



On March 5, 1997, the Board received Petitioner's "Amendment" to the PFR, citing to WAC 242-02-260.

On March 12, 1997, the Presiding Officer sent a memo to the parties regarding "Proposed Restatement of Legal Issues and Added Board Issues for Discussion at March 17, 1997 Prehearing Conference." The memo posed the question of standing for Fennel Creek.

On March 17, 1997, the Board held a prehearing conference in the above-captioned matter.

On March 21, 1997, the Board issued its "Prehearing Order and Order Granting Intervention." The Order established the Legal Issues based upon the PFR, as amended, and the Board's March 12, 1997 memo. It also established the deadlines for filing motions (March 31), responses (April 7) and rebuttals to responses (April 10).

On March 27, 1997, the Board received "Amended Motion to Supplement the Record," including six documents and videotapes of two County Council meetings that petitioner wanted to add to the County's index; and Petitioner's "Motion for Amendment to Change Petitioner's Name" (**Friends' Motion to Amend**), with supporting memorandum and declarations of Jane M. Kelley and Idell Rodriguez.

On March 31, 1997, the Board received "Pierce County's Preliminary Exhibit and Witness List"; "City of Bonney Lake's Memorandum in Response to Petitioner's Motion for Amendment to Change Petitioner's Name"; "County's Motion to Dismiss," asserting lack of standing of petitioner; and "City of Bonney Lake's Motion to Dismiss," asserting lack of standing of petitioner.

On April 7, 1997, the Board received "The County's Response to Petitioner's Motion to Supplement," objecting to four of the documents submitted; "The County's Response to Friend's Motion to Change Name"; and "Friends of Fennel Creek's Response to Motions(s) to Dismiss" (**Friends' Response to Motions to Dismiss**).

On April 9, 1997, the Board received "City of Bonney Lake's Rebuttal to Petitioner's Response to Motions to Dismiss."

On April 10, 1997, the Board received "Pierce County's Rebuttal to Friends' Response"; "Friends of Fennel Creek's Rebuttal to Bonney Lake's Response"; and "City of Bonney Lake's Motion to Strike Petitioner's Rebuttal to Bonney Lake's Response."

On April 15, 1997, the Board received "The County's Motion to Strike."

The Board did not conduct a hearing on the motions in this case; the Board issues this Order

based upon review of the documents referenced above, its prior Orders and Chapter 36.70A RCW.

## **II. findings of fact**

- 1.The Pierce County Council adopted Ordinance No. 96-111 on November 5, 1996.PFR, at 2.
- 2.The adoption of Ordinance No. 96-111 was published on December 11, 1996.PFR, at 2.
- 3.Friends of Fennel Creek was incorporated on December 16, 1996.County's Motion to Dismiss, Attachment 3.
- 4.Friends of Fennel Creek filed the PFR with the Board on February 3, 1997.

## **III. discussion of motions**

There are four motions pending before the Board in this case: Motion to Supplement, Motion to Amend, Motion to Dismiss, and Motion to Strike.The Board will address the motions in the following order:first, Motion to Strike; second, Motion to Amend; third, Motion to Dismiss; and finally, Motion to Supplement.

### **A. Motion to Strike**

Both the City and the County moved to Strike petitioner's "Friends of Fennel Creek's Rebuttal to Bonney Lake's Response."The City and County both assert that Friends of Fennel Creek is not entitled to an additional response to the Motions to Dismiss.

### **discussion**

The Board's Prehearing Order, Section III, Dispositive Motions, at 4, provides:

The moving party shall file any dispositive motion and supporting legal memoranda by the date and in the manner stated in the Final Schedule<sup>[1]</sup> above.

A party shall file a response to dispositive motions by the date and in the manner stated in the Final Schedule<sup>[1]</sup> above.Copies of exhibits referenced in the response shall be attached, unless the relevant exhibit was already attached to the moving party's brief.

A moving party may, at its option, file a reply brief rebutting the response brief, by the date and in the manner stated in the Final Schedule<sup>[1]</sup> above.

Thus, the sequence of briefing motions is:1) moving party's motion; 2) nonmoving party's

response; and 3) moving party's reply. The Board's Order makes no provision for a nonmoving party to file a *second* response to a moving party's motion, nor has the Presiding Officer or Board authorized such submittal.

