

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

MCGOWAN, et al.,	)	
	)	<b>Case No. 96-3-0027</b>
Petitioners,	)	
	)	<b>ORDER ON MOTIONS</b>
v.	)	
	)	
PIERCE COUNTY,	)	
	)	
Respondent.	)	
	)	
	)	
_____	)	

**I. Procedural Background**

On June 21, 1996, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (the **PFR**) from Michael E. and Wendy J. McGowan (**McGowan**) and Rockmann Development Group (**Rockmann**). The matter was assigned Case No. 96-3-0027, and captioned *McGowan, et al., v. Pierce County*. Petitioners challenge a Pierce County (the **County**) development regulation, Ordinance No. 96-18S (the **Ordinance**) published April 24, 1996. Petitioners allege that the Ordinance fails to comply with the Growth Management Act (**GMA** or the **Act**), the Pierce County Comprehensive Plan (the **Plan**), and its Multi-County Planning Policies and County-wide Planning Policies (**CPPs**).

The Board held a prehearing conference on July 26, 1996, at the Board's office, 2329 One Union Square, Seattle, and entered a Prehearing Order (the **Prehearing Order**) on August 1, 1996. The Prehearing Order set forth the legal issues and a schedule for the filing of motions and briefs, and set dates for a hearing on the motions and the hearing on the merits.

On August 8, 1996, the Board received the "County's Motion to Dismiss" (the **Motion to Dismiss**), the "County's Preliminary Exhibit List," and the "County's Motion to Supplement the Record" (the **County's Motion to Supplement**) together with a "Declaration of Anna Graham, Senior Planner" (the **Graham Declaration**).

On August 9, 1996, the Board received the "Petitioners' Motion to Supplement the Record" (the **Petitioners' Motion to Supplement**) and the "Petitioners' Memorandum in Support of Motion to Supplement Record" (the **Petitioners' Memorandum**), together with the Declaration of John

T. Lewis, the Declaration of Sean M. Comfort, the Declaration of Michael E. McGowan, the Declaration of Debbie Purdie, and the “Petitioners’ Preliminary Exhibit and Witness Lists” (the **Petitioners’ Preliminary Exhibit and Witness Lists**).

On August 16, 1996, the Board received the “Petitioners’ Memorandum in Opposition to Respondent’s Motion to Dismiss” (the **Petitioners’ Response to Motion to Dismiss**) and the “Petitioners’ Response to County’s Motion to Supplement the Record” (the **Petitioners’ Response to Motion to Supplement**). On this same date, the Board received the “County’s Response to Petitioners’ Motion to Supplement the Record and County’s Motion to Supplement the Record and County’s Motion to Supplement” (the **County’s Response to Motion to Supplement and County’s Motion to Supplement**).

On August 20, 1996, the Board received the “County’s Rebuttal to Petitioners’ Response to Motion to Dismiss” (the **County’s Rebuttal to Response to Motion to Dismiss**).

On August 21, 1996, the Board received “Petitioners’ Reply Memorandum in Support of Motion to Supplement the Record” (the **Petitioners’ Reply in Support of Motion to Supplement**).

On August 22, 1996, the Board received the “County’s Proposed Findings of Fact and Conclusions of Law” (the **County’s Proposed Findings and Conclusions**) and the “County’s Rebuttal to Petitioners’ Response (Supplemental Exhibits)” (the **County’s Rebuttal to Response re: Supplemental Exhibits**). Later on this same date, the Board held a hearing on the County’s Motion to Dismiss. Appearing for the Board at its Seattle office were Chris Smith Towne and Joseph W. Tovar, Presiding Officer. Appearing telephonically for the County was Eileen M. McKain. Appearing telephonically for McGowan was Caroleen M. Dineen. Court reporting services were provided by Sue Wajda, CSR, Seattle. No witnesses testified. During the hearing, Petitioners moved to strike the County’s Rebuttal to Response re: Supplemental Exhibits, and requested an opportunity to respond to the County’s Proposed Findings and Conclusions. The Presiding Officer indicated that the Board would subsequently rule on the motion to strike and ordered the Petitioner to submit, by 5:00 p.m. on August 26, 1996, a post-hearing brief addressing the County’s Proposed Findings and Conclusions.

