

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

THEODORE A. MAHR, et.al.)	
)	
Petitioners,)	No. 94-2-0007
)	
vs.)	ORDER ON
)	MOTIONS
THURSTON COUNTY,)	
Respondent,)	
)	
and)	
)	
PEASE PENSION FUND)	
Intervenor.)	
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On June 10, 1994 a petition was filed for review of the Interim Urban Growth Boundary Area (IUGA) adopted by Thurston County on April 11, 1994 and the “related SEPA, DNSs and land use decisions.” The petition named Thurston County and City of Olympia as respondents.

A Prehearing Order was entered July 20, 1994 listing the three issues to be presented. The Order also determined that the other issues raised in the petition were outside the jurisdiction of the Board. A schedule for motions was established requiring that all motions were to be filed by August 12, 1994.

On August 26, 1994 Pease Pension Fund through its attorney, Richard G. Phillips, Jr., filed a motion to intervene. The City of Olympia filed a motion to be dismissed. Petitioners filed a motion on August 5, 1994 “to vacate” the prehearing order determination concerning the Board’s jurisdiction.

Thurston County filed an index to the record on August 2, 1994 and Thurston County and petitioners agreed that the index would constitute the record with the addition of a video tape

presented by petitioners. Petitioners objected to the scope of the record on the basis of their motion to vacate.

On August 30, 1994 potential intervenor and Thurston County submitted a request to “supplement” the record with additional documents relating to the IUGA Ordinance items 1 through 18. Potential intervenor also requested supplementation by exhibits 19 through 22. All motions were served on other parties prior to the scheduled hearing of August 31, 1994.

On August 31, 1994 a hearing was held concerning the motions filed by the parties and by potential intervenor. Present for that hearing was William H. Nielsen, Presiding Officer, Nan Henriksen and Les Eldridge, Board Members, Ted Mahr and Jerry “Doc” Dierker representing petitioners, John Vanek representing the City of Olympia, Tom Bjorgen representing Thurston County and Richard G. Phillips, Jr. representing potential intervenor. All parties had an opportunity to comment on the various motions and petitioners requested and were granted additional time to comment on the County’s and potential intervenor’s motion to “supplement” the record.

On September 2, 1994 petitioners filed a “supplement to the record” consisting of copies of petitions that had been submitted to the Thurston County Board of Commissioners and the City of Olympia on January 24, 1994 and copies of additional petitions that had been submitted to the Thurston County Board of Commissioners in the “late 1980’s.” Our decision on the various motions follows.

1. PEASE PENSION FUND’S MOTION FOR INTERVENTION.

There was no opposition voiced at the August 31, 1994 hearing to the proposed intervention. Additionally, the materials submitted in support of the motion show that intervention is properly granted. The intervention is conditioned upon adherence to the issues and schedule set forth in the Prehearing Order. The brief of intervenor is due by 1:30 p.m. September 23, 1994.

2. CITY OF OLYMPIA’S MOTION TO DISMISS.

The petition named the City of Olympia on the apparent basis of the City’s Determination of Non-

Significance (DNS) in October or November of 1993 concerning its sewer extension agreement to an area within what is now the IUGA. The extension apparently was entwined with a preliminary plat entitled “Cedrona” located within the IUGA.

The City of Olympia has not made any GMA decisions with regard to the IUGA at issue in this case. Under RCW 36.70A.110 that decision was made by Thurston County. Nor does it appear that we would have jurisdiction to effect any remedy involving the City of Olympia. A DNS for a sewer extension is not within the jurisdiction given to us by RCW 36.70A.280. Even if some convincing argument could be made that a Board should review this issue, which was not done in this case, the sixty day limitation for filing a petition under RCW 36.70A.290 would apply to the City’s action and would prohibit consideration of the issue.

3. PETITIONERS’ MOTION TO VACATE.

As provided in the Prehearing Order, petitioners’ objections to the scope of the issues before the Board was noted. Additionally, on August 5, 1994 petitioners filed a “motion to vacate” which presented the issue as follows:

“Does the GMA and SEPA grant GMHB jurisdiction to review the decisions appealed here made by Thurston and the City of Olympia under the GMA for compliance with all relevant local, state, Federal and International Treaties, statutes, standards, plans, administrative regulations, legal provisions, requirements or permit programs and judicial interpretations thereof, relating to resource management, environmental protection, and regulation of land use, utilities and public facilities, including the Shorelines Management Act, “spot zoning”, conflict of interest, appearance of fairness doctrine, NEPA, the Clean Water Act, the Endangered Species Act, Agenda 21, the Biodiversity Treaty, the Pacific Salmon Treaties, and other applicable law?”

Petitioners claim that the Prehearing Order unreasonably and unlawfully segments review of the decisions under appeal by limiting the Board’s jurisdiction to exclude the issues noted above.

Petitioners rely upon the procedural criteria adopted by the then Department of Community Development, WAC 365-195-700 through 750, SEPA regulations, WAC 197-11, the “supremacy

clause” of Article VI of the United States Constitution, the GMA, specifically RCW 36.70A.110 (4), .280(1)(a) and *King County vs. Boundary Review Board* 122 Wn.2d. 648(1993). None of the citations lead to the conclusion asserted by petitioners.

