BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

SKAGIT COUNTY GROWTHWATCH, Petitioner, v. SKAGIT COUNTY, Respondent.	NO. 03-02-0019 **ORDER GRANTING COUNTY'S MOTION TO DISMISS**

On September 15, 2003, Skagit County Growthwatch (SKG) filed a Petition for Review (PFR) challenging Skagit County's (County) adoption of Ordinance Nos. O20030006 and O20030021 along with their compliance with the State Environmental Policy Act (SEPA). The PFR was assigned Case No. 03-2-0019. These ordinances impose new development regulations for agricultural processing facilities. Interim Ordinance No. O20030006 was adopted on February 26, 2003. Permanent Ordinance No. O20030021 was adopted June 3, 2003.

On October 29, 2003, Skagit County filed a dispositive motion to dismiss the case in its entirety on the ground that Petitioner SKG lacks standing pursuant to RCW 36.70A.280(4) and WAC 242-02-530(4). In its motion, the County points out that SCG's only participation at the local level was to send two letters dated April 18, 2003 and June 3, 2003 which raised no issues in a way which would confer standing. Instead, SCG vaguely referenced the comments of unnamed others and urged the rejection of the ordinances.

The April 18, 2003 letter stated in its entirety:

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> I write this letter on behalf of myself and Skagit County Growthwatch. We are opposed to Interim Ordinance O20030006 and request that you recommend that this ordinance be repealed effective on the day of adoption. Further, we request that you recommend that the proposed permanent ordinance not be adopted. We incorporate by reference into this letter, all written and oral evidence, argument, and testimony presented by others in this proceeding that opposes amendments made by the interim and proposed permanent Ordinance.

Ex. 25(11); Record at 104

The June 3, 2003 letter stated in its entirety:

> I write this letter on behalf of my client, Skagit County Growthwatch. We are opposed to Interim Ordinance O20030006 and request that the BOCC repeal this Ordinance effective on the day of adoption and not adopt any similar permanent ordinance. We incorporate by reference into this letter as our comments, all written and oral evidence, argument, and testimony presented by others in this proceeding that opposes the Interim Ordinance or the making of Interim Ordinance permanent.

Ex. 36(5)

SCG did not appear at the hearing before the planning commission or the Board of County Commissioners (BOCC) and did not submit any additional evidence or comment.

In its motion, the County points out that RCW 36.70A.280(4), as amended by Ch. 332, Laws of 2003, provides:

> To establish participation standing under subsection (2)(b) of this section, a person must show that his or her participation before the county or city was reasonably related to the person's issue as presented to the board.

SCG claims participation standing in this case. However, neither of the letters submitted by SCG raises any specific issues that are reasonably related to the very detailed issues presented in the PFR.

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The County explains on page 4 of its motion that through the above legislative change to the participation standing statute, the Legislature has codified the rules of law established by the Court of Appeals in *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657, 997 P.2d 405 (2000). In that case, the Court, in reviewing a decision by this Board, ruled that the GMA's participation standing provisions required a petitioner's comments before the local jurisdiction to be reasonably related to the issues that the petitioner later raised before the hearings board. *Wells* at 673.

The County contends that, since SCG supplied no specific evidence or comments, and only generally referenced everyone else's comments, the County could not be required to sift through every comment in the oral and written record to try to figure out which of SCG's PFR issues are reasonably related to others' comments. The GMA imposes no such requirement, states the County. The *Wells* court referred to the Central Puget Sound Hearings Board (Central Board) case of *Alpine v. Kitsap County*, CPSGMHB No. 98-3-0032c (Order on Dispositive Motions, October 7, 1998), and noted:

> We conclude that the *Alpine* approach furthers the GMA's goals of encouraging meaningful public participation in the local government planning process and achieving local government compliance with the GMA. Persons who wish to raise issues before a growth management hearings board should participate actively in the planning process for the geographic areas or subjects of interest to them. The GMA assumes the local government will have an opportunity to address those concerns before an appeal to the growth management hearings board.

Alpine at 674.

The County points out that in this case, the County had no opportunity to address the issues of particular interest to SCG since SCG identified no such issues in its comment letters. The County states on page 7 of its motion, "What SCG has done here is to attempt to preserve its right to appeal everything, while telling the County nothing about its real, substantive concerns with the Ordinance."

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SCG answers in its November 10, 2003 response with these major points:

(1) SCG's two comment letters each request that instead of adopting a permanent ordinance related to Interim Ordinance 020030006, the County should repeal the Interim Ordinance in its entirety and not adopt a related permanent ordinance.

(2) Both challenged ordinances specifically deal with the expansion of uses related to agriculture by allowing these uses virtually anywhere in the rural (RRV) lands and in the agricultural (AG-NRL) and other designated resource lands without any provision to protect rural character or protect resource land viability.

