

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

ABENROTH, et al.,	)	
	)	No. 97-2-0060c
Petitioners,	)	
	)	ORDER ON MOTIONS
vs.	)	
	)	
SKAGIT COUNTY,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
TOM and SHEILA BUGGIA, et al.,	)	
	)	
Intervenors.	)	
	)	

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**Swetts' and Hamiltons' Requests for Reconsideration of Order Dismissing Petitions for  
Review for Lack of Standing**

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1. The motions hearing on the County's motion to dismiss 14 petitioners for lack of standing was held September 30, 1997.
  
2. On October 2, 1997, we issued an early notice of decision on motions. At the bottom of that notice we stated: "Orders on all of the above will be entered as soon as workload permits."
  
3. On October 7, 1997, Nan Henriksen talked to Tom Ehrlichman on the phone. She told him that we would not be able to get the motions order out for at least another week. She also told him that we had been very lenient with his formerly pro se clients in determining standing by reviewing all materials we had received from those petitioners, not just the petitions filed. Two of his clients were denied standing because nothing in their petitions or briefing by Mr.

Ehrlichman in response to the County's motion to dismiss provided any information that would allow us to find APA standing. We determined that those petitioners were appealing previous actions by this Board and failure to keep promises made at the permit counter, not the comprehensive plan (CP) and development regulations (DRs). Mr. Ehrlichman was informed that the Board would be open to receiving clarifying information if supplied quickly.

4. On October 16, 1997, we issued the order on motions.

5. On October 20, 1997, we received a memo from Mr. Ehrlichman stating that he intended to file a motion for reconsideration by 10:00 a.m. on October 22, 1997. He requested we establish an expedited schedule for decision on this as yet unfiled reconsideration motion. He proposed that the County be required to file a response by 10:00 a.m. on October 27, 1997, and the Board issue an order by 10:00 a.m. on October 29, 1997, so that the issue would be settled before October 31, 1997, when response briefs were due.

6. At the end of the day on October 22, 1997, we received the motion.

7. On October 27, 1997, we received a fax from Jay Derr on behalf of the County stating that they had not received the motion until after working hours on October 22<sup>nd</sup> and needed to use their full 10 days to respond.

8. On October 30, 1997, we received Friends' response asking us to deny the motion. At page 9 Friends stated:

“The motion for reconsideration regarding the dismissal of the petitions of Swett and Hamilton should also be denied. As a procedural matter, it is necessary to point out that RCW 34.05.470(2) provides that “[n]o petition for reconsideration may stay the effectiveness of an order.” Therefore, because the petitions of Swett and Hamilton have been dismissed and responses to their issues are no longer required, Friend's (sic) does not intend to file a response to their issues in its October 31, 1997 brief. If their motions for reconsideration are granted, Friends requests 10 days to file a response to their issues.

The Board was correct in dismissing the petitions of Swett and Hamilton. Swett and Hamilton argue that the APA standing issue was not before the Board. S & H Motion at 4-

5. But the County motion did challenge APA standing for Swett and Hamilton. County Motion at 1-2.

Swett and Hamilton argue that they did allege injury in fact because they stated that the plan created an “injustice of removing our rights” because it did not provide a “proper amount of time” for allowing urban growth plats outside the urban growth areas. S & H Motion at 5. Their request relates to the February 7, 1997, order of invalidity in WWGMHB No. 95-2-0065. This Board and the County cannot now grant relief from that order. The relief requested would be to once again allow urban growth outside the UGAs. This is a violation of RCW 36.70A.110(1) and no relief can be granted. The petitioners failed to supply adequate facts to support their assertion of injury-in-fact when given an opportunity by the Board.”

9. On November 3, 1997, we received the County’s response asking for denial. In that brief the County pointed out that WAC 242-02 does not provide for reconsideration of a Board’s decision on a motion. The County contended that the policy reason for not allowing reconsideration of decisions on motions is the tight time deadlines involved in preparing for a hearing on the merits. Given our previous order the issues relating to the Swetts and Hamiltons were not now properly before the Board. As the County’s response brief was due October 31, 1997, it did not respond to those issues. If we were to grant the request for reconsideration, the County argued it would have to be afforded additional time to brief these issues which would prevent their being heard at the November 12-14, 1997, hearing on the merits.

The County further stated:

“In ASCL’s Response to Skagit County’s Motion to Dismiss for Lack of Standing, the Swetts and Hamiltons argued for the first time that they met the APA standing requirements because of one unsubstantiated sentence in their Petitions, which provides:

This property has been adversely impacted by the adoption of the Skagit County Comprehensive Plan for the reasons discussed below.

There were no reasons “discussed below” in either Petition which specifically related to their properties nor did they make an additional showing in their Response to the County’s Motion. The Swetts and Hamiltons wholly failed to meet their obligation under the APA

standing requirements despite having the opportunity to do so both in their Petition and at the time they filed their response to the County's Motion to Dismiss."

Both the County and Friends objected to any new information being considered by the Board.

