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

CHRISTINE WYNECOOP and  
NEIGHBORHOOD ALLIANCE OF SPOKANE,

Petitioners,

Case No. 07-1-0007

v.

**FINAL DECISION AND ORDER  
OF DISMISSAL**

SPOKANE COUNTY,

Respondent.

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**I. PROCEDURAL HISTORY**

On June 1, 2007, CHRISTINE WYNECOOP and NEIGHBORHOOD ALLIANCE OF SPOKANE, by and through their representative, Rick Eichstaedt, filed a Petition for Review.

On June 14, 2007, the Board received Respondent's Notice of Unavailability of Respondent's Counsel.

On June 18, 2007, the Board received Respondent's Motion to Extend Time for Filing of Index of Record and for Continuance of Prehearing Conference asking for additional time due to the unavailability of Respondent's counsel.

On June 20, 2007, the Board issued its Order on Motion to Extend Time for Filing of Index of Record, and for Continuance of Prehearing Conference.

On July 17, 2007, the Board held the Prehearing Conference. Present were Joyce Mulliken, Presiding Officer, and Board Members John Roskelley and Dennis Dellwo. Present for Petitioners was Rick Eichstaedt. Present for Respondent was Dave Hubert.

On July 18, 2007, the Board issued its Prehearing Order.

On July 25, 2007, the Board received Petitioners' Motion to Supplement the Record.

1 On August 2, 2007, the Board received Respondent's Objection to Motion to  
2 Supplement the Record.

3 On August 8, 2007, the Board received Petitioners' Reply in Support of Motion to  
4 Supplement the Record.

5 On August 16, 2007, the Board held a telephonic motion hearing. Present were Joyce  
6 Mulliken, Presiding Officer, and Board Member Dennis Dellwo. Board Member John  
7 Roskelley recused himself from this matter. Present for Petitioners were Lindell Haggin and  
8 Rick Eichstaedt. Present for Respondent was Dave Hubert.

9 On August 23, 2007, the Board issued its Order on Motion to Supplement the  
10 Record.

11 No dispositive motions were received.

12 The following briefs were received by the Board and shall be referenced as follows:

- 13 • Petitioners' Hearing on the Merits Brief: **Petitioners' Brief**
- 14 • Respondents' Hearing on the Merits Brief: **County's Response**
- 15 • Petitioners' Hearing on the Merits Reply and Request for Official Notice of  
16 Material Fact: **Petitioners' Reply Brief**

17 On October 9, 2007, the Board held the hearing on the merits. Present were Joyce  
18 Mulliken, Presiding Officer, and Board Member Dennis Dellwo. Present for Petitioners was  
19 Rick Eichstaedt. Present for Respondent was Dave Hubert.

## 20 **II. DISCUSSION AND ANALYSIS**

### 21 **The Challenged Action**

22 Petitioners' challenge arises from an Administrative Interpretation (**AI-0002-2005**)  
23 issued on May 11, 2005, by the Director of Building and Planning for Spokane County  
24 (**Director**) which re-designated 8.26 acres of land from Low Density Residential (**LDR**) to  
25 Mixed-Use (**MU**). PFR, at 3; PFR, Attachment 1. The AI was based on the fact that the  
26 subject property (which had been merged via a lot line adjustment) had dual  
comprehensive zoning – Urban Activity Center (southern portion) and LDR (northern  
portion) – and two implementing zoning districts – Mixed-Use (southern portion) and LDR

1 (northern portion). The Director determined that a parcel bisected by two comprehensive  
2 plan land use designations and implementing zones was inconsistent with the intent of the  
3 Comprehensive Plan and could be characterized as a mapping error. PFR, Attachment 1, at  
4 2. Therefore, the Director ruled that the official zoning map should be amended so that the  
5 parcel was entirely zoned MU. *Id.* Despite the Director's ruling, the County's  
6 Comprehensive Zoning Map has never been changed to reflect the administrative  
7 interpretation. County Response, at 5. The AI was not appealed as provided by the Spokane  
8 County Code (SCC) 14.502 and, therefore, the decision became final in 2005.<sup>1</sup>

9 The Director's AI did not, in and of itself, allow for development of the subject  
10 property at a greater density. However, AI-0002-2005 was used as a basis for modification  
11 of a preliminary plat that had been approved by the County in 2004. The County's Hearing  
12 Examiner found a "Change of Conditions" warranting an increase in density to the  
13 previously-approved Wandermere Heights Plat. Plaintiffs' Opening Brief, at 4-5; PFR,  
14 Attachment 1. The Hearing Examiner issued his decision approving a zoning change for the  
15 Plat which reflected the MU zoning on April 21, 2006. The record does not reflect that the  
16 Hearing Examiner's decision was appealed, and therefore the plat modification became final  
17 in 2006.<sup>2</sup> Building permits have vested and development of the site has commenced.  
18 Petitioners' Reply, at 6-7.

