State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

CITY OF WENATCHEE, Petitioner(s), v. CHELAN COUNTY, Respondent, BRIAN NELSON, Intervenor.	Case No. 08-1-0015 ORDER ON MOTIONS

This matter comes before the Growth Management Hearings Board (Board) on two motions seeking to dismiss, in whole or in part, the Petition for Review (PFR) filed by the City of Wenatchee (City).[1] This PFR challenges Chelan County's (County) adoption of six Comprehensive Plan Amendments (CPA) asserting these amendments do not comply with various provisions of the Growth Management Act (GMA), RCW 36.70A.[2] The first motion was filed by Intervenor Brian Nelson (Intervenor) and seeks to dismiss the City's claims in relationship to three Comprehensive Plan Amendments – CPA 2007-17, CPA 2007-18, and CPA 2007-19.[3] The Intervenor additionally provides alternative arguments to support dismissal of each of the City's Legal Issues.[4] The second motion was filed by the County

[1] The City of Wenatchee filed its PFR with the Board on September 5, 2008.
[2] As stated in the Board's October 15, 2008, the City of Wenatchee presents six Legal Issues for the Board's resolve in relationship to these amendments.
[3] *See*, Intervenor's Motion on the Merits and Memorandum, filed October 27, 2008; Intervenor's Reply, filed November 19, 2008.
[4] *Id.* at 5-11.

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and seeks to dismiss the City's PFR in its entirety for failure to personally serve the County Auditor, for failure to provide specificity within the City's Statement of the Issues, and on the merits in regards to the City's claims related to the Sunnyslope Subarea Plan (SSP) and the Malaga Subarea Plan (MSP).[5] In addition, the County further contends the City's challenge constitutes an untimely challenge to the Chelan County Comprehensive Plan and Development Regulations (DR).[6]

On November 25, 2008, the Board held its telephonic Motion Hearing. Present were, Joyce Mulliken, Presiding Officer, Board Members John Roskelley and Raymond Paolella, and Board Staff Attorney Julie Taylor. Present for the Petitioners were City of Wenatchee Attorney Steve Smith and City of Wenatchee Community Development Director Rick Smith. Present for Chelan County was Susan Hinkle, and for the Intervenor, Donald Dimmitt.

I. DISCUSSION

A. County's Motion for Dismissal – Service

Chelan County contends the PFR should be dismissed because the City failed to personally serve the Chelan County Auditor.[7] The County contends Washington Administrative Code (WAC) 242-02-230 and RCW 4.28.080 require personal service.[8]

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[5] *See*, County's Dispositive Motions and County's Memorandum in Support of Dispositive Motions, filed October 29, 2008. The County and the City refer to the Malaga Subarea Plan also as the Malaga Vision Plan, for the purposes of this order the Board shall refer to this plan as the Malaga Subarea Plan (MSP).

[6] *Id.*

[7] At oral argument, the County asserted that the Western Board's holding in *Sherman v. Skagit County*, WWGMHB Case No. 07-2-0021, Order of Dismissal (Dec. 20, 2007) supports its assertion that personal service was required and that the Board's previous holding in *Cove Heights v. Chelan County*, EWGMHB Case No. 08-1-0013 is in juxtaposition to the Western Board. The County misreads the *Sherman* decision. In the *Sherman* case, Skagit County moved for dismissal of the PFR because the Petitioner had failed to serve the County Auditor in any manner. In stead of serving the Auditor, Petitioner served the PFR on the Board of County Commissioners. In deciding to dismiss the case, the Western Board did not conclude that personal service was required; rather, the Western Board stated, on numerous occasions, that the Petitioner was required to serve the County Auditor and that service could be completed via personal service or mail service.

[8] *Id.* at 1-2. Chelan County notes that it presented similar argument in the recent case of *Cove Heights v. Chelan County*, EWGMHB Case No. 08-1-0013, and adopts the argument presented in that case pertaining to service. The *Cove Heights* matter is a separate and distinct case from the one currently before the Board and, as such, if the County wished to incorporate the arguments it presented in the *Cove Heights* case then it has the responsibility to provide the *Cove Heights* briefing to the Board. For this reason, the Board cannot consider any briefing materials beyond those actually submitted by Chelan County in this case.

