

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

CITY OF TACOMA and WALLER ENTERPRISES LLC,)	CPSGMHB Consolidated
)	Case No. 06-3-0011c
Petitioners,)	<i>(Tacoma IV)</i>
)	
v.)	
)	
PIERCE COUNTY,)	ORDER ON MOTION to
)	DISMISS and ORDER ON
Respondent,)	INTERVENTION
)	
and)	
)	
WALLER ENTERPRISES LLC,)	
)	
Intervener.)	
)	

I. BACKGROUND

On February 23, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the City of Tacoma (**City** or **Tacoma**). The matter was assigned Case No. 06-3-0009. The matter is hereafter referred to as *Tacoma IV v. Pierce County*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges Pierce County’s (**Respondent** or the **County**) adoption of Ordinance Nos. 2005-93s and 2005-94s2 amending the County’s Comprehensive Plan and development regulations regarding a “Rural Neighborhood Center” (**RNC**) in the vicinity of E. 72nd Street and Waller Road. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**). Tacoma asserts that the County’s expansion of the RNC (a limited area of more intensive rural development – LAMIRD) does not comply with the Act, indicating the prior rural designation should be retained.

On February 24, 2006, the Board issued a Notice of Hearing in the *Tacoma IV* matter.

On February 27, 2006, the Board received a PFR from Waller Enterprises LLC (hereafter **Waller**). The case was assigned CPSGMHB Case No. 06-3-0011. Edward G. McGuire is also the PO in this matter. Waller too, challenges Pierce County’s adoption of Ordinance Nos. 2005-93s and 2005-94s2 amending the County’s Comprehensive Plan and development regulations regarding the County’s RNC designation in the vicinity of E. 72nd Street and Waller Road. Again, the basis for the challenge is noncompliance with

various provisions of the GMA. Waller asserts that the RNC designation is in error because the area should have been included in the County's urban growth area (**UGA**).

On March 1, 2006, the Board issued a Notice of Hearing and Order of Consolidation in the above captioned matter. The Order Consolidated the *Tacoma* PFR and the *Waller* PFR into one consolidated case – *Tacoma IV v. Pierce County*, CPSGMHB Consolidated Case No. 06-3-0011c.

On March 22, 2006, the Board received “Respondent Pierce County’s Motion to Dismiss Petitioner Waller Enterprises” (**Co. Motion – Dismiss**). The County asserted that Petitioner Waller did not properly serve a copy of the PFR on the County; therefore, Petitioner’s PFR should be dismissed.

On March 30, 2006, the Board received Pierce County’s Index of the Record (**Index**).

On March 31, 2006, the day after the prehearing conference, the Board issued its “Prehearing Order” (**PHO**) in this matter. The PHO set forth the deadlines for filing motions, responses and replies, as well as the legal issues to be decided in this matter.

On April 11, 2006, the Board received “Respondent Pierce County’s Amended Index of the Record” (**Amended Index**).

On April 12, 2006, the Board received “Motion of Waller Enterprises to Become a Party or to Intervene” (**Waller Motion – Intervene**).

On April 19, 2006, the Board received “Waller Enterprises Opposition to Pierce County’s Motion to Dismiss” (**Waller Response – Dismiss**).

The Board did not receive any responses to the motion to intervene or a reply brief from the County on the motion to dismiss.

All filings were timely made and received by the Board.

II. INTERVENTION

WAC 272-020-270 enables the Board to grant intervention¹ if such intervention is in the interest of justice and will not impair the orderly and prompt conduct of the proceedings.

The Board’s rules of Practice and Procedure allow a party served with a motion, ten days to respond to that motion. WAC 242-02-534.

Waller moved to intervene on behalf of Pierce County against the City of Tacoma challenge on April 12, 2006. Neither the County nor Tacoma responded.

¹ In reaching its decision, the Board may turn to the superior court’s civil rules for guidance. See WAC 242-02-270.

Waller's Motion

The Board notes that Waller filed a PFR with the Board challenging Pierce County. However, while Waller challenges the County's action on one hand, it seeks to support the County's action on the other. *See* PHO, Section IX, Legal Issues 1 and 2, at 7.

The City of Tacoma challenges the County's expansion of an existing RNC to include additional property, including property owned by Waller. Waller, as the property owner, seeks to intervene on behalf of the County in opposition to the City of Tacoma.

