

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12

**State of Washington  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON**

SUPERIOR ASPHALT & CONCRETE CO.,

Petitioner,

v.

YAKIMA COUNTY,

Respondent,

COLUMBIA READY-MIX, INC.,

Intervenor.

Case No. 05-1-0012

ORDER ON DISPOSITIVE MOTIONS

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**I. PROCEDURAL HISTORY**

On December 22, 2005, SUPERIOR ASPHALT & CONCRETE CO., by and through its representatives, Charles Flower and Patrick Andreotti, filed a Petition for Review.

On January 5, 2006, the Board received Columbia Ready-Mix, Inc., Motion to Intervene on behalf of Respondent Yakima County.

On January 20, 2006, the Board heard the Motion to Intervene before the Prehearing conference. Having received no objections to intervention, the Board granted intervention status to Columbia Ready-Mix, Inc. on behalf of Respondent Yakima County.

On January 20, 2006, 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 Charles Flower. Present for Respondent was Terry Austin. Present for Intervenor was Kenneth Harper.

On January 20, 2006, the Board issued its Prehearing Order.

1 On February 3, 2006, the Board received Petitioner's Motion to Supplement the  
2 Record and Petitioner's Additions to Index.

3 On February 21, 2006, the Board received Yakima County and Columbia Ready-Mix,  
4 Inc.'s Dispositive Motion and Memorandum. On February 21, 2006, the Board also received  
5 Petitioner-Superior Asphalt & Concrete Co.'s Dispositive Motion Brief and Exhibits.

6 On March 23, 2006, the Board held the motion hearing. Present were, Dennis  
7 Dellwo, Presiding Officer, and Board Members John Roskelley and Judy Wall. Present for  
8 Petitioners was Charles Flower. Present for Respondent was Yakima County Prosecutor,  
9 Terry Austin. Present for Intervenors was Kenneth Harper.

### 9 **PETITIONER'S DISPOSITIVE MOTIONS**

10 The Petitioners moved the Growth Management Hearings Board (Board) to hold that  
11 Yakima County Ordinance 10-2005 is invalid, does not comply with the requirements of the  
12 Growth Management Act (GMA), would substantially interfere with the fulfillment of the  
13 goals of the GMA, and for the Board to remand the case to the Yakima County Board of  
14 County Commissioners.

### 15 **DISCUSSION:**

16 The Petitioner has asked the Board for a finding of invalidity of Ordinance 10-2005.  
17 In their brief, the Petitioner listed and argued five reasons for such a finding. Those five  
18 reasons are as follows:

- 19 1. The County was precluded from such action due to a suspension of the  
20 annual Plan 2015 amendment process until development by Yakima  
21 County's PSD of proposals for plan map amendments as part of the 5-  
22 year Comprehensive Plan update.
- 23 2. Yakima County violated the public participation requirements of RCW  
24 36.70A.035 and RCW 36.70A.140.
- 25 3. Yakima County hearings on this Resolution were held less than the  
26 fifteen days required by WAC 197-11-310(6).

- 1           4.     Yakima County failed to conduct any environmental review required by  
2           RCW 43.21C for the Plan text amendment, which was applicable to,  
3           and impacted all Yakima County land previously designated  
4           “agricultural resource”, and;
- 5           5.     Yakima County Ordinance 10-2005 is invalid because it converts  
6           previously designated “agricultural resource” land to “mineral resource”  
7           land without applying any criteria to determine whether or not the  
8           designation of the “agricultural resource” land was appropriate and did  
9           so without the existence of Yakima County’s adequate “mineral  
            resource” designation “criteria”, in violation of RCW 36.70A.020, etc.

10           The parties argued the above motion extensively. However, the Board finds two of  
11           the Respondent’s arguments are persuasive. The Respondent first argues that these issues  
12           are not properly heard in a dispositive motion. The second is that many facts are not before  
13           the Board and need to be reviewed in greater depth because there are genuine issues of  
14           material fact.