(3) The SCG request to repeal the interim ordinance and not adopt a permanent ordinance was a request to not weaken existing controls on these agricultural-related uses.

(4) One of the members of SCG is Citizens for Zoning and Code Compliance (CZCC). Gerald Steel represents both SCG and CZCC.

(5) On April 18, 2003 and June 3, 2003, Gerald Steel prepared and faxed to the County extensive comments for CZCC. Ex. 36-4.

(6) Rather than faxing a second full set of these documents to the County to secure standing for SCG, Steel faxed a one-page letter on behalf of SCG that incorporated all of the written evidence, argument, and testimony of the CZCC comments and all other comments opposing the amendment in those proceedings.

(7) Incorporation by reference is an acceptable technique for incorporating documents into a record. In this case, all of the documents referenced were already in the record and SCG was just incorporating this evidence, argument, and testimony as its own. This is a method of administrative efficiency that should be supported by this Board.

(8) There is no prejudice to the County from this technique. The County need do no extra work to find documents and put them in the record because all of the documents incorporated by reference are already in the record.

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(9) The County has already been put on notice of the issues it must address by the documents already in the record, and so there is no loss of notice of issues to the County by SCG's incorporating the issues and evidence submitted by others into its written comments.

(10) Judicial efficiency should prevail and SCG should be allowed to incorporate other comments in the record as its own comments by a simple "incorporation by reference" statement as it has done.

(11) SCG should be allowed standing based on the comments regarding the subject ordinances submitted by one of its members and others because those comments have been properly incorporated by reference into timely submitted comments by SCG.

(12) The County's reliance on the 2003 amendment to RCW 36.70A.280(4) is misplaced, since Ch. 332, Laws of 2003, had not been passed by the Legislature when SCG sent its letters to the County to reach participation standing.

Skagit County began its November 14, 2003 reply with the following:

> Skagit County Growthwatch (SCG) claims that it has achieved participation standing in this case by "incorporating by reference" the comments of others. Even if the Growth Management Act (GMA) allows that, SCG's attempt was fatally defective due to the complete lack of specificity in its letters with reference to either arguments or identify of the documents it claims it was referencing. Further, under the GMA, comments by one party at the local level cannot achieve GMA standing for a second party where the commenting party does not explicitly state that it speaks for or represents the second party. SCG lacks standing and this petition should be dismissed.

County's Reply Re: Dispositive Motions at 1.

The County supported this statement with the following arguments:

(1) Although SCG claims that CZCC is a member of SCG, there is nothing in the record to prove that allegation, nor has SCG referenced anything in the record to support that claim.

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(2) There is nothing in Mr. Steel's letter on behalf of CZCC that indicates that those comments were on behalf of SCG. That defect is fatal to SCG's claim.

(3) In *Evergreen Islands v. Skagit County*, WWGMHB No. 00-2-0046c, this Board denied Skagit County's motion to dismiss one of the petitioners (Evergreen Islands) in that case due to lack of standing where two members spoke at the hearing but did not claim they were members of Evergreen Islands. On appeal to Superior Court, Judge James Allendoerfer ruled that Evergreen Islands did not have standing and reversed the Board's ruling on that issue. Mr. Steel is aware that this is the law for GMA standing in Skagit County since he represented Evergreen Islands in that judicial appeal.

(4) SCG letters did not properly "incorporate by reference" Mr. Steel's comments on behalf of CZCC, even if GMA allowed this technique to achieve standing. Mr. Steel's letters on behalf of SCG do not specifically reference the letters he wrote for CZCC by date, by author, by issue, nor in any other way that would allow the County to identify what specific issues were a concern to SCG.

(5) All Mr. Steel had to do was state in his letters from CZCC that his comments were also on behalf of SCG. That would not have taken more than another line of letters. However, he did not do so, presumably because those letters were not written as a representative of SCG.

(6) Alternatively, SCG could have simply set forth its issues in its letters as it did in its Petition for Review before this Board in a letter that would have taken little more than a page. However, SCG failed to do that.

(7) Although SCG states that the County was not prejudiced by its lack of specificity, the County was prejudiced because it has a right to demand that each commenter be specifically aligned with the issues of interest to it so that the County may consider those issues, arguments and concerns knowing which party is raising them. As the County pointed out in its dispositive motion, the appeals court in *Wells* held that GMA guaranteed that the County know these things.

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(8) Even if this were not the case, a lack of prejudice to this local jurisdiction does not confer standing on a petitioner who fails to otherwise comply with GMA's standing requirement.

(9) Contrary to SCG's assertion that the 2003 amendment to RCW 36.70A.280(4) does not apply to this case, the GMA standing requirement (that a comment be "reasonably related" to an issue raised before the hearings board) was already law from the *Wells* opinion. Thus, applying the new amendment to a petition filed with the Board after its effective date, where the action at the local level relating to standing occurred before its effective date, does not prejudice SCG.

