

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

ABENROTH, et al.,

Petitioners,

vs.

SKAGIT COUNTY,

Respondent,

and

TOM and SHEILA BUGGIA, et al.,

Intervenors.

No. 97-2-0060c

ORDER ON MOTIONS

Motion for Supplemental Evidence

On September 16, 1997, petitioners, known informally as Association of Skagit County Landowners (ASCL), filed a motion to supplement the record. Skagit County filed a response on September 26, 1997.

ASCL's motion involved three requests:

- (1) Exerpts from forestry journal article entitled: Economics of Forest Tract Size: Theory and Literature.
- (2) Depositions of County staff concerning the nature and extent of the County's evaluation and response to public comments submitted by ASCL petitioners.
- (3) Declarations of certain individuals concerning the issue discussed in (2).

In its response, Skagit County voiced no objection to (1) as long as the entire article is included and a copy is served on the County. The County voiced strong objection to (2) and (3). Mr. Nielsen discussed (2) in his October 10, 1997, order denying ASCL's motion for production of

documents/limited discovery.

ASCL has made no showing that the additional evidence in (2) and (3) is “necessary or of substantial assistance to the board in reaching its decision” under RCW 36.70A.290(4). We have consistently limited our review to the record below unless we are convinced that such additional evidence is necessary to us in reaching a decision.

Item (1) forestry journal article is admitted in its entirety. The motion on items (2) and (3) is denied.

Motion for Removal of Items From Index

On September 16, 1997, Friends of Skagit County filed a motion to strike from the record all documents on Index Pages 43 and 44 with dates after the close of public input. On September 25, 1997, Skagit County filed a response concurring with the motion.

This motion is granted as pertains to those documents that were received from the public after the public comment period closed for the comprehensive plan (CP) and development regulations.

Motion to Extend Briefing Schedule

On September 16, 1997, ASCL filed a motion to amend the prehearing order to extend briefing schedule and memorandum in support. Skagit County filed a response on September 26, 1997, asking us to deny the motion.

This motion and response were linked closely to ASCL’s motion for production of documents/limited discovery. Our October 10, 1997, order dealt with many of the issues raised in this motion. In addition, Ms. Henriksen sent a letter to all parties on September 18, 1997, which stated:

“...If you find such documents that were not available to you by September 8, 1997, when additions to the index were due, we will add those to the index. In fairness to all parties we will accept no new evidence after November 6, 1997.”

ASCL's motion is denied.

Motion to Disqualify William H. Nielsen

On September 16, 1997, Friends of Skagit County (Friends) filed a motion to disqualify Board member William H. Nielsen from Board discussion and decision on the issues raised by John L. and Dolores A. Abenroth in WWGMHB #97-2-0051. In the motion Friends stated:

“This motion does not seek to bar Mr. Nielsen from participating in all other parts of the consolidated proceeding WWGMHB #97-2-0060c including addressing procedural issues that affect multiple petitions.”

On September 25, 1997, we received ASCL's response opposing any motions to recuse a Board member with respect to only one petition for review in what has become a consolidated case. We heard oral argument on the issue at the September 30, 1997, motions hearing.

The basis of this motion came about from a letter sent by Board Member Nielsen to the parties disclosing a personal “friendship” with petitioners John and Dolores Abenroth. The letter also reminded the parties of Board Member Nielsen's “friendship” with Chief Civil Deputy Prosecuting Attorney John Moffat.

Nothing in the years that Skagit County has been involved in our cases suggests that Board Member Nielsen has in any way been influenced because of his “friendship” with Mr. Moffat. Friends has failed to demonstrate how Nielsen's “friendship” would in any way influence his decision in the instant case. Additionally, the motion requested only disqualification from participation solely as to the Abenroth property question. Because of the consolidated nature of this case it would be virtually impossible to decide the other issues without them also having significant impact on the Abenroth property. Therefore, the motion is denied.

Motion on Subject Matter Jurisdiction

On September 16, 1997, ASCL filed a dispositive motion on subject matter jurisdiction. Skagit County filed a response on September 26, 1997, and oral argument was heard at the motions hearing on September 30, 1997.

