

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

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| Peninsula Neighborhood Association, |) | Case No. 95-3-0059 |
| Petitioner, |) | [PNA I] |
| v. |) | FINAL DECISION AND ORDER |
| Pierce County, |) | |
| Respondent. |) | |
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I. PROCEDURAL HISTORY

On September 1, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board** or **CPSGMHB**) received a Petition for Review from Peninsula Neighborhood Association (**PNA**) in the above-captioned matter. PNA challenged the environmental analysis conducted for the Pierce County (the **County**) Comprehensive Plan (the **Plan**), claiming that it does not comply with Chapter 43.21C RCW, the State Environmental Policy Act (**SEPA**) or with the SEPA Rules in Chapter 197-11 WAC.

On September 26, 1995, “Pierce County’s Motion to Dismiss” (**County’s Motion to Dismiss**) and Pierce County’s Brief in Support of Motion to Dismiss (**County’s Motion Brief**) were filed with the Board. Four exhibits were attached: Exhibit A -- Declaration of Mark Truckey; Exhibit B -- Declaration of Debbie Hayes; Exhibit C -- “Order Granting Pierce County’s Motion to Dismiss PNA’s SEPA Claims” in *Gig Harbor v. Pierce County*, CPSGMHB Case No. 95-3-0016; and Exhibit D -- “Pierce County’s Motion and Memorandum to Dismiss PNA’s SEPA Claims” in *Gig Harbor v. Pierce County*.

On October 10, 1995, the Board entered a Prehearing Order that, among other things, established a briefing schedule for both the County’s Motion to Dismiss and for prehearing briefs in event the County’s Motion to Dismiss was either denied or not determined prior to the hearing on the merits. In addition, the Prehearing Order set forth five legal issues relating to whether the County complied with SEPA.

On November 3, 1995, PNA filed its “Response to Pierce County’s Motion to Dismiss.”

On November 13, 1995, “Pierce County’s Reply to PNA’s Response to County’s Motion to Dismiss” was filed with the Board.

On December 15, 1995, PNA’s “Prehearing Brief” was filed with the Board.

On January 5, 1996, “Pierce County’s Motion to Strike and Prehearing Brief Responding to PNA” was filed with the Board. In addition, seven exhibits were attached to the County’s Prehearing Brief.

PNA elected not to file a reply brief.

The Board held a hearing on the merits at 9:30 a.m. on Friday, January 19, 1996, at the Metropolitan Park District offices in Tacoma, Washington. M. Peter Philley, Presiding Officer in this matter, and Chris Smith Towne appeared for the Board. Thomas D. Morfee represented PNA and Eileen M. McKain represented the County. Court reporting services were provided by Nancy A. Poppe, CSR, of Robert H. Lewis & Associates, Tacoma. No witnesses testified. The Presiding Officer first ruled on the County’s Motion to Strike. Oral argument was then heard on the County’s Motion to Dismiss and on PNA’s substantive SEPA claims as set forth in the

[\[1\]](#)
Prehearing Order.

County’s Motion to Strike

The County’s Motion to Strike references in PNA’s Prehearing Brief at page 4, relating to the Cascadia development proposal, and at page 5, relating to density assumptions, was **denied**.

In response to the County’s Motion to Strike references in PNA’s Prehearing Brief at page 8 to a Draft Supplemental Environmental Impact Statement for proposed amendments to the Plan that the County issued in September 1995, PNA **withdrew** the statement. The Presiding Officer

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denied the County’s Motion to Strike the first part of the sentence in question.

