing was not required to support a challenge to compliance with the GMA. SEPA standing is not addressed in the *Thurston County* ruling.

¹⁵ The legislature has the authority to define and restrict standing. *Citizens for Clean Air v. Spokane*, 114 Wn. 2d 20, 29, 785 P.2d 447 (1990). The legislature has imposed standing restrictions in other land use provisions. See for example, the GMA's standing provisions at RCW 36.70A.280(2), the Boundary Review Board Statute requirements at RCW 36.93.160(5), or the LUPA standing provisions at RCW 36.70C.060.

¹⁶ See e.g., *West Seattle Defense Fund v. City of Seattle (West Seattle)*, CPSGMHB Case No. 94-3-0016, Order Granting Seattle's Motion to Dismiss SEPA Claims (December 30, 1994), at 8; *Bremerton v. Kitsap County (Bremerton)*, CPSGMHB Case No. 95-3-0039, Order on County's Dispositive Motions (June 9, 1995), at 6.

¹⁷ *Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010, Order Granting Dispositive Motions (February 16, 1994), at 6; see also, *West Seattle*, *supra*, at 10.

Having reviewed the extensive and expert briefing of the parties in this case, this Board remains persuaded that the “aggrieved person” standing requirement based on RCW 43.21C.075(4) is the appropriate rule to apply to SEPA challenges before the Board.¹⁸ The Board therefore declines to abandon the two-part test for SEPA standing.

Do Petitioners here have standing to assert their SEPA claims? YES

The threshold legal issues posed in this case then ask:

Do Petitioners in this matter have standing to pursue the alleged SEPA claims?

The two-part standing test requires, first, that Petitioners interests be within the zone of interests protected by SEPA, and second, that Petitioners demonstrate injury-in-fact. As set forth below, the Board concludes that Petitioners here meet both prongs of the test.

Do Petitioners meet the zone-of interests test? YES

The Washington Supreme Court has defined the “zone of interests” protected by SEPA:

SEPA is concerned with ‘broad questions of environmental impact, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources.’

Kucera v. Washington State Department of Transportation (Kucera), 140 Wn.2d 200, 212-213, 995 P.2d 63 (2000), quoting *Snohomish County Property Rights Alliance v. Snohomish County (Property Rights Alliance)*, 76 Wn.App. 44, 52-53, 882 P.2d 807, (1994).

Economic interests are not within the “zone of interests” protected or regulated by SEPA. *Harris v. Pierce County*, 84 Wn. App. 222, 231, 928 P.2d 1111 (1996). Purely economic interests include “the protection of individual property rights, property values, property taxes, [and] restrictions on the use of property.” *Property Rights Alliance*, 76 Wn. App. at 52 (1994). Merely being a “resident, property owner and taxpayer” or a party “active in seeking full public participation in the planning procedure” is insufficient for SEPA standing. *Id.*

The City¹⁹ asserts that the Petitioners have predominantly economic interests; their primary concerns are property values and economic rights. City Motion – Dismiss, at 8-9. The City states that the Petitioners are solely concerned with economic effects on the use of their property adjacent to the Touchstone development. *Id.* In the City’s view, because the Petitioners are both businesses, their interests are necessarily limited to their corporate interests as business owners. City Reply, at 3.

¹⁸ It is of course troubling to the Central Board that our Eastern and Western Washington Board colleagues apply a different rule; thus we appreciate the assistance of counsel in this case in helping us re-assess the question.

¹⁹ Intervenor Touchstone does not address this question.

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Petitioners respond that their appeal is not based on loss of property value or on restrictions on property use or revenue reductions but on the environmental values that SEPA is written to protect. Petitioners' Reply, at 8-10. They point out that SEPA protections include impacts of urban development on public and private views, shadows, light and air, traffic congestion, public open space, transportation, and aesthetics. *Id.*²⁰ Petitioners submit the Declaration of Kenneth Davidson, one of the principals of the Davidson Serles partnership, documenting various environmental impacts of the Touchstone development. They assert that Continental Plaza will suffer the same impacts.²¹

The Board finds that Petitioners' interests are within the zone of SEPA protection. Mr. Davidson's Declaration indicates the following concerns:

