

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 WHIDBEY ENVIRONMENTAL ACTION  
4 NETWORK,

5 Petitioner,

6  
7 v.

8 ISLAND COUNTY,

9  
10 Respondent.

Case No. 06-2-0027

**ORDER ON MOTION TO DISMISS  
PETITION FOR REVIEW**

11  
12 **This Matter** comes before the Board upon motion of Island County. The County filed its  
13 Motion to Dismiss Petition for Review on November 3, 2006. Petitioner Whidbey  
14 Environmental Action Network (WEAN) filed its response to the motion on November 13,  
15 2006.<sup>1</sup> Island County requested a hearing on the motion be held at the time of the  
16 scheduled prehearing conference, November 15, 2006. WEAN had no objection and so a  
17 hearing on the motion was held telephonically on November 15, 2006. All three board  
18 members attended, Holly Gadbaw presiding.  
19  
20

21  
22 Having heard the arguments of the parties, reviewed the pleadings filed by the parties, the  
23 Petition for Review, and this case's files and records, the Board grants the County's motion  
24 to dismiss for WEAN's failure to timely file its petition for review. Electronic (e-mail) filing of  
25 a petition for review is not permitted by the Board's rules of practice and procedure, WAC  
26 242-02-230.  
27  
28  
29  
30  
31  
32

---

<sup>1</sup> Petitioner's Response to County's Motion to Dismiss

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

**ISSUE PRESENTED IN MOTION**

*Is timely filing with the Board of a petition for review accomplished by e-mail filing on the sixtieth day after publication, followed by same-day mailing of copies of the petition for review?*

**DISCUSSION**

**Positions of the Parties**

The County argues that the Petition for Review was not filed with the Board in the time specified by RCW 36.70A.290(2)(b), that is, within sixty days after publication of the adoption of the challenged enactment. Ordinance C-97-06 was adopted on August 21, 2006 and notice of the adoption was published on August 26, 2007, the County asserts.<sup>2</sup> The County points out that the mailed copies of the petition for review in this case were not filed with the Board until October 27, 2006.<sup>3</sup> Therefore, the County argues that the filing was not timely.

Petitioner WEAN responds that it filed the petition for review with the Board by e-mail on October 25, 2006.<sup>4</sup> WEAN argues that the Board’s rules allow e-mail filing because the rule on filing of petitions is not “exclusionary”, and does not restrict the electronic method of filing petitions to telefacsimile filings.<sup>5</sup> WEAN also argues that WAC 242-02-310 and 242-02-320 allow all “papers” to be filed with the Board by e-mail so that petitions may also be filed in that manner.<sup>6</sup> WEAN includes in its response a declaration from the Board’s executive assistant establishing that it sent the petition on October 25, 2006 and the Board received it on that date.<sup>7</sup>

---

<sup>2</sup> Motion to Dismiss Petition for Review at 1-2.  
<sup>3</sup> *Ibid.*  
<sup>4</sup> Petitioner’s Response to County Motion to Dismiss.  
<sup>5</sup> *Ibid* at 3  
<sup>6</sup> *Ibid* at 4-5

<sup>7</sup> Declaration of Paulette Yorke  
ORDER ON MOTION TO DISMISS  
Case No. 06-2-0027  
November 16, 2006  
Page 2 of 7

1 **Board Discussion:**

2 Petitions for review to the growth boards must be filed with the Board within 60 days of the  
3 date of publication of the legislative enactment. RCW 36.70A.290 (2).

4 2) All petitions relating to whether or not an adopted comprehensive plan,  
5 development regulation, or permanent amendment thereto, is in compliance with the  
6 goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be  
7 filed within sixty days after publication by the legislative bodies of the county or city.

8  
9 The acceptable procedure for filing a petition for review with the Board is set forth in WAC  
10 242-02-230:

11 (1) The original and four copies of the petition for review shall be filed with a board  
12 personally, or by first class, certified, or registered mail. Filings may also be made  
13 with a board by electronic telefacsimile transmission as provided in [WAC 242-02-240](#).  
14 A copy of the petition for review shall be personally served upon all other named  
15 parties or deposited in the mail and postmarked on or before the date filed with the  
16 board. When a county is a party, the county auditor shall be served in noncharter  
17 counties and the agent designated by the legislative authority in charter counties.  
18 The mayor, city manager, or city clerk shall be served when a city is a party. When  
19 the state of Washington is a party, the office of the attorney general shall be served  
20 at its main office in Olympia unless service upon the state is otherwise provided by  
21 law. Proof of service may be filed with the board pursuant to [WAC 242-02-340](#).

22 (2) A board may dismiss a case for failure to substantially comply with subsection (1)  
23 of this section.

24 WAC 242-02-230 sets the requirements for filing a petition for review and does not provide  
25 that petitions for review may be filed by e-mail.

26 Original filings, that is, filing of petitions for review, are governed by WAC 242-02-230. This  
27 rule is clear on its face and does not allow for e-mail filings. WAC 242-02-230 specifies the  
28 ways in which petitions for review may be filed: personally, by first-class mail, by certified  
29 mail, by registered mail, or by electronic facsimile transmission. There is no provision for  
30 email filing. It is a well-established rule of statutory construction that the express mention of  
31 one item implies the exclusion of all others. [Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1,](#)  
32 [77 Wn.2d 94, 98, 459 P.2d 633 \(1969\)](#). Thus, WAC 242-02-320's authorization of filing by

1 telefacsimile (in addition to filing personally or by mail) implies that e-mail filing of the  
2 petition for review is not authorized.

