

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

ISLAND COUNTY CITIZENS' GROWTH)	
MANAGEMENT COALITION, et al.,)	No. 98-2-0023c
)	
Petitioners,)	ORDER ON
)	MOTIONS
v.)	TO DISMISS
)	
ISLAND COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
RESOURCE GROUP, INC., et al.,)	
)	
Intervenors.)	
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On January 29, 1999, Island County (County) filed three motions to dismiss:

1. Motion to dismiss State Environmental Policy Act (SEPA) claims for failure to exhaust administrative remedies and lack of standing.
2. Motion to dismiss issues not properly raised before Island County.
3. Motion to dismiss for lack of jurisdiction.

On February 11, 1999, we received responses to these motions from Island County Citizens' Growth Management Coalition (Coalition), Whidbey Environmental Action Network (WEAN), and Richard Wright (collectively, Petitioners). A motions hearing was held on February 16, 1999, in the Commissioners Hearing Room at the Island County Courthouse Annex in Coupeville, Washington.

Our decision on the County's motion (3), to dismiss issues 1, 4, 6, and 7 as they relate to regulations protecting critical areas other than fish and wildlife habitat, which were not substantively amended by Ordinance C-62-98, is deferred until after the hearing on the merits.

**(1) Motion to Dismiss SEPA Claims for Failure to Exhaust Administrative Remedies and Lack of SEPA
Standing**

Exhaustion of Remedies

The County claimed Petitioners had a duty to exhaust administrative remedies prior to bringing a SEPA challenge in this case. The County issued 14 declarations of nonsignificance (DNS) for a variety of associated development

regulations ultimately adopted in September 1998. Petitioner WEAN appealed only the DNS for Ordinance C-62-98 to the County Hearing Examiner as required by Island County Code. Petitioner WEAN perfected its appeal before the Hearing Examiner on June 13, 1998. The County moved to dismiss that appeal because of a lack of standing. The Hearing Examiner granted the motion on July 2, 1998. WEAN thereafter filed a Land Use Petition Act (LUPA) appeal in Superior Court. Prior to this hearing the County entered a stipulation for dismissal in Superior Court because the Hearing Examiner determination was not “ripe” for judicial review.

The County’s argument is premised on RCW 43.21C.075(2), *Citizens v. Spokane County* 114 Wn.2d 20 (1990) (*Citizens*) and the adoption of such a requirement by the Central Puget Sound Board in *Hapsmith v. Auburn*, #95-3-0075 (*Hapsmith*). Because we do not find any requirement in the Growth Management Act (GMA, Act) for exhaustion of administrative remedies prior to bringing the action before us, we deny the County’s motion on this ground.

RCW 36.70A.280(1) provides that a Growth Management Hearing Board (GMHB) “shall hear and determine” issues concerning compliance with:

1. RCW 36.70A;
2. RCW 90.58, relating to adoptions or amendments to the Shoreline Master Programs of planning jurisdictions; and
3. RCW 43.21C as it relates to (1) and (2).

The County’s reliance on RCW 43.21C.075(2) and WAC 197-11-680(3)(c) is misplaced. The exhaustion requirement set forth in the statute is specifically directed to actions that must be taken in order to qualify for *judicial* review. The actions of the parties in this case with regard to Ordinance C-62-98 demonstrates the irrelevancy of the use of a separate exhaustion test prior to review by a GMHB. An appeal was made to the Hearing Examiner who made his ruling based upon an inability of Petitioners to demonstrate standing under the two-prong test discussed below. That decision was appealed to Superior Court and the County agreed that it was not within the Superior Court’s LUPA jurisdiction. The Superior Court case was dismissed. One of the specific grounds set forth by the County for its stipulation was that the issue first had to be reviewed by a GMHB under RCW 36.70A.280. Thus, even if there was a requirement for exhaustion of administrative remedies under the authority of *Citizens* there would appear to be no adequate remedy for Petitioners here. The lack of ability for Petitioner to receive judicial review prior to this case indicates the futility of using the County process.

The determining factor for us, in addition to the clear language of RCW 36.70A.280(1), is found in RCW 43.21C.075 (4)(c). That statute requires issues of environmental compliance and final action to be decided at the same time. This case is essentially the same situation as found in the case of *Whatcom Environmental Council, et al., v. Whatcom County*, #95-2-0071 (FDO). In that case, a Hearing Examiner’s decision had been appealed to the Whatcom County Council in a separate process but had not been decided by the Council. Nonetheless, we found that under the provisions of the GMA we had jurisdiction to rule on the County’s SEPA compliance in issuing a DNS.