ASCL raised four issues for review:

1. Does the Board have jurisdiction to determine whether the County complied with the requirements of the Planning Enabling Act, RCW 36.70? If the Board does have jurisdiction, did the County comply with RCW 36.70's requirements for adoption of the plan and interim regulations?
2. Does the Board have jurisdiction to determine whether the County complied with the requirements of Skagit County's local Public Participation Program (Ord. No. 16519?) If the Board does have such jurisdiction, did the County fail to comply with the public notice and participation requirements of that ordinance?
3. Does the Board have jurisdiction to determine whether the County's actions violated constitutional requirements concerning (a) procedural due process; (b) substantive due process; or (c) invidious and irrational conduct? If the Board does have such jurisdiction, did the County's actions in adopting the plan and implementing regulations subsequent to their adoption constitute violations of those requirements?
4. Does the Board have jurisdiction to determine whether compliance with minimum notice requirements of the Planning Enabling Act, RCW 36.70, violates minimum constitutional requirements for notice? If so, did the County's reliance on RCW 36.70 notice procedures comply with those minimum constitutional requirements?

ASCL stated: "Based on ASCL's reading of prior Board decisions, ASCL has concluded that the Board does not assert jurisdiction over these legal issues."

In its response Skagit County concurred that we do not have jurisdiction to consider issues relating to the County's compliance with RCW 36.70 or constitutional issues raised by ASCL (Issues 1, 3 and 4).

As regards to issue 2, the County stated:

"The County disagrees that this Board does not have jurisdiction to consider in this proceeding whether the County was in compliance with its Public Participation Program to the extent that ASCL contends or may contend that such a challenge is more appropriately brought in a different forum. Whether the County complied with that Program (during the time period after its adoption) is inextricably tied up in the issue of whether the County complied with the public participation requirements of the Growth management Act (GMA). It is this Board that is required to make that determination in the first instance and this is the appropriate case for such a determination."

As we have stated in previous decisions, we have no jurisdiction to consider issues relating to the County's compliance with RCW 36.70 or constitutional issues (Issues 1, 3, and 4.) We will reserve decision on our jurisdiction regarding Skagit County's Public Participation Program (Ordinance No. 16519) until after further briefing and the hearing on the merits.

Motion to Dismiss Petitions for Lack of Standing

On September 16, 1997, Skagit County filed a motion to dismiss the following petitioners for lack of standing:

Norman C. and Lottie Hornbeck
Robert and Marion Sjoboen
Karyn Livingston and R. Ross Wilson (Livingston)
Larry Dent
Dean and Rosalie Schanzenbach
James Swett, et ux.
Dean Hamilton, et ux.
Morris and Charlene Robinson
Carl and Barbara Mattiesen
Stanley and Helen Walters
Shirley Fox
Mark Danielson and Patti Cromarty (Danielson)
Wylie, Incorporated (Wylie)
George and Marion Klein

On September 25, 1997, we received responses from Hornbeck, Sjoben, Swett, Hamilton, Robinson, Matthiesen, Wylie, Klein, and Danielson. On October 1, 1997, we received a letter from Shirley Fox. We heard oral argument on the motions at the September 30, 1997, motions hearing.

In its September 16, 1997, motion, the County claimed that all the above-listed petitioners failed to show that they meet the standing requirements of GMA and regulations adopted thereunder. The following supported the assertion:

“1. Standing Requirements Under GMA.

Standing requirements under GMA are set forth in RCW 36.70A.280(2) and WAC 242-02-210(2)(d). RCW 36.70A.280(2) provides:

- (2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530. (emphasis added)

RCW 34.05.530, referenced in RCW 36.70A.280(2)(d) cited above, 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 judgement 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 subsections of RCW 36.70A.280(2) at issues in this motion are (b) and (d). WAC 242-02-210(2)(d), recently amended (effective March 1, 1997), provides additional pleading standing for standing requirements as follows:

- 2) Numbered paragraphs stating:

- (d) A statement specifying the type and the basis of the petitioner's standing before the board pursuant to RCW 36.70A.280(2). Petitioners shall distinguish between participant standing under the act, governor certified standing, standing pursuant to the Administrative Procedure Act, and standing pursuant to the State Environmental Policy Act, as the case may be;...

The County asserted that since there was no statement in any of the contested petitions “specifying the type and the basis of the petitioner’s standing before the board”, none comply with WAC 242-02-210(2)(d).

ASCL’s September 25, 1997, brief responded:

“The County elevates form over substance in citing WAC 242-02-210(2)(d) as the basis for dismissal of pro se petitions. Under the County’s suggested approach, a Board would never hear a pro se petitioner’s claim unless they made an “explicit claim of standing” specifying whether the petitioner was relying on appearance or APA standing. The County’s standard would eliminate pro se participation by citizens who are not knowledgeable about the legal tests for the three types of standing. To require a petitioner to file a detailed statement within their petition requires pro se Petitioners to have skilled legal knowledge as to complicated standing concepts, effectively barring pro se Petitioners from review who have valid claims.”