II. FINDINGS OF FACT

1. On November 25, 1992, the County issued a Determination of Significance (**DS**) regarding its proposed comprehensive plan. Ex. 1401.
2. In June, 1993, the first draft comprehensive plan, prepared by the Pierce County Executive (the **Executive**), was reviewed by the Pierce County Planning Commission (the **Planning Commission**). See *Gig Harbor v. Pierce County*, Finding of Fact No. 15.
3. On July 6, 1993, the Executive presented the Draft Comprehensive Plan to the County Council. See *Gig Harbor v. Pierce County*, Finding of Fact No. 16.
4. On July 28, 1993, the County released a Draft Environmental Impact Statement (**DEIS**) for

its proposed comprehensive plan.Ex. 1403.

5.On September 20, 1993, the County issued its Final Environmental Impact Statement (**FEIS**) for the proposed comprehensive plan.Ex. 1404.

6.On December 21, 1993, the Draft Comprehensive Plan for Pierce County — Executive Proposal was released to the public.*See Gig Harbor v. Pierce County*, Finding of Fact No. 20.

7.On March 29, 1994, the County Council proposed a revised draft of the comprehensive plan and forwarded it to the Planning Commission for review.*See Gig Harbor v. Pierce County*, Finding of Fact No. 22.

8.On April 22, 1994, the County issued a Draft Supplemental Environmental Impact Statement (**DSEIS**) for the proposed comprehensive plan. Ex. 1405.

9.On June 10, 1994, the County issued a Final Supplemental Environmental Impact Statement (**FSEIS**) for the proposed comprehensive plan.Ex. 1406.

10.On June 24, 1994, PNA filed an appeal with the Pierce County Hearing Examiner (**the Hearing Examiner**) challenging the County's SEPA analysis of the draft comprehensive plan, administrative appeal file AE6-94.Declaration of Mark Truckey, at 2; *see also* Ex. 1420.

11.On August 30, 1994, Tom Morfee, PNA's Executive Director, sent a letter to Debora A. Hyde, Director of Pierce County Planning and Land Services (**PALS**), requesting "an indefinite postponement" of its administrative appeal to the Hearing Examiner.The letter indicated the request was made based on an understanding that "a number of substantial amendments" would be proposed to the County's proposed comprehensive plan, which would necessitate the preparation of "a new supplemental EIS," and thus making PNA's appeal of the FSEIS moot.Ex. B-2 to Declaration of Debbie Hayes.

12.On November 10, 1994, revisions to the March 1994 draft comprehensive plan were made and incorporated into an updated draft, the November 10, 1994 Draft Comprehensive Plan. *SeeGig Harbor v. Pierce County*, Finding of Fact No. 27.

13.On November 10, 1994, the County Council held a public hearing on the Draft Comprehensive Plan dated November 10, 1994.Additional public hearings were held on November 14, 21, 22, 28 and 29, 1994.*See Gig Harbor v. Pierce County*, Finding of Fact No. 28.

14.On November 29, 1994, the County issued an "Addendum to Final Supplemental Environmental Impact Statement for Adoption of the Comprehensive Plan for Pierce County, Washington" (the **Addendum**).The Addendum evaluated the differences between the March, 1994, Draft Plan and the November, 1994, Draft Plan.Ex. 1407.

15.On November 29, 1994, the County's Environmental Official under SEPA, Debora A. Hyde, sent a letter to Dennis Flannigan, Chair of the County Council, advising him that staff had reviewed proposed amendments to the November 10, 1994 draft of the comprehensive plan and concluded that "... the changes proposed to the Draft Comprehensive Plan do not alter the analysis of significant environmental impacts which was previously documented in the June 1994 Final SEIS, the April 1994 Draft SEIS, the July 1993 Draft EIS, and the September 1993 Final EIS.No additional environmental review is required."Ex. 1407.

16. On November 29, 1994, the County Council passed and the Executive approved Ordinance No. 94-82S to meet the requirements of the Growth Management Act, which adopted the Pierce County Comprehensive Plan (the **Plan**). See *Gig Harbor v. Pierce County*, Finding of Fact No. 31.

17. On December 7, 1995, notice of adoption of the Plan was published in *The South Pierce County Dispatch*, a weekly newspaper in Eatonville, Washington. Ex. B-1 to Declaration of Debbie Hayes.