The City and County filed motions to dismiss on March 31, 1997. Fennel Creek filed its response to the motions to dismiss on April 7. The City and County filed their replies to Fennel Creek's response on April 9 and 10, respectively. Then, on April 10, Fennel Creek filed "Friends of Fennel Creek's Rebuttal to Bonney Lake's Response" (**Friend's Rebuttal**). It is this last filing, Friends' Rebuttal, that the City and County have moved to strike as an impermissible second response to their motions to dismiss.

Friends' Rebuttal is clearly directed at the motions to dismiss: 1) the Introduction refers to the motions to dismiss; 2) the Discussion argues against the motions to dismiss; and 3) the relief requested in the Conclusion is that the motions to dismiss be denied. Therefore, the Friend's Rebuttal is an impermissible second response to the motions to dismiss, and the motions to strike are granted.

### **Conclusion**

The "Friends' Rebuttal" is an impermissible second response to the Motions to Dismiss and the City and County Motions to strike are **granted**.

### **B. Motion to Amend**

Petitioner filed a "Motion for Amendment to Change Petitioner's Name." The City and the County filed responses to this motion, asserting that the amendment is an untimely attempt to add petitioners to the PFR.

### **discussion**

The GMA requires petitions for review to be filed within sixty days after publication by the county or city. RCW 36.70A.290(2). In addition, a petition for review may be amended as a matter of right until thirty days after it is filed. WAC 242-02-260(1). However, any proposed amendments after the initial thirty-day period must be approved by the Board or presiding officer. WAC 242-02-260(2).

In this case, the County adopted the challenged action on November 5, 1996, and published its action on December 11, 1996. Fennel Creek's PFR was timely filed on February 3, 1997; no other person challenged the County's action within the sixty-day appeals period.

On March 27, 1997, Fennel Creek asked the Board to allow it to amend its PFR by adding two new petitioners -- Ms. Jane M. Kelley and Ms. Idell Rodriguez. Neither Kelley nor Rodriguez

filed a petition within sixty days of the date the County published its action. Although Fennel Creek amended its PFR twice “as a matter of right” within thirty days after filing its petition, neither of those amendments included adding a petitioner.<sup>[1]</sup>

In *Banigan v. Kitsap County* [**Banigan**], CPSGMHB Case No. 96-3-0016 (1996), a petitioner organization argued that, if it lacked standing to challenge the county’s action, an individual member of the organization should be substituted for the organization as petitioner. This Board agreed with Kitsap County’s argument that the individual, who did not file a PFR within the sixty-day appeal period, “is now time barred from bringing a petition on her own behalf.” *Banigan*, Order Granting Dispositive Motions, at 10-11. Just as did the organization in *Banigan*, Fennel Creek now attempts to add petitioners to continue Fennel Creek’s challenge should the Board determine that Fennel Creek lacks standing to pursue this appeal. Consistent with its decision in *Banigan*, **the Board denies Fennel Creek’s Motion to Amend its PFR by adding two new petitioners.**

Even if the Board allowed Fennel Creek to amend its PFR, the new petitioners’ challenge would fail. Ms. Kelley and Ms. Rodriguez did not appeal the County’s action within sixty days after publication. Adding them to Fennel Creek’s PFR does not necessarily mean that Fennel Creek’s PFR filing date applies to Kelley and Rodriguez. Kelley’s and Rodriguez’s filing date does not necessarily relate back to the filing of the original PFR; Kelley and Rodriguez would have a filing date no earlier than March 27, 1997, the date Fennel Creek moved to amend its petition.

Superior Court Civil Rule (**CR**) 15(c) allows the relation back of amendments changing or adding parties when certain notice and prejudice requirements are met.<sup>[1]</sup> In *Haberman v. WPPSS*, 109 Wn.2d 107 (1987), the court found that even if the requirements of CR 15(c) are met, “the court must determine whether failure to join the plaintiffs earlier was the result of inexcusable neglect.” *Haberman*, at 173. If there was inexcusable neglect, the amendment will not relate back to the date of original filing.

