

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

ALBERT MARSHALL LOOMIS, IV.,	)	
	)	
Petitioner,	)	No. 95-2-0066
	)	
vs.	)	ORDER ON
	)	MOTION TO
JEFFERSON COUNTY,	)	DISMISS FOR
	)	LACK OF
Respondent,	)	STANDING
	)	
and	)	
	)	
POPE RESOURCES,	)	
	)	
Intervenor.	)	
_____	)	

On April 18, 1995, Jefferson County filed a “Motion to Dismiss Based on Lack of Standing.” On April 27, 1995, Loomis filed a response to the motion. On May 5, 1995, Jefferson County filed a reply brief in support of the motion. On May 5, 1995, Petitioner filed a supplement to his previous response. On May 11, 1995, Jefferson County filed a reply to that supplement. A hearing was held May 15, 1995.

Having reviewed the motion and all oral and written arguments in this matter, the majority holds that Mr. Loomis does not have appearance standing and a different majority holds that he does have standing under the APA standard. We therefore deny the County’s motion to dismiss.

We have attached majority and minority opinions on both of these standing tests.

**APPEARANCE STANDING**  
**MAJORITY OPINION**

In his initial response to the Motion to Dismiss, page 4, Petitioner stated “Mr. Loomis concedes that he does not have appearance standing.” The brief only argued standing under the

Administrative Procedures Act (APA Standing).

On May 5, 1995, a "Supplement to Petitioner Loomis' Response to Motion to Dismiss Based on Lack of Standing" was filed. In that supplement, Petitioner stated that subsequent to his April 27, 1995, response, he discovered an article authored by two members of the Central Puget Sound Growth Management Hearings Board and one member of the Western Washington Growth Board at 16 UPS L. Rev 1323 (1993). In the article, published prior to any decision on standing by a Board, the authors made the unsupported statement that the standing requirement set forth in RCW 36.70A.280(2) may be satisfied by merely attending a county public hearing on the issue which is subject to the petition for review. Using this interpretation of the appearance requirement, petitioner contended he met the test by attending a January 9, 1995, public hearing on the proposed Port Ludlow interim urban growth area.

We disagree with that interpretation of what constitutes "appearance" under GMA.

RCW 36.70A.280 (2) states:

A petition may be filed only by the state, a county, or city that plans under this chapter, a person who has either appeared before the county or city regarding the matter on which a review is being requested or is certified by the governor within sixty days of filing the request with the board, or a person qualified pursuant to RCW 34.05.530.

The pertinent language for our discussion is "...a person who has...appeared before the County or City, regarding the matter on which a review is being requested...." We seriously doubt local elected officials or legislators involved in writing the GMA meant this phrase to include mere attendance at a public meeting. There is a big difference between appearance before a jurisdiction regarding the matter on which a review is being requested and merely attending such a meeting.

The purpose of appearance as the main test for standing to appeal is to encourage and require meaningful public participation at the local level. "Participation" by definition, is a sharing. It is proactive, not passive. In order to "appear regarding the matter," (RCW 36.70A.280(2)) one must comment or attempt to comment upon the matter verbally or in writing.

The lexicon of language is rife with definitions casting “appearance” as an outward, obvious indication of participation in a proceeding:

- “‘Appearance:’ outward show; outward impressions, indications” and “‘Appear:’ to be obvious or easily perceived.” (Random House Dictionary of the English Language (Unabridged)).
- “‘Appear:’ show or present oneself; come before the public; become or be evident.” (The New Century Dictionary of the English Language - Appleton - Century Company).
- “‘Appear:’ to present oneself formally, to come before the public.” (Webster’s New World Dictionary of the American Language, 2nd College Edition).

Clearly, any standard definition of “appear” goes far beyond mere attendance. It is difficult to be outward, easily perceived, or evident while sitting anonymously in the back of a crowded room.

Citizens are required to participate in and contribute to the process at the local level if they wish to ensure their right to appeal to us later. Merely sitting in the back of the room, giving decision-makers no verbal or written comments, does not contribute to better decision-making.

We have repeatedly stated that to further the interactive process of GMA, local legislative bodies must ensure meaningful input and dialogue. See e.g., *City of Port Townsend v. Jefferson County*, WWGMHB #94-2-0006. By the same token, citizens have the responsibility to actively participate in that dialogue. Mr. Loomis concedes that he made no oral or written presentation, nor did he sign in to inform the presiding officer that he was willing to participate. This Board has consistently refused to consider supplemental evidence that was not made available to local decision makers. We have been determined not to allow persons to ignore the local process and bring new information to us on appeal. Why then would we allow someone who brought up no concerns at the local level to do so under an appeal?

Mr. Loomis contended that he had no reason to actively participate at the local level because he

avored the decision. That may well be the reason that the legislature included the other two more-difficult ways to achieve standing. It should not be used as a reason to render meaningless the appearance requirement.