18. On January 1, 1995, the Plan took effect. See *Gig Harbor v. Pierce County*, Finding of Fact No. 35.

19. On January 23, 1995, PNA's Executive Director, Tom Morfee, sent a letter to Debora A. Hyde, Director of Pierce County PALS, indicating that PNA "... wishes to reinstate its environmental review of the Comprehensive Plan..." Ex. B-3 to Declaration of Debbie Hayes.

20. On January 27, 1995, the Board received the first of seven petitions for review challenging the Plan and related enactments. On February 3, 1995, PNA filed its petition for review. These petitions were consolidated into one case, CPSGMHB Case No. 95-3-0016, which is referred to as *Gig Harbor v. Pierce County*.

21. On March 1, 1995, the Hearing Examiner held a hearing on PNA's SEPA challenge. Declaration of Mark Truckey, at 3. The County challenged PNA's SEPA standing to bring the administrative appeal. Ex. D to Declaration of Mark Truckey, at 3.

22. On March 8, 1995, the Board issued a Prehearing Order in *Gig Harbor v. Pierce County* that contained a statement of legal issues before the Board. PNA's Legal Issues Nos. 5 and 6

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related to PNA's SEPA claims.

23. On March 15, 1995, "Pierce County's Motion and Memorandum to Dismiss PNA's SEPA Claims" was filed with the Board in *Gig Harbor v. Pierce County*. Ex. D to Declaration of Mark Truckey.

24. On March 24, 1995, the Board received PNA's "Response to Pierce County's Dispositive Motion" in *Gig Harbor v. Pierce County* indicating that PNA withdrew Legal Issues Nos. 5 and 6 as set forth in the Prehearing Order in that case. See Ex. C to Declaration of Mark

[4]

Truckey.

25. On April 11, 1995, the Board entered an "Order Granting Pierce County's Motion to Dismiss PNA's SEPA Claims" in *Gig Harbor v. Pierce County*. The order dismissed PNA's SEPA claims with prejudice. Ex. C to Declaration of Mark Truckey.

26. On June 2, 1995, the Hearing Examiner issued a report and decision in administrative appeal AE6-94, finding that the County's SEPA review was adequate. Declaration of Mark Truckey, at 4. The Hearing Examiner also found that PNA had standing to challenge the adequacy of the County's environmental review since the citizen members of PNA "... collectively would be specifically and perceptibly harmed and are not merely concerned

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bystanders." PNA's Response Brief, at 2.

27. On June 13, 1995, PNA filed a request for reconsideration of the Hearing Examiner's decision. Declaration of Mark Truckey, at 4.
28. On July 7, 1995, the Hearing Examiner issued a decision on reconsideration which denied PNA's request for reconsideration and thus affirmed the June 2, 1995 decision. Declaration of Mark Truckey, at 4.
29. On September 1, 1995, PNA filed a Petition for Review in this case, CPSGMHB Case No. 95-3-0059, which is referred to as *PNA I*.
30. On October 31, 1995, the Board issued its Final Decision and Order in *Gig Harbor v. Pierce County*.
31. The Board's Final Decision and Order in *Gig Harbor v. Pierce County* was not subsequently appealed to superior court.

III. DISCUSSION AND CONCLUSIONS

County's Motion to Dismiss

The Board **grants** the County's Motion to Dismiss. RCW 36.70A.290(2) provides:

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

...

(b) Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

Except as provided in (c) of this subsection, for purposes of this section the date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto. Emphasis added.

The County published notice of adoption of its Plan on December 7, 1994. Finding of Fact No. 17. Pursuant to RCW 36.70A.290(2), PNA had to file a petition for review challenging the Plan's lack of compliance with the GMA or the inadequacy of the environmental analysis conducted on the Plan within sixty days of that date. PNA complied with RCW 36.70A.290(2) by filing its Petition for Review with the Board in *Gig Harbor v. Pierce County* on February 3, 1995. Finding of Fact No. 20.