(10) Since there is no nexus between SCG's participation in the record and the issues raised here, SCG lacks standing in this case.

BOARD DISCUSSION AND DECISION

After carefully considering all of the above briefing, we held a telephonic motions hearing on November 19, 2003. Attorney Board Member Margery Hite had recused herself due to a potential conflict, since she owns designated agricultural land in Skagit County. Since neither Board Member Nan Henriksen nor Holly Gadbaw is an attorney, we asked Ed McGuire, attorney member of the Central Puget Sound Growth Management Hearings Board, to listen in and review our decision for proper legal form. Since Mr. Steel voiced concern about Mr. McGuire's participation, we have not consulted with Mr. McGuire since the hearing and have not had this decision reviewed by him.

On November 21, 2003, we issued an advance notice of decision which stated:

> Ms. Gadbaw and I have carefully reviewed your briefings and exhibits, listened to your oral arguments, and have reached the decision to grant the County's motion to dismiss Skagit County Growth Watch's (SCG) petition due to SCG's lack of participatory standing. We agree with the County that RCW 36.70A.280(2), as construed by the Court of Appeals in *Wells v* Western *Washington Growth*

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> *Management Hearings Board*, 100 Wn. App.657, 997 P.2d 405 (2000) does not allow a petitioner to achieve participatory standing on an issue by a letter that vaguely references unnamed portions of the record submitted by unnamed other participants, as SCG has done in this case.
>
> Due to an extremely heavy workload, it may be some time before we can issue an official order reflecting the above decision. We are sending this advance notice so that Mr. Steel will not begin writing petitioner's opening brief. We also want to assure Mr. Steel that neither Ms. Gadbaw nor I have spoken to Mr. McGuire since yesterday's hearing.

As we stated in the advance notice, having carefully reviewed the parties' briefings, exhibits, and oral arguments, we find the County's arguments to be persuasive. We agree with the County that RCW 36.70A.280(2), as construed by the Court of Appeals in *Wells*, does not allow a petitioner to achieve participatory standing by sending a letter that vaguely references unnamed portions of the record submitted by unnamed other participants. The *Wells* court made it perfectly clear to this Board that we were to tighten up our interpretation of the GMA's participatory standing requirements. The court ruled that the GMA's participation standing provisions require petitioner's comments before the local jurisdiction to be reasonably related to the issues that petitioner later raised before the hearings board. *Alpine* at 673. We believe it is immaterial whether the amendment to 36.70A.280(4) was passed before or after the adoption of the contested ordinance, since we are relying on the Court of Appeals decision in *Wells* in this decision.

We agree fully with the public participation goal of encouraging meaningful public participation in the local government planning process. Persons who wish to raise issues before us should participate actively in the local planning process and inform the local government about their concerns. The GMA is based on the assumption that the local government will have an opportunity to address those concerns before an appeal is filed to the growth board.

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In this case, SCG merely told the local government that they were opposed to the ordinance in general. This provided no meaningful information to Skagit County as to why SCG opposed the ordinance. Further, SCG stated, "We incorporate by reference into this letter as our comments, all written and oral evidence, argument, and testimony presented by others in this proceeding that opposes the Interim Ordinance or the making of Interim Ordinance permanent." As the County says, "What SCG has done here is to attempt to preserve its right to appeal everything, while telling the County nothing about its real, substantive concerns with the Ordinance." (Emphasis added). This is contrary to GMA's requirement for "meaningful public participation". The GMA imposes obligations on both local governments and citizens in the public participation process. Local governments have the responsibility to ensure citizens have opportunities to present concerns about local government proposals and have them reasonably considered. Citizens have the responsibility to define reasonably what those concerns are. Petitioner in this case has not fulfilled this responsibility.

For all the reasons stated in the county's argument as laid out in this decision, we grant the County's motion to dismiss this case. Western Washington Growth Management Hearings Board Case No. 03-2-0019 is dismissed in its entirety.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

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

SO ORDERED this 22nd day of January 2004.

Nan A. Henriksen

Nan Henriksen, Board Member

Holly Gadbaw

Holly Gadbaw, Board Member

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WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD
Case No. 03-2-0019
Skagit County Growthwatch v. Skagit County

DECLARATION OF SERVICE

I, MICHELE TURNER, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am an Assistant for the Western Washington Growth Management Hearings Board. On the date indicated below and manner indicated below, an Order Granting County's Motion to Dismiss in the above-entitled case was sent to the following:

Skagit County Growthwatch
2545 NE 95th St.
Seattle, WA 98115
[X] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile

Gerald Steel, PE
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Skagit County-Commissioners
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[ ] By Legal Messenger
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DATED this 22nd day of January, at Olympia, Washington.

Michele Turner
MICHELE TURNER

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