19 The only challenge to the AI came via a whistleblower complaint filed in March 2007,  
20 approximately 22 months after issuance of AI-0002-2005. The whistleblower's complaint

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21 <sup>1</sup> SCC 14.502.060 states that Administrative Determinations, such as AIs, are appealed to the County Hearing  
22 Examiner consistent with the procedures set forth in SCC Title 13. SCC 13.900.106(a) states that appeals of  
23 Type I applications (including AIs) must be filed within 14 calendar days of the issuance of the decision or  
24 notice of the decision is mailed. The AI was issued on May 11, 2005 and the required notice was mailed by  
25 First Class Mail to adjacent property owners on May 11, 2005. Petitioners' HOM Brief, Exhibit 4.

26 <sup>2</sup> SCC 1.46.130 provides that appeals of a Hearing Examiner's decision pertaining to Preliminary Plats –  
Change of Conditions (SCC 1.46.070(d)) must be appealed within 21 days of the issuance of the Examiner's  
decision via a LUPA appeal to Superior Court.

1 asserted that the AI was improper in that it was not consistent with various state laws,  
2 including the GMA. Petitioners' Brief, at 4. This complaint gave rise to an investigation by  
3 the County after which, on April 25, 2007, the Board of County Commissioners (BOCC)  
4 adopted Resolution 07-0346. Resolution No. 7-0346 notes the procedural error created by  
5 the AI but did not invalidate or remand it to the Director. Rather, the BOCC mandated the  
6 Building and Planning Department not use the AI process to rezone a parcel of property  
7 which has dual zoning as a result of a lot line adjustment but that the comprehensive plan  
8 amendment/update process be utilized. County's Response, at 4.

9 Subsequently, on June 4, 2007, the Petitioners filed the PFR alleging violations of  
10 various sections of the GMA pertaining to comprehensive plan amendments (RCW  
11 36.70A.130) and public/agency participation (RCW 36.70A. 035, 36.70A.106, and  
12 36.70A.140). In addition, Petitioners assert violations of the substantive and procedural  
13 requirements of the State Environmental Policy Act (**SEPA**), RCW 43.21C. PFR, at 4-5. All  
14 of these alleged violations stem from AI-0002-2005.

15 **Board Discussion and Analysis:**

16 WAC 242-02-030(3) provides that any party, or the Board, upon its own motion, may  
17 challenge jurisdiction. The County raised the issue of jurisdiction for the first time in its  
18 Response Brief, alleging that AI-0002-2005 is a site-specific rezone for which the Board  
19 lacks subject matter jurisdiction. County Response, at 7-8. The Board, *sua sponte*, also  
20 questions its jurisdiction in this matter. Jurisdiction before the Board requires three things –  
21 *timeliness, subject matter jurisdiction, and standing*. Without all of these things, the Board  
22 does not have jurisdiction to hear the issues presented by a petitioner.

23 **TIMELINESS:**

24 As the parties are well aware, if a petitioner fails to file the PFR within the statutory  
25 appeal period the Board does not have the authority to review the challenged action  
26 regardless of whether or not the challenged action is of the type for which the Board has

1 jurisdiction. RCW 36.70A.290(2)<sup>3</sup> limits the time within which a jurisdiction is exposed to a  
2 potential GMA challenge to a 60-day period. Publication establishes the 60-day deadline  
3 beyond which petitions may not be filed with the Board and effectively puts the public on  
4 notice of the opportunity to appeal. The Board notes that if publication does not occur,  
5 there is no closure of the appeal period and the limitation of RCW 36.70A.290(2) does not  
6 arise.

7 The Petitioners' briefing asserts a failure to "publish" the challenged action in  
8 connection with public participation and agency notification requirements. Petitioners' Brief,  
9 at 11-17. Although the GMA requires jurisdictions to publish notice of an action, the GMA  
10 does not set forth a specific method of publication. Rather the Act provides a listing of  
11 examples including posting of the property; newspaper publication; and the notification of  
12 known interested parties – public and private (*see* RCW 36.70A.035(1)). A definition for  
13 publication is provided in the Washington Administrative Code (WAC) which provides, in  
14 relevant part: "Publication means ... (b) *For a county, the date the county publishes the*

15 <sup>3</sup> RCW 36.70A.290 provides, in pertinent part: (emphasis added)

16 (2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or  
17 permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter  
18 90.58 or 43.21C RCW *must be filed within sixty days after publication* by the legislative bodies of the county or  
19 city.

