

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

F. WHITMORE READING, HAROLD P. DYGERT,)	
JOANNE MOORE-DYGERT, JOANN BLACK, J.R.)	
GONZALEZ, MARY JO ROGERS-GONZALEZ,)	No. 94-2-0019
CHRISTINE M. MASTERSON, LYNN M. SALERNO,)	
STEPHEN SCHRODER, STEPHEN LINDBERG and)	ORDER ON
DIANA RYDER, individually, and as members of)	DISPOSITIVE
the SOUTH END NEIGHBORS DEFENSE FUND, a)	MOTIONS
non-profit association, & THEODORE MAHR, et.al.,))	
))	
Petitioners,)	
)	
)	
vs.)	
)	
THURSTON COUNTY and)	
CITY OF OLYMPIA)	
)	
Respondents.)	
)	
and)	
GARY E. BRIGGS,)	
)	
Intervenor.)	
_____)	

On November 16, 1994, a prehearing order was entered in the above entitled matter. The order listed five major categories of issues, three of which involved a number of sub-issues. A deadline of December 2, 1994, was established for filing of dispositive motions.

On December 1, 1994, Respondents Thurston County and City of Olympia and Intervenor Briggs (Respondents) filed a motion requesting additional time to file dispositive motions. After a telephone conference involving all parties the extension was granted. A new deadline of December 6, 1994, was established for Respondents' filing. The previously established response deadline of noon, December 12th was retained, as well as the hearing at 9:30 a.m., December 14,

1994.

Respondents' dispositive motions were filed and served on the other parties during the day of December 6, 1994. The motions included a 50 page brief with attachments and 7 pages of affidavits with attachments. Exhibits submitted in support of the motions involved (1) the Thurston Regional Transportation Plan (TRTP) 1992 draft consisting of approximately 170 pages; (2) the Final Environmental Impact Statement (FEIS) for the TRTP consisting of approximately 64 pages; (3) the final TRTP consisting of 125 pages; (4) a document entitled "Employment and Population Projections for Thurston County" consisting of 50 plus pages, and appendices; (5) the FEIS for the Joint Comprehensive Plan consisting of approximately 105 plus pages and appendices; and (6) the Olympia Thurston County Joint Comprehensive Plan consisting of some 300 pages.

On December 12, 1994, Petitioner Mahr submitted a responding brief of 10 pages plus an attached affidavit and an exhibit. On December 13, 1994, Petitioner Reading submitted a 37 page brief. Immediately preceding the 9:30 hearing on December 14, 1994, Respondents filed a 4 page reply brief and Petitioner Reading filed a 4 page affidavit from David D. Markley.

The dispositive motions of Respondents addressed every issue set forth in the November 16, 1994, prehearing order but did not address the minor changes made by the December 6, 1994, amended prehearing order. We notified the parties of our conclusion the afternoon of December 14, 1994, because the Petitioners' briefs were due December 22, 1994. This Order formalizes our decision and sets forth our reasons.

We believe that the analogy for dispositive motions is closer to an appellate court motion on the merits (RAP 18.14(e)) than superior court summary judgment (CR 56) or failure to state a claim (CR 12(b)(6)) motions. Unless we specifically authorize oral testimony under RCW 36.70A.290 (4), we are not a fact-finding body. *Clark County Natural Resources Council v. Clark County*, WWGMHB 92-2-0001. We review evidence from the record but do not make findings of fact since we are not called upon to determine witness testimony. In the context of a dispositive motion, affidavits of witnesses are of little, if any, value. In this case Respondents submitted two affidavits which pointed to specific portions of the record but which also attested to the veracity

of certain statements made in Respondents' brief. Each of the Petitioners submitted an affidavit attesting to certain facts concerning their respective claims. We did not consider any of the "facts" submitted by the affidavits. Since there was no request to supplement the record by means of oral testimony factual statements made in affidavits are not properly considered by us.

In order to determine whether to grant or deny dispositive motions, we must first establish the criteria by which that decision will be made. In deciding upon those criteria, we have taken into account WAC 242-02-530(4), and examined the Dispositive Orders in the Central Puget Sound Board case of *Twin Falls, Inc. et.al. v. Snohomish County*, #93-3-0003 (*Twin Falls*) dated June 11, 1993, and the Eastern Board case of *Save, et.al. v. Chelan County*, #94-1-0015 dated May 24, 1994. We generally agree with the holdings made in those cases with the changes noted below.

In considering the ruling on a dispositive motion we first look at the size of the limited record. If a decision requires review of a significant number of exhibits from a record, the purpose of a speedy and efficient disposition is thwarted and the likelihood of granting the motion is diminished. Similarly, the amount of time available to a responding party and to us in relationship to the size of the limited record is a significant factor.