The Board has reviewed the motion, and noting no objections filed by the parties, the Board has determined that Waller's intervention in this matter is in the interest of justice and will not impair the orderly and prompt conduct of the proceedings. Therefore, the Board will **grant** Waller's motion to intervene.

Waller may file a prehearing response brief in support of Respondent Pierce County in accordance with the briefing schedule set forth for Respondent in the PHO and limited to responding to the three City of Tacoma Issues [Legal Issues 1, 2 and 3]. *See* PHO, at 7. Respondent Pierce County, at its discretion, may share allotted time for oral argument at the Hearing on the Merits (**HOM**) with Intervener Waller.

Waller is entitled to notice of any settlement discussions that occur between Petitioner City of Tacoma and Respondent Pierce County regarding the RNC designation, and may participate in such discussions, if any. However, because of the Board's disposition of the Waller PFR, discussed *infra*, a settlement only requires the agreement of Tacoma and Pierce County.

III. MOTION TO DISMISS

The County alleges that Waller failed to serve the County in accordance with the Board's Rules of Practice and Procedure; therefore, the PFR should be dismissed. In response, Waller argues: 1) the County Council was served, even if the Auditor was not; 2) the County is not prejudiced by the appeal since the Waller PFR challenges the same property; 3) there is no legal authority for dismissal; and 4) any error was inadvertent. Waller Response, at 1-6.

The Board's Rules of Practice and Procedure specify the filing and service requirements for a PFR. WAC 242-02-230 provides:

- (1) The original and three copies of the petition for review shall be filed with a board personally, or by first class, certified or registered mail. Filings may also be made with a board by electronic telefacsimile transmission as provided in WAC 242-02-240. *A copy of the petition for review shall be personally served upon all other named parties or deposited in the mail and postmarked on or before the date filed with the board. When a county is a party, the county auditor shall be*

*served in noncharter counties and the agent designated by the legislative authority in charter counties.*² The mayor, city manager, or city clerk shall be served when a city is a party. When the state of Washington is a party, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law. Proof of service may be filed with the board pursuant to WAC 242-02-340.

(2) *A board may dismiss a case for failure to substantially comply with subsection (1) of this subsection.*

(Emphasis supplied). Additionally, the Board’s Rules provide, “Any action may be dismissed by a board: . . . (4) Upon a board’s own motion for failure by the parties to comply with these rules or any order of the board.” WAC 242-02-720(4).

The Board received the City of Tacoma PFR on February 23, 2006. See PFR No. 06-3-0009. The Declaration of Service attached to Tacoma’s PFR indicates that the Board, Pierce County Auditor and Council and *Petitioner Waller’s attorney* were served a copy of the PFR by legal messenger. See Declaration of Service with PFR No. 06-3-0009; and Co. Motion – Dismiss, Attachment B.

After receiving the City of Tacoma PFR on February 23, 2006, the Board issued a “Notice of Hearing” (NOH). The Board’s NOH was served on Petitioners attorneys, the Pierce County Auditor and Council as well as *Petitioner Waller’s attorney*. See NOH and attached Declaration of Service.

It is undisputed that the Board received the Waller’s PFR on February 27, 2006.³ See PFR No. 06-3-0011. However, the County contends that contrary to the Board’s rules, the County Council, not the County Auditor was served with the Waller PFR on February 28, 2006. See Co. Motion – Dismiss, at 5-7; Attachments C and D.

On March 1, 2006, the Board issued a “Notice of Hearing and Order of Consolidation” involving the two PFRs challenging the County’s action. This Notice and Order set March 30, 2006 as the prehearing conference (PHC) date. Subsequently, but prior to the PHC, the County filed its motion to dismiss. See *infra*.

At the PHC on March 30, 2006, the Board acknowledged the early motion by the County and noted that Waller need not respond to the motion until the date indicated in the

² The Pierce County Charter designates the County Auditor as the “Filing Officer.” See Pierce County Charter, Section 5.90; Co. Motion – Dismiss, at 6; footnote 1.

