

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 TUMWATER LIVABLE COMMUNITY, GEORGE
4 ROTHER, SHERRY BUCKNER, and MARK
5 WALLACE,

6 Petitioners,

7 v.

8 CITY OF TUMWATER,

9 Respondent.

Case No. 05-2-0010

**ORDER GRANTING MOTION TO
DISMISS FOR LACK OF
STANDING**

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11 THIS Matter comes before the Board upon the City's motion to dismiss and to limit issues.
12 Respondent's Motion to Dismiss for Lack of Standing and to Limit Issues, August 22, 2005.
13 Pursuant to the schedule established in the Order Granting Extension of Deadline for Filing
14 a Decision entered April 27, 2005, the Petitioners' response to the City's motion was due
15 September 1, 2005. However, no response was filed with the Board as of the date of this
16 order (September 8, 2005).
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19 The City seeks dismissal of the petition for review on the grounds that the Petitioners lack
20 standing in accordance with RCW 36.70A.280(2), (3) and (4). Respondent's Motion to
21 Dismiss for Lack of Standing and to Limit Issues at 5-21. Petitioners Tumwater Livable
22 Community (TLC) and Mark Wallace allege standing under both RCW 36.70A.280(2)(b) and
23 (2)(d). Petition for Review at 2. Petitioners George Rother and Sherry Buckner allege
24 standing under RCW 36.70A.280(2)(d) only. Petition for Review at 3.
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PROCEDURAL BACKGROUND

28 The petition in this case challenges the City's failure to adopt mandatory updates to its
29 comprehensive plan pursuant to RCW 36.70A.130, the actions taken in the adoption of
30 Ordinance 02004-037, and the Determination of Non Significance adopted June 30, 2004.
31 Petition for Review at 2.
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1 The petition for review was filed with the Board on March 18, 2005. On April 20, 2005, the
2 parties jointly moved for an extension of the deadline for a final decision and order pursuant
3 to RCW 36.70A.300(2)(b), to pursue settlement. The Order Granting Extension of Deadline
4 for Filing a Decision in response to the joint motion established a schedule for motions and
5 briefing. The deadline for substantive motions is set in that order as August 22, 2005. The
6 City filed its motion to dismiss on August 22, 2005. The deadline for response to the
7 substantive motions was set as September 1, 2005. (Motions to Supplement the Record
8 were due August 25, 2005, with responses to those motions due September 2, 2005).

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11 The parties notified the Board that their settlement efforts had not been successful and that
12 they would proceed with adjudication of this case.

14 **DECISION**

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16 The City has challenged the Petitioners' standing to bring the petition for review in this case.
17 Two Petitioners, TLC and Mark Wallace, allege standing under RCW 36.70A.280(2)(b) and
18 (d); Petitioners Rother and Buckner allege standing under RCW 36.70A.280(2)(d) only.

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20 The Growth Management Act (GMA) provides the ways in which standing may be achieved:

21 A petition may be filed only by: (a) The state, or a county or city that plans under this
22 chapter; (b) a person who has participated orally or in writing before the county or city
23 regarding the matter on which a review is being requested; (c) a person who is
24 certified by the governor within sixty days of filing the request with the board; or (d) a
25 person qualified pursuant to RCW 34.05.530.

26 RCW 36.70A.280(2).

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28 Standing under RCW 36.70A.280(2)(b) is known as "participatory" standing because it
29 requires that the petitioner have participated regarding the matters being challenged before
30 the county or city. Here, only TLC and Petitioner Wallace claim participatory standing.

31 Petition for Review at 2-3. As to the participatory standing alleged by TLC, the City states
32 that there is nothing in the City's record showing that anyone identified as Tumwater Livable

1 Community¹ ever testified, or submitted comments to the City in the process of adopting
2 Ordinance 02004-036 or the Determination of Non-Significance. Respondent's Motion to
3 Dismiss for Lack of Standing and to Limit Issues at 8-10.
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6 As to the participatory standing asserted by Petitioner Mark Wallace, the City points to its
7 record regarding the adoption of Ordinance 02004-036, which adopted the 2004
8 comprehensive plan amendments. Ibid at 8. The City finds no testimony or comments
9 submitted by Petitioner Wallace in those proceedings. Ibid. The City acknowledges that
10 Petitioner Wallace offered comments before the City Council on October 5, 2004, but
11 argues that those comments concerned a rezone application. Ibid at 9.
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14 Exhibit 33 contains the minutes of the October 5, 2005, meeting of the Tumwater City
15 Council. Petitioner Wallace's comments appear at p.14, and concern the Palermo-
16 Deschutes Area Rezone. Ex. 33 at 10-14. In those comments, Petitioner Wallace did not
17 raise the City's failure to adopt mandatory updates to its comprehensive plan pursuant to
18 RCW 36.70A.130, the actions taken in the adoption of Ordinance 02004-037, or the
19 Determination of Non Significance adopted June 30, 2004. Therefore, that portion of the
20 record does not demonstrate that he participated in the matters regarding which a review is
21 being requested. RCW 36.70A.280(2)(b).
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24 In addition to the participatory standing asserted by Petitioners TLC and Wallace,
25 Petitioners TLC, Wallace, Rother, and Buckner all allege standing under RCW
26 36.70A.280(2)(d). This provision of the GMA confers standing to bring GMA claims on
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30 ¹ The City also offers registration date from the Secretary of State Online Corporations Database to show that
31 Tumwater Livable Community did not become incorporated until March 25, 2005; three months after
32 Ordinance Nos. 02004-036 and 02004-027 were adopted. Attachment B to Respondent's Motion to Dismiss
for Lack of Standing and To Limit Issues.

