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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

COVE HEIGHTS CONDOMINIUM
ASSOCIATION,

Petitioner(s),

Case No. 08-1-0013

v.

ORDER ON MOTIONS TO DISMISS

CHELAN COUNTY,

Respondent.

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I. PROCEDURAL HISTORY

On June 19, 2008, COVE HEIGHTS CONDOMINIUM ASSOCIATION, by and through their representatives, Steve Smith and Amy Vira, filed a Petition for Review (PFR).

On July 8, 2008, the Board held the telephonic Prehearing conference. Present were, Raymond Paoella, Presiding Officer, and Board Members, John Roskelley and Joyce Mulliken. Present for the Petitioners were Steve Smith and Amy Vira. Present for the Respondent was Susan Hinkle. During the prehearing conference, the Board noted that Petitioners' issue statements do not contain a citation to the GMA statute that Petitioners allege the County has violated. The Board requested Petitioners clarify their issue statements to provide such a statutory citation.

On July 10, 2008, the Board issued its Prehearing Order. In the Prehearing Order, the Board reiterated its request for Petitioners to clarify their issue statements to include statutory citations. The Board indicated it would issue an Amended Prehearing Order once the revised issue statement was received.

On July 16, 2008, the Board received Petitioners' First Amended Petition for Review.

1 On July 17, 2008, the Board issued its Amended Prehearing Order.

2 On July 25, 2008, the Board received Respondent's Motion for Dismissal of Petition
3 for Review and First Amended Petition for Review, Memorandum in Support of Motion to
4 Dismiss, and Affidavits of Janet Merz, Cindy Dietz, John Guenther, Freeman Moore, Jr., and
5 Susan Hinkle.

6 On July 29, 2008, the Board received Respondent's First Amended Index of Record,
7 Second and Third Motions to Dismiss, and Memorandum in Support of.

8 On August 2, 2008, the Board received Petitioner's Response to Respondent's
9 Motions to Dismiss.

10 On August 19, 2008, the Board received Respondent Chelan County's Reply to
11 Petitioner's Response to Motions to Dismiss.

12 On August 26, 2008, the Board held its telephonic motion hearing. Present were,
13 Raymond Paoella, Presiding Officer, and Board Members, John Roskelley and Joyce
14 Mulliken. Present for the Petitioners were Steve Smith and Amy Vira. Present for the
15 Respondent was Susan Hinkle.

16 II. MOTION

17 Respondent, Chelan County, moved to dismiss the Petition for Review and the
18 Amended Petition for Review based on three grounds: (1) Failure of Petitioner to serve
19 Chelan County within the time period specified in WAC 242-02-230; (2) Lack of APA
20 standing; (3) Lack of jurisdiction for untimely service of petition.

21 II. DISCUSSION

22 RCW 36.70A.290 provides that review by the Growth Management Hearings Board
23 (GMHB) shall be initiated by: (1) filing a petition relating to whether or not an adopted
24 comprehensive plan or development regulation is in compliance with the GMA (or RCW
25 Chapters 43.21C or 90.58); (2) including a detailed statement of issues in the petition; and
26 (3) filing the petition in the Growth Management Hearings Board office within 60 days after
publication by the legislative body. The Board's jurisdiction is invoked when these statutory
requirements are satisfied by a petitioner with standing under RCW 36.70A.280(2).

1 There is no requirement in the GMA statutes to serve the petition upon the county or
2 city whose action is challenged. However, there is a service requirement in the Board's
3 adopted rules of procedure. WAC 242-02-230(1) provides, in pertinent part, as follows:

4 A copy of the petition for review shall be personally served upon all other
5 named parties or deposited in the mail and postmarked on or before the date
6 filed with the board. When a county is a party, the county auditor shall be
7 served in noncharter counties and the agent designated by the legislative
8 authority in charter counties...