³ The Board notes that Waller’s Declaration of Service that accompanied the Board’s PFR indicates, “On the date below [February 27, 2006] written copies of the foregoing document [PFR] were served as follows: [listing addresses of clerk of the CPSGMHB, Mayor of Tacoma, Pierce County Council and courtesy copy to Attorneys for Tacoma].” See also Co. Motion, Attachment D. The Declaration of Service did not indicate what form of service (i.e. legal messenger, mail, fax etc.) was employed.

schedule. Waller did file a timely response. *Infra*. Also at the PHC, Waller’s attorney provided Pierce County’s attorney with a copy of the PFR filed by Waller.

There is no documentary evidence before the Board, or explanation by Petitioner, why Petitioner Waller *never* attempted to properly serve its PFR on Pierce County. First, prior to filing its PFR, Petitioner’s attorney was served with a copy of the City of Tacoma PFR; likewise, Petitioner’s attorney was served with a copy the Board’s Notice of Hearing in the Tacoma case. As the Declarations of Service indicate, both the PFR and NOH were served upon the Pierce County Auditor. Second, the Board’s Rules of Practice and Procedure specify who must be served. Even though these examples of proper service upon the County were available to Waller, as well as the Board’s Rules, Waller simply filed a PFR with the Board and the County Council, ignoring the proper service requirements. Third, even after the County filed its motion to dismiss, Petitioner did not attempt to correct the faulty service. Instead, Petitioner provided a copy of the PFR to the County at the PHC – over a month after the date the PFR should have been served on the County.

It is undisputed that the Waller PFR was not served on the Pierce County Auditor. Failure to serve the Auditor, the “filing official” designated by the Pierce County Charter, fails to comply with the Board’s Rules of Practice and Procedure. The Board cannot construe Petitioner’s lack of effort to properly serve the County as “substantial compliance” with the Board’s service provisions. Therefore, pursuant to WAC 242-02-230 and -720(4), the Board will **dismiss** the Waller’s PFR.

Petitioner’s attorney should be aware that there is significant Board precedent⁴ for this Board’s dismissal of a PFR for improper service; however, improper service has been a rare event in the CPS region since the millennium.

⁴ See for example:

A letter addressed only to “the city” does not meet the requirements that the mayor, city manager, or city clerk be served personally or by mail with a copy of the PFR. WAC 242-02-230(1). *Salisbury v. Bonney Lake*, CPSGMHB Case No. 95-3-0058, Order Granting Bonney Lake’s Motion to Dismiss, (Oct. 27,1995), at 3.

The County demonstrated that there was no record that the County had been served with one of the petitions for review; the Board dismissed the challenged PFR. *Sky Valley, et al., v. Snohomish County*, CPSGMHB Consolidated Case No. 95-3-0068, Order on Dispositive Motions, (January 9, 1996), at 7.

The prosecutor was served, not the County Council Clerk as required by local ordinance; mail service is proper, but must be served on the proper agent. *Keesling v. King County*, CPSGMHB Case No. 95-3-0078, Order Granting Motion to Dismiss for Lack of Timely Service, (Mar. 18, 1996), at 3.

Petitioner failed to properly serve the respondent, in accordance with the Board’s rules of practice and procedure. *Wallock and DÉJÀ VU of Everett v. City of Everett*, CPSGMHB Case No. 96-3-0037, Order Granting Motion to Dismiss, (Feb. 20, 1997), at 3-4.

III. ORDER

Based upon review of the Petition for Review, Declarations of Service, the motions and materials submitted by the parties, the Act, Board Rules of Practice and Procedure, and prior decisions of this Board, the Board enters the following ORDER:

- Waller's Motion to Intervene is **granted**. Waller may intervene in support of the County's action designating the area as RNC as specified *supra*.
- The County's Motion to Dismiss for failure to properly serve the PFR upon the County is **granted**. Therefore, the Waller Enterprises LLC PFR, No. 06-3-0011⁵ – is **dismissed with prejudice**.
- The only matters remaining in this case [*City of Tacoma IV v. Pierce County*, CPSGMHB Case No. 06-3-0011c] are the City of Tacoma's three Legal Issues. See PHO, at 7.

So ORDERED this 1st day of May, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
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.

The service provisions in the Board's rules are jurisdictional, not just procedural. *Sky Valley and Dwayne Lane v. Snohomish County*, CPSGMHB Consolidated Case No. 98-3-0033c, Order Granting Motion to Dismiss, (Jan. 20, 1999), at 2-3

⁵ **Note that this matter will retain the case number of 06-3-0011c for the remainder of this proceeding.**