

**BEFORE THE WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD**

SKAGIT COUNTY GROWTHWATCH,

Petitioner,

v.

SKAGIT COUNTY,

Respondent

and

DAY CREEK SAND & GRAVEL,

Intervenor.

No. 04-2-0004

**ORDER ON MOTION  
TO DISMISS**

THIS MATTER comes before the Board upon the motion of Respondent Skagit County for an order dismissing the Petition for Review filed in this case. Skagit County's Motion to Dismiss, April 8, 2004. Petitioner, Skagit County GrowthWatch, responded on April 19, 2004 (Response to Skagit County's Motion to Dismiss and Request to Strike Attachments and Argument) and a hearing on the motion was held on April 28, 2004. Due to new arguments offered by the Intervenor at the hearing, Petitioner was allowed to submit supplemental briefing which was filed on May 13, 2004. Response to Argument of Day Creek Sand and Gravel Regarding Skagit County Motion to Dismiss.

The Petition for Review challenges two administrative interpretations issued by the County. The first one challenges Resolution #R20030195, a decision of the county board of commissioners upholding a change in the comprehensive plan map through an administrative interpretation. The property at issue is owned by Day Creek Sand and Gravel, LLC. The mapping change was appealed through the County's

administrative process under SCC 14.06 by a different petitioner to the hearing examiner, the board of county commissioners, and the superior court, as a Land Use Petition Act (LUPA) case. The order in the LUPA case was not appealed.

The second administrative interpretation pertains to an administrative interpretation sought for Karma Gardens, File No. PL03-0883. The administrative interpretation changed the designation of Karma Gardens from Agriculture-Natural Resource Land to Rural Business. This appeal is the first challenge to this administrative interpretation.

### **I. DECISION**

Skagit County's motion to dismiss is based on four arguments: (1) the Board does not have jurisdiction to review the County's administrative interpretations; (2) Petitioner failed to exhaust its administrative remedies and should have followed the procedures outlined in the Skagit County Code; (3) the Petition was not timely filed; and (4) the claim is precluded by *res judicata*. Skagit County's Motion to Dismiss, April 8, 2004, at 2.

(1) The County first argues that the Board does not have jurisdiction to review the County's administrative interpretations. Petitioners respond that the challenged actions should not have been handled administratively because they constitute comprehensive plan amendments. We find that the Board has jurisdiction to determine whether the challenged administrative interpretations were in fact comprehensive plan amendments.

A comprehensive plan is defined by the Growth Management Act (GMA). It provides that comprehensive plan amendments must be carried out in conformity with RCW 36.70A.140:

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the

comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

RCW 36.70A.070

Petitioner alleges that the County has amended the comprehensive plan by changing the comprehensive plan maps, but has done so without following its own procedures for amending comprehensive plans as required by the GMA. First Amended Petition for Review. The Board has jurisdiction over petitions alleging that the county is not in compliance with the GMA. RCW 36.70A.280(1)(a). The County argues that the Board does not have jurisdiction because the County has chosen to make its designation and mapping changes by administrative interpretation. However, if the Petitioner is correct and the challenged changes were actually comprehensive plan amendments, it would not matter what the County called them – the Board would still have jurisdiction.

The County also argues that Petitioner is essentially challenging the code provision allowing the County to make mapping changes by administrative interpretation. The County argues that the county code is compliant and therefore Petitioner should have challenged this provision of the code rather than the application of it. Skagit County's Motion to Dismiss at 7. However, there is nothing in the code provision to alert the reader that the County would use it to make changes in the maps in the comprehensive plan. In fact, as Petitioner argues, Chapter 14.06 is expressly limited to development permits (SCC 14.06.010) while Chapter 14.08 expressly addresses comprehensive plan map amendments, SCC 14.08.020.

Therefore, we conclude that the Board has jurisdiction to consider whether the administrative interpretations undertaken by the County are actually comprehensive

plan amendments that should comport with the approved County processes for such amendments. Ch. 14.08 SCC; and Ch.2 of the Skagit County Comprehensive Plan.

2) The second basis for dismissal argued by the County is that Petitioner failed to exhaust its administrative remedies. The administrative interpretation provisions of the county code provide for appeal of an administrative interpretation. SCC 14.06.040(3)(d); SCC 14.06.110(7) – 14.06.110(14). The County argues that Petitioner should have appealed the administrative interpretation under the code appeal processes before undertaking an appeal to the board. Skagit County’s Motion to Dismiss at 8.

