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

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| PENINSULA NEIGHBORHOOD ASSOCIATION, Petitioner, v. PIERCE COUNTY, Respondent. | ) | **Case No. 96-3-0039** **[PNA VI]** **ORDER DENYING MOTION TO DISMISS** |

## I. Procedural Background

On December 16, 1996, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a petition for review from the Peninsula Neighborhood Association (**PNA**) challenging Pierce County Ordinance No. 96-97, amending the County's development regulations, specifically amendments to Pierce County Code 18A.05.035B(2), "Uses Requiring an Administrative, Conditional Use or Public Facilities Permit."The petition was assigned Case No. 96-3-0039, and captioned *PNA v. Pierce County* (***PNA VI***).

On January 24, 1997, the Board held a prehearing conference at the Board's office, 2329 One Union Square, Seattle.The parties participated telephonically.Board member Chris Smith Towne, Presiding Officer in this matter, conducted the conference.PNA was represented by Thomas D. Morfee; Eileen McKain represented Respondent Pierce County (the **County**).

The Board entered a Prehearing Order following the January 24 prehearing conference, setting forth the legal issues and a schedule for the filing of motions and briefs, and the dates for a hearing on the merits.

On February 5, 1997, the Board received "Pierce County's Motion to Dismiss" and "Memorandum in Support of County's Motion to Dismiss" (**Motion to Dismiss**), including "Affidavit of Sean

Gaffney."

On February 19, 1997, the Board received PNA's "Response to County's Motion to Dismiss" (**Response to Motion**).

On February 24, 1997, the Board received "County's Rebuttal to PNA's Response" (**County's Rebuttal**).

On March 3, 1997, the Board received PNA's "Response to County's Rebuttal" and "Pierce County's Motion to Strike PNA's Response" (**Motion to Strike**).

## ii. findings of fact

Ordinance No. 96-97

1.The County published a Notice of Meeting of the Planning Commission scheduled for June 25, 1996.The notice stated:

> Public Hearing:
>
> Amendments to Title 18A, Pierce County Development Regulations-Zoning.In an effort to complete the Development Regulations for Pierce County and further implement the Pierce County Comprehensive Plan, provisions are being developed which implement: planned unit developments, temporary uses, and concurrency.In addition, substantive amendments and technical zoning atlas corrections are being proposed.The Planning Commission will review the draft amendments and technical map changes and make a final recommendation to the County Council.
>
> Public testimony on the proposed Planned Unit Development, Temporary Uses and Concurrency chapters of the Development Regulations will be received by the Commission on June 25, 1996.Hearings on proposed substantive amendments and technical zoning atlas corrections will be continued to future dates.

Motion to Dismiss, Exhibit A - Affidavit of Sean Gaffney (attachments 1, 2, and 3).

2.The Planning Commission held public meetings to review proposed changes to the Regulations on June 25, July 23, and July 31, 1996.Motion to Dismiss, at 2; Response to Motion, at 2.

3.The Planning Commission transmitted its recommendation to the Pierce County Council (the **Council**) on July 31, 1996.Motion to Dismiss, at 2; Response to Motion, at 2.

4.The County published a Notice of Public Hearing Before the Pierce County Council scheduled for October 1, 1996.The notice stated:

> NOTICE IS HEREBY GIVEN that the Pierce County Council will hold a public hearing on Tuesday, October 1, 1996, . . . to consider the following:
>
> > PROPOSAL NO. 96-97, AN ORDINANCE OF THE PIERCE COUNTY COUNCIL AMENDING CHAPTER 18A OF THE PIERCE COUNTY CODE, THE PIERCE COUNTY DEVELOPMENT REGULATIONS - ZONING, BY ESTABLISHING PROVISIONS FOR TEMPORARY USES AND PLANNED UNIT DEVELOPMENTS (PUD), PROVIDING SUBSTANTIVE AMENDMENTS TO CLARIFY AND IMPROVE THE OBJECTIVES OF THE REGULATION; IMPLEMENTING TECHNICAL CORRECTIONS TO THE PIERCE COUNTY ZONING ATLAS; AND ADOPTING FINDINGS OF FACT.
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> . . .
>
> Copies of the entire proposed Ordinance are available in the Office of the Pierce County Council . . . .