We hold that Mr. Loomis does not have appearance standing before this Board.

DATED this 1st day of June, 1995.

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Nan A. Henriksen  
Board Member

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Les Eldridge  
Board Member

### **APPEARANCE STANDING**

#### **MINORITY OPINION**

Regardless of my status as one of the co-authors of the law review article cited in the majority opinion, I believe my colleagues have made a grievous error in their interpretation of RCW 36.70A.280(2). Under the guise of interpreting the word "appeared", the majority decision has in fact added a requirement to standing that does not appear in the statute.

It is a fundamental rule of statutory interpretation that the first step is to determine if an ambiguity exists. No ambiguity is found in the word "appear". Under any definition, the word "appear" means to attend. There is no definition, synonym or any other construction of that word that includes a requirement of participation. Unless the majority can convincingly show that

"participate" is a subset of "appear" there is no foundation for their decision.

The majority's definitional statements do not provide such a foundation. If the majority is so concerned about "outward show," should we then allow depositions of county commissioners to see if they knew Mr. Loomis was present? Nonetheless, "show" or "present" do not equal "participate."

Nor is there anything in the GMA that supports the majority statement that appearance standing for purposes of appeal is related to "meaningful public participation at the local level." Rather, what the majority has done here is added a requirement for standing that "one must comment or attempt to comment" based on what the majority believes the Legislature should have done when enacting RCW 36.70A.280(2). There are plenty of ambiguities in the GMA and it is inappropriate for the majority to add one that isn't present.

The majority opinion raises more questions than a straight forward determination that appearance equals attend. For instance, there was an unrefuted offer of proof by petitioner at the motions hearing that the Chairman of the Board of County Commissioners admonished the public hearing audience "not to repeat previous testimony" and to limit comments to three minutes. If petitioner in this case decided to take direction from the Chairman, did he in fact then "attempt to comment" and think better of it because he was told specifically not to. It is certainly unclear to me how the majority ever expects to provide any predictability from their "attempt to comment" test.

If the majority decision is based upon a policy decision to inspire more "public participation" they have chosen a poor vehicle. We have, in our three-year history, listened to or read transcripts of many public hearings. The message the majority is sending to everyone is, be sure you say something no matter how repetitious, banal or otherwise unresponsive. During those long nights that approach midnight after weeks of public testimony, when everyone must still speak to "appear", I don't believe that local government officials will feel that the majority requirement is a good policy decision.

DATED this 1st day of June, 1995.

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William H. Nielsen  
Board Member

**APA STANDING**

**MAJORITY OPINION**

Petitioner also contended that the criteria established in RCW 34.05.530 were met within the context of the county's motion to dismiss. This is our first case in which the "APA standing" issue has been squarely presented.

The statute provides:

"A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

(1) the agency action has prejudiced or is likely to prejudice that person;

(2) that person's asserted interests are among those that the agency

was required to consider when it engaged in the agency action challenged; and

(3) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

At the hearing the parties referenced the Central Puget Sound Board case of *Friends of the Law v. King County*, CPSGMHB #94-3-0003 (*FOTL*), as well as *Trepanier v. Everett*, 64 Wn.App. 380 (1992) (*Trepanier*), *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44 (1994), and *Byers v. Clallam County*, 84 Wn.2d 796 (1974). We have also independently researched this matter.

We agree with the statement in *FOTL* that RCW 34.05.530, adopted in 1988, does not have appellate court interpretation in the context presented by the issues in this case. We also agree

with the statement that historically Washington and Federal Courts have given a narrow or restrictive interpretation to these standing criteria. Finally, we concur that applying APA standing criteria in a legislative context under GMA is an unusual situation.

It is because of the "legislative" application of RCW 34.05.530 here that we are reluctant to adopt the two-part test announced in *Trepanier*. State Environmental Policy Act (SEPA) challenges for judicial review are controlled by RCW 43.21C.080(2) and not by the APA statute. Likewise, statutory writ of certiorari challenges are controlled by RCW 7.16.040, while constitutional writ cases have no statutory basis at all. Thus, the cases cited by the parties are not on point. We do recognize there are similarities between the "zone of interest" and "injury in fact" tests set forth in *Trepanier* and subsections (1) and (2) of RCW 34.05.530.

The reason for a restrictive interpretation of APA standing is obvious. As noted in *Sterling v. County of Spokane*, 31 Wn.App. 467 (1982) a person who is "aggrieved" does not otherwise need to be a party to the particular action in question. The majority in this case having held that petitioner has not "appeared", and a certification from the Governor having not been made within 60 days of the petition, the only remaining method for Mr. Loomis to pursue his appeal is to fall within the criteria established by RCW 34.05.530.