Petitioner responds that the GMA gives a petitioner with standing an absolute right to file a petition for review and that the County’s requirement for an administrative appeal is therefore unlawful. Response to Skagit County’s Motion to Dismiss and Request to Strike Attachments and Argument at 7. Petitioner cites to this Board’s decision in *Island County Citizens’ Growth Management Coalition et al. v. Island County*, WWGMHB Case No. 98-2-0023c (Order on Motions to Dismiss, March 1, 1999) for the proposition that the GMA has no requirement for exhaustion of remedies. *Ibid.*

At argument, Petitioner further noted that there is no public notice requirement of an administrative interpretation to alert a citizens’ group to the need for appeal. Also, the county code sets a standing requirement for appealing an administrative interpretation (“aggrieved parties”) that is different from the standing requirements under the GMA. SCC 14.06.040(3)(d); RCW 36.70A.280(2).

Since Petitioner is a citizen watchdog group rather than a party which has suffered specific injury, it is clear that Petitioner could not meet the standing requirements of

SCC 14.06.040(3)(d). On the other hand, Petitioner does meet the participatory standing requirements of the GMA because it raised the issue to the County before filing this appeal. RCW 36.70A.280(2)(b). The County's position would leave the Petitioner with no ability to appeal the administrative interpretation as a GMA-related action, even assuming exhaustion of administrative remedies were required by the GMA. We conclude the Petitioner was not required to exhaust administrative remedies.

3) The County's third basis for its motion to dismiss is that the Petition was not timely filed. The County argues that Petitioner was required to file an appeal within 14 days of the day the notice of the administrative interpretation was issued. Skagit County's Motion to Dismiss at 9. With respect to the Day Creek Resolution, the County argues the appeal should have been filed within 21 days of the decision. *Ibid* at 10.

The County mistakes the appeal period required under the GMA with the appeal period established under county code for appeals of administrative interpretations. The GMA requires filing of a petition for review within 60 days of publication of notice that it has adopted the comprehensive plan amendment or development regulation. RCW 36.70A.290. In this case, the County never published such a notice because the County takes the position that it did not amend the comprehensive plan. Under these circumstances, the time period by which Petitioner must file its appeal has not even begun to run. The Petition is timely.

5) The County's fourth basis for its motion to dismiss is that Petitioner's claim is precluded by *res judicata*. The County argues that the Superior Court's decision in the appeal of the Day Creek Sand and Gravel administrative interpretation under the Land Use Petition Act (LUPA) by Day Creek Stewards bars the Petitioner, Skagit GrowthWatch, from bringing this appeal to the Board. Order on Land Use Petition,

*Day Creek Stewards v. Day Creek Sand and Gravel, Judy Anderson, Kevin and Debora Sullivan, Thomas J. Higgins, and Skagit County*, Snohomish County Superior Court Cause No. 03-2-08806-2, February 18, 2004. The County states: “The Petition is precluded under the doctrine of *res judicata* because it amounts to relitigation of claims and issues that were litigated or could have been litigated in a prior action.” Skagit County’s Motion to Dismiss at 10.

The County argues that there is an identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) quality of the persons for or against whom the claim is made; such that *res judicata* applies in this case. *Ibid* at 11.

Petitioner responds that the equitable remedy of *res judicata* does not apply in cases before the hearings boards, citing *Cities of Tacoma, Milton, Puyallup and Sumner v. Pierce County*, CPSGMHB Case No. 94-3-0001 (Order on Dispositive Motions, March 4, 1994). Response to Skagit County’s Motion to Dismiss and Request to Strike Attachments and Argument at 9. Further, Petitioner argues that there is not an identity of persons and parties, inasmuch as Petitioner in the LUPA petition was Day Creek Stewards, while the Petition in this GMA petition was filed by Skagit GrowthWatch. Petitioner’s attorney expressly represents that the groups have different members. Response to Argument of Day Creek Sand and Gravel Regarding Skagit County Motion to Dismiss at 4.

We do not find that this appeal is barred by *res judicata*. First of all, there is not an identity of causes of action between this appeal and the LUPA case. Here, Petitioner challenges the County’s compliance with the GMA in making the mapping changes it made. In the superior court case, the Order on Land Use Petition did not resolve any issues of GMA compliance. The court instead determined whether the board of county commissioners acted appropriately under the county code in reversing the

decision of the hearing examiner. Order on Land Use Petition, *Day Creek Stewards v. Day Creek Sand and Gravel, Judy Anderson, Kevin and Debora Sullivan, Thomas J. Higgins, and Skagit County*, Snohomish County Superior Court Cause No. 03-2-08806-2, February 18, 2004. These are not the same claims.