- a concern for protection of a dedicated pedestrian corridor used by building occupants (including children at a daycare) as a City-required linkage to Peter Kirk Park, the library and performing arts center, retail and the waterfront; ¶¶ 5, 6, 7, 14.
- preservation of light, air sun and space to building occupants and the daycare playground area; ¶¶ 9, 10.
- preservation of a designated view corridor that the plan amendment has moved, diminishing the enjoyment for many people currently working in Kirkland; ¶ 11.
- projected increase in traffic congestion at a nearby intersection from Level of Service C to Level of Service F; ¶¶ 12, 13.
- spill-over parking resulting from reduced supply of parking on Touchstone's property; ¶ 15.

In each instance, the relief requested by Mr. Davidson is protection of a specific environmental value. Environmental protection may also serve his economic interests as a commercial building owner, but is clearly within the SEPA zone of interests. In the *Kucera* case, *supra*, the court ruled that Kucera had standing to allege SEPA non-compliance in WSDOT's failure to review the fast-ferry's impacts on the shoreline. The threatened injury in that case was environmental damage to shorelines of the state; the fact that the Kuceras' water-front property also sustained economic damage did not preclude standing to bring the appeal.

The Board's analysis in *Hood Canal Environmental Council, et al., v. Kitsap County*, CPSGMHB Case No. 06-3-0012c, Order on Motions (May 8, 2006) is instructive. In *Hood Canal*, a property rights organization, Kitsap Alliance of Property Owners (KAPO), challenged the County's adoption of its critical areas ordinance (CAO) as not based on best available science (BAS) and non-compliant with SEPA procedural requirements. The County moved to dismiss the SEPA challenge for lack of standing. The Board looked to see whether KAPO's expressed concerns included effective environmental protection:

²⁰ See Petitioners' Reply, Attachment A: WAC 197-11-444 "Elements of the environment."

²¹ Petitioners' Reply, at 8-9 and 12, fn. 6; Davidson Declaration, ¶¶ 5-7, 10, and 14.

Reviewing the supporting documents filed by KAPO, the Board agrees with the County that KAPO's core interests are in the unrestricted use of their properties. The August 23, 2004 letter to the County, which KAPO attaches to show its concern for environmental values, questions the BAS underlying the proposed increased buffer widths and the scientific evidence for the effectiveness of buffers, but *does not suggest any potentially adverse environmental consequences which KAPO members seek to avert*. Rather, the letter advocates identifying "the value of property lost to the increased buffers or the increased burden placed on property owners" and objects to "bureaucrats' tendencies to always increase their control and jurisdiction over private property." Index No. 235.

KAPO also submits, as evidence of their environmental interests, two papers by Dr. Robert N. Crittenden and a paper by Dr. J. W. Buell which they introduced in the County's CAO process. Index No. 626. These documents which, at best, argue about the effectiveness and practical application of buffers and the County's draft CAO, *do not suggest that KAPO members are seeking to avert any negative environmental impacts* by their participation in the CAO discussion process.

Id. at 9-10. Nevertheless, the Board acknowledged "a threshold showing of KAPO's concern for environmental matters" and went on to dismiss for failure to demonstrate an injury-in-fact – the second part of the two-part test. *Id.*

Here, Petitioners have articulated the negative environmental impacts they seek to avert and have demonstrated concerns within the SEPA "zone of interests." The Board finds that Petitioners meet the first prong of the SEPA standing test.

Have the Petitioners shown injury-in-fact? YES

In *MBA/Brink, supra*, the Board described the second prong of the two-part SEPA standing test:

Second, the plaintiff must *allege an injury in fact*; that is, the plaintiff must present sufficient evidentiary facts to show that the challenged SEPA determination will cause him or her *specific and perceptible harm*. The plaintiff who alleges a *threatened injury* rather than an existing injury must also show that the injury will be "*immediate, concrete, and specific*"; a conjectural or hypothetical injury will not confer standing.