Then, however, PNA voluntarily withdrew its SEPA issues in *Gig Harbor v. Pierce County* on

March 24, 1995. Finding of Fact No. 24. ^[6] Since this withdrawal took place well past the sixty day period for filing a petition for review, the Board dismissed PNA's SEPA appeals with prejudice. Finding of Fact No. 25.

PNA did not attempt to revive its SEPA appeal of the County's Plan until September 1, 1995, when it filed the present appeal with the Board. Finding of Fact No. 29. It is notice of publication

of the Plan, not the date a SEPA document is prepared nor the date a hearing examiner issues a decision on an administrative appeal of that SEPA document(s), that triggers the sixty-day statute of limitations for bringing appeals to the Board. Since PNA's petition for review in this case was filed nearly nine months after the County published notice of adoption of its Plan, this case must be **dismissed with prejudice**.

Conclusion

The Board **grants** the County's Motion to Dismiss because PNA's petition for review is untimely. The Petition was filed more than sixty days after the County's publication of notice of adoption of the comprehensive plan.

Since the County's Motion to Dismiss is granted for failure to file a timely appeal, the Board will not make a determination on the five substantive SEPA issues before it.

ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board orders:

The County's Motion to Dismiss is **granted**. PNA's Petition for Review in this matter is **dismissed with prejudice**. The Board cannot address PNA's claims that the County's SEPA analysis of its comprehensive plan is inadequate.

So ordered this 24th day of January, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

Note: This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

[1] The Presiding Officer denied the County's objection to admitting the notice of appeal page of the Pierce County Hearing Examiner's final decision in administrative appeal file AE6-94. The County objected on the grounds that

admitting the document would allow the record to be supplemented after the deadline for making motions to supplement the record. The objection was not sustained because the document in question, PNA Ex. 1, was listed on the County's Index as part of the record and because the County had quoted (without submitting the actual document in question) from the page in question in the Declaration of Mark Truckey, attached as Exhibit A to the County's Motion to Dismiss, at 4. Subsequently, PNA filed the page in question on January 22, 1996.

[2]

The County requested that the following sentence in its entirety be stricken:

... Including that analysis would have substantially increased the capacity of the CUGA, ~~as was proven later when the results of the analysis were presented in the DSEIS for 1995 Amendments to the Plan...~~

The language that PNA withdrew is shown with a strike-through.

[3]

PNA's Legal Issues Nos. 5 and 6, as set forth in the Board's Prehearing Order *in Gig Harbor v. Pierce County* asked:

Legal Issue No. 5

Should PNA's SEPA claims be dismissed because the Board lacks jurisdiction since PNA has failed to exhaust its administrative remedies and/or lacks SEPA standing?

Legal Issue No. 6

Was the County required by WAC 197-11-600(4)(d) to issue a supplemental environmental impact statement when changes occurred, for example on the mapping amendments to the Plan M-7, M-8, M-12 through M-15 and M-20, text amendment 12?

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The Board notes that PNA "withdrew" Legal Issue No. 5 even though that issue consisted of an affirmative defense raised by the County.

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The Board was not provided a complete copy of the Hearing Examiner's decision although PNA Ex. 1 is a page from that document.

[6]

The Board notes that although it has applied the exhaustion of administrative remedies doctrine to SEPA issues and must continue to do so, it might have permitted PNA's SEPA appeal to proceed had PNA met the requirements for the "futility" exception to that doctrine. The Board also notes that the County moved to dismiss PNA's SEPA issues based on several grounds in addition to the exhaustion of administrative remedies doctrine. By noting that the Board would have considered a "futility" argument, it is not indicating whether it would have granted or denied the County's motion on these other legal theories had PNA not voluntarily withdrawn its SEPA issues.