The County argues that Day Creek Stewards attempted to raise issues of GMA compliance in their petition and argument. However, it is clear that the court could not and did not resolve GMA compliance issues in the LUPA case. A LUPA petition may not be used to obtain judicial review of land use decisions that “are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board.” RCW 36.70C.030(1)(a)(ii). LUPA does not apply to decisions subject to review by a growth management hearings board. *Caswell v. Pierce County*, 99 Wn. App. 194, 198, 992 P.2d 534, 2000 Wash. App. LEXIS 163 (Div. I – 2000). If a land use decision must be appealed to a growth management hearings board, there is no direct judicial review of the decision unless all parties agree to direct review in superior court. *Wenatchee Sportsmen v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000).

For these reasons, even though the appellant may have raised GMA-based arguments in the LUPA petition, the superior court could not resolve them in the LUPA order. In the Day Creek LUPA challenge, the superior court did not have jurisdiction to decide the compliance of the County with the Growth Management Act because issues of GMA compliance must be appealed to a growth hearings board. *Snohomish County v. Somers*, 105 Wn. App. 937, 944, 21 P.3d 1165, 2001 Wash. App. LEXIS 836 (Div. I – 2001). Even if the parties sought to have the court resolve GMA issues, the court did not do so. Therefore, the causes of action are not the same and *res judicata* does not apply.

We also find that there is no identity or privity of parties in this case. The County has argued orally that because the same attorney has represented the petitioner in each case, the petitioners must be seen as being in privity. The County also argues that the two groups “share the same relationship as aggrieved parties and interested citizen groups, in the subject matter of the litigation.” Skagit County’s Motion to Dismiss at 12.

Clearly, the fact that an attorney has represented another party in a related action does not confer privity upon the parties. The County cites no authority for this proposition, which would have the effect of creating an automatic identity of interest between clients of a given attorney simply by virtue of retaining the same attorney. The County’s argument that all interested citizen groups are in privity is also without foundation. Interested citizen groups could easily take different positions with respect to an issue and should not be lumped together merely on the basis that they are citizen groups.

That having been said, we are troubled by this appeal of the Day Creek mapping change where it has already been the subject of an unappealed judicial determination. While the superior court did not decide the issue of GMA compliance, the court did decide that “the specific parcels at issue should have been included in the MRO and were not due to the mapping error.” Order on Land Use Petition, Conclusion of Law 3. The court affirmed the decision of the board of county commissioners, which in turn had affirmed the administrative interpretation despite a contrary decision by the hearing examiner. *Ibid.*

While we may not have decided the issue as the superior court did, the court determined that the County was acting within its authority under the county code when it made the mapping change to the County’s Comprehensive Plan/Zoning Map. Order

on Land Use Petition, Conclusion of Law 4. It is difficult to see how we could decide for Petitioner in the Day Creek appeal *without* determining that the superior court judge was in error. Clearly, it is not the prerogative of the hearings boards to over-rule superior court judges; indeed, it is the reverse.

The posture of the Day Creek appeal puts the Board in a very awkward position. However, there is no such problem with respect to the Karma Gardens appeal. Petitioner has stated that its concern with respect to both appeals is the principle involved with respect to the County's use of administrative interpretations to make comprehensive plan amendments. Since Petitioner can still pursue its appeal of the County's practice through the challenge to the Karma Gardens administrative interpretation, we find under the highly unusual circumstances of this case that the appeal of the Day Creek administrative interpretation should be dismissed. At the same time, we find that the appeal of the Karma Gardens administrative interpretation on the basis that it constituted a comprehensive plan amendment should go forward to the hearing on the merits.

## **II. ORDER**

Based on the foregoing, the issues in the First Amended Petition for Review challenging Resolution #R20030195 (applicant Day Creek Sand & Gravel) (Issues 1-3) are hereby **DISMISSED**;

**PROVIDED** that the issues in the First Amended Petition for Review challenging Administrative Interpretation under File No. PL03-0883 (Issues 4-6) are **NOT** dismissed and will be heard at the Hearing on the Merits on July 14, 2004.

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This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

So ORDERED this 2<sup>nd</sup> day of June 2004.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Holly Gadbow, Board Member

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Nan Henriksen, Board Member

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Margery Hite, Board Member