In its Motion to Dismiss, the City argues that Petitioners must demonstrate specific and perceptible harm by showing "how the comprehensive plan applies with great particularity to specific parcels of property" and by inclusion of affidavits documenting direct adverse impacts. City Motion – Dismiss, at 9, citing *Bremerton, supra*, at 9-10. In its Reply, the City adds that Petitioners' interests here are speculative; they are not injured until the City approves a specific development pursuant to the Ordinances. City Reply, at 3-4.

Touchstone also argues that until the City's process is complete, there is no indication as to whether the Touchstone proposal will be approved, or in what form; Petitioners' claims of injury are merely speculative. Touchstone Reply, at 2-4.

Petitioners contend that the injury is not hypothetical or conjectural. First, they claim direct impacts, as set forth in the Davidson Declaration. Second, they assert that the City's Ordinance redesignates/rezones a specific parcel; under the companion Planned Action Ordinance, so long as the eventual project conforms to the adopted standards, there is no further SEPA review, so Petitioners cannot wait until the permit is issued to bring a SEPA challenge. Petitioners' Reply, at 12-15, citing Ordinance 4175, Section 3, F(1). Further, SEPA's required scope of review for legislative actions (amending comp plan and zoning) is broader than for project-specific proposals on sites already zoned for the proposed activity, since the former requires consideration of off-site alternatives. *Id.* citing WAC 197-11-440(5)(d).

The Board reviews Petitioners' allegations below and concludes that the Petitioners have shown, first, "specific and perceptible" harm, and second, to the extent the harm is threatened, that it is "immediate, concrete and specific," not merely hypothetical and conjectural.

Have the Petitioners demonstrated "specific and perceptible" harm? YES

In *West Seattle, supra*, at 7, the Board described the governing principle:

Unless litigants can demonstrate a direct stake in the controversy, i.e, that they will be specifically and perceptibly harmed, they cannot invoke judicial intervention.

The Board finds that the Declaration of Kenneth Davidson provides sufficient evidentiary facts to support Petitioners' claims of specific injury. Mr. Davidson asserts:

- Under the City's plan amendment, the dedicated pedestrian corridor used by building occupants (including children at a daycare) as a City-required linkage to Peter Kirk Park, the library and performing arts center, retail and the waterfront, will be effectively blocked by being directed through a private building lobby. ¶¶ 5, 6, 7, 14, citing Ordinance 4172, Ex. 6, Design Guidelines, p. DG-16 ["through-building connection"].
- Under the City's plan amendment, Petitioners' views west toward the park and waterfront will be completely blocked, as demonstrated by an EIS exhibit. ¶ 10, Ex. 5.
- Under the plan amendment, afternoon sun and light to building occupants and the daycare playground area will be blocked. ¶¶ 9, 10.
- Under the plan amendment, a designated view corridor has simply been moved, to the detriment of Petitioners and many current Kirkland workers and guests. ¶ 11.
- Under the plan amendment, traffic congestion at the intersection of Central Way and 6th Street will increase from Level of Service C to Level of Service F, as projected by

the FEIS. ¶¶ 12, 13, Ex. 4, FEIS at 4-8. This increased congestion will directly impact Petitioners and other users of their business entrances.

- Under the plan amendment, spill-over parking will likely result from the reduced supply of parking on Touchstone's property. ¶ 15. Errors in the City's parking analysis were pointed out by a traffic engineer retained by Davidson Serles to comment on the EIS. Ex. 7.

The Board concludes that Petitioners here have provided sufficient evidentiary facts to demonstrate a direct stake in the outcome of the City's environmental review. This does not, of course, determine the merits of their claims, only their standing to assert them.

Have the Petitioners demonstrated harm that is "immediate, concrete and specific", not merely "conjectural and hypothetical"? YES

Frequently, GMA challenges involve broad general planning and zoning enactments. In such cases, harm may be merely speculative, as the development allowed [or restrictions imposed] under the plan may never occur or may be mitigated during subsequent project-specific review.²²

In the *West Seattle* Order on Motions, *supra*, at 7-8, the Board noted the difficulty of demonstrating specific injury based on the broad, guiding nature of some GMA planning documents:

To the extent that GMA policy documents, including comprehensive plans, are broad, *do not apply to specific parcels of land and do not narrowly direct specific regulatory outcomes*, it will be *difficult to demonstrate specific injury*, and therefore it will be more *difficult to establish SEPA standing*. ...

