State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

LARSON BEACH NEIGHBORS and JEANIE WAGENMAN, Petitioner, v. STEVENS COUNTY, Respondent.	Case No. 04-1-0010 ORDER ON MOTIONS

I. PROCEDURAL HISTORY

On September 10, 2004, LARSON BEACH NEIGHBORS and JEANIE WAGENMAN, by and through its representative, Jeanie Wagenman, filed a Petition for Review.

On October 5, 2004, the Board held a telephonic Prehearing conference. Present were Dennis Dellwo, Presiding Officer, and Board Member John Roskelley. Board Member Judy Wall was unavailable. Present for Petitioners was Jeanie Wagenman. Present for Respondent was Peter Scott and Lloyd Nickel.

On October 11, 2004, the Board issued its Prehearing Order.

On October 15, 2004, the Respondent County filed a Motion to Dismiss the Petition in this matter.

On October 26, 2004, the Board received Petitioners' Motion Additions to the Index of Record Clarification of Admitted Exhibits October 26, 2004.

On November 9, 2004, the Board received Petitioners Response 11/9/04 to Respondent's Motion to Dismiss.

After receiving the briefing of the parties, a telephonic motion hearing was held on the 22nd day of November 2004. Present were Dennis Dellwo, Presiding Officer, and Board Members John Roskelley and Judy Wall. Present for the Petitioner was Jeanie Wagenman. Present for the Respondent was Peter Scott.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

II. FINDINGS OF FACT

1. The Petitioners filed their petition in this matter within 60 days of the County's publication of the subject action.
2. The issue raised herein is a challenge to the manner in which public participation occurred in the final amendment of Title 13 concerning the protection of habitat and endangered species.
3. The issue raised herein has not been decided by this Board in any other action where these Petitioners have been a party.
4. In Case No. 03-1-0006c, this Board allowed the parties additional time for the briefing of a specific issue, protection of Habitat and Listed Species.
5. This Board did not direct the parties to brief nor did it enter an order deciding the issue involving public participation preceding the adoption of an amendment to Title 13 involving the protection of Habitat and Listed Species.

III. BURDEN OF PROOF

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act.

The Board will grant deference to counties and cities in how they plan under Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County,* and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

goals of the GMA." *Thurston County v. Cooper Point Association,* 108 Wn.App. 429, 444, 31 P.3d 28 (2001).

Pursuant to RCW 36.70A.320(3) we "shall find compliance unless [we] determine that the action by [Jefferson County] is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [the GMA]." In order to find the County's action clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

The Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

IV. DISCUSSION

A final hearing was held in the matter of *Larson Beach Neighbors et al, v. Stevens County,* 03-1-0006c on the 2nd day of August 2004. At that time, Petitioner Wagenman raised a substantive compliance issue regarding changes made by the County to the protection requirements in Title 13 for habitat associated with listed species. She also questioned whether the requirements of public participation had been violated in making those changes. The County objected to these new issues at the telephonic compliance hearing, arguing that they are not properly before the board, having been raised for the first time in a reply brief.

Upon further discussion, the parties agreed that, rather than forcing the submission of another petition, it would be in everyone's interest for the Board to examine the merits of the newly raised compliance issue. On August 4, 2004, the Board issued an Order of Continuance of Compliance Hearing to allow additional briefing regarding the issue of Protection of Habitat and Species. The Board also solicited briefing from any interested State agency. This Order directed the parties to provide additional briefing on the issue of the protection of habitat and species. No mention in that order was made of public participation or requesting briefing on that issue.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

The Petitioners provided briefing as directed by the Board. They did not add briefing concerning the public participation issue. There was no comment from either party concerning the failure to include in the order a direction to brief the public participation issue or the failure to brief it. A decision was issued without mention of the public participation issue. The Petitioner filed this petition after the parties were made aware of the Board's decision.

Public Participation is often an issue in petitions filed before this Board. When a party objects to a substantive portion of the Comprehensive Plan of the Jurisdiction, Public Participation is almost always another issue. The Board does not examine the motivation for raising such issues, but must decide legitimate issues when raised. The mentioning of a new issue in briefing will not cause that issue to be excluded from being properly raised in another petition. Comments that would encourage the Board or a party to consider a new issue to avoid a possible new petition do not prevent a separate issue from being raised in that new petition. Public Participation is a new independent issue that may be brought by a separate petition**,** even if the substantive issue is already decided. The deciding of one issue is, in most cases**,** not *res adjudicata* for the public participation issue that might be brought.

The Petitioner properly filed her petition in this matter contending the County failed to properly comply with the public participation requirements of the GMA. This issue had not been decided prior to this nor had an earlier petition been amended to include this issue. The Petitioner was not directed to brief this issue nor did Ms. Wagenman or the County correct the Board's Order directing briefing only on the substantial issue, not the public participation. If someone made a mistake, it was the Board. If it was intended to include both issues in the 03-1-0006c matters, the Board should have directed the parties to brief both issues. The Board did not.

The Petition is properly before the Board at this time and the Petitioners are not precluded from raising the issue they have in this matter.

The Respondent does not object to the motions made by the Petitioner. The Board agrees that the Record should be easily available to Petitioners in this and other matters. All

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

documents that are part of the Record must be available to the Petitioner for her review and for copying if desired. The three documents that were received by the County after the closure of the Record will be eliminated from the Record that is before this Board. Those documents are Exhibit Nos. 164, 165, and 166.

III. ORDER

Based upon the above Procedural History, arguments of parties and Findings it is hereby ordered as follows:

1. The County's motion to dismiss the Petition in this matter is denied and the matter will proceed to final hearing.

2. The Motions for Additions to the Index of Record Clarification of Admitted Exhibits filed by Petitioner is granted and the County is directed to make the record easily available for the Petitioner.

SO ORDERED this 29th day of November 2004.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
Dennis Dellwo, Board Member

_____
Judy Wall, Board Member

_____
John Roskelley, Board Member

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964