

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 1000 FRIENDS OF WASHINGTON

4 Petitioners,

Case No. 05-2-0002

5
6 v.

ORDER ON MOTIONS TO DISMISS

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8
9 THURSTON COUNTY,

10 Respondent.

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12 THIS Matter comes before the Board upon the County's Motion to Dismiss or Limit Issues.
13 The County moves for dismissal of the Petition for Review on the grounds that the Petitioner
14 lacks standing. The County further moves to dismiss issues 3 and 5 of the Prehearing
15 Order on two grounds: Petitioner failed to join indispensable parties; and the appeal of the
16 urban growth area (UGA) boundaries is time barred. We find that the Petitioner has
17 standing to bring the claims in this Petition for Review; that the cities are not indispensable
18 parties to the appeal of the County's decision regarding urban growth area boundaries; and
19 that the appeal of the urban growth area boundaries is not time barred.
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23 **ISSUES ON MOTIONS TO DISMISS**

24 A: Does Petitioner have standing to raise the issues in this petition for review?

25 B: Are the Cities of Olympia, Lacey, Tumwater and Yelm indispensable parties under
26 CR 19 to the claims (Issues 3 and 5 of the Prehearing Order) regarding urban growth
27 areas?

28 C: Is Petitioner barred from challenging the County's UGAs because those issues
29 were litigated and decided in *Reading v. Thurston County*, WWGMHB Case No. 94-
30 2-0019; and because the time for bringing such challenges was within sixty days of
31 the UGA boundary adoptions in 1994 and 1995?
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1 **BURDEN OF PROOF**

2 This Petition for Review challenges the County’s adoption of Resolution 13234 and
3 Ordinance 13235. Resolution 13234 amends the County’s comprehensive plan. Ordinance
4 13235 amends the County’s development regulations. Pursuant to RCW 36.70A.320(1),
5 comprehensive plans, development regulations and amendments to them are presumed
6 valid upon adoption. The statute further provides:
7

8 The board shall find compliance unless it determines that the action by the state
9 agency, county, or city is clearly erroneous in view of the entire record before the
10 board and in light of the goals and requirements of this chapter.

11 RCW 36.70A.320(3)

12 In order to find the County’s action clearly erroneous, the Board must be “left with the firm
13 and definite conviction that a mistake has been made.” *Department of Ecology v. PUD1*,
14 121 Wn.2d 179, 201, 849 P.2d 646 (1993). The burden is on the Petitioner to demonstrate
15 that any action taken by the County is not in compliance with the requirements of Ch.
16 36.70A RCW (the Growth Management Act, or, the GMA). RCW 36.70A.320(2).
17

18 **DISCUSSION**

19 A. Does Petitioner have standing to raise the issues in this petition for review?
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21 The County first argues that the Petitioner does not have standing to challenge the
22 resolution and ordinance at issue here because it “does not exist as a non-profit corporation
23 as stated in the petition” and because Petitioner has neither shown that its interests are
24 within the zone of interest to be protected by the challenged action nor alleged injury in fact
25 in relation to the County’s action in this matter. Memorandum in Support of Respondent’s
26 Dispositive Motion to Dismiss or Limit Issues at 4.
27

28
29 Petitioner responds that it is a registered non-profit corporation although it has officially
30 changed its name from “1000 Friends of Washington” to “Futurewise.” Response to Motion
31 to Dismiss at 2. Petitioner further argues that it does not need to be a registered non-profit
32

1 corporation - RCW 36.70A.280(3) defines a “person” who may have standing to include “a
2 private organization or entity of any character.” *Ibid* at 5.

3
4 RCW 36.70A.280(3) defines a “person”:

5 For purposes of this section “person” means any individual, partnership, corporation,
6 association, state agency, governmental subdivision or unit thereof, or public or
7 private organization or entity of any character.