“Generally, inexcusable neglect exists when no reason for the initial failure to name the party appears in the record.” *Hollywood Hills Citizens v. King County*, 101 Wn.2d 68, 78 (1984). The record is silent on Fennel Creek’s reason for not adding Kelley and Rodriguez as petitioners within the sixty-day appeal period. Consequently, Fennel Creek’s failure to name Kelley and Rodriguez as petitioners is inexcusable neglect. Thus, even if Kelley and Rodriguez were added to the PFR as requested by Fennel Creek, their filing date would not relate back to Fennel Creek’s filing date, and as a result would be past the sixty-day appeal period established by the legislature.

## **conclusion**

Petitioner Friends of Fennel Creek’s Motion to Amend the PFR to add Ms. Kelley and Ms. Rodriguez as new petitioners is **denied**.

### **C. Motion to Dismiss**

The City and County challenge Petitioner’s standing to bring this appeal. The sole petitioner in this case is Friends of Fennel Creek, a non-profit corporation; there are no individual petitioners.

#### **Discussion**

Not every individual or organization unhappy with a local jurisdiction’s GMA activity has standing to appeal to this Board. Requirements for standing are provided by the legislature. RCW 36.70A.280(2) provides in relevant part:

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; . . . or (d) a person qualified pursuant to RCW 34.05.530 [the Administrative Procedures Act (APA)].

In response to the motions to dismiss, Petitioner alleges standing under .280(2)(b) (**participation standing**) and .280(2)(d) (**APA standing**).

#### Participation Standing

For an organization to have participation standing, a member of that organization must identify himself or herself as a representative of the organization when that person testifies at a hearing or submits a letter to the county or city. *Friends of the Law v. King County*, CPSGMHB Case No. 94-3-0003, Order on Dispositive Motions (1994), at 9; *see also, McGowan v. Pierce County*, CPSGMHB Case No. 96-3-0027, Order on Motions (Sept. 5, 1996), at 8.

In *Association to Protect Anderson Creek v. City of Bremerton [Anderson Creek]*, an organization argued that it had standing because its members testified before the City of Bremerton. However, these individual members did not identify themselves as representatives of the organization. Consequently, the Board held that the organization did not have standing to pursue its appeal. CPSGMHB Case No. 95-3-0053, Order on Bremerton’s Dispositive Motions (Oct. 18, 1995), at 11. In *Anderson Creek*, the petition was filed by the organization and by individual members of the organization. Thus, the individuals had standing, the organization did not. The individuals were permitted to pursue their appeal before the Board. *Id.*

Fennel Creek has not argued that any of its members identified themselves before the County as representatives of the organization. Indeed, the organization “Friends of Fennel Creek” did not exist until forty-one days after the County adopted Ordinance No. 96-111. Fennel Creek’s argument for participation standing is more fragile than the argument of the organization in

*Anderson Creek*. If an already-formed organization cannot get standing when its members do not identify themselves as representatives of the organization, how can a not-yet-formed organization obtain standing? It cannot.<sup>[1]</sup>

Fennel Creek does not have participation standing to pursue this appeal

### APA Standing

Fennel Creek asserts APA standing, for the first time, in its Response to Motions to Dismiss, at 5-8. Petitions for review must specify which method of standing allows petitioners to proceed. In *Hapsmith v. City of Auburn [Hapsmith]*, this Board stated:

[P]etitions for review relying upon APA standing must either allege that the petitioners are within the zone of interests of the GMA and that they have been injured by the local government's GMA action, or they must cite to the specific GMA standing provision under which they qualify (i.e., RCW 36.70A.280(2)'s language "qualified pursuant to RCW 34.05.530).

CPSGMHB Case No. 95-3-0075, Final Decision and Order (May 10, 1996), at 16.

Fennel Creek's PFR contains no suggestion that it relied on APA standing.<sup>[1]</sup> On that basis alone, Fennel Creek is denied APA standing. Even if Fennel Creek had alleged APA standing in its PFR, it has failed to adequately demonstrate that it qualifies for APA standing.

The requirements for APA standing are contained in RCW 34.05.530, which provides:

A person has standing to obtain judicial review 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.

