CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

SR 9 / US 2 LLC	)	**Case No. 08-3-0004**
Petitioner,	)	***(SR9/US2 II)***
v.	)	
SNOHOMISH COUNTY,	)	**ORDER GRANTING MOTION TO DISMISS**
Respondent.	)	

I. BACKGROUND

On August 8, 2008, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Petitioner SR 9 / US 2 LLC (**Petitioner** or **SR9**). The matter was assigned Case No. 08-3-0004. Board member Edward G. McGuire is the Presiding Officer for this matter. Petitioner challenges the Snohomish County's (**Respondent** or **County**) decision to remove a proposed plan/zoning amendment from the County's annual review docket [Motion 08-238].

The Board issued a Notice of Hearing on August 14, 2008. In the notice, the Board asked the parties to consider a stipulated dismissal, a settlement extension, or be prepared to discuss the Board's jurisdiction over the challenged action at the scheduled prehearing conference.

On August 28, 2008, the Board received a "Joint Request for Settlement Extension" signed by the representatives of the parties. The Board issued an "Order Granting 90-day Settlement Extension" on September 2, 2008.

On December 12, 2008, the Board received "Status Report and Second Joint Request for Settlement Extension" signed by the parties. The Board issued an "Order Granting Second 90-day Settlement Extension" on December 17, 2008.

On March 13, 2009, the Board received a "Joint Status Report" from the parties indicating that they were no longer pursuing settlement discussions and expected to proceed to hearing.

On March 16, 2009, the Board conducted the PHC at the Board's offices in Seattle. Board member Edward G. McGuire, Presiding Officer in this matter, conducted the conference. Board member David O. Earling also attended the PHC. Patrick J. Schneider

represented Petitioner SR9/US2 LLC and John R. Moffat represented Respondent Snohomish County. At the PHC, Snohomish County indicated that it would be filing a Motion to Dismiss the PFR due to the Board's lack of subject matter jurisdiction. The same day the Board issued its Prehearing Order, setting forth the briefing and hearing schedule.

On March 30, 2009, the Board received "Snohomish County's Dispositive Motion for Dismissal of Petition for Review" (**County Motion**), with 10 attachments.

On April 6, 2009, the Board received "SR(/US2's Response to Snohomish County's Dispositive Motion" (**SR9 Response**).

On April 7, 2009 the Board received a letter from Snohomish County noting that in light of SR9's Response, the County would not be filing a reply. The County requested an Order dismissing the PFR. 4/7/09 Letter, at 1. The Board did not hold a hearing on the motion.

II. DISCUSSION OF DISPOSITIVE MOTIONS

Background:

RCW 36.70A.470(2) provides:

> Each county and county planning under RCW 36.70A.040 *shall include in its development regulations a procedure* for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.

(Emphasis supplied).

Pursuant to this requirement, Snohomish County adopted a docketing procedure codified at Chapter 30.74 Snohomish County Code (**SCC**).

In accordance with the County's docketing process and the County's annual review process, Petitioner sought to have the current designations for 140 acres near the intersection of SR9 and US2 changed in the County's Plan and zoning map. For the County's 2007 annual review, Petitioner filed an application seeking to have the property: 1) included in the Urban Growth Area (**UGA**) of the City of Snohomish; 2) to redesignate the property from Rural Residential with Rural Transition Area to Urban in the Plan; and 3) rezone the property from Rural 5 acre, and Planned Residential Development – Suburban Agriculture SA-1 (zoning) to various zoning designations. PFR, at 3-4; County Motion, at 2-3.

At about the same time, the City of Lake Stevens filed a similar application requesting that an area, including Petitioner's property, be included in the UGA for the City of Lake Stevens. County Motion, at 3. In mid-June 2007, the County placed both proposals on its docketing calendar and identified them as "Docket XII" for consideration. The day after this decision was made, the County determined that both proposals required expanded environmental review, pursuant to Chapter 43.21C RCW [SEPA], and the County *removed* both proposals, among others, from the docket and rescheduled them for Docket XIII –a later annual review. Petitioner's proposal was identified as SNO-1 and the Lake Stevens proposal was identified as LS-1. A schedule for preparation of a Supplemental Environmental Impact Statement (**SEIS**) was prepared, slating March 2009 as the tentative completion date for the SEIS. *Id*. at 4-5; and PFR, at 4-5.

On June 16, 2008, the County Council discussed various proposals for consideration under its annual docketing cycle [Docket XIII] and set the final docket schedule. A motion was made to remove both SNO-1 and LS-1 from Docket XIII, thereby ending further consideration of the proposals by the County. The motion carried and Motion 08-238 included the following notation for SNO-1 and LS-1 – "Do Not Process Further.' *See* Ex.164, County Motion at 5-6; and PFR, at 5. This appeal followed.