The County observed that the CPSGMHB adopted an exhaustion of administrative remedies test in *Hapsmith*. That decision appears to be based upon the conclusion that since GMHBs are quasi-judicial bodies that the rules for judicial review are applicable. We disagree with that conclusion. Rather, the quasi-judicial nature of a GMHB categorizes us as part of the administrative review process. Therefore, the exhaustion requirement for judicial review does not apply, particularly in light of the clear language of RCW 36.70A.280(1).

Additional support for our conclusion is found in WAC 197-11-130 *et. seq.* Under the provisions of RCW 43.21C.110, environmental review of GMA actions is to be accomplished contemporaneously with or prior to GMA review of proposals and actions. Essentially, the County's separate administrative process is irrelevant to our consideration of SEPA compliance for GMA actions.

SEPA Standing

The County argued that Petitioners did not have SEPA standing because they were unable to satisfy the two-prong standing requirements embodied in *Trepanier v. Everett*, 64 Wn. App. 380 (1992) (*Trepanier*). The County recognized that we have previously ruled adversely to that position in *Rasmussen v. Clark County*, #95-2-0055 (Order 5-6-95) (*Rasmussen*). The County pointed out that the CPSGMHB has consistently and continuously applied the rule that "GMA appearance standing does not automatically bestow SEPA standing upon a petitioner." The County's position is that petitioner participation in the GMA process is not enough to achieve SEPA standing. A petitioner must also be "aggrieved" under the *Trepanier* test. We reject the County's analysis.

RCW 36.70A.280(2) establishes four classes of petitioners:

1. The state, counties, or cities planning under GMA;
2. A person (including organizations) who have participated regarding the matter on which review is sought;
3. A person certified by the Governor;
4. A person qualified under RCW 34.05.530 (APA).

The County's argument first assumed that there is an exhaustion of administrative remedies requirement for GMHB review of SEPA issues. The argument then claims that since the County requires the two-prong standard to qualify for County review a GMHB review should be the same. As we have concluded above, there is no exhaustion of administrative remedies requirement for GMHB review. Additionally, even if there were, adopting the County's argument would put local governments in a position to impose any number of pre-conditions to qualify for GMHB review on SEPA issues. Clearly the Legislature has sole authority to impose conditions for standing. Under the clear language of RCW 36.70A.280(2), it has chosen not to do so.

The County also argued that by adopting the two-prong standard we would harmonize SEPA and GMA because any appeal of our decision on SEPA issues to Superior Court would require petitioner to establish SEPA standing under the two-prong analysis. The recent case of *Citizens v. Columbia County*, 92 Wn. App. 290 (1998), puts that assumption into serious question.

Likewise, the County's reliance on RCW 39.70A.290(3) that requires the fixing of a hearing date within ten days of the petition unless a GMHB finds that the person lacks standing does not address the issue of whether there is a different standing requirement for SEPA challenges than for other GMA challenges.

We rely on the language of *Rasmussen* that:

“We find no authority in the Act for us to engraft a different and more rigorous standing requirement for SEPA challenges than that which is set forth in the plain language of the statute.”

The County did not convince us that there was an ambiguity in the Act or between the Act and SEPA. However, even if we found an ambiguity there is nothing in the Act, particularly subsection .280(2), that indicates any legislative intent to treat the standing requirement for SEPA challenges any differently than any other GMA challenge.

Finally, the County challenged Petitioners' ability to question the adequacy of the final environmental impact statement and the various draft environmental impact statements because of a failure to comment on the “water resources” portions of those documents under the provisions of WAC 197-11-545 (lack of comment). Petitioners claimed that a variety of comments were made. We will defer decision on that issue until we have had an opportunity to review the full record at the hearing on the merits. It may well be that the County's challenge on this issue relates to the level of “participation” required by the GMA. The parties may, but are not required to, submit additional briefing on this issue at the hearing on the merits.

(2) Motion to Dismiss Issues not Properly Raised before Island County

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Island County challenged the standing requirement of all three Petitioners on certain issues. The challenges related to two separate contentions:

1. Issues now before us that were not raised at the local level for which the comment was so vague as to not fairly apprise the County of the party's specific concern; or
2. Issues that were raised where the County either took the action requested by Petitioners or the Petitioners agreed with the County at the time the issue was presented.