On this same date, subsequent to the hearing, the Board received a letter from Petitioner confirming its request that the Board strike the County’s Rebuttal to Petitioners’ Response.

On August 26, 1996, the Board received “Petitioners’ Response to Respondent Pierce County’s Proposed Findings of Fact and Conclusions of Law” (the **Petitioners’ Response to Proposed Findings and Conclusions**).

## **Ii. findings of fact**

1. On November 29, 1994, the Pierce County Council (the **Council**) passed Ordinance 94-

82S, adopting the Pierce County Comprehensive Plan (the **Plan**).

2. On October 31, 1995, the Board entered its Final Decision and Order in *City of Gig Harbor, et al., v. Pierce County [Gig Harbor]*, CPSGMHB Case No. 95-3-0016. The Board remanded certain parts of Pierce County's Plan to the County to bring the Plan into compliance with the Act. One portion of the Board's order provided:

The Plan's Rural Activity Center provisions are remanded with instructions for the County to establish specific criteria that prohibit urban uses in the rural areas unless the uses, by their very nature, are dependent upon being in a rural area and is [sic] compatible with the functional and visual character of the immediate rural area. *Gig Harbor*, at 62.

3. On November 21, 1995, the Council passed Ordinance 95-132S, amending the Plan. The amendments provided for delayed implementation for RAC map amendments possibly affected by the Board's compliance order in *Gig Harbor*. See PFR, Exhibit (Ex.) A, at 2-3.

4. On January 17, 1996, the County published notice in several legal newspapers announcing a February 21 meeting of the Planning Commission. See Motion to Dismiss, Ex. A, Graham Declaration, Attachments (Att.) 1-3. The notice provided:

The Planning Commission will begin public hearings on proposed amendments to the Plan, Development Regulations, and Zoning Atlas . . .

The issues considered under this remand [of *Gig Harbor* by the Board] include: . . . Rural Activity Center designations, and rural densities. Draft responses to the compliance order include proposed changes to the Comprehensive Plan (Title 19A), the Development Regulations - Zoning (Title 18A), and the Official Zoning Atlas.

5. On February 7, 1996, the County's Planning and Land Services Department (**PALS**) issued a "Staff Report and Draft Supplemental Environmental Impact Statement - Amendments to Pierce County Comprehensive Plan and Development Regulations - Zoning - Hearings Board Compliance" (the Integrated Report). See Motion to Dismiss, Ex. A, Graham Declaration, Att. 9.

6. On March 6, 1996, the County published notice in several legal newspapers announcing a March 26 hearing before the Council. See Motion to Dismiss, Ex. A, Graham Declaration, Att. 4-8. The notice provided:

The Pierce County Council will hold a public hearing on [March 26, 1996] . . . to consider the following:

PROPOSAL NO. 96-18, AN ORDINANCE . . . AMENDING THE PIERCE COUNTY DEVELOPMENT REGULATIONS - ZONING . . .; AMENDING THE PIERCE COUNTY ZONING ATLAS; AND ADOPTING FINDINGS OF FACT, PURSUANT

TO THE GROWTH MANAGEMENT ACT CHAPTER 36.70A RCW AND THE DECISION AND ORDER ISSUED BY THE [BOARD IN *GIG HARBOR*].

Copies of the entire proposed Ordinance are available . . . .