The County further argued that since six of the pro ses later hired an attorney to represent them and the attorney did not correct the deficiency, ASCL’s pro se argument should not apply to them.

ASCL countered:

“Representation at a later stage should not be interpreted as eliminating the pro se status of petitioners at the time they filed their petitions..... While repackaging the facts presented by the pro se petitioners would certainly have brought the petitions into closer conformity with the form suggested in the Board’s rules, nothing in those rules requires the “strict” conformity to the suggested form for pro se petitioners, contrary to the County’s contention. The County cites no authority for such a position. In fact, the American tradition of notice pleading favors liberal treatment of these pro se petitioners and rejection of the County’s self serving and strained reading of pleading requirements for pro se petitioners.”

We do not believe in form over substance as applied to our rules that are not directly taken from specific requirements of the GMA. If we can ascertain (through the body of the petition or other information supplied by the petitioner) that the petitioner does in fact qualify for standing, we will deny the County’s motion to disqualify. When we asked the County at the motions hearing what prejudice this interpretation would cause the County, we received no reply.

The County claimed that none of these petitioners had “participation” standing under RCW 36.70A.280(2)(b). Several of these petitioners claimed in their petitions or in their responses that they did have such standing. Some relied on assertions of testimony or letters on their behalf by others. Other petitioners relied on documents presented to the County after the adoption of the CP.

“Participation” standing can not be based on input by others unless petitioner can show that the other person specifically referenced representing the petitioner’s viewpoints during his/her input. Input after the contested action was taken is likewise no ground for “participation” standing. We therefore find no convincing showing of “participation” standing by any of these petitioners.

We the must determine if these petitioners satisfy the APA’s standing requirements under RCW 34.05.530. A person is aggrieved or adversely affected 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 judgement 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.

After careful review of all input presented to us by petitioners, we find that Hornbeck, Sjoboen, Dent, Schanzenbach, Robinson, Matthieson, Walters, Fox, Danielson, Wylie, and Klein have met the above test.

Even with a generous interpretation of these requirements we are unable to find APA standing for Livingston, Swett, and Hamilton. Livingston supplied us with no information that would allow us to deduce what their previous zoning had been and how the contested action affected that zoning. There was no hint of what the injury would be or if a judgement in their favor would substantially eliminate the injury.

The petitions of Hamilton and Swett refer to the injury suffered as:

“However, the area of most concern is the dates that the commissioners opened and verbally stated that the County would accept plats that had been started prior to the

moratorium and allow one month to complete them and turn them into the permit center. With this knowledge, we proceeded to complete the plat, which incurred great expense. The required procedures were accepted over the counter, however, no response has been made nor any file opened.”

Even though we sympathize with the plight of Swett and Hamilton, we do not see how a judgement in their favor by this Board would substantially eliminate that prejudice. The petitioners’ concerns are outside our jurisdiction.

We grant the County’s motion in the cases of Livingston, Swett, and Hamilton.

Motions to Intervene

We received motions to intervene from: Fluke Capital Management, L.P., (FCM) on August 13, 1997; City of Anacortes on September 3, 1997; Tom and Sheila Buggia and TB Enterprises (Buggia) on September 5, 1997; City of Sedro-Woolley on September 9, 1997; Towns of Concrete and Hamilton on September 10, 1997; Peggy Rundgren and Gunnar and Judith Pederson, Moses Trust, Henry and Ruth Adamitz, Chester and Martha Allshouse, Michael F. Bell, Robert J. Brown, John or Donna M. Butler, Pat Cummings, Mary and Norm Coker, Larry and Geraldine Earnst, Sandra DuVarney, Buraleen Esary, Robert L. Ensley, Norris Estvold, Estvold Family LTD Partnership and Dorris T. Estvold, Steve Estvold, Iva Ewing, Ruth Fellows, Mary A. Fotland, Dorothy Geoghegan, William and Gilda Gorr, Dave and Mary Hambright, Mae A. Greathouse, Jay V. Harris, Dennis and Patricia Hamilton, Einar Heyntsen, Donald R. Helgeson, Dwight and Hattie Hillier, Melvin Heyntsen, Durwin and Cherlyn Hurley, Jill Holdal, John Hunter, Jeff and Deborah Ingman, Keith Johnson, Richard B. Johnson, Clarence B. Jones, Eugene and Myrtle Landers, William E. Lewis, Hope Martin, Randy M. Martin, Tim and Molly McCalib, Hollis N. Merchant, Gary L. Minor, David Mischke, Earl R. Morgan, Gregory and Betti Necas, Theodore J. Palmer, Daniel and Rebecca Peck, Gunner Pedersen, Chaneey W. Pitman, George H. Pitman, Ken Portis, Nancy and Bob Price, Greg Pulley, Allen E. Richards, Dean and Rosalie Schanzenbach, Erwin L. Schnider, Georgia Schopf, Richard and Dorothy Shelley, Marvin and Alice Shaultz, Lorna Shuler, Brett L. Smith, Thomas H. Solberg, Charles T. Spink, William H. Stiles, Jr., Robert O. Taylor, Charles H. Trafton, Roy and Ethel Vahlbusch,