15           The Growth Boards have increasingly refused to consider dispositive motions that  
16           raise issues which are the “heart” of the case before the Board, involve issues of significant  
17           complexity, require review of the bulk of the record, or that require extensive reference to  
18           the record. While this Board in the past has seen fit to rule on some complex dispositive  
19           motions, the three Hearings Boards are developing a consensus as to what limits all the  
20           Boards should follow. This Board sees the logic of such limits and will apply them here.

21           The Board finds that the issues raised by the Petitioners in their Motion are complex  
22           and require the use of extensive parts of the record. The Board further finds that these  
23           issues are at the heart of the case before it and requires time and consideration, which will  
24           be available at the Hearing on the Merits.

25           The Board also finds that there are genuine issues of material fact that must await  
26           the full hearing for resolution. The motions of the Petitioner are denied at this time.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**RESPONDENT’S DISPOSITIVE MOTIONS**

The Respondent, Yakima County and Columbia Ready-Mix, Inc., Intervenor, filed a Dispositive Motion claiming the following:

- 1. The Petitioner failed to invoke GMA appearance standing;
- 2. The Petitioner failed to make sufficient allegations and facts to support SEPA standing; and
- 3. The Board does not have jurisdiction over certain matters raised by Petitioner.

**DISCUSSION:**

The issues raised by the Respondent’s motions will be considered because they are issues that can be decided on the record before us and are appropriately raised at this time. The issues basically involve the jurisdiction of the Board and the standing of the Petitioner before the Board.

**ISSUE 1:**

The Respondent contends that the Petitioner failed to properly invoke GMA standing. They contend that the Petitioner never appeared personally or personally participated in any public hearing or meeting relevant to the now-challenged actions of Yakima County.

The Petitioner clearly demonstrated that their attorneys, Flowers and Andreotti, submitted comments upon the proposed application, clearly stating that the comments were submitted on behalf of Superior Asphalt and Concrete Co. Furthermore, that law firm appeared on behalf of Petitioner, Superior Asphalt and Concrete Co., at each and every hearing and public meeting in this case held by Yakima County where public comment was allowed. The attorneys representing the Petitioner participated in the proceedings and identified themselves as “representatives” of the Petitioner.

RCW 36.70A.280(2)(3) & (4) allows a petition to be filed only by “(b) a person who has participated orally or in writing before the count or city regarding the matter on which review is being requested...” The Petitioner is a corporation and therefore a “person” under the law. In this case, that “corporate person” was unable to participate except through a

1 representative. Clearly that Corporations' lawyer is qualified to represent the Petitioner  
2 before the County or City and is only required by common sense and Board case law to  
3 identify him or herself and give notice that they are acting in a representative capacity for  
4 that Corporation. This was done. Dismissal of the petition for lack of standing is denied.

5 **ISSUE 2:**

6 The Respondents contend that the Petitioner's SEPA issues should be dismissed  
7 because they do not have SEPA standing. The Respondents contend that the Eastern  
8 Washington Growth Management Hearings Board should follow Central Washington Growth  
9 Management Hearings Board's position that a Petitioner must have SEPA standing to raise  
10 SEPA issues before the GMA Boards.

11 SEPA standing would require a Petitioner to show it is within the zone of interests  
12 protected by SEPA and that it would be exposed to a specific and perceptible harm. SEPA  
13 standing has not been alleged nor argued by the Petitioner and the Respondents believe  
14 that Legal Issues 6 and 7 should be dismissed.

15 This Board, following the lead of the Western Washington Growth Management  
16 Hearings Board, applies instead the GMA measure of standing for the SEPA issues that this  
17 Board has jurisdiction under the GMA to review. (RCW 36.70A.280(a)). This Board cites with  
18 approval the Western Board's decision in *WEAN v. Island County*, NO. 03-2-0008 (FDO  
19 08/25/03.) In that decision, the Western Board articulates its rationale for measuring a  
20 parties standing in a case such as this, by reference to the GMA rather than SEPA.