King County v. Boundary Review Board (City of Black Diamond Case) involved the City having filed a notice of intent with the Boundary Review Board to annex certain properties southwest of it’s city limits. Petitioners attempt to correlate that case with the City of Olympia’s sewer extension agreement executed in late 1993 is simply incorrect. Nothing in the City of Black Diamond case supports nor has any relevance to the issues presented here which deal with the adoption of an IUGA by Thurston County.

Reliance on the procedural criteria, WAC 365-195, as a methodology of showing jurisdiction of this Board is likewise misplaced. RCW 36.70A.190(4)(b) specifies that the department will adopt procedural criteria “to assist counties and cities”, in adopting comprehensive plans and development regulations. The Act further provides at RCW 36.70A.320 that the Board “shall consider the criteria” in making our decisions. WAC 365-195-030(1) properly states that the chapter makes “recommendations” for meeting requirements of the Act but goes on in subparagraph (3) to indicate that compliance with the procedural criteria is not a prerequisite to finding compliance with the Act. Insofar as the record may reflect that Thurston County did or did not consider the procedural criteria and what bearing that determination might have on finding compliance or non-compliance, the issue is presented within the restrictions of the Prehearing Order.

A Board’s jurisdiction is set forth in RCW 36.70A.280 and .290. For purposes of the issues in this case those two sections deal with compliance with the goals and requirements of the Act relating to a GMA action or non-action and appropriate SEPA connections therewith. Contrary to the position of petitioners the nexus between the Act and SEPA does not include a grant of jurisdiction for us to impose standards, goals and requirements of federal statutes and constitutional provisions outside the context of GMA. Nor does the “supremacy clause” mandate that we entertain jurisdiction of those issues in spite of the Legislature’s restrictions against such jurisdiction. We generally agree with the discussion of similar issues by the Central Puget Sound Board found in *Gutschmidt v. Mercer Island* case #92-3-0006, Order on Prehearing Motions,

pages 9-13.

4. PETITIONERS' OBJECTIONS TO INDEX OF THE RECORD.

On August 16, 1994 petitioners filed an objection to the index of record presented by Thurston County and generally requested that the record be supplemented with material necessary to support the motion to vacate, i.e., the various issues raised by petitioners that were determined to be outside our jurisdiction. Because petitioners' motion to expand the issues has been denied for reasons set forth in paragraph three above, there is no basis for supplementing the record with materials designed to support their position on those issues.

5. INTERVENOR'S MOTION TO SUPPLEMENT THE RECORD.

On August 26, 1994 intervenor filed a motion to supplement the record in addition to the index prepared by Thurston County. On August 30, 1994 intervenor filed a clarifying motion specifying exactly which documents intervenor wish to have added to the record in this case. That August 30, 1994 motion was joined in part by Thurston County.

Our review of the documents indicates that intervenor's request is not technically a "supplementation to the record" because the documents appear to be the kind that are or should have been included in the County's record originally. The documents are nothing more than identification of requested exhibits to be included in our hearing. RCW 36.70A.290(4) directs that supplemental or additional evidence is that which is requested beyond the record developed by the local government. Such a motion would rarely be granted. The exhibits requested by intervenor and Thurston County are those we consider to be within the record developed by the County and are properly admitted.

6. PETITIONERS' SUPPLEMENT TO THE RECORD.

On September 2, 1994 petitioners filed a document entitled "Supplement to the Record" containing signed petitions as noted above. It is unclear whether these petitions were actually part of the record developed by the County or not. Under any theory we reject inclusion of these

petitions as part of our record of review.

If the petitions were not part of the record of the County under RCW 36.70A.290(4) we find that the evidence is not necessary nor of substantial assistance in reaching our decision. Additionally, the submission was not properly made by motion. Even if we overlook that requirement, the submission did not comply with the timelines set forth in the Prehearing Order. This case is already replete with unnecessary and excessive copies and we refuse to authorize a continuation of that process.

If these documents are part of the record of the County under the Act they are of no relevance to our hearing and so will not be admitted as exhibits.

ORDER

1. Pease Pension Fund is granted intervenor status subject to the requirements and restrictions of the previously entered Prehearing Order.

2. The City of Olympia is dismissed as a party to this action. The proper heading for this case shall be as follows:

Theodore A. Mahr et.al., Petitioners, vs. Thurston County, Respondents and Pease Pension Fund, Intervenor
Case #94-2-0007.

3. Petitioners' motion to vacate the prehearing order issues is denied.

4. Petitioners' motion to supplement the record concerning the proposed issues is denied.

5. Intervenor's and Thurston County's motion to add additional exhibits to the record, items #1 through 22 is granted. Intervenor has the responsibility of immediately preparing those exhibits and distributing them to the Board, petitioners and respondent.

6. Petitioners' September 2, 1994 submission "Supplement to the Record" is rejected and will not become part of the Board's record in this case.

DATED this 7th day of September, 1994.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member/Presiding Officer

Nan A. Henriksen
Board Member

Les Eldridge
Board Member