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The City of Wenatchee asserts that it complied with the requirements of WAC 242-02-230 which permits service by U.S. Mail. The City states that it mailed a copy of the PFR to Chelan County on September 5, 2008, the same date that the PFR was filed with the Board.

Board Analysis and Discussion:

The County does not argue the City did not serve the Chelan County Auditor with a copy of the PFR. Rather, the County argues the City was required to *personally serve* the PFR upon the County Auditor. As this Board has previously stated, the GMA does not set forth a service requirement, rather the need to serve parties is set forth in WAC 242-02-230.[9] WAC 242-02-230 provides: (In relevant part, emphasis added)

> (1) ... 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 non-charter counties* ...

Chelan County contends that regardless of the conjunctive "or" utilized in WAC 242-02-230(1), personal service is required. The County relies on RCW 4.28.080(1) to support this assertion. RCW 4.28.080 provides: (In relevant part, Emphasis added)

> *Service made in the modes provided in this section shall be taken and held to be personal service*. The summons shall be served by delivering a copy thereof, as follows:
>
> (1) *If the action be against any county* in this state, to *the county auditor* or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.

WAC 242-02-230(1) and RCW 4.28.080(1) require the county auditor be served in non-charter counties, such as Chelan County. Thus, the question is whether RCW 4.28.080

[9] *Cove Heights v. Chelan County*, EWGMHB Case No. 08-1-0015, Order on Motions, at 3 (Sept. 3, 2008).

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controls service in Board proceedings or whether it is the Board's own Rules of Practice and Procedures which control.

The Board's Rules, WAC 242-02, were adopted pursuant to RCW 36.70A.270(7) which requires the Boards to adopt administrative rules of practice and procedure. WAC 242-02 was originally adopted in 1992 and has been subject to various amendments since that time. The GMA makes no reference to RCW Title 4 - Civil Procedure, which addresses civil actions brought in Washington Courts. In addition, neither the GMA nor the WAC references RCW 4.28.080. Rather, the GMA explicitly states the Administrative Procedures Act (APA), RCW 34.05, governs the practices and procedures of the Board.[10] The application of the APA to the Board's practices and procedures is logical given the fact the Board is a quasi-judicial administrative agency created by the Legislature and not a court.

Turning to the APA for further guidance, RCW 34.05.010(19) provides a definition of service: (Emphasis added)

> (19) "Service," except as otherwise provided in this chapter, means *posting in the United States mail, properly addressed, postage prepaid,* ***or*** *personal service. Service by mail is complete upon deposit in the United States mail*. Agencies may, by rule, authorize service by electronic telefacsimile transmission, where copies are mailed simultaneously, or by commercial parcel delivery company.

The Board is not aware of a provision of the APA which limits service to personal service. RCW 4.28.080 pertains to civil actions filed in the courts and, as a quasi-judicial administrative agency, this provision of the RCWs is simply not applicable to the Board's proceedings. Therefore, under both the Board's rules and the APA, the mailing of a PFR is an appropriate manner of service so long as the PFR was deposited in the mail and postmarked on or before the date filed with the Board.[11]

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[10] RCW 36.70A.270(7).

[11] WAC 242-02-230(1).

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The County's own exhibits to its Dispositive Motion clearly denote the City properly addressed and mailed a copy of the PFR to the Chelan County Auditor on September 5, 2008, the same day the City filed the PFR with the Board.[12] **Thus, the Board finds and concludes the City properly served the PFR on the County as required by WAC 242-02-230(1) and, therefore, the County's Motion to Dismiss the PFR based on improper service is DENIED.**

B. County's Motion for Dismissal – Issue Statements

Chelan County asserts the Issue Statements presented by the City of Wenatchee lack sufficient specificity as required by WAC 242-02-210 and, therefore, the Board should dismiss the PFR. The crux of the County's argument is the City has failed to provide specific facts as to how the County has violated the GMA provisions set forth in the issue statement.[13]

In response, the City contends the facts relevant to the substantive issues will be presented and detailed during briefing and argument on the merits of the matter. The City argues it is not required to present its entire argument and supporting facts within its issue statements.[14]

Board Analysis and Discussion

RCW 36.70A.290(1) requires that a PFR include a detailed Statement of Issues, and this statute limits the scope of review to the issues presented to the Board in the Statement of Issues. WAC 242-02-210(2)(c) amplifies this requirement by providing:

> A detailed statement of the issues presented for resolution by the board that specifies the provisions of the act or other statute allegedly being violated and, if applicable, the provision of the document that is being appealed.