8
9 While Petitioner submitted evidence that it is a registered non-profit corporation (Tab 1 to
10 Petitioner’s Response to Motion to Dismiss), it need not be a registered non-profit
11 corporation to proceed under this section of the GMA. First as 1000 Friends of Washington
12 and later under the new name of Futurewise, Petitioner clearly identified the issues it wished
13 the County to address and made it plain that it was speaking as an organization rather than
14 as an individual. Petitioner provided evidence that it submitted written comments, attended
15 and testified at a Planning Commission meeting and at a public hearing before the Board of
16 County Commissioners; and that in each instance the speaker and/or writer identified
17 himself as speaking for Futurewise, rather than as an individual. *Ibid* at 6. This is sufficient
18 to qualify the Petitioner as a “person” who may bring this Petition for Review.

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21 In response to the allegation that it fails to allege interests within the zone of interests to be
22 protected and to allege an injury in fact, Petitioner responds that it alleges “participation
23 standing” rather than APA (Administrative Procedure Act) standing. *Ibid* at 4-6.

24 Participation standing, Petitioner argues, requires that the person have participated in
25 person or by submitting comments in writing in a public hearing or meeting. *Ibid*.

26
27
28 The GMA provides four bases upon which a person may have standing to bring a petition
29 for review:

30 A petition may be filed only by: (a) The state, or a county or city that plans under this
31 chapter; (b) a person who has participated orally or in writing before the county or city
32 regarding the matter on which a review is being requested; (c) a person who is

1 certified by the governor within sixty days of filing the request with the board; or (d) a
2 person qualified pursuant to RCW 34.05.530.
3 RCW 36.70A.280(2)

4
5 The County challenges the Petitioner's standing on the basis of RCW 36.70A.280(2)(d) -
6 standing pursuant to the Administrative Procedures Act (Ch. 34.05 RCW). However,
7 Petitioner asserts standing under a different subsection of RCW 36.70A.280(2) – standing
8 under RCW 36.70A.280(2)(b), which is participation standing. To establish participation
9 standing, the person must have participated orally or in writing before the county or city
10 regarding the matter on which review is requested. RCW 36.70A.280(2) and .280(4). This
11 Futurewise did. See Index No. 130 (September 29, 2004, Letter to the Chair of the
12 Thurston County Planning Commission); and Index No. 237 (November 15, 2004, Letter to
13 the Board of Thurston County Commissioners).
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15
16 *Conclusion:* We find the Petitioner has standing pursuant to RCW 36.70A.280(2)(b).
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18
19 B. Are the Cities of Olympia, Lacey, Tumwater and Yelm indispensable parties under
20 CR 19 to the claims (Issues 3 and 5 of the Prehearing Order) regarding urban growth
21 areas?

22 The County moves to dismiss Issues 3 and 5 of the Prehearing Order, asserting that the
23 Cities of Olympia, Lacey, Tumwater, and Yelm are indispensable parties under CR 19.
24 Memorandum in Support of Respondent's Dispositive Motion to Dismiss or Limit Issues at 7.
25 The County argues that the indispensable party rule applies to legislative actions such as
26 those challenged here because the legislative decisions of Olympia, Lacey, Tumwater, and
27 Yelm are at issue here. *Ibid.*
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29
30 Petitioner responds that the cities do not have authority to adopt UGAs and so they are not
31 indispensable parties to this action. Response to Motion to Dismiss at 13-14. Petitioner
32

1 points to RCW 36.70A.110(6) which provides: "Each county shall include designations of
2 urban growth areas in its comprehensive plan." *Ibid.*

3
4 Civil Rule 19 provides:

5 A person who is subject to service of process and whose joinder will not deprive the
6 court of jurisdiction over the subject matter of the action shall be joined as a party in
7 the action if (1) in his absence complete relief cannot be accorded among those
8 already parties, or (2) he claims an interest relating to the subject of the action and is
9 so situated that the disposition of the action in his absence may (A) as a practical
10 matter impair or impede his ability to protect that interest or (B) leave any of the
11 persons already parties subject to a substantial risk of incurring double, multiple, or
12 otherwise inconsistent obligations by reason of his claimed interest. If he has not
13 been so joined, the court shall order that he be made a party. If he should join as a
14 plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an
15 involuntary plaintiff. If the joined party objects to venue and his joinder would render
16 the venue of the action improper, he shall be dismissed from the action.