The second criterion involves the nature of the claim of the dispositive motion. As we pointed out in *Mahr, et.al. v. Thurston County*, WWGMHB 94-2-0007 (*Mahr*), there are generally three types of issues we are called upon to decide: (1) legal interpretations; (2) SEPA determinations; and (3) generic claims of non-compliance. In the dispositive motion context, an issue which is purely legal in scope such as jurisdiction, which can be decided without the necessity of any reference to the record, is the type of issue envisioned by WAC 242-02-530(4). A procedural challenge to State Environmental Policy Act (SEPA) compliance, particularly one involving a DNS would lend itself to resolution by dispositive motion.

Less likely to be susceptible to dispositive motion resolution are substantive issues such as the adequacy of a Final Environmental Impact Statement, or challenges to compliance with the Growth Management Act (GMA, Act). Those types of issues frequently require an examination of the record that is more extensive and exhaustive than is normally available in a dispositive motion setting. When we consider this criterion concerning the nature of the claim, we also look

to whether the questions to be resolved are matters of first impression or are complex and thus require more reflection and analysis.

The final criterion involves a balancing of the apparent merit or reasonableness of the arguments presented by each side, as shown by materials contained in the limited record. Here we review the facial strength of each claim in light of the dispositive motion challenge. Motions which can be specifically supported by the limited record are more likely to be granted. Issues that appear to require a broader-based interdependent examination of the record are much less likely to be granted.

Thus, we reach our decision on a dispositive motion by reviewing an inter-related combination of criteria as to the size of the limited record in conjunction with time availability, the nature of the motion, the complexity of the issue including whether it is one of first impression, and the reasonableness of the claims. After consideration of all these criteria, we will deny a motion if there is doubt as to whether it should be granted. A denial of a dispositive motion simply means that the issue will be decided after a review of the entire record and a complete hearing.

To put some flesh on the skeletal framework enunciated above we address the motions in this case. As noted *infra*, Respondents challenged each and every issue in their dispositive motions. In the space of *seven* days we were in the position of having seen nothing about the merits of the case to the position of having to absorb over 800 pages of exhibits. We went from ground zero knowledge of the arguments to approximately 100 pages of briefing. On the morning after receiving the final brief we were confronted with 2 1/2 hours of argument and the necessity to reach a decision that afternoon.

Suffice it to say that the record for purposes of the dispositive motions was not, in our view, "limited" nor did the short time frame in which to consider these issues lend itself to granting the motions. As noted in *Twin Falls*, the 180 day deadline for a written decision is often little enough time for both the parties and a Board to adequately reflect and decide these issues.

Part of the issues presented by this case involve a challenge to the adequacy of the FEIS. Respondents did acknowledge that some type of *de novo* review appeared appropriate and that

overall a "rule of reason" standard seemed to apply. This is a matter of first impression for us. The complexity of the SEPA issues as well as the apparent need to examine the entire record on a substantive basis leads us to deny the motions as to all SEPA issues.

Likewise, the issues in this case that relate to compliance of the Joint Comprehensive Plan with the Act are complex and appear to require examination of more of the record than exists here. The reasonableness or facial validity of the claims are considered in light of our four-question analysis. As we held in *Mahr*, unless there is no evidence in the record to substantiate a claim, we examine the entire record with our four-question analysis. In a dispositive motion context we review the limited record to determine if a reasonable argument can be made to warrant use of the four-question analysis. The compliance issues meet that test.

After considering all our criteria we deny the dispositive motions except for the two specific issues noted below.

The parties stipulated that the claim made in issue 3c was without foundation. The motion is granted as to issue 3c.

Issue 2 of the prehearing order concerns the claim that the public participation requirements of the Act as to the road widening and new road construction aspects of the Joint Comprehensive Plan were not adhered to. Respondents' dispositive motion points out that the comprehensive plan and an earlier draft did address those issues and were available for public comment. At the dispositive motions hearing, Petitioner Mahr claimed that a special notice should have been given because of the history of participation. No such requirement or duty is found the Act. Respondents' motion for issue 2 is granted. Petitioner Mahr's motion for reconsideration, filed December 16, 1994, is denied.

All other dispositive motions are denied. Petitioner Reading, et.al., requested that we grant a motion in their favor as part of their responding brief. We will not consider such a request made long after the deadline and without a specific written motion.

DATED this 22nd day of December, 1994.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Presiding Officer/Board Member

Les Eldridge
Board Member

Nan A. Henriksen
Board Member