We have never interpreted WAC 242-02 to prohibit reconsideration of a motion ruling. We will not do so now.

However, we deny the request for the following reasons:

1. The clarifying information was not filed quickly enough to prevent total disruption of the proceedings if granted.
2. The clarifying information does not provide sufficient information to establish APA standing and would require an extremely strained reading of the petition.

### **Motions for Reconsideration of Intervention Denial**

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We received the following motions or requests for reconsideration of our ruling denying intervention status:

1. October 23, 1997, - William E. Lewis and David Mischke
2. October 24, 1997, - Randy Rockafellow, Gary Dickman, and ASCL
3. October 27, 1997, - Harry and Ruth Adamitz, Chester Allshouse, Lawrence Bates/Robert Cobban, Michael Bell, Robert Brown, Donna Butler, Mary and Norm Coker, Pat Cummings, Robert Ensley, Doris Estvold, Norris Estvold, Steve Estvold, Iva Ewing, Mae Greathouse, Jay Harris, Donald Helgeson, Mel Heyntsen, Dwight and Hattie Hillier, John Hunter, Cherlyn Hurley, Jeff and Deborah Ingman, Keith Johnson, Clarence Jones, Lowell and Beverly Joy, Myrtle and Eugene Landers, Leo Mcintee, Hollis Merchant, Theodore Palmer, Michael Perry, Chanecy Pitman, Ken Portis, Nancy Price, Greg Pulley, Allen Richards, John Sandell, Georgia Schope, Richard Shelly, Marvin and Alice Shoultz, Loma Shulter, Brett Smith, Tom Solberg, Charles Spink, Charles Trafton, Ethel Vahbusch, Gilbert & Eva Walden, Kenneth Wolcoski, and Harold Knudsen Farms/Ida McKenna.

On October 30, 1997, Friends responded asking us to deny all the reconsideration motions and on November 3, 1997, the County asked us to deny the motions of Rockafellow, Dickman, and ASCL.

The motions for reconsideration by Lewis, Mischke, and the other proposed intervenors listed under number 3 above stated:

“The Board’s primary reason for denying these Motions apparently is based on intervenors’ use of a Xeroxed form with blanks. The use of such a mode for presenting Motions does not negate or draw into question the validity of the Motion. The Board chooses to ignore the conclusions drawn by the Court in Whatcom County Superior Court, No. 96-2-01146-7 (Freestone, et. al., v. Western Washington Growth Management Hearings Board). A transcript of the Court’s decision includes a statement by the Court that

“I don’t see anything wrong with a person using a form. I don’t think there’s anything in the law that prevents a person or should restrict a person from using a form, provided the form meets their particular circumstances and puts forward the arguments that they wish to put forward. Forms are used by the courts all the time.”

These proposed intervenors have misread and misinterpreted our decision here as the Judge did in the above case. The fact that the xeroxed forms were used was not relevant to nor used as a basis for our decision.

As we stated in our October 16, 1997, Order:

“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.”

In their motions for reconsideration these proposed intervenors do not argue that factual information was not necessary or that it had been provided and therefore these motions have the same flaws found in the original motions.

As regards to the request for reconsideration by Rockafellow, Dickman, and ASCL the County’s response states:

“Rockafellow’s and Dickman’s arguments for reconsideration of the motion for intervention make a complete mockery out of the 60-day time period for filing petitions under RCW 36.70A.290(2) and the Prehearing Order entered by this Board which sets forth the issues for the Hearing on the Merits. Based upon the arguments made in Rockafellow’s and Dickman’s Request for Reconsideration of the Order Denying Motion to Intervene, any property owner in Skagit County should be able to file a motion to intervene and brief why the County should have designated that property owner’s property differently and that would be relevant to the issues before this Board. None of the briefing submitted by Rockafellow and Dickman pertains to any of the issues in this case identified in the Prehearing Order; they relate only to the individual property designations of Dickman’s and Rockefellow’s properties, which are not issues in this case. Briefing before this Board is not a floating concept. Briefing must be tied to specific issues identified in the Prehearing Order. There are not such issues which pertain to the property owned by Dickman and Rockafellow. Their attempted analogy to the intervention by the Flukes and Buggias (Request at p. 5) is not on point since those Intervenors’ properties were specifically impacted by issues explicitly identified in the Amended Prehearing Order. (See, e.g., Issues 50, 53)”

Friends further stated in its response brief:

“The Board should also uphold its denial of intervenor status for Rockafellow, Dickman, Swett, and Hamilton (II(A) 11). The motion for reconsideration of intervenor status is premised on the mistaken believe that, as intervenors, these parties will be able to argue the facts of their own property even though they have either filed no petition or had their petition dismissed. The Board has correctly removed consideration of these parties specific issues. Order on Motion at 18. Reconsideration should be denied.”

After careful review of the above motions and the responses of Friends and the County, we deny the motions and requests.