Motion to Dismiss, Ex. A - Affidavit of Sean Gaffney (attachments 4, 5, 6, 7, and 8).

5.On October 1, 1996, the Council held a public hearing regarding proposed Ordinance 96-97. At this hearing, Councilmember Stoner recommended an amendment (the **Expansion Amendment**) to Ordinance 96-97, which would:

> provide an exemption for uses requiring an administrative, conditional use, or public facilities permit to allow a one-time expansion of a structure up to 25 percent when noise, glare, and dust is not increased on surrounding properties and the hours of operation are not altered.Response to Motion, Attachment B (October 1, 1996 Memo from Councilmember Bill Stoner to Councilmembers).

The Council adopted Councilmember Stoner's recommendation.County's Rebuttal, at 4-5.

6.PNA did not attend Planning Commission or Council hearings or testify or write to the County regarding Ordinance 96-97, prior to the Council's adoption.Response to Motion, at 2-3.

<u>Ordinance 96-118</u>

7.The County published a Notice of Meeting of the Planning Commission scheduled for November 26, 1996.The notice stated:

> <u>Public Hearing:</u>
>
> <u>Ordinance No. 96-118.</u>The Planning Commission will receive testimony and review this ordinance which amends Ordinance 96-97 (Development Regulations/Zoning) by correcting the definition of "Family" and by adding additional Findings of Fact to Exhibit "E" of Ordinance No. 96-97.

Motion to Dismiss, Ex. A - Affidavit of Sean Gaffney (attachments 10 and 11).

8.The County published a Notice of Public Hearing Before the Pierce County Council scheduled for November 26, 1996.The notice stated:

> NOTICE IS HEREBY GIVEN that the Pierce County Council will hold a public hearing on Tuesday, November 26, 1996, . . . to consider the following:
>
> > PROPOSAL NO. 96-118, AN ORDINANCE OF THE PIERCE COUNTY COUNCIL AMENDING ORDINANCE NO. 96-97 (DEVELOPMENT REGULATIONS-ZONING) BY CORRECTING THE DEFINITION OF "FAMILY"; AND BY ADDING ADDITIONAL FINDINGS OF FACT TO EXHIBIT "E" OF ORDINANCE NO. 96-97.
>
> . . .
>
> Copies of the entire proposed Ordinance are available in the Office of the Pierce County Council . . . .

Motion to Dismiss, Ex. A - Affidavit of Sean Gaffney (attachments 12 and 13).

9.On November 26, 1996, the Council held a public hearing regarding proposed Ordinance 96-118.The Council adopted Ordinance 96-118s, which amended Ordinance 96-97 by correcting the definition of "family" and by adding findings of fact.One of the added findings of fact, dealing with the provision challenged in this case, provides:

> 18.By allowing a structure to expand by 25 percent prior to obtaining a Conditional Use, Administrative, or Public Facility Permit, the Council finds that this provides flexibility to property owners with legally existing uses.This provision shall allow for a one-time limited expansion without outwardly increasing impacts to adjacent properties.The Council finds this allows for an expedited process for small expansions of existing nonconforming uses while retaining needed controls for larger expansions.

Motion to Dismiss, Ex. A - Affidavit of Sean Gaffney (attachment 9).

10.PNA did not attend Planning Commission or Council hearings regarding Ordinance 96-118 prior to the Council's adoption.PNA did not testify or write to the County regarding Ordinance 96-118 prior to adoption.

## III. <u>pierce county's motion to strike</u>

The County's motion to strike PNA's Response to County's Rebuttal is **granted**.

## iv. <u>pierce County's motion to dismiss</u>

The County seeks to dismiss the petition on two grounds:lack of standing and mootness.The

County asserts PNA lacks standing because it did not participate in the public participation process for the adoption of Ordinance 96-97, as required by RCW 36.70A.280(2)(b).[1] In the alternative, the County argues that the petition should be dismissed because Ordinance 96-97 was subsequently amended, thus rendered moot, by the adoption of Ordinance 96-118s.