3  
4 WEAN argues that WAC 242-02-320 controls because it applies to all papers. Under WAC  
5 242-02-320, papers may be filed with the Board by e-mail followed by same-day mailing:

6  
7 Service of papers, specified in WAC [242-02-310](#)(1), shall be made personally or by  
8 first class, registered or certified mail, or by facsimile transmission. The board may be  
9 served by e-mail filings, provided that an original and three copies are deposited in  
10 the mail and postmarked no later than the same day. Exhibits shall not be served  
11 electronically but shall be deemed timely filed if included in the mailed copies.

12 WAC 242-02-320.

13 However, the papers listed in this rule do not include petitions for review. "Service of  
14 papers" is defined in WAC 242-02-310 as applying to "pleadings, briefs, exhibits and other  
15 documents or papers". By its terms, WAC 242-02-310 does not include the petition for  
16 review, which has its own rule because it initiates the action. WAC 242-02-230.

17  
18 Further, the rules must be construed so that no rule is mere "surplusage". If WAC 242-02-  
19 320 applied to filing of petitions, then there would be no reason for the more specific  
20 provisions of WAC 242-02-230. As a matter of statutory construction, the more specific rule  
21 takes precedence over the general rule. See *State v. Munson*, 22 Wn.App.522, 526, 597  
22 P.2d 440, 1979 Wash. LEXIS 2512 (Div. II, 1979).

23  
24  
25 WEAN also argues that it substantially complied with WAC 242-02-230 because it met the  
26 purpose and intent of the rules.<sup>8</sup> WEAN argues that the County and the Board received the  
27 e-mail filing in a timely manner and that the County is only "hair-splitting".<sup>9</sup> WEAN also  
28  
29  
30  
31

32 <sup>8</sup> Petitioner's Response to County's Motion to Dismiss at 6.

<sup>9</sup> *Ibid* at 7.

1 maintains that the Board would exceed its authority and the statutory requirements for filing  
2 if it were to impose a rule that limited Board jurisdiction based on the method of filing.<sup>10</sup>  
3

4 WEAN is essentially arguing that it can choose any method it wants to place a petition  
5 before the Board because the GMA does not define acceptable methods of filing. This  
6 argument is unpersuasive. The Boards properly adopted the rules for practice and  
7 procedure pursuant to the delegation in RCW 36.70A.270(7). Proper methods of filing are  
8 typically the province of rules, rather than statutes. See CR 5(e). There are no contrary  
9 rules in the GMA itself, so the Boards' rules govern.  
10

11  
12 WEAN would have the Board find that the rules do not apply because the Board received  
13 the petition within 60 days of publication and so did the County. However, procedural rules  
14 are in place for the purpose of establishing an orderly process that is known and fair to both  
15 sides. The Growth Management Hearings Boards jointly agreed upon and passed rules for  
16 filing petitions. When WAC 242-02-310 and 242-02-320 were adopted in 2004 to allow e-  
17 mail service of papers, WAC 242-02-230 was not modified to also allow e-mail filings of  
18 petitions. This Board has no authority to modify WAC 242-02-230 unilaterally merely  
19 because WEAN believes e-mail filings are sufficient. If WEAN wishes to see such a change  
20 in board rules, it may propose a rule change pursuant to WAC 242-02-052. In that event,  
21 the boards would follow the process set forth in WAC 242-02-054 for consideration of a rule  
22 change. By finding substantial compliance as WEAN urges, this Board would short-cut the  
23 rule-making process and deprive the other boards and the public of the opportunity to  
24 participate in the decision to change the methods for filing petitions.  
25  
26  
27

28 In addition, we note that e-mail filing differs from the methods set forth in WAC 242-02-230  
29 in an important respect. The methods established for filing a petition for review with the  
30  
31

32  

---

<sup>10</sup> *Ibid* at 8-9.

1 boards in WAC 242-02-230 all require that a paper petition for review be in the hands of the  
2 board to initiate a case. Personal service and service by US mail inherently require that a  
3 physical petition be filed. Filing by fax is expressly conditioned on the risk being on the  
4 sender that the fax copy be received by the board. WAC 242-02-240(2). An e-mail filing  
5 does not present the board with a paper petition upon receipt. In fact, e-mail service is only  
6 completed some days later when the paper copies arrive by mail. WAC 242-02-320. Thus,  
7 allowing e-mail filing would on occasion actually *extend* the statutory deadline for filing a  
8 petition for review because the filing would not be completed until after the mailed copies  
9 were received. Clearly, the Board cannot extend its jurisdiction through adoption of rules of  
10 practice and procedure. See *In the Matter of the Petition of Bert Loomis for a Declaratory*  
11 *Ruling*, WWGMHB Case No. 06-2-0006 (Decision on Petition for Declaratory Ruling, March  
12 28, 2006) at 4.  
13  
14

15  
16 **Conclusion:** Sending the Board an e-mail version of a petition for review does not  
17 constitute "filing" for purposes of WAC 242-02-230. That rule requires the petition to be filed  
18 with the Board personally, by mail, or by electronic telefacsimile (FAX). In this case, WEAN  
19 did not file the petition for review with the Board until more than sixty days after the County  
20 published its notice of adoption of the challenged ordinance, because mailed copies were  
21 not filed until October 27, 2006.  
22

## 23 24 ORDER

25 Based on the foregoing, the Board finds that the petition for review in this case was not  
26 timely filed and GRANTS the County's motion to dismiss. The petition for review is  
27 therefore hereby DISMISSED.  
28

29 Entered this 16th day of November 2006.  
30  
31  
32

\_\_\_\_\_  
Holly Gadbow, Board Member

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

\_\_\_\_\_  
Margery Hite, Board Member

\_\_\_\_\_  
James McNamara, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

**Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

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

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