7. On March 26, 1996, the Council held a public hearing and continued consideration of Proposal 96-18 to April 16, 1996. *See County’s Rebuttal to Response to Motion to Dismiss, Attached Minutes of March 26, 1996 Council meeting, at 6.* Also on March 26, the Council passed Ordinance 96-17S2, amending the Plan to comply with the Board’s Order in *Gig Harbor*. *Comprehensive Plan for Pierce County, Washington 1995 Amendments, Vol. 1, at 1.*

8. On April 16, 1996, the County held a public hearing and passed Ordinance 96-18S, adopting amendments to the County’s zoning regulations (Title 18A). *See County’s Response to Motion to Supplement and County’s Motion to Supplement, Ex. A, Affidavit of Anna Graham, at 7.*

9. In the Plan, Rural Activity Centers (**RACs**) are located on lands designated for rural land uses. The Plan defines RACs as:

. . . location[s] where commercial businesses are concentrated, providing goods and services meeting the needs of a local rural community. Resource based industrial operations can also be found in these centers. *Plan’s Glossary, at B-20. Gig Harbor, at 47.*

10. A commercial center is defined at PCC 18.25.270 as “any center containing a variety of stores with a cumulative floor area greater than 80,000 square feet . . . .” *See also Peninsula Neighborhood Association v. Pierce County, CPSGMHB Case No. 95-3-0071, Final Decision and Order (March 20, 1996), at 10 (citing Pierce County Code 18A.25.270).*

11. Petitioner Rockmann owns property within the Graham RAC, and intends to develop a “planned commercial center” on this property. *PFR, at 2-3.*

12. Petitioners McGowan own property within the Graham RAC, and intend to develop a “planned commercial center” on this property. *PFR, at 2-3.*

**III. ORDER ON MOTIONS TO SUPPLEMENT**

In the summary tables below, proposed exhibits that indicate “Admitted” become supplemental exhibits. “Denied” means that the exhibit or testimony is not admitted.

**county’s august 8, 1996, motion to supplement**

Proposed Exhibit: Documents	Ruling
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Declaration of Anna Graham signed 7/31/96	<b>Admitted</b>
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**petitioners' august 9, 1996, Motion to Supplement**

<b>Proposed Exhibit: Documents</b>	<b>Ruling</b>
Declaration of John T. Lewis signed 8/9/96	<b>Admitted</b>
Declaration of Sean M. Comfort signed 8/9/96	<b>Admitted</b>
Declaration of Michael E. McGowan signed 8/9/96	<b>Admitted</b>
Declaration of Debbie Purdie (undated)	<b>Admitted</b>

A portion of the Petitioners' Motion to Supplement generally describes several categories of unnamed documents. [\[1\]](#) This portion of the motion is construed by the Board to be a Motion for Discovery and is **denied**.

<b>Proposed Exhibit: Witness Testimony</b>	<b>Ruling</b>
<a href="#">[2]</a>	
Michael E. McGowan	<b>Denied</b>
Al Olson	<b>Denied</b>
John Lewis	<b>Denied</b>
Bill Dodge	<b>Denied</b>
Sean Comfort	<b>Denied</b>
Bruce McKean	<b>Denied</b>
David Kehle	<b>Denied</b>
Roger Ockfen	<b>Denied</b>
Art Jones	<b>Denied</b>
Nick Ockfen	<b>Denied</b>
Christopher Brown	<b>Denied</b>
Raymond Barkhart	<b>Denied</b>
R.D. Sparling	<b>Denied</b>

**county's August 16, 1996, Motion to Supplement**

<b>Proposed Exhibit: Documents</b>	<b>Ruling</b>
Affidavit of Anna Graham signed 8/15/96	<b>Admitted</b>
Affidavit of Saeed Yekalam signed 8/15/96	<b>Admitted</b>
Affidavit of Charles Vincent signed 8/15/96	<b>Admitted</b>

<b>Proposed Exhibit: Witness Testimony</b>	<b>Ruling</b>
<a href="#">[3]</a>	
Doug Sutherland	<b>Denied</b>
Sally Walker	<b>Denied</b>
Bill Stoner	<b>Denied</b>
Debora Hyde	<b>Denied</b>
David Rosenkranz	<b>Denied</b>
Charles Vincent	<b>Denied</b>
Anna Graham	<b>Denied</b>
Saeed Yekalam	<b>Denied</b>

#### **iv. order on motion to strike**

The County's Rebuttal to Response re: Supplemental Exhibits was submitted well after the deadline set forth in the Prehearing Order. The Petitioners' Motion to Strike is **granted**.