This does not mean, however, that it will never be possible to establish SEPA standing to challenge a GMA policy document. For example, to the extent that *certain comprehensive plan policies apply with particularity to unique parcels of land and narrowly direct specific regulatory outcomes*, it will be *less difficult to demonstrate immediate, concrete, and specific injury*. In such an instance, it may be *possible to establish SEPA standing* to challenge the GMA policy document.

In the present challenge, the City and Touchstone argue that Petitioners have not alleged "immediate, concrete and specific" injuries because "until the City process is complete, there is no indication as to whether the Touchstone proposal will be approved, and if it is approved, what form it may take." Touchstone Reply, at 3; see also, City Reply, at 4.

²² See *Hood Canal*, *supra*, at 10-11; *West Seattle*, *supra*, at 10; *Dyes Inlet Preservation Council v. Kitsap County*, CPSGMHB Case No. 07-3-0021c, Order on Motions (May 3, 2007), at 5-6; *KCRP V v. Kitsap County*, CPSGMHB Case No. 05-3-0039, Order on Motions (October 20, 2005), at 7; *Save Our Separators v. City of Kent*, CPSGMHB Case No. 04-3-0019, Final Decision and Order (December 16, 2004), at 4-5.

Petitioners point out however, that under the Planned Action Ordinance [Ordinance No. 4175] adopted concurrently with the two challenged ordinances [Ordinance No. 4170 Comprehensive Plan Amendment and Ordinance No. 4171 Zoning amendment], no further mitigation will be required if Touchstone develops its property within the scope of the comprehensive plan and zoning allowance. Petitioners Reply, at 13. Thus the impact of the City's action is immediate and specific.

The Board concurs with Petitioners. The *West Seattle* ruling indicated that it may be difficult to demonstrate SEPA standing when challenged policy documents “do not apply to specific parcels of land and do not narrowly direct specific regulatory outcomes.” But “to the extent that certain comprehensive plan policies apply with particularity to unique parcels of land and narrowly direct specific regulatory outcomes,” demonstration of immediate, concrete and specific injury is possible. *West Seattle, supra*, at 8 (emphasis in original).

The two challenged ordinances in this case apply with particularity to specific parcels of land – the Touchstone, Orni and Altom tracts. Further, the ordinances narrowly direct specific regulatory outcomes, establishing specific uses, intensities and conditions for development on each of the three tracts.

Finally, no additional environmental review or mitigation will occur if development applications meet the parameters of the accompanying Planned Action Ordinance. This contrasts with the many cases where the Board has found no “immediate” harm because the “nonproject” action would in fact allow subsequent project-specific environmental review and mitigation.²³ Thus, the injury to Petitioners is “immediate, concrete, and specific” within the requirements of the two-part SEPA standing test.

The Board concludes that Petitioners meet the second prong of the SEPA standing test.

Conclusion

The Board finds and concludes that the two-part standing test remains the appropriate basis for its review of SEPA challenges to city and county actions adopting or amending comprehensive plans and development regulations. The Board further finds and concludes that the issues raised by Petitioners Davidson Serles and Continental Plaza are within the zone of interests protected by SEPA and that they have presented sufficient evidentiary facts to demonstrate injury in fact.

The motions of the City and Intervenor Touchstone to dismiss Petitioners' SEPA challenges for lack of standing are **dismissed**.

V. ORDER

²³ See, e.g., *Halmo v. Pierce County*, CPSGMHB Case No. 07-3-0004c, Final Decision and Order (September 28, 2007) at 46.

Based upon review of the Petitions 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:

- The Board finds that the documents with which Petitioners seek to supplement the record may be necessary or of substantial assistance to the Board in reaching its decision. Petitioners' Motion to Supplement the Record is **granted**.
- The Board finds and concludes that Petitioners have standing/ lack standing to bring a claim under SEPA. The City's Motion to Dismiss SEPA claims is **denied**. Intervenor Touchstone's Motion to Dismiss SEPA Claims is **denied**.

SO ORDERED this 11th day of June, 2009.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O Earling
Board Member

Margaret A. Pageler
Board Member