**County’s Motion to Strike Briefing by Dickman and Rockafellow/Friends Motion to Also Strike the Site-Specific Arguments Relating to Properties Owned by Swett and Hamilton from the ASCL Brief**

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Given our previous decision to dismiss the site-specific arguments of Rockafellow, Dickman, Swett, and Hamilton, we grant the above motions to strike from ASCL’s brief all site-specific arguments relating to properties owned by those four.

**Motions and Requests for Intervention/Amicus Status**

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We received the following:

1. October 22, 1997 – Request for intervention from Port of Skagit County
2. October 24, 1997 – Request from Skagit County School Districts for Amicus Status
3. October 27, 1997 – Motions to intervene from Richard Bertelsen, Gerald Strong, Gregory Herrington, C&B Partnership, Anthony Hamerski, Vivian and Thelma Bates, and Kathleen Ferguson
4. October 3, 1997 – Motion to appear amicus curiae by Skagit County PUD #1

On October 28, 1997, we issued an early notice of decisions denying the above requests.

Also, on October 28, 1997, we received a letter from the Port of Skagit County requesting

reconsideration.

In its October 30, 1997, response to motions Friends stated:

“With respect to the motions and letters requesting intervention and amicus curiae status, Friends supports the Boards’ ruling expressed in its October 28, 1997 early notice of decisions. Because all of these requests were filed more than 3 weeks after the motions hearing, they simply are not timely filed. All petitioners and existing intervenors are busy preparing their responses to opening briefs on a very tight schedule. It is an imposition on petitioners and existing intervenors to have to make time in these tight schedules to address these untimely requests for intervention or amicus curiae status. RCW 34.05.443 limits the grant of intervention to those situations where there will be “[n]o impairment of orderly and prompt proceedings.” Order on Motions (October 16, 1997) at 15. The untimely nature of these requests for intervention and amicus status is impairing the proceedings because, unless the Board acts quickly to deny these requests as it had done, petitioners and existing intervenors must address these requests during the time that has been allotted to writing briefs.”

As we stated in our October 16, 1997, motions order, review of RCW 34.05.443 is the necessary first step in determining if intervention should be granted. That section of the APA clearly states that granting the intervention should be denied if it would impair the orderly and prompt conduct of proceedings. Our previous denial of interventions because they would work undue hardship on the original parties is even more necessary with this grouping. These requests were filed more than five weeks after all motions were due, more than three weeks after the motions hearing, only a week before all reply briefs were due, and only two weeks before the hearing on the merits. For that reason alone, these eleventh hour requests must be denied. Further, the interests stated in the motions appear to be well represented by the County and other parties in this case. The motions and requests are denied.

As to the Port’s request for reconsideration of our early notice of denial:

1. Friends submitted its petition for review on August 4, 1997. In that petition, Friends question 3.11 asked the Board to resolve:

“Whether unincorporated UGAs should be held invalid for substantial interference with

RCW 36.70A.020(1),(2),(3),(4),(5),(8),(9), and (10)?"

3.27 asked us to resolve:

“Whether the failure to preclude commercial/industrial development inside UGA’s prior to provision of full urban governmental services is a violation of RCW 36.70A.020, .-070, and .-110?”

2. We held a full day of prehearing conferences on August 18, 1997, in Skagit County.
3. In our prehearing order the above issues were listed as issues to be resolved in this case.
4. In the prehearing order, we set September 16, 1997, as the date that all motions were due, including motions to intervene.
5. On October 22, 1997, the Port filed a four-sentence letter requesting intervention which stated no grounds that justify intervention.
6. On October 28, 1997, we issued an early notice of denial of intervention status.
7. Later that day, the Port filed a letter requesting reconsideration.
8. On October 29, 1997, we sent a fax to Friends with the request for reconsideration and asked for response the following day.
9. On October 30, 1997, we received Friends’ response stating that even having to respond was working a hardship on the original parties and that if we wished a full response it would require more time. However, Friends listed obvious flaws:
  - a. Port offers no specific grounds for relief
  - b. Port’s assertion that it just found out about potential invalidity is unpersuasive since Friends had requested invalidity of UGAs months earlier.
  - c. After listing several other flaws Friends concludes:

“The Port has the burden to demonstrate that it is allowed to intervene. It has not met its burden. This is not the “11<sup>th</sup> hour” as the Port argues in its request for reconsideration at 1. It is well beyond the “11<sup>th</sup> hour.” The Port’s late and incomplete request for reconsideration is impairing the proceedings and will further impair the proceedings if it is necessary for Friends and other petitioners and intervenors to further respond to their request. Their request for intervention is untimely and their request for reconsideration should be denied.”

We find Friends argument to be persuasive and deny the request for reconsideration.

**County's Motion for Order Striking Declaration of Klein and Sitkin**

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We accede to the County's and Klein's request to stay a ruling on this motion.

So ORDERED this 7<sup>th</sup> day of November, 1997.

**WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD**

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Nan Henriksen  
Board Member

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Les Eldridge  
Board Member

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William H. Nielsen  
Board Member

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