From its argument, the County contends the City is required to set forth supporting facts within its issue statement. The County is incorrect. The Board recognizes one of the

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[12] Affidavit of Moore; Attachment A to Affidavit.
[13] County Dispositive Motion/Memorandum, at 2-3.
[14] City's Response, at 2-3.

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most vital elements of the PFR is the Statement of the Issues as this presents the questions a petitioner would like the Board to resolve. However, *the legal issues are not the same as legal argument*. The PFR is not the time or the place to present legal argument on the merits of the case. All parties will have this opportunity during their briefing on the merits. The structure of an issue statement is simple - issues are to be framed as a question and should be concise and to the point. Each legal issue should indicate the specific section of the GMA and the sections of the jurisdiction's actions that a petitioner alleges violate the GMA. If issue statements contained the facts supporting the allegation, these statements would be transformed from a single, questioning sentence to a multi-page briefing of the case.

In reviewing the Legal Issues, as set forth in the Board's October 15, 2008, Prehearing Order (PHO), the Board finds each statement includes a citation to a GMA provision and denotes the six challenged amendments that are the subject of the challenge. How the City argues these alleged violations will be revealed in its forthcoming brief(s). **Thus, the Board concludes the City's issues statements conform to the requirements of RCW 36.70A.290(1) and WAC 242-02-210(2)(c) and the County's Motion to Dismiss is DENIED**.

C. County's and Intervenor's Motion for Dismissal – Merits of the Challenge

Intervenor Brian Nelson and Chelan County both seek to dismiss the PFR, in whole or in part, by asserting the challenged actions are compliant with the GMA. Chelan County argues that four of the amendments are consistent with the Sunnyslope Subarea Plan (SSP) and the other two amendments are consistent with the Malaga Subarea Plan (MSP).[15] As a result, the County contends these amendments are compliant with the GMA and the City's challenge amounts to an untimely challenge of the underlying subarea plans or, in the alternative, the County's CP and DR.[16]

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[15]County's Memorandum, at 3-5. Intervenor presented argument in regards to CPA 2007-017, CPA 2007-18, and CPA 2007-19. The County incorporates this argument and extends it to CPA 2007-21. County's Memorandum, at 3-4.

[16] *Id.*, at 3-5.

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Like Chelan County, the Intervenor asserts three of the challenged CPAs are consistent with the underlying subarea plan and are untimely or moot. According to the Intervenor, the City was a participant in the development of the SSP and, in October 2007, passed a resolution accepting the SSP. Therefore, no issue remains for the Board's review.[17] In addition, the Intervenor sets forth various assertions as to each of the City's Legal Issues and how undisputed facts demonstrate GMA compliance, therefore, warranting dismissal of the PFR.[18]

In response to these motions, the City of Wenatchee argues it is challenging the six CPAs approved by the County Commissioners in July 2008, not previously adopted provisions of the County's CP or related Subarea Plans.[19] The City contends its prior actions in regards to the SSP or MSP do not preclude the present appeal.[20] In addition, the City provides a brief responding argument in relationship to clustering, agricultural land, and the frequency of amendments. Lastly, the City asserts there are still issues on the merits for the Board to address and, as such, the County's and the Intervenor's motions are not appropriate and should be denied.[21]

Board Analysis and Discussion

WAC 242-02-530(4) permits the filing of a dispositive motion on a limited record. Such a motion is similar to a Motion for Summary Judgment before the Court and, therefore, the Board will grant such a motion only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Here, the City challenges six CPAs and alleges violations of various GMA provisions, including RCW 36.70A.110, 36.70A.115, 36.70A.130, 36.70A.177, and several of the GMA's goals set forth in RCW 36.70A.020.