The first criterion involves actual or likely prejudice to the aggrieved person. This does sound similar to the "injury in fact" prong of the two-part *Trepanier* test. In our case, for purposes of a motion concerning standing, the claim presented by petitioner is that he owns property within the IUGA that is adversely affected by the failure of the IUGA ordinance to comply with the GMA, specifically RCW 36.70A.110. Petitioner's factual allegations and claims satisfy the subsection (1) criterion.

The second criterion concerns whether petitioner's asserted interests are among those required to be considered by the Board of County Commissioners (BOCC). This is analogous to the "zone of interest" prong. In the context of the claims made in this case, petitioner alleged that the BOCC failed to provide GMA required public facilities and services "assurances" in establishing the IUGA. At this stage of the case, we are not dealing with the ultimate issue of whether petitioner will prevail on his contention. Rather, this criterion is established where a legitimate issue has

been presented that a petitioner has a personal interest in. We are satisfied that the criterion has been met here.

Finally, subsection (3) requires that a petitioner establish that a successful result (judgment) would "substantially eliminate or redress" the alleged prejudice. There is no similar requirement in the *Trepanier* test. If the petitioner establishes that the IUGA is not in compliance with the GMA, our exclusive remedy is to remand to the BOCC. Such a remand would, at the very minimum, provide the County with an opportunity to correct the alleged deficiencies. Given the scheme of our authority under GMA and the direct adoption of RCW 34.05.530 into the standing requirements of GMA, such a result would be the maximum "judgment" available. Requiring more than that result to satisfy this subsection would set a standard virtually impossible to meet and render the statute meaningless.

Petitioner has satisfied the criteria established under RCW 34.05.530 and thus has standing to bring the claims set forth in his petition.

DATED this 1st day of June, 1995

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William H. Nielsen  
Board Member

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Les Eldridge  
Board Member

**APA STANDING**

**MINORITY OPINION**

RCW 34.05.530 provides that standing is available under the APA to a person who is "aggrieved or adversely affected" by the agency's contested action. The statute then sets forth three criteria

which must be met before one can be considered to be "aggrieved or adversely affected":

A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present: (1) The agency action has prejudiced or is likely to prejudice that person; (2) that person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and (3) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

If all three elements of the statute test have not been met, the petition must be dismissed based on lack of standing.

I agree with Central Puget Sound Board's analysis in *Friends of the Law, et.al, v. King County, et. al.*, CPSGMHB #94-3-0003, p.351, as to why standing under the APA standard should be narrowly construed.

Having failed to meet the appearance standard, petitioner Loomis should be required to meet the strict requirement of the APA standard in order to show standing. Mr. Loomis does not meet the requirements under APA standing.

(1) The agency action has prejudiced or is likely to prejudice that person — the "injury-in-fact" test. The legislature passed the IUGA requirement as a protective mechanism to ensure that urban services and sprawl would not spread while local governments prepared their comprehensive plans and implementing development regulations. If Mr. Loomis had been excluded from the IUGA I can see how he might be able to show "injury-in-fact" from these interim controls. However, he was included. His arguments that he has been injured by the adoption of the Port Ludlow IUGA are not convincing.

(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged. There is a great deal of confusion in this appeal as to what the actual asserted interests are. They range from inadequate capital facilities planning, to lack of assurances that services would be available when developer wants them, to Pope Resources refusal to serve a development for which a county permit has not even been applied. The answer to this question might

well be different depending on which asserted interest I focused upon. During oral argument, petitioner stated that the asserted interest for APA standing is adequate consideration by the County of ability to provide urban services within the Port Ludlow IUGA. This is an interest that the County is required to consider during the process of designating an IUGA.

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. The only way our judgment would redress Petitioner's perceived injury is if we not only found that Jefferson County was not in compliance with the Act but also required that, in order to achieve compliance, Jefferson County must take the specific action that Mr. Loomis wishes. This Board has never done that and I can't believe we ever would. The County could just as likely achieve compliance by redrawing or withdrawing the IUGA, which certainly would not address Loomis' inability to immediately acquire services for his development.

It seems obvious to me that Mr. Loomis has not met two of the three requirements for APA standing and that the petition must be dismissed based on lack of standing.

If this were a Final Urban Growth Area and Comprehensive Plan appeal I might be able to understand why the majority of this Board would want to hold Mr. Loomis to a lesser APA standard and allow this appeal to proceed. However: (a) This is an IUGA case; (b) IUGAs are temporary development control mechanisms; (c) A decision on this appeal might well not have any applicability to a later FUGA decision; (d) Mr. Loomis is now participating in the comprehensive plan and FUGA delineation process in Jefferson County and will have appearance standing for a FUGA appeal if he deems necessary; (e) Loomis can also take Pope Resources to court if he feels he has a right to immediate water and sewer provision.

For these reasons, I cannot understand why this Board (which prides itself on practicality and common sense) would choose to allow Mr. Loomis to qualify under an overly lenient interpretation of APA standing and proceed with this appeal.

DATED this 1st day of June, 1995.

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Nan A. Henriksen  
Board Member