21 The GMA confers jurisdiction upon the Boards to hear petitions alleging  
22 noncompliance with the GMA, the Shoreline Management Act or SEPA "as it relates to plans,  
23 development regulations, or amendments, adopted under the GMA". (RCW 36.70A.280(a)).  
24 In the next subsection, RCW 36.70A.280(b), the statute lists the methods by which a  
25 petitioner may establish standing to bring a petition to the Board. There is no suggestion in  
26 the language that participatory standing as a basis for bringing a petition should not be  
deemed sufficient to establish standing to bring any claim over which the Boards have

1 jurisdiction, including SEPA claims. Had the Legislature wanted to set different standing  
2 requirements for different types of claims, it clearly could have done so. It did not.

3 The motion to dismiss issues 6 and 7 is denied.

4 **ISSUE 3:**

5 The Respondent seeks the dismissal of Legal Issues 1 and 2 of the Petitioner's  
6 Petition. The Respondent contends that the Board does not have the jurisdiction to  
7 determine whether certain actions of Respondent Yakima County do or do not violate the  
8 Washington State Constitution. Further the Respondent believes that the Board does not  
9 have subject matter jurisdiction sufficient to determine whether the County's actions,  
pursuant to a declaration of an emergency, were proper.

10 The Board has consistently held that it does not have the jurisdiction to determine  
11 the constitutionality of the GMA or actions of the County or City. (*Tracy v. City of Mercer*  
12 *Island*, CPSGMPB Case No. 92-3-0001, Final Decision and Order, (Jan. 5, 1993) *Gutschmidt*  
13 *v. City of Mercer Island*, CPSGMPB Case No. 92-3-0006, (Mar. 16, 1993) and *Home Builders*  
14 *Association of Kitsap County v. City of Bainbridge Island*, Case No. 01-3-0019, 10/18/01  
15 Order; *NW Golf*, 9314, 9/29/99 Order). In these cases, the Central Board concluded that it  
16 did not have jurisdiction to determine constitutional issues arising from the implementation  
17 of the GMA. The jurisdiction granted the Boards clearly list their parameters. The Petitioners  
18 contend that we could make such a finding by taking judicial notice of the County's actions  
19 and finding that such actions are unconstitutional. It cannot be viewed in any other way  
20 than the Board finding that it has the jurisdiction to determine that the complained action  
21 was unconstitutional. There has been no determination of constitutionality or  
unconstitutionality and the Board does not have the authority to make such a finding.

22 The Respondent also seeks the dismissal of Issue 2, which states that Resolution  
23 651-2001 precluded the County from considering Columbia's requested Plan text  
24 amendment because of the suspension of annual Comprehensive Plan amendments. The  
25 Respondent contends that the Board does not have the jurisdiction to determine whether  
26

1 the County properly found that an emergency existed and that Columbia's application be  
2 considered.

3 The Board finds that Respondents' motion to dismiss Petitioner's Issue 2 is not  
4 properly decided as a Dispositive Motion. This issue goes to the heart of the Petition and  
5 requires a full hearing with all the facts available to the parties and the Board. The Board  
6 will not make a determination at this time as to whether jurisdiction exists for consideration  
7 of this issue.

### 8 III. ORDER

9 Based upon review of the petition for review, prehearing order, the briefing of the  
10 parties, the Board's prior cases, the GMA, and having considered the arguments of the  
11 parties and deliberated on the matter, the Board ORDERS:

- 12 1. The Petitioner's Motions seeking a finding of invalidity and non-  
13 compliance is denied at this time.
- 14 2. The Respondents' motion to dismiss Legal Issue 1 is granted.
- 15 3. All other motions of the Respondent are denied.

16 **SO ORDERED** this 30<sup>th</sup> day of March 2006.

17 EASTERN WASHINGTON GROWTH MANAGEMENT  
18 HEARINGS BOARD

19 \_\_\_\_\_  
20 Dennis Dellwo, Board Member

21 \_\_\_\_\_  
22 Judy Wall, Board Member

23 \_\_\_\_\_  
24 John Roskelley, Board Member