Colleen Van Buren, Gilbert L. Walden, David Welts, Kenneth Wolcoski, and Michael R. Perry, on September 15, 1997; Harold Knudsen Farms and Ida McKenna, John Sandell, Lowell and Beverly Joy, Sidney and Wilma Jenkins, Lawrence Bates and Robert Colborn, Lee L. McIntee, Gary Dickman, Randy Rockafellow, and the Association of Skagit County Land Owners Petitioners' Group on September 16, 1997.

Two of the proposed intervenors, FCM and Buggia, asked for an expedited review of their motions. We received no objection to their motions to intervene. On September 25, 1997, we found that the material contained in the two motions to intervene and supporting memoranda and affidavits showed that intervenor status should be granted and issued the order allowing their intervention.

No objections have been filed to the motions to intervene by the Cities of Anacortes and Sedro-Woolley and the Towns of Concrete and Hamilton. We have carefully reviewed these motions and supporting documentation and grant those motions to intervene.

The motion to intervene by Peggy Rundgren and Gunnar and Judith Pederson (Rundgren) presents facts that show that theirs is the property whose designation is being specifically challenged by Petitioners Stan and Julie Olson. Facts were presented that convinced us that their "interest" may not be adequately protected by existing parties. Their motion is therefore granted.

The motion filed by William A. Stiles, Jr., presented facts including his ownership of property on Old Highway 99 in the Burlington area. He stated that he specifically wished to address issues relating to "commercial, highway-oriented commercial and tourist-related activities in areas outside of designated urban growth areas." Since there is only one other party that has announced its specific interest in these issues, Stiles "interest" may not already be adequately represented. We therefore grant his motion to intervene.

The above motions to intervene by Anacortes, Sedro-Woolley, Concrete, Hamilton, Rundgren, and Stiles are granted subject to the condition that intervenors are limited to the issues set forth in the prehearing order and will abide by all other requirements of the prehearing order.

Moses Trust, Gregory and Betti Necas, and Robert O. Taylor filed “notices to intervene” rather than motions. These notices included constitutional issues exclusively. On September 19, 1997, we sent them letters informing them that a response without constitutional challenges was due by September 25, 1997, if they wished to proceed. We have received no response from any of the three and therefore consider their notices for intervention to be abandoned.

Seventy-four of the remaining motions to intervene were filed by property owners on xeroxed forms with blanks only for the name of potential intervenor, the mailing address, and the legal description of property. All these motions were limited to the issues raised by Friends.

On September 25, 1997, Friends filed a response to these motions to intervene. Friends contended that all of these motions should be denied because of a lack of specificity. They further asserted:

“The Administrative Procedures Act and the Board’s own rules authorize the Board to set conditions on intervention necessary for the Board to maintain control of the proceedings. See RCW 34.05.443(2); WAC 242-02-270(3). Indeed, the APA directs that a motion to intervene should be denied (not simply conditioned) if the intervention would “impair the orderly and prompt conduct of the proceedings.” See RCW 34.05.443(1).

In lieu of being granted intervention status, the moving parties could more appropriately be granted *amicus curiae* status:

It is easy enough to see what are the arguments against intervention, where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief *amicus curiae* and not by intervention.

Crosby Stream Gauge and Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972 (D. Mass. 1943).”

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We faced a similar situation in Case 96-2-0008. In the May 22, 1996, order on intervention we stated:

“This new language indicates a legislative intent that RCW 34.05 is to be the primary focus

of procedural issues before a Board, rather than WAC 242-02. Since there are no provisions for intervention in the GMA (and hence no conflict) review of RCW 34.05.443 is a necessary first step. Subsection (1) of that statute states:

‘The presiding officer may grant a petition for intervention at any time, upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interest of justice and will not impair the orderly and prompt conduct of the proceedings.’

Thus, this section provides for three separate tests in determining whether to grant intervention status:

- (1) Qualification under "any provision of law";
- (2) Sought in the interest of justice and;
- (3) No impairment of orderly and prompt proceedings.