#### **v. pierce county's motion to dismiss**

##### **background**

In *Gig Harbor*, this Board found that certain parts of Pierce County's Plan were not in compliance with the GMA, and remanded the Plan to the County for modification. In *Gig Harbor*, the Board examined, *inter alia*, the Plan's RACs. The Board remanded the Plan to the County with instructions to prohibit certain urban uses in rural areas. *Id.*, at 62. To comply with the Board's *Gig Harbor* Order, the County amended its Plan. *See* Finding of Fact 3. Petitioners now challenge the County's corresponding amendment of its development regulations.

In April 1996, the County amended its development regulations by prohibiting "commercial centers" as a permitted use within RACs. Finding of Fact 8. The Petitioners' own property in the Graham RAC, and desire to develop facilities that would be classified as commercial centers. Petitioners ask the Board to:

(1) determine that “the Ordinance’s [96-18S] prohibition of commercial centers and prohibition and restriction of other types of uses within a RAC does not comply with the goals and provisions of the GMA”;

(2) remand the Ordinance to the Council and require the Council to allow “sufficient public participation in the development and promulgation of amendments to the Development Regulations”;

(3) remand the Ordinance and require the Council to “eliminate the prohibition of commercial centers within a RAC as a conditional use and the prohibitions or restrictions on other types of uses within a RAC as either permitted or conditional uses”; and

(4) invalidate the provision prohibiting commercial centers during the period of remand. PFR, at 7-8.

The County now challenges Petitioners’ standing to appeal this matter, arguing that Petitioners do not meet any of the three bases for standing under the GMA.

### **discussion**

The Act provides three methods for a person to obtain standing: participation in the local government’s adoption process, certification by the Governor, or compliance with Administrative Procedure Act (the **APA**) standing requirements. *See* RCW 36.70A.280(2). Certification standing is not at issue in this case.

RCW 36.70A.280(2)<sup>[4]</sup> provides:

A petition may be filed only by:

(a) The state, or a county or city that plans under this chapter;

(b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested;

(c) a person who is certified by the governor within sixty days of filing the request with the board; or

(d) a person qualified pursuant to RCW 34.05.530 [APA standing provision].

(emphasis added).

### **Participation Standing**

Just as local governments must inform their citizenry of proposed GMA planning activities, so too must citizens inform local government of their concerns and interests in such planning. Government decisionmakers cannot be expected to anticipate concerns not placed before them. The legislature recognized this premise when it amended the standing provisions of RCW 36.70A.280(2) in 1996. That the level of participation necessary to obtain standing was enhanced

demonstrates the legislature's desire to require citizens to air their concerns to local government before the local government acts.

In previous cases, the Board interpreted the appearance standing language of former RCW 36.70A.280(2) to intend that:

. . . *talking* to local government staff or, in the case of elected officials, *talking* to them off the record (i.e., not at a public hearing or meeting), as opposed to communicating in writing to either or talking to elected officials on the record at a public hearing or meeting, does not constitute appearance [standing]. The Board considers its GMA appearance standing to be quite liberal -- writing one letter will suffice to grant standing. Therefore, the Board will not extend this standard to include any oral communications with staff or any off-the-record oral communications with elected officials. *Friends of the Law v. King County*, CPSGPHB Case No. 94-3-0003 (April 22, 1994), Order on Dispositive Motions, at 9 (emphasis in original).