15 CR 19(a)

16 We note that the boards did not adopt this civil rule or any rule on joinder because the
17 situation and authority of the growth boards is distinctly different from the general jurisdiction
18 of the superior courts. The growth boards are limited in their powers and can only enter
19 findings of compliance or noncompliance, invalidity, and a recommendation of sanctions
20 based upon proper petitions brought pursuant to the GMA. See RCW 36.70A.280, .290,
21 .300, .302, and .345. The boards have not been granted the power to join a local
22 jurisdiction when there was no petition alleging that it failed to comply with the GMA. To
23 impose a mandatory joinder requirement in addition to the petition filing deadlines would
24 create a new restriction on petitions - one that is not present in the statute and one which
25 creates a trap for the unwary. Therefore, Civil Rule 19 does not apply to actions before the
26 boards. This does not mean that the cities might not wish to participate if they determine
27 that they have interests to protect in this case. In that event, the cities can seek intervenor
28 status pursuant to WAC 242-02-270. However, it does mean that the cities are not
29 indispensable parties to this proceeding.
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1 *Conclusion:* The named cities are not indispensable parties to this action.

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3 C. Is Petitioner barred from challenging the County's UGAs because those issues
4 were litigated and decided in *Reading, v. Thurston County*, WWGMHB Case No. 94-
5 2-0019; and because the time for bringing such challenges was within sixty days of
6 the UGA boundary adoptions in 1994 and 1995?

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8 The County argues that Petitioner cannot challenge the UGA decisions of nine to ten years
9 ago because the statute requires petitions to be filed within sixty days of the publication of
10 the adoption. Memorandum in Support of Respondent's Dispositive Motion to Dismiss or
11 Limit Issues at 5. Petitioner responds that the County has not provided any evidence that it
12 did publish notice of the adoption of the ordinance or resolution that created the UGAs.
13 Response to Motion to Dismiss at 7. Petitioner also argues that it is challenging the
14 resolution and ordinance adopted by the County on November 22, 2004, rather than any
15 resolution or ordinance that may have been enacted nine or ten years ago. *Ibid* at 7-8.

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17
18 Petitioner's claims arise out of the ordinance and resolution that the County enacted in
19 November of 2004. The petition was timely filed with respect to those claims. The petition
20 filing requirements apply to the legislative enactments, not to the "decisions."

21
22 The County further argues that the principles of *res judicata*, *collateral estoppel* and *stare*
23 *decisis* preclude this Board from deciding Issues 3 and 5 because they were already
24 litigated in the case of *Reading v. Thurston County*, WWGMHB 94-2-0019. Memorandum in
25 Support of Respondent's Dispositive Motion to Dismiss or Limit Issues at 5. Petitioner
26 points out that this argument can only apply to Issue 3 since it is the only issue that
27 challenges the size and location of the County's UGA, which was subject to the challenge in
28 the *Reading* case. Response to Motion to Dismiss at 7.
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1 The decision in *Reading v. Olympia*, WWGMHB Case No. 94-2-0019 (Final Decision and
2 Order, March 23, 1995) considered challenges to the then-established UGAs. The Board
3 found the Olympia UGA “too large” but also found that the Petitioners did not overcome the
4 presumption of validity since the Lacey and Tumwater UGAs had not yet been designated.
5 *Ibid.* The Board expressly reserved ruling on the UGA boundaries when all of them had
6 been established:¹
7

8 The interior boundary lines between the three cities are minimally significant for GMA
9 purposes. It is the exterior boundaries that are important. At the time of the hearing,
10 Thurston County had not adopted a comprehensive plan UGA for either Lacey or
11 Tumwater. Given that scenario, and the evidence in this record, we are not
12 persuaded that the presumption of validity which attaches to the county’s adoption of
13 the Olympia UGA has been overcome by petitioners. We will review all the exterior
14 boundaries if future challenges are made to the completed UGAs as established by
15 Thurston County.