The County's argument began with the following propositions:

1. The County has the ultimate burden and responsibility for planning, harmonizing GMA's goals, and implementing the County's future. RCW 36.70A.3201.
2. A County has a broad range of discretion in complying with the goals and requirements of the Act.
3. The role of a GMHB is an appellate one because the review is based on the record (except in exceptional circumstances) and the standard of review is the clearly erroneous test.
4. Early and continuous public participation is central to the GMA.

We agree with all of the County's asserted propositions except that we believe that the role of a GMHB is in many respects an extension of the public participation theme of the GMA. The County's argument and conclusion is found on page 10 of its memorandum as follows:

"If the burden and responsibility of balancing and harmonizing the planning goals of the GMA is on the local jurisdiction, and if the discretion embodied in the GMA is to be exercised by the local jurisdiction, then the views and contentions of parties who are concerned about that balancing must be made known to the local jurisdiction."

The County's argument goes on to assert that if a party's position is first articulated during an appeal to a GMHB, or if the party changes its position before the GMHB from what it was at the local jurisdiction, the local jurisdiction has thus been "blind-sided."

We disagree with the County's conclusion because we find no provisions in the GMA that would restrict a party's ability to raise such issues under the conditions argued by the County. Under the motion presented, we are not asked to, nor do we express an opinion on, the scope of the phrase "regarding the matter for which review is requested." The County's assertion in this motion was that all issues of any nature must be raised at the local level. We reject that contention.

RCW 36.70A.280(2)(b) establishes standing:

"A person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested."

Under the clear language of this subsection a person or group must (1) participate and (2) the participation must be related to the matter for which review is requested. Nowhere in this section, or any other provisions of the Act, does the Legislature evidence an intent to bring into play the provisions of RCW 34.05.554 requiring an issue to be raised before an agency in order to preserve it for judicial review. Because there is a vast difference between judicial review of an agency action and a GMHB review of a local government legislative action under the GMA, we are not disposed, nor are we authorized by the GMA, to impose such a requirement in order to achieve standing before a GMHB. As observed by the Supreme Court in *Skagit Surveyors v. Friends* 135 Wn.2d 452 (1998), a GMHB has only that authority which is granted by the Legislature. We find no legislative authority in the Act that allows us to impose issue-specific requirements of RCW 34.05.554 as a condition precedent to review.

As to the issues that were raised at the local level, the County asked for dismissal on two grounds. First, the County alleged that it took the action initially requested by Petitioners and thus the issues before us are moot. Second, the County alleged that Petitioners agreed with its actions and thus the judicial concept of invited error should preclude our consideration of those matters.

In 1996 the Legislature amended RCW 36.70A.280(2)(b) to strike the term *appear* and insert the term *participate*. The choice of that term by the Legislature mitigates against the argument presented by the County concerning its legitimate aversion to being "blind-sided." There is not a definition of participation that precludes a person from changing his or her mind. Nor does participation mean that a person could not agree with the County at one stage and

disagree at a later stage.

Rather, the legislative history of the GMA demonstrates the Legislature's anti-blind-side decision. Simply put, the Legislature resolved that issue by directing that a GMHB review be on the record rather than *de novo*. That ultimately is the County's fallback position, particularly under a clearly erroneous standard of review. If, as alleged by the County, the Petitioners received all that they requested or agreed to the County's action, it would seem that the record would not provide sufficient evidence to support a claim now that the County's action was not in compliance with the Act. We are not precluding the County from making such an argument by our decision on this motion.

We are aware that the Superior Court for Whatcom County recently issued a ruling in an appeal from one of our cases that supports the County's contentions on issue-specific standing. We point out that we were only a nominal and non-participating party in that action and did not have an opportunity to present any arguments to the Superior Court. Under the provisions of RCW 2.06.040 such a Superior Court decision does not have precedential value outside of Whatcom County. We have considered the Court's decision but find that it does not apply in this case.

The County has raised many compelling policy reasons in support of its motion. Petitioners have raised compelling policy reasons in opposition. Petitioners point out that under the GMA scheme a GMHB does perform a public participation role in addition to its role as a quasi-judicial body. Because the Legislature has seen fit to provide an administrative remedy to local government legislative action, it would be counter to the legislative goal of encouraging public participation in the planning process to require the preparation of extensive and specific issue lists to the local government in order to preserve the administrative appeal option. Such a requirement could also overburden local governments and their public hearings without any corresponding benefit.

Ultimately, in our view, resolution of those valid and competing policy decisions rests with the Legislature.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this decision.

So ORDERED this 1st day of March, 1999.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

William H. Nielsen
Board Member

Les Eldridge
Board Member