20 (a) Except as provided in (c) of this subsection, the *date of publication* for a city shall be the date  
21 the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or  
22 development regulations, or amendment thereto, *as is required to be published*.

23 (b) *Promptly after adoption, a county shall publish a notice* that it has adopted the comprehensive  
24 plan or development regulations or amendment thereto. Except as provided in (c) of this  
25 subsection, for purposes of this section the date of *publication for a county shall be the date the*  
26 *county publishes the notice* that it has adopted the comprehensive plan or development regulations,  
or amendment thereto.

1 notice that it has adopted a comprehensive plan, development regulations *or other*  
2 *enactments, ...*" 242-02-040(11)(b) (Emphasis added).

3 Pursuant to SCC 14.502.040, notice of an AI is to be mailed by First Class Mail to  
4 adjacent property owners and include statements explaining the action taken and any  
5 aggrieved party's appeal process. It is undisputed that this notice was provided and, in fact,  
6 Petitioners cite to the notice issued by the County on May 11, 2005. See Petitioners' Brief,  
7 Exhibit 4. Although this notice may not have conformed to County-enacted notice  
8 requirements for comprehensive plan amendments, it was in conformance with SCC  
9 14.502.040(3)(1) - the notice requirements for AIs. The Board concludes the complained of  
10 action – AI-0002-2005 – was published as required by law and therefore any potential  
11 appeal period commenced on May 11, 2005.

12 The Petitioners filed their PFR on June 4, 2007, some 25 months after the appeal  
13 period had closed. The PFR is untimely and must be dismissed.

14 The Board notes that its conclusion is consistent with Washington's public policy  
15 supporting the finality of land use decisions in regard to LUPA actions and the premise that  
16 even illegal decisions must be challenged in a timely, appropriate manner. *See e.g. Habitat*  
17 *Watch*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005); *Chelan v. Nykreim*, 146 Wn.2d 904,  
18 *52 P.3d 1 (2002)*; *Wenatchee Sportsmen*, 141 Wn.2d 169, 173; 4 P.3d 123 (2000) - all  
19 recognizing a strong public policy supporting administrative finality in land use decisions and  
20 concluding that allowing a challenge to a land use decision beyond the statutory period  
21 leaves land use decisions open to reconsideration long after the decisions are finalized,  
22 thereby placing property owners in a precarious position and undermining the Legislature's  
23 intent to provide expedited appeal procedures in a consistent, predictable and timely  
24 manner. In addition, this same line of cases hold that a timely filed administrative appeal  
25 may not be used to collaterally attack a land use decision which has become final. *Habitat*  
26 *Watch*, 155 Wn.2d at 410-11; *Wenatchee Sportsman*, 141 Wn.2d at 181.

1 In addition, the Board disagrees with the County that its jurisdiction is limited to  
2 legislatively-enacted actions.<sup>4</sup> In recent Board cases and court decisions, it has been  
3 determined that the Board may have jurisdiction over an action if the action amounts to a  
4 *de facto* amendment of a comprehensive plan or development regulation. In *Skagit County*  
5 *Growthwatch v. Skagit County*, WWGMHB Case No. 04-2-0004, a case involving two  
6 administrative interpretations issued by the County in regard to comprehensive mapping  
7 changes, the Western Board concluded that it had jurisdiction to consider whether the AIs  
8 undertaken by the County were actually comprehensive plan amendments subject to  
9 compliance with the County-adopted process for such amendments. *Skagit County*  
10 *Growthwatch*, Order on Motions (June 2, 2004) at 3-4; *Skagit County Growthwatch*, Final  
11 Decision (Aug. 23, 2004), at 4-12. In *Alexanderson et al., v. Clark County*, 135 Wn.App.  
12 541, 144 P.3d 1219 (2006), the Court of Appeals held that the Western Board had  
13 jurisdiction to review a Memorandum of Understanding (MOU) between Clark County and  
14 the Cowlitz Tribe because the MOU could be characterized as a *de facto* amendment of the  
15 County's Comprehensive Plan.<sup>5</sup> *Alexanderson*, 135 Wn. App. at 550.