**discussion**

*Standing*

PNA concedes it did not participate in the adoption of Ordinance 96-97.PNA reviewed the amendments proposed by Ordinance 96-97 during the public participation process and found nothing objectionable; therefore, it did not testify or write to the County regarding the proposed amendments.The County contends that this decision not to participate is fatal to PNA's petition. The Board does not agree.

PNA alleges that the challenged expansion amendment, introduced and adopted on the day the County Council voted to adopt Ordinance 96-97, was a substantial change to the proposed Ordinance 96-97.According to PNA, the public participation process preceding the vote-day addition of the expansion amendment contained nothing that would have provided Petitioner with any reason to believe that the expansion amendment was being considered.The County has not argued that the County's notice, the draft ordinances, or the content of the public hearings prior to October 1, 1996, provided the public with any reason to believe that the expansion amendment was being considered.

If PNA's contention is correct that the County's notice was insufficient to provide for adequate public participation, then to dismiss this petition for lack of standing would be to encourage jurisdictions to offer contentious amendments on the day the legislative body votes, thus avoiding participation (and GMA standing) of opponents.

At this stage of the present controversy, the Board cannot say whether or not the County's notice was sufficient.The Board is saying only that PNA's petition cannot be summarily dismissed for lack of standing.[2]

**The Board holds that, at this stage of the proceedings, the record does not support the County's motion to dismiss PNA's challenge for lack of standing.**

*Mootness*

The County argues that PNA's petition is moot because the County amended the challenged ordinance by subsequently adopting Ordinance 96-118s.The County quotes *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70 (1968), to support its position:

> In the instant case the determinative factor is that substantial changes in the statutory provisions here in question have been made.The rationale for declining to decide purely academic questions is particularly persuasive where the case involves constitutional questions with respect to a statute which has been rewritten or superseded by another statute, unless, of course, the statutory changes are irrelevant to the issues presented.[Citations omitted.]
>
> We are persuaded by the arguments advanced by respondents in support of their initial position on the motion to dismiss.We note also that appellants, in their brief, (FN1) concede the point that Laws of 1967, Ex. Sess., ch. 146, was an attempt by the legislature to correct the alleged deficiencies relied upon by appellants in support of their position that chapter 174 was unconstitutional.

Motion to Dismiss, at 7 (quoting *Grays Harbor Paper*, at 73-74).

The Washington Supreme Court more recently considered mootness in *Citizens v. Klickitat County*, 122 Wn.2d 619 (1993).In *Citizens*, petitioners appealed a county's approval of a solid waste management plan and associated environmental impact statement (**EIS**).The county argued that petitioners' appeal was moot because the county subsequently updated its plan and EIS, and the updated versions superseded the challenged plan and EIS.*Citizens*, 122 Wn.2d, at 630.The court disagreed with the county, noting that the updated versions did not correct the flaw alleged by petitioners.The court stated:

> The 1992 addendum is not a completely new update or plan standing alone.Rather it is an addendum to the 1990 Plan Update, standing on its shoulders, so to speak.The addendum merely changes one aspect of the 1990 Plan Update; it is not a substitute for the entire Plan.
>
> . . .
>
> If the 1990 Plan Update is void for failure to follow the strictures of SEPA, then the underpinnings of the 1992 addendum are gone.*Id.* at 631-32.

The record before the Board at this stage of these proceedings does not support the inference that Ordinance 96-118s made substantial changes to Ordinance 96-97, relevant to the issues presented in this case, as contemplated in *Grays Harbor Paper*.The current record suggests that Ordinance 96-118s is more like the revisions considered in *Citizens*, and that Ordinance 96-118s merely changes a few aspects of Ordinance 96-97, and does not supersede the challenged portion of Ordinance 96-97.

The subject of proposed Ordinance 96-118 was an amendment to a definition and findings of fact to support Ordinance 96-97.Even if PNA had participated in the process of adopting Ordinance 96-118s, at best it could hope only to affect the Council's findings.Based on the County's notices for both the Planning Commission and Council hearings, PNA could not have hoped to change the substance of Ordinance 96-97.