Since there is no provision of law within the GMA concerning intervention, test (1) starts with WAC 242-02-270(1) and through it to CR 24. CR 24 provides for intervention as a matter of right or for discretionary intervention."

Civil Rule 24(a)(2) provides that intervention as a matter of right is appropriate:

“When the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

As in the Whatcom case, these motions must be reviewed to determine whether the applicants have shown an “interest” in the case that is not adequately protected by existing parties. In order to demonstrate such “interest” some factual information must be shown. None of these potential intervenors submitted any facts other than alleged ownership of property in Skagit County and a legal description of that property. None provided any factual basis as to why the presence of the County and 26 petitioners who are also property owners opposed to Friends position on issues could not and would not adequately represent the “interests” of these additional property owners. Only conclusionary general statements were provided. The requests to intervene as a matter of right are denied because of an inadequate showing of an “interest” and that such “interest” is not already adequately represented by existing parties.

The second portion of CR 24 involves permissive intervention. Again, no facts were submitted. The potential intervenors did not show any reasons why those additional interventions should be granted.

Finally, granting these interventions would impair “the orderly and prompt conduct of the proceeding” RCW 34.05.443(1). There are already approximately 40 parties to this case. Allowing more than 70 additional parties would place substantial added burdens on existing parties for service of subsequent pleadings, briefs, and exhibits and also would impinge on their time for oral argument at the hearing on the merits. Absent a factual showing of reasons to allow these interventions and in light of the additional burdens on the existing parties that would occur if they were granted, those interventions are denied.

Even though these property owners have not provided sufficient information to warrant intervention, *amicus curiae* status is granted to them under the provisions of WAC 242-02-280. *Amicus curiae* briefs will allow us to be presented with all the facts that are relevant in determining the issues already presented in this case without undue hardship to the original parties. Parties do not have to serve *amici* with copies of their briefing. However, have provided all of them with a copy of Friends’ brief. All *amici* must make sure that we and Friends receive their briefs by 1:00 p.m. on October 31, 1997. *Amici* may serve all other parties by regular first class mail. They do not have to serve other *amici*.

The motions filed by Randy Rockafellow and Gary Dickman present an additional problem. In its September 25, 1997, response to motions to intervene the County stated:

“Regarding Messrs. Dickman and Rockafellow, both their motions and declarations repeatedly refer to the land use designations of certain parcels of land that they own. If Messrs. Dickman and Rockafellow wished to challenge the land use designations on their property, they were required to file a petition with this Board by August 4, 1997. Since they did not file such a petition, those land designations are not at issue in these proceedings and Messrs. Dickman and Rockafellow should not be permitted to challenge those designations at this late date.”

We agree with the County’s statement that “intervenors are only permitted to address issues noted in this Board’s issues list that were raised by timely, valid petitions for review.” As the County points out: “to hold otherwise would make a mockery of the GMA’s requirements that petitions

be brought within 60 days of publication of the challenged enactment (RCW 36.70A.2909(2))
.....”

We will not allow admittance of belated petitions filed as motions for intervention. When those new issues are removed we are left with two more property owners with views similar to those of current parties opposed to Friends’ issues. As we have discussed at length above, these interests are adequately represented. We therefore deny Rockafellow and Dickman’s motions to intervene but grant them *amicus curiae* status.

As regards to ASCL Petitioners’ motions to intervene, that motion states:

“Each of the individual petitioners appearing in the above-captioned action as an informal association known as the Association of Skagit Landowners (“ASCL”) hereby individually requests that the Board issue an order allowing intervention for that individual, in the event the individual petitioner were to have his or her petition for review dismissed for any reason. Thus, this motion should be decided after all other motions.”

In its September 25, 1997, response brief the County stated:

“The County has moved to dismiss several of the ASCL members’ petitions for lack of standing. If that motion is granted and any of those petitions are dismissed, this Board should remove from its issue list any issues raised only in the dismissed petition. Like Messrs. Dickman and Rockafellow, if individual ASCL members’ petitions are dismissed, there will no longer be a timely, valid challenge to the land use designations on their property. Thus, those designations will not be subject to challenge in these proceedings.”

Two of the contested petitioners, Swett and Hamilton, were dismissed for lack of standing. As with Rockafellow and Dickman, when the specific issues relevant to their dismissed petitions are removed, the remaining issues are adequately represented by numerous parties remaining in the case. Therefore, the motion is denied, but Swetts and Hamiltons are granted *amicus curiae* status.

So ORDERED this 16th day of October, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

William H. Nielsen
Board Member