16 Given these recent holdings, the County should not assume that just because an  
17 action was not a "GMA legislative enactment" it is immune to a challenge. Rather, it is the  
18 effect of the jurisdiction's action – amending a comprehensive plan or development  
19 regulation – which may give rise to the Board's subject matter jurisdiction. However, in  
20 this matter, the Board does not have to determine whether or not the action amounts to an

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21 <sup>4</sup> The County asserted that the Board lacked subject matter jurisdiction over the AI because it was not a  
22 legislative-enacted action. County's Response, at 7.

23 <sup>5</sup> In contrast, the Central Board has twice held reviewed actions based on assertions that these actions  
24 amounted to *de facto* amendments to a comprehensive plan. See *Campbell v. Everett*, CPSGMHB Case No.  
25 06-3-0031, Order of Dismissal (11/9/06); *Petso v. Snohomish County*, CPSGMHB Case No. 07-3-0006, Order of  
26 Dismissal (4/11/07). In both situations, the issued turned on whether the challenged jurisdiction had planning  
authority over the land in question.

1 amendment of the comprehensive plan or a development regulation because, as noted  
2 *supra*, the PFR was untimely and must be dismissed.

3 **STANDING:**

4 Second, the Board also notes that Petitioners failed to state the basis of standing in  
5 the PFR or the HOM brief. The GMA provides for three types of standing – participation,  
6 governor-certified, and Administrative Procedure Act (APA, RCW 34.05). RCW  
7 36.70A.280(2). From the PFR, the Board assumes that Petitioners' rely on the APA standing  
8 requirements. APA standing requires the satisfaction of three conditions (1) Petitioner[s]  
9 have been or is likely to be prejudiced by the County's action; (2) Petitioners' asserted  
10 interests are among those that the County was required to consider; and (3) Judgment in  
11 favor of the Petitioners would substantially eliminate or redress the prejudice. RCW  
12 34.05.530. The first and third prongs are generally called "injury-in-fact" requirements,  
13 while the second is called the "zone of interest" prong. Although the Board has previously  
14 ruled the GMA's standing provisions should be interpreted broadly<sup>6</sup>, this does not mean the  
15 Petitioners do not have to provide how, either individually or as an organization, they satisfy  
16 three factors. Petitioners have provided no argument in support of APA standing.  
17 Petitioners, not the Board or the County, bear the burden of establishing standing. *Allen v.*  
18 *University of Washington*, 92 Wn. App. 31; 959 P.2d 118 (1998), *affirm'd* by 140 Wn.2d  
19 323; 997 P.2d 360 (2000). The Petitioners have failed to support the basis for APA  
20 standing, RCW 34.05.530. Lack of standing is grounds for dismissal of the PFR.

19 **III. CONCLUSION**

20 As noted *supra*, the Board finds and concludes that it lacks jurisdiction over the PFR  
21 based on the Petitioners failure to file the PFR within the 60-day statutory deadline, and to  
22 adequately set forth and support their standing.

23  
24  
25 <sup>6</sup> See *Woodmansee et al v. Ferry County*, EWGMHB Case No. 95-1-0010, FDO (May 13, 1996); *Concerned Friends of*  
26 *Ferry County/Robinson v. Ferry County*, EWGMHB Case No. 01-1-0019, Amended Motion Order (April 16, 2002).

1 The Board does not condone the Director's apparent error in this matter and  
2 recognizes an administrative interpretation is not the proper method for a comprehensive  
3 plan amendment – whether it be textual or to the land use map. It appears the Spokane  
4 County Board of County Commissioners has come to the same conclusion. Resolution No. 7-  
5 0346, at 2. However, the complained of action is a two year old decision that has become  
6 final under the County's development regulations and, for which building permits have  
7 vested and development has commenced. The relief sought by the Petitioners – invalidity of  
8 the action – would have no impact on the building permits issued to date as these permits  
9 appear to have vested, regardless of any underlying impropriety of the action.<sup>7</sup>

#### 10 **IV. FINDINGS OF FACT**

- 11 1. On May 11, 2005, the Director of Building and Planning for Spokane  
12 County issued an AI in regards to a parcel of land that maintained two  
13 land use designations – UAC and LDR.
- 14 2. Notice of the AI was provided, as required by SCC 14.502.040(3)(a), on  
15 May 11, 2005.
- 16 3. The Administrative Interpretation was not appealed.
- 17 4. On April 21, 2006, the Hearing Examiner for Spokane County approved  
18 a "Change of Conditions" warranting an increase in density to the  
19 previously-approved Wandermere Heights Plat from LDR to MU.
- 20 5. The Hearing Examiner's decision was not appealed. Building permits  
21 have vested and development of the site has commenced.
- 22 6. On December 8, 2006, a Whistleblower's Complaint was filed in regard  
23 to the May 2005, AI.