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[17] Intervenor's Motion, at 4-5.
[18] *Id.*, at 5-12
[19] City's Response, at 3.
[20] *Id.*, at 3-4.
[21] *Id.*, at 7-8.

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After a thorough review of the briefing and entertaining arguments of the motion hearing, the Board is unable to conclude that there is undisputed fact and law present in this matter which would warrant dismissal. On its face, its appears to the Board the City's challenge is not to the Sunnyslope Subarea Plan, the Malaga Subarea Plan, or Chelan County's Comprehensive Plan and Development Regulations, but rather to the six amendments adopted by resolution on July 22, 2008. As such, the question remains as to whether or not *those* amendments comply with the cited GMA provisions. A question that requires further development by all parties involved.

When issues are complex, extensive review of the Record pertaining to the core of a case is required. Therefore, the parties require time and careful consideration of the facts and law in order to fully develop briefing. Due to the limited factual evidence and argument provided to the Board at this time, the Board concludes dismissal of the matter would not be appropriate as it is evident disputes remain as to the underlying facts and the interpretation and application of GMA provisions to the six challenged CP amendments. **As such, the Board DENIES Intervenor's Motion for Dismissal and Chelan County's Motion for Dismissal of the PFR and the case will proceed as noted in the schedule set forth by the Board in the October 15 Prehearing Order.**

II. ORDER

1. Chelan County's Motion to Dismiss the Petition for Review due to improper service is DENIED.
2. Chelan County's Motion to Dismiss the Petition for Review due to insufficient specificity within the City of Wenatchee's Issue Statements is DENIED.
3. Intervenor Brian Nelson's Motion to Dismiss and Chelan County's Motion to Dismiss, both based on the merits of the issues presented by the City of Wenatchee, is DENIED.
4. The case shall proceed as denoted by the schedule set forth in the Board's October 15, 2008, Prehearing Order. Unless the parties seek an

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extension of the matter for the purpose of settlement negotiations, the City shall file its Hearing on the Merits Brief no later than December 23, 2008.

SO ORDERED this 2nd day of December 2008.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Joyce Mulliken, Board Member
(Board Member Mulliken files Concurring Opinion below)

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John Roskelley, Board Member

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Raymond L. Paolella, Board Member

Concurring Opinion of Board Member Joyce Mulliken

Although I concur in the result of the Board's Order on Motions, I write separate to express my concerns in regards to this challenge.

The GMA is intended to provide for coordinated and planned growth within Washington State that is founded on common goals for the people living within those jurisdictions. Through the GMA, citizens, communities, local governments, and the private sectors are encouraged to coordinate and cooperate with one another when developing comprehensive land use plans. Although the GMA places certain responsibilities on counties, such as designating urban growth areas for which a correlating responsibility is not granted to cities, this hierarchy does not distort the GMA's underlying tenant of coordination and consistency between counties and their cities and is clearly demonstrated by provisions relating to this interdependent relationship. *See e.g., RCW 36.70A.210(2)*(A county shall

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adopt a county–wide planning policy in *cooperation* with its cities); *RCW 36.70A.110(2)*(Location of UGA shall be in *consultation* with city); *RCW 36.70A.100*(Comprehensive Plans are to be coordinated and consistent with comprehensive plans of bordering common borders).

Both the City of Wenatchee and Chelan County have responsibilities for planning in conformance with the GMA and a variety of opportunities were undoubtedly provided to allow for resolution of differences that could have precluded the filing of a Petition for Review (PFR) before the Board. I acknowledge the GMA permits a city to challenge a county or a county to challenge a city and, throughout all three of the GMHBs, such challenges have been raised on numerous occasions. During the early years of adopting Comprehensive Plans and Development Regulations, such challenges were understandable as cities and counties were learning the process of developing compliant comprehensive land use plans. I do not dispute that some of these cases had merit. Given the economic situation facing cities, counties, and the State, I believe it is in the best interests of all to make every effort possible to address comprehensive land use planning in a coordinated fashion and use dispute resolution to the fullest extent. This Board Member encourages the parties to continue their efforts in this regard.

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Joyce Mulliken, Board Member

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