The legislature has effectively replaced the prior *appearance* standard with a *participation* standard; however, the portion of the above cited interpretation regarding oral communications with staff or off-the-record oral communications with elected officials still holds. Thus, while Petitioners assert they have at various times discussed contemplated development projects with PALS staff and several elected officials, such discussion does not rise to the status of participation standing. Petitioners do not claim to have written to staff or elected officials, or to have spoken at a public hearing or meeting regarding the effect of the proposed amendments on their properties. The sole assertion of Petitioner Rockmann's participation in the legislative process of adopting Ordinance 96-18S is Sean Comfort's attendance at the March 26, 1996 Council hearing. Petitioners' Opposition to Motion to Dismiss, at 3. However, Mr. Comfort's attendance does not rise to the level of participation required to establish standing for Petitioners.

The Board has held that "for an organization to have standing, a member of that organization must identify him or herself as a representative of the organization, when that person attends the hearing or meeting, testifies at a hearing, or submits a letter on the subject." *Banigan v. Kitsap County*, CPSGMHB Case No. 96-3-0016c (July 29, 1996), at 7 (citing *Hapsmith v. City of Auburn*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996), at 13). Property owner standing through the actions of its representatives is analogous to organizational standing through the actions of its members. **The Board holds that for either an organization or a property owner to establish participation standing through the actions of a representative, that representative must identify him or herself as such when he or she participates orally or in writing regarding the matter on which a Board review is subsequently requested.**

There is no indication that Mr. Comfort spoke to the Council at this hearing. Even if he had

spoken at this meeting, there is no indication that he identified himself as a representative of Petitioner Rockmann. Mr. Comfort's actions, or lack thereof, at the March 26 Council hearing are not sufficient to confer standing on Petitioner Rockmann.

In addition, both Rockmann and the McGowans claim that they did not challenge the adoption of Ordinance 96-18S because the County failed to notify them that the Council was considering amending the uses allowed in RACs. Even if this is true, Petitioners have not shown that the County was required to search out Petitioners and specifically advise them of the details of all options being considered by the County. It is sufficient that the County published, beginning at least in January 1996, notices of Planning Commission meetings and Council hearings on the matters challenged here. These notices stated that the County was considering changes to its zoning regulations and zoning atlas in response to the Board's remand of the Plan; some of these notices specifically identified RAC designations and rural densities as issues to be considered. *See* Finding of Fact 3. In February 1996, the County published The Staff Report and Draft Supplemental Environmental Impact Statement. This publication expressly indicated that one of the options under consideration by the County was the elimination of commercial centers as permitted uses within RACs. **The Board holds that the County's publication of notice was sufficient to comply with the Act.**

**The Board holds that Petitioners do not have participation standing under RCW 36.70A.280 (2)(b).**

### APA Standing

RCW 34.05.530 provides:

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

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

Failure of any one condition will deprive a petitioner of standing.

Proper analysis of Petitioners' APA standing in this case requires the Board to review the Plan. The Board takes official notice of Pierce County's Comprehensive Plan as codified in Title 19A Pierce County Code (PCC). *See* WAC 242-02-660(3). The County amended its Plan on

November 21, 1995, and March 26, 1996. Finding of Fact 7. The Plan, as amended, has not been challenged and is therefore irrefutably valid. *See* RCW 36.70A.320(1) *and Gig Harbor*, at 21 (citing *Twin Falls v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (October 6, 1993), Final Decision and Order, at 55).

RUR Objective 1 of the Plan's Rural Element, codified in PCC 19A.40.010, provides in part:

1.4 Non residential uses of rural intensity include: Industrial and commercial uses which: are dependent upon being in a rural area, are compatible with the functional and visual character of the rural area, are smaller in size/scale and utilize a smaller percentage of impervious cover than the same land use allowed in an urban area and do not require urban level services. These uses of rural intensity may be allowed in rural areas but they should be compatible with densities, land uses, and standards of rural areas and should meet site development and performance standards. . . .