To establish APA standing, petitioners must demonstrate that they are within the zone of interests sought to be protected by the GMA and that they have been injured in fact. To demonstrate injury-in-fact, petitioners must show that the government's action will cause petitioners "specific and perceptible harm" and that the injury will be "immediate, concrete, and specific." *Hapsmith*, at 15.

Fennel Creek offers the following statements to demonstrate immediate, concrete, and specific harm:

1. Land within the proposed UGA is currently experiencing severe impacts from the uncontrolled surface water runoff, suspected pollution from failed on-site septic systems, and flooding of the stream system and floodplain that lies downhill from this site.
2. The proposed UGA includes parcels which have already been ‘vested’ for new residential or commercial development under current Pierce County development regulations.
3. This ‘vested’ development meets the definition of development pursuant to criteria established by this Board in previous decisions.
4. [T]he effects of continued urbanization and suburban sprawl will exacerbate the current severe impacts being experienced by the residents of the land directly adjacent to the UGA area.

Friends’ Response to Motions to Dismiss, at 7-8.

Fennel Creek’s first three statements are nothing more than its observations and perception of current conditions; they do not allege any injury as a result of the adoption of Ordinance No. 96-111. Therefore, these three statements do not support any injury in fact caused by the County’s adoption of the ordinance. Fennel Creek’s fourth statement does not allege immediate, concrete, and specific harm; instead, it alleges only vague and conjectural injury, at some future time. Such a showing is not sufficient to establish that the County’s action, adopting Ordinance 96-111, has prejudiced Fennel Creek. *See HEAL v. City of Seattle*, CPSGMHB Case No. 96-3-0012, Final Decision and Order (Aug. 21, 1996), at 10.

Fennel Creek does not have APA standing to pursue this appeal.

**The Board holds that, because Fennel Creek does not have participation standing or APA standing to pursue this appeal, Fennel Creek’s petition for review must be dismissed with prejudice.**

### **Conclusion**

Because Fennel Creek does not have participation standing or APA standing to pursue this appeal, the City and County motions to dismiss are **granted**. Fennel Creek’s petition for review must be **dismissed with prejudice**.

### **D. Motion to Supplement**

Having granted the Respondent’s and Intervenor’s Motions to Dismiss, the Board need not, and will not, address Petitioner’s Motion to Supplement.



The hearing on the merits for CPSGMHB Case No. 97-3-0005 (Fennel Creek), scheduled for June 19, 1997 is **canceled**.

So ORDERED this 22nd day of April, 1997.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member

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Joseph W. Tovar, AICP  
Board Member

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Chris Smith Towne  
Board Member

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[1]

The Prehearing Order set the deadline for filing Motions and supporting briefs as March 31, 1997.

[1]

The Prehearing Order set the deadline for filing Responses to Motions as April 7, 1997.

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The Prehearing Order set the deadline for filing Rebuttal to Responses to Motions as April 10, 1997.

[1]

On February 21 and March 5, 1997, the PFR was amended per WAC 242-02-260(1). *See* Procedural History, *supra*.

[1]

Although not bound by the Superior Court Civil Rules, the Board may refer to them for guidance. *See Tacoma, et al. v. Pierce County*, CPSGPHB Case No. 94-3-0001, Order on Dispositive Motions (1994), at 17.

[1]

In its response to the motions to dismiss, Petitioner argues that Fennel Creek somehow inherited its members' rights to appeal. Fennel Creek's reliance on Chapter 24.03 RCW is ill-conceived. The survivorship of all "rights, privileges, immunities and powers" referred to in RCW 24.03.210(3) applies when a merger or consolidation of existing corporations has been affected, not the joining of "informal associations."

[1]

Fennel Creek's statement of standing is quoted in its entirety below:

FFC derives its standing to petition the Board from the Growth Management Act, specifically RCW 36.70A.110. Since 1990, members of FFC have spent many hundreds of hours participating in the Pierce County comprehensive planning process. FFC was not granted sufficient opportunity to testify on the above element of Ordinance No. 96-111 due to the fact that only one portion of the Growth Management Act, that dealing with sewer capacity, was permitted to be discussed by the Pierce County Council. Further, Council Representative, Jan Shabro, who represents the part of Pierce County we are concerned with was ill and not

available for assistance when this matter came before the Pierce County Council.  
PFR, at 4.