1 those persons who qualified under the standard for standing under the Administrative
2 Procedures Act (APA), RCW 34.05.530:

3 A person has standing to obtain judicial review of agency action if that person is
4 aggrieved or adversely affected by the agency action. A person is aggrieved or
5 adversely affected within the meaning of this section only when all three of the
6 following conditions are present:

- 7 1. The agency action has prejudiced or is likely to prejudice that person;
- 8 2. That person's asserted interests are among those that the agency was
9 required to consider when it engaged in the agency action challenged; and
- 10 3. A judgment in favor of that person would substantially eliminate or redress the
11 prejudice to that person caused or likely to be caused by the agency action.

12 RCW 34.05.530.

13 The City argues that Petitioners have failed to show that they meet the "injury in fact" and
14 the "zone of interests" prongs of standing under the APA. Respondent's Motion to Dismiss
15 for Lack of Standing and to Limit Issues at 12-20. This Board has held that this is the
16 proper test to be applied to determine APA standing. *JCHA v. Port Townsend, WWGMHB*
17 *Case No. 96-2-0029 (Order on Motions, November 27, 1996)*. We have also held that
18 affidavits must be submitted to prove APA standing and that allegations in a petition for
19 review are insufficient proof if standing is challenged. *Ibid*.

20 Here, Petitioners have failed to respond to the City's motion to dismiss for lack of standing.
21 There are, therefore, no affidavits in the evidence before the Board establishing APA
22 standing for any petitioner.
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25 **Conclusion:** Petitioners TLC and Wallace have failed to establish participatory standing in
26 this case. Petitioners TLC, Wallace, Rother and Buckner have failed to establish APA
27 standing. Because we decide that the petitioners lack standing, we do not reach the City's
28 arguments on limiting issues, changing the hearing date, and supplementing the record.
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FINDINGS OF FACT

1. Tumwater is a city in Thurston County, a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.70A.040.
2. Tumwater Livable Community (TLC) is a non-profit organization, registered with the Secretary of State and incorporated on March 25, 2005.
3. Petitioners George Rother, Sherry Buckner, and Mark Wallace are residents of Tumwater, Washington.
4. The petition for review was filed in this case by all petitioners on March 18, 2005.
5. The petition challenges the City of Tumwater's compliance with RCW 36.70A.130; its adoption of Ordinance 02004-036 and 02004-037, and the Determination of Non Significance (DNS) adopted June 30, 2004.
6. The City asserts that TLC and Mark Wallace did not raise any of the matters alleged in the petition for review to the City prior to the filing of the petition.
7. The City asserts that none of the Petitioners meet the "injury-in-fact" test or the "zone of interests" tests of RCW 35.04.530.
8. No evidence has been presented that TLC or Mark Wallace raised any of the matters in the petition for review to the City of Tumwater in its adoption of Ordinances 02004-036, 02004-037 or its DNS.
9. No evidence has been presented that TLC or Mark Wallace raised the matter of the City's failure to comply with RCW 36.70A.130 to the City before filing this petition for review.
10. No evidence has been presented that any Petitioner meets the "injury-in-fact" test or the "zone of interests" tests of RCW 35.04.530.

CONCLUSIONS OF LAW

- A. This Board has jurisdiction over the parties to this case.
 - B. The Petitioners lack standing to bring this petition for review.
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1 **ORDER**

2 The City having challenged the Petitioners' standing through its motion to dismiss and the
3 Petitioners having failed to offer evidence to support their claims of standing, this petition is
4 hereby DISMISSED.
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6 Pursuant to RCW 36.70A.300 this is a final order of the Board.
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8 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date of
9 mailing of this Order to file a petition for reconsideration. The original and three copies of a
10 motion for reconsideration, together with any argument in support thereof, should be filed
11 with the Board by mailing, faxing, or otherwise delivering the original and three copies of the
12 motion for reconsideration directly to the Board, with a copy to all other parties of record.
13 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-
14 02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite
15 for filing a petition for judicial review.

16 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
17 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
18 review may be instituted by filing a petition in superior court according to the procedures
19 specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition
20 for judicial review of this Order shall be filed with the appropriate court and served on the
21 Board, the Office of the Attorney General, and all parties within thirty days after service of the
22 final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in
23 person or by mail, but service on the Board means **actual receipt of the document at the**
24 **Board office** within thirty days after service of the final order. A petition for judicial review
25 may not be served on the Board by fax or by electronic mail.

26 **Service.** This Order was served on you the day it was deposited in the United States mail.
27 RCW 34.05.010(19)

28 Entered this 8th day of September 2005.

29 _____
Margery Hite, Board Member

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Holly Gadbow, Board Member

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Gayle Rothrock, Board Member