1.7 In limited cases, uses of urban intensity may be allowed in the rural area if: the uses, by their very nature, are dependent upon being in a rural area, they do not require urban level services, they are compatible with the functional and visual character of the immediate rural area, and they meet site development and performance standards. . . . (emphasis added).

Commercial centers include “any center containing a variety of stores” (emphasis added). *See* Finding of Fact 10. The definition of commercial centers does not limit the upward size or scale of the centers, nor does it limit the nature of the stores in those centers to only those that are “dependent upon being in a rural area” nor does it contain any development standards or other limiting language to assure that the use(s) in whole or in part are “compatible with the functional and visual character of the rural area.” Thus, to allow commercial centers in rural areas would be inconsistent with RUR Objective 1 of the County's irrefutably valid Plan.

In the instant case, Petitioners claim that they are injured because the County's amendment to the zoning regulations prevents them from building commercial centers in the Graham RAC. The only judgment that could substantially eliminate this injury and confer standing on Petitioners is for the Board to remand Ordinance 96-18S to the County and require the County to allow such developments in RACs.

Requiring the County's zoning regulations to allow commercial centers in RACs would be tantamount to requiring the County to make its development regulations inconsistent with its Plan, and thereby fail to comply with the consistency requirements of the Act. RCW 36.70A.130 (1). The Board will not require the County to enact development regulations allowing a use that is inconsistent with its valid Plan. Thus, the only judgment that could substantially eliminate Petitioners' injury is not a remedy that can be granted by the Board.

Because there is no available judgment that would substantially eliminate or redress the prejudice

to Petitioners, Petitioners have not met the third condition in RCW 34.05.520. **The Board holds that Petitioners do not have APA standing under RCW 36.70A.280(2)(d).**

### **Conclusion**

The Board concludes that Petitioners do not have standing to challenge the County's adoption of Ordinance 96-18S.

### **Vi. ORDER**

Having reviewed the above-referenced documents and having deliberated on the matter, the Board enters the following order.

The County's Motion to Dismiss is **granted**. Consequently, this case is **dismissed with prejudice**. The remaining dates on the case schedule as set forth in the Prehearing Order are **stricken**.

So ORDERED this 5th day of September, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Joseph W. Tovar, AICP  
Board Member

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Chris Smith Towne  
Board Member

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[\[1\]](#) Petitioners' Motion to Supplement provides:

Petitioners request that the record for the above-entitled action be supplemented to include evidence of: (i) notices posted and/or mailed in circumstances of promulgation and/or amendment of Pierce County's Comprehensive Plan (the "Plan") and Pierce County's Development Regulations (the "Development Regulations") other than any notices given with regard to the amendments and ordinance at issue in the above-entitled action; (ii) statements made to Petitioners by Pierce County staff and/or officials regarding amendments to be made to the Plan and Development Regulations; and (iii) changes in Pierce County's policies and/or procedures for providing notice which were proposed and/or adopted by Pierce County after

the ordinance at issue in the above-entitled action was approved. Petitioners' Motion to Supplement, at 1-2.

[2] Although the Petitioners' Motion to Supplement did not explicitly reference proposed witnesses, the Board received, on the same date, the Petitioners' Preliminary Exhibit and Witness Lists. In the event that the Petitioners did intend to move to supplement the record with the testimony of witnesses identified in this pleading, the Board will rule on their admissibility.

[3] The Board notes that the County identified eight individuals as rebuttal witnesses in the event that the Board granted the Petitioners' Motion to Supplement. It was unclear from the County's pleading whether these rebuttal witnesses were to rebut witness testimony or the information presented in the form of declarations. Because the Board does, in fact, admit certain exhibits identified in the County's motion to supplement, the Board will rule on the Petitioners' offered witness testimony.

[4] Substitute Senate Bill 6637 amended RCW 36.70A.280(2) effective March 30, 1996. Petitioners filing petitions after that effective date, as in this matter, must satisfy the revised GMA standing provision.