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24 <sup>7</sup> RCW 36.70A.302(2) provides: *A determination of invalidity is prospective in effect and does not extinguish rights that*  
25 *vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does*  
26 *not apply to a completed development permit application for a project that vested under state or local law before receipt of*  
*the board's order by the county or city or to related construction permits for that project.*

- 1           7.     The County conducted an investigation on the Whistleblower's  
2           Complaint and, on April 25, 2007, the BOCC adopted Resolution No. 7-  
3           0346 which noted the procedural error created by the AI but did not  
4           invalidate or remand it to the Director. The BOCC mandated that the  
5           BPD not use the AI process to rezone a parcel of property which has  
6           dual zoning as a result of a lot line adjustment but the comprehensive  
7           plan amendment/update process be utilized.
- 8           8.     On June 4, 2007, the Petitioners filed a PFR alleging non-compliance  
9           with the GMA and SEPA based on the May 2005 AI.
- 10          9.     Within the PFR, the Petitioners assert, individually or through their  
11          members, that they are citizens of Spokane County who either live in  
12          the neighborhood impacted by the challenged action or are affected by  
13          the challenged action.
- 14          10.    The Petitioners appear to assert standing pursuant to RCW 34.05.530 –  
15          APA standing. However, the Petitioners do not provide argument to  
16          support the satisfaction of the three prongs required by the APA.

#### **V. CONCLUSIONS OF LAW**

- 17          1.     RCW 36.70A.290(2) requires that a PFR being filed within 60 days of  
18          publication. The GMA does not mandate a method of publication but  
19          WAC 242-02-040(11)(b) states publication is satisfied when a county  
20          publishes the notice of an enactment. The AI was published as required  
21          by the SCC.
- 22          2.     The PFR in this matter was filed over two years after the publication of  
23          the AI.
- 24          3.     The Board finds and concludes that the PFR is untimely.
- 25          4.     RCW 36.70A.280(2)(d) permits a petitioner to establish standing based  
26          on RCW 34.05.530. The burden is on the Petitioners to demonstrate all

1 three prongs of the standing test have been met. Petitioners failed to  
2 provide any argument to support their apparent APA standing and,  
3 therefore, have not met the burden of proof.

- 4 5. The Board finds and concludes the Petitioners have not demonstrated  
5 standing in this matter.

## 6 VI. ORDER

7 Based upon review of the GMA, Board's Rules of Practice and Procedure, briefing and  
8 exhibits submitted by the parties, case law and prior decisions of this Board, and having  
9 deliberated on the matter, the Board enters the following ORDER:

- 10 1. The matter of *Wynecoop and Neighborhood Alliance of Spokane County*  
11 *v. Spokane County*, EWGMHB Case No. 07-1-0007, is **dismissed with**  
12 **prejudice** and the matter is **closed**.

13 Pursuant to RCW 36.70A.300 this is a final order of the Board.

### 14 Reconsideration:

15 Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this  
16 Order to file a petition for reconsideration. Petitions for reconsideration shall  
17 follow the format set out in WAC 242-02-832. The original and four (4) copies of  
18 the petition for reconsideration, together with any argument in support thereof,  
19 should be filed by mailing, faxing or delivering the document directly to the  
20 Board, with a copy to all other parties of record and their representatives. Filing  
21 means actual receipt of the document at the Board office. RCW 34.05.010(6),  
22 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite  
23 for filing a petition for judicial review.

### 24 Judicial Review:

25 Any party aggrieved by a final decision of the Board may appeal the decision to  
26 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial  
review may be instituted by filing a petition in superior court according to the  
procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

1 **Enforcement:**

2 **The petition for judicial review of this Order shall be filed with the appropriate**  
3 **court and served on the Board, the Office of the Attorney General, and all parties**  
4 **within thirty days after service of the final order, as provided in RCW 34.05.542.**  
5 **Service on the Board may be accomplished in person or by mail. Service on the**  
6 **Board means actual receipt of the document at the Board office within thirty**  
7 **days after service of the final order.**

8 **Service:**

9 **This Order was served on you the day it was deposited in the United States mail.**

10 **RCW 34.05.010(19)**

11 **SO ORDERED** this 14<sup>th</sup> day of November 2007.

12 EASTERN WASHINGTON GROWTH MANAGEMENT  
13 HEARINGS BOARD

14 \_\_\_\_\_  
15 Joyce Mulliken, Board Member

16 \_\_\_\_\_  
17 Dennis Dellwo, Board Member