The PFR:

The SR9/US2 PFR was timely filed, but noted that the Petitioner was also filing an action for damages in King County Superior Court. The PFR contained the following assertions:

> Petitioner believes that prior decisions of this Growth Management Hearings Board, including *Agriculture for Tomorrow v. Snohomish County* (***AFT***), Case No. 99-3-0004, Order on Dispositive Motion, (June 18, 1999); *Harvey Airfield v. Snohomish County* (***Harvey Airfield***), Case No. 00-3-0008, Order on Dispositive Motions (July 13, 2000); and *Bidwell v. City of Bellevue* (***Bidwell***), Case No. 00-3-0009, Order on Dispositive Motion, (July 14, 2000), demonstrate that the Board will not accept jurisdiction over this challenge to the County's docketing decision. In addition, Petitioner does not believe that an appeal to this Board, even if it accepts jurisdiction and the appeal is successful, can be an adequate administrative remedy for the economic harm done to Petitioner by the Council's decision to remove the Proposal from Docket XIII by making a pre-mature decision uninformed by the contents of the SEIS. However, Petitioner files this appeal to forestall any future argument by the County, in the superior court action for damages, that Petitioner would have failed to exhaust its administrative remedy if Petitioner had not brought this appeal to the Growth Management Hearings Board.

PFR, at 2.

It is this language in the PFR that caused the Board to state in the Notice of Hearing (**NOH**), "In light of Petitioner's position, the Board asks the parties to consider a stipulated dismissal, a settlement extension, and/or be prepared to discuss the Board's jurisdiction over the challenged action at the prehearing conference." NOH, at 1. The parties subsequently sought, and received, two settlement extensions which ultimately did not resolve the dispute and the case is proceeding before this Board according to the final schedule established in the PHO.

Motion to Dismiss and Response:

In its motion, the County argues that RCW 36.70A.280(1) grants the Board authority to review "adopted comprehensive plan, development regulations, or permanent amendments thereto. . .the Hearings Boards have no jurisdiction to review a decision by a county not to adopt an amendment to a plan or regulation, which is the type of decision the County made with respect to the Petitioner's docket application." County Motion, at 6-7.

To further support this conclusion, the County cites to this Board's decision in *Cole v. Pierce County*, (***Cole***) CPSGMHB Case No. 96-3-0009, Final Decision and Order, (July 31, 1996) [Holding that the Board had no authority to review the County's decision not to act upon a petitioner's request for a plan or development regulation amendment when the request was not mandated by the GMA]; and *Torrance v. King County* (***Torrance***), CPSGMHB Case No. 96-3-0038, Order Granting Dispositive Motion (March 31, 1997) [Affirming the Board decision in *Cole*.] *Id*. at 7-8.

Additionally, the County points to the cases noted by Petitioner in their PFR, namely, *AFT, Bidwell* and *Harvey Airfield* [Each holding and affirming that a jurisdiction's decision not to include a proposal on its final docket was not an action that could be appealed to the Board under the GMA because it did not adopt or amend the jurisdiction's Plan or development regulations. Both *AFT* and *Harvey Airfield* were challenges specifically to Snohomish County's docketing decisions.] The County concludes that "All of these decisions demonstrate the Board's interpretation that it lacks jurisdiction over appeals of county decisions NOT to make a change to a plan or development regulation. The Petition should be dismissed." *Id*. at 8.

In response, Petitioner notes its challenge to the County was to not only challenge the County's action of removing its proposal from the XIII docket, but also to anticipate an argument in Superior Court that Petitioner had failed to exhaust its administrative remedy. SR2 Response, at 1. Petitioner states:

> While SR9/US2 does not agree with the County's arguments or its characterization of the facts, SR9/US2 acknowledges that this Board has declined to exercise jurisdiction in similar situations. SR9/US2 therefore will not present argument in response to the County's motion to dismiss.

Id. at 1-2.

Board Discussion:

The Board agrees with the County. Absent a change in the GMA's provisions and requirements[1] or a regional or state decision that requires a jurisdiction to amend its Plan or development regulations[2] to maintain compliance with the GMA, local jurisdictions generally have discretion in deciding whether, and how, to amend their GMA Comprehensive Plans and development regulations.

This Board has consistently held, and affirms here, that a jurisdiction's decision to "docket" a proposal for consideration during an annual review cycle is not subject to the Board's jurisdiction.[3] Absent a duty to amend its Plan or development regulation, such decisions are within the jurisdiction's discretion.

A decision *not to docket* a proposal for further consideration does not result in an amendment to a plan or development regulation falling within the Board's subject matter jurisdiction [See RCW 36.70A.280(1)]. Here the challenged action is such a decision, and there is no evidence that the County has a duty to amend its plan to address the Petitioner's proposal. Consequently, the Board grants the County's motion to dismiss and the matter is closed.

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:

- The County's motion to dismiss CPSGMHB Case No. 08-3-0004 is **granted**.
- CPSGMHB Case No. 08-3-0004 is **dismissed with prejudice.**
- The matter of SR9/US2 II v. Snohomish County, CPSGMHB Case No. 08-3-0004 is **closed**.

So ORDERED this 9th day of April, 2009.

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[1] *See: Thurston County v. Western Washington Growth Management Hearings Board* (***Thurston Co.***), 164 Wn. 2d 329, 190 P3d 38 (2008), *Cole* and *Torrance*

[2] *See: Port of Seattle v. City of Des Moines* (***Port of Seattle***), CPSGMHB Case No. 97-3-0014, Final Decision and Order, (August 13, 1997); and *Sound Transit v. City of Tukwila* (***Sound Transit***), CPSGMHB Case No. 99-3-0003, Final Decision and Order, (September 15, 1999).

[3] *See: AFT, Bidwell* and *Harvey Airfield*

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____

David O. Earling
Board Member

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Edward G. McGuire, AICP
Board Member

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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.[4]

[4] 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)