9 WAC 242-02-230(2) provides that the Board "may dismiss a case for failure to
10 substantially comply with" the PFR service rule. This Board has ruled in previous
11 cases that a motion to dismiss will be denied when the jurisdiction does not
12 demonstrate any prejudice from the failure to properly serve the PFR.¹

13 RCW 36.70A.270(7) authorizes the GMHB to adopt "administrative rules of
14 practice and procedure." But this statute does not authorize the GMHB to impose a
15 jurisdictional service requirement.² Stated differently, the GMHB cannot enlarge or
16 add to the specified statutory requirements that invoke the Board's jurisdiction. Thus,
17 the administrative rule requiring service on the County is procedural in nature, not
18 jurisdictional.

19 In this case, the PFR (dated June 18, 2008) was filed with the Board on June
20 19, 2008. Petitioner's attorney has stated that on June 18, he sent the PFR to a
21 process server for service on the Chelan County Auditor, but for some unknown
22 reason actual service on Chelan County was delayed until July 22, 2008. On June
23 23, 2008, the Chelan County Prosecuting Attorney and County Commissioner's Office
24 received the Board's Notice of Hearing of this PFR, together with tentative schedule
25 for the proceedings which included a Prehearing Conference on July 8, 2008, and a
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¹ Humphrey v. Douglas County, Case No. 07-1-0010 (EWGMHB Order on Motion, Sept. 21, 2007).

² *Id.*

1 Hearing on the Merits on October 29, 2008. At that point, no one in the Chelan
2 County government had received the PFR itself, although the County was aware of
3 the PFR filing because of the Board's notification.

4 On July 8, 2008, the Prehearing Conference was conducted. The County was
5 represented at the Prehearing Conference by Deputy Prosecuting Attorney Susan
6 Hinkle. Petitioner's Statement of Issues was discussed at the conference, and the
7 Presiding Officer asked the Petitioner to submit an amended Statement of Issues
8 with specific citation to the GMA. The County gave no indication at the conference
9 that it had not received a copy of the PFR. In fact, the County participated in the
10 conference discussion regarding clarification of Petitioner's Statement of Issues.
11 There was no indication that the County's ability to participate in the Prehearing
12 Conference had been impaired. Furthermore, the County submitted its Index of the
13 Record on July 9, 2008,³ and there was no indication that its ability to prepare the
14 Index had been impaired.

15 In this case, the County has not shown that it was prejudiced by the delay in
16 service of the PFR.⁴ Furthermore, the Petitioner attempted to serve Chelan County at
17 the time of PFR filing with the Board. Under these facts, the Board finds that
18 Petitioner substantially complied with WAC 242-02-230(1). The Respondent also
19 argued that the delay in service divested the Board of jurisdiction. But the Board
20 finds that the delay of service did not violate any statutory jurisdictional requirement.
21 This case does not warrant an order of dismissal for the delay in service.

22 Respondent also moved to dismiss based on lack of standing under the
23 Administrative Procedure Act, RCW 34.05.530, alleging that Petitioner has not
24 asserted it will have an "injury-in-fact." In general, parties owning property adjacent

25 ³ The Board's Notice of Hearing required submittal of the Index of the Record by July 3, 2008.

26 ⁴ The County asserts prejudice based on the inability of Virgil McClosky to participate in the prehearing conference as an
intervenor. However, the Board notes that Mr. McClosky has not sought intervention in this matter and therefore no
prejudice can be based on an unexercised right.

1 to a proposed project and who allege that the project will injure their property have
2 standing under the injury-in-fact analysis. *Suquamish Indian Tribe v. Kitsap County*,
3 92 Wn. App. 816, 830 (1998). Here, the Petitioner is an adjacent property owner,
4 has some control of the access to the project area, and Petitioner alleges an injury to
5 their property, i.e., additional traffic and activity will adversely affect Petitioner's
6 property. Therefore, Petitioner satisfies the APA standing test for injury-in-fact and
7 the Petition for Review should not be dismissed.

8 **III. ORDER**

9 The Eastern Washington Growth Management Hearings Board **DENIES** Respondent's
10 three motions to dismiss the Petition for Review and Amended Petition for Review in this
11 matter.

12 **SO ORDERED** this 3rd day of September 2008.

13 EASTERN WASHINGTON GROWTH MANAGEMENT
14 HEARINGS BOARD

15 _____
16 Raymond L. Paoella, Board Member

17 _____
18 John Roskelley, Board Member

19 _____
20 Joyce Mulliken, Board Member