16 *Reading v. Olympia*, WWGMHB Case No. 94-2-0019 (Final Decision and Order, March 23,
17 1995).

18 The County argues that the issue of its Olympia UGA boundaries was litigated and decided
19 in the County’s favor. It is the prior decision, the County argues, that entitles the County to
20 *res judicata* (claim preclusion), *collateral estoppel* (issue preclusion) and/or *stare decisis*.
21 Memorandum in Support of Respondent’s Dispositive Motion to Dismiss or Limit Issues at 6.

22
23 Petitioner responds that the elements of *res judicata* and/or *collateral estoppel* have not
24 been met in this case. Response to Motion to Dismiss at 9 -13. For *res judicata* to apply,
25 there must be an identity of subject-matter; cause of action; person or parties; and quality of
26 the persons for or against whom the claim is made. *Alishio v. DSHS*, 122 Wn. App. 1, 9, 91
27 P.3d 893, 2004 Wash. App. LEXIS 655 (Div. I – 2004). There is no identity of parties here
28 because 1000 Friends/Futurewise was not a party to the *Reading* case. Response to
29 Motion to Dismiss at 11-12.
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¹ No appeal of these later-established UGA boundaries was brought to this Board.

1 For *collateral estoppel* to apply, the requirements are: (1) identical issues; (2) a final
2 judgment on the merits; (3) the party against whom the plea is asserted must have been a
3 party to or in privity with a party to the prior adjudication; and (4) application of the doctrine
4 must not work an injustice on the party against whom the doctrine is applied. *Hadley v.*
5 *Maxwell*, 144 Wn. 2d 306, 311-312, 27 P.3d 600, 2001 Wash. LEXIS 535 (2001). The
6 focus is on whether there has been a full and fair hearing by all the parties. *Ibid.*
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9 As Petitioner points out, it was not a party to the *Reading* case and was not in privity with
10 those who were parties. Response to Motion to Dismiss at 11-12. Thus, the third
11 requirement for *collateral estoppel* is not met in this case.
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13
14 Petitioner also points out that it is appealing a different enactment (the County's 2004
15 update) than was appealed in the *Reading* case. Petitioner alleges that its appeal arises
16 out of different facts, including a new set of population projections. *Ibid.* Therefore,
17 Petitioner argues, the issues are not identical.
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20 The Petition for Review in this case challenges the County's compliance with RCW
21 36.70A.130. Pursuant to RCW 36.70A.130(4)(a), Thurston County was required to "take
22 action to review and, if needed, revise their comprehensive plans and development
23 regulations to ensure the plan and regulations comply with the requirements of this chapter"
24 no later than December 1, 2004. This requirement is known as the "update" requirement. A
25 central question in this appeal is what the County was required to do regarding the UGA
26 boundaries as a result of its update requirements. This issue was clearly not litigated in the
27 *Reading* case.
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29
30 The County argues that *stare decisis* also bars the litigation of this Petition for Review but
31 does not elaborate and provides no authority to support its assertion. There is, therefore,
32 no basis provided for this argument.

1 *Conclusion:* This petition is not barred by *stare decisis*, *collateral estoppel* and/or *res*
2 *judicata*.

3 **ORDER**

4 Based on the foregoing, the County's Motions to Dismiss are hereby DENIED.

5 All of the issues as set out in the Prehearing Order will go forward for argument at the
6 hearing on the merits on June 16, 2005.
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9 Entered this 21st day of April 2005.
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12 _____
Margery Hite, Board Member

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Holly Gadbow, Board Member

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16 _____
Gayle Rothrock, Board Member
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