Consequently, the Board cannot agree with the County that PNA's challenge is moot.

**The Board holds that, at this stage of the proceedings, the record does not support the County's motion to dismiss PNA's challenge for mootness.**

## Conclusion

Because the record before the Board at this stage of the proceedings does not allow the Board to determine whether the County's notice was sufficient, the Board will not dismiss PNA's challenge for lack of standing.

Because the record before the Board at this stage of the proceedings does not show that Ordinance 96-118s made substantial changes to the challenged portion of Ordinance 96-97, the Board will not dismiss PNA's challenge for mootness.

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## v. ORDER

Based upon a review of the petition for review, the briefs of the parties, the Act, previous Board decisions and case law, the Board enters the following ORDER:

Respondent's motion to dismiss is **denied**.

So ORDERED this 9th day of April, 1997.
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____

Joseph W. Tovar, AICP
Board Member

_____

Chris Smith Towne
Board Member

## PRESIDING OFFICER'S CHECKLIST

| X | What enactment(s) were challenged? CHECK ALLTHAT APPLY | X | Why (with what) did Petitioner and Respondent allege violation or inconsistencies? |
|---|---|---|---|
| | City Comp Plan Amendment | | [F]UGAs |
| | City Comprehensive Plan | | Board Jurisdiction |
| | County Comp Plan Amendment | | Capital Facilities Element/Fiscal Impact Analysis |
| | County Comprehensive Plan | | CITY Comp Plan |
| | County-wide Planning Policies (CWPPs) | | COUNTY Comp Plan |
| | Development Ordinance (designation, regulation, etc.) | | Critical Areas/Designation |
| | Development Ordinance Amendment | | CWPPs |
| | Multi-County Planning Policies (MCPPs) | | Essential Public Facilities |
| | OFM Population Projections | | Failure to Act |
| | Pre-existing Development Enactment (designation, regulation, etc.) | | GMA Goals |
| | | | Housing Element |
| | | | IUGAs |
| | | | Land Use Element |
| | | | Lands Useful for Public Purposes |
| | | | Multi-County Planning Policies (MCPPs) |
| | | | OFM Population Projections |
| | | | Public Facilities |
| | | | Public Participation |
| | | | Resource Lands/Designation |
| | | | Rural Element |
| | | | SEPA |
| | | | Shorelines Master Programs |
| | | | Standing |
| | | | Transportation Element |

| # Issues Added:/Rescinded (+/-) | # Issues Dismissed/ dismissal type | #Remands (+/-) Added/Rescinded | #Remands Dismissed/ dismissal type |
|---|---|---|---|
| | | | |

| x | DISPOSITION TYPE |
|---|---|

| | | | |
|---|---|---|---|
| | Continue Invalidity | | |
| | Correction or Amendment (Dispositive) | | |
| | **DISMISSED**:then choose type of dismissal | x | **DISMISSAL TYPE** |
| | Finding of Compliance | | Petition Withdrawn/Mediated |
| | Finding of Non-compliance | | Stipulation/Mediation |
| | WITH REMANDS | | Lack of Jurisdiction |
| | Finding of Invalidity | | Lack of Standing |
| | Modify Invalidity | | Failure to Appear |
| | Rescind Invalidity | | Lack of Timeliness |
| | Sanctions Not Recommended | | |
| | Sanctions Recommended | | |
| | Sanctions Not Imposed by Governor | | |
| | Sanctions Imposed by Governor | | |
| | Sanctions Rescinded by Governor | | **RECONSIDERATIONS:** |

**Reconsideration** Denied

Reconsideration Granted in whole (then fill in Disposition types above, to enter changes, additions, deletions in # issues/remands addded or deleted,above

Reconsideration Granted in part (give proportion)

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[1] RCW 36.70A.280(2) provides:

> A petition may be filed only by: . . . (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.

[2] If the Board determines in its Final Decision and Order that the County's public participation procedures as to the challenged expansion amendment complied with the Act (Legal Issue No. 1), then PNA's lack of participation would deprive it of standing and the Board will not consider the substantive challenge of Legal Issue No. 2.