Supreme Court No. 100934-8
Court of Appeals No. 54915-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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KENMORE MHP LLC; JIM PERKINS; and KENMORE VILLAGE MHP, LLC, Petitioners,

v.

CITY OF KENMORE; ENVIRONMENTAL LAND USE HEARINGS OFFICE; and the GROWTH MANAGEMENT HEARINGS BOARD FOR THE CENTRAL PUGET SOUND REGION, Respondents.

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# RESPONDENT CITY OF KENMORE'S ANSWER TO PETITION FOR REVIEW

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INSLEE, BEST, DOEZIE & RYDER, P.S.
Dawn F. Reitan, W.S.B.A. #23148
Curtis J. Chambers, W.S.B.A. #42984
Attorneys for Appellant City of Kenmore
10900 NE 4th Street, Suite 1500
Bellevue, Washington 98004
Tel: (425) 455-1234 / Fax: (425) 635-7720
E-mail: dreitan@insleebest.com
cchambers@insleebest.com

LAW, LYMAN, DANIEL, KAMERRER &
BOGDANOVICH, P.S.
Jeffrey S. Myers, W.S.B.A. #16390
Attorney for Appellant City of Kenmore
P.O. Box 11880
Olympia, WA 98508-1880
Tel: (360) 754-3480 / Fax: (360) 357-3511
E-mail: jmyers@lldkb.com

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Washington Cases

**Federal Cases**



**Washington Statutes**

**Rules**



**Growth Management Hearings Board Orders**

## I. INTRODUCTION

This Court should deny the Petition for Review because the Court of Appeal's published opinion gives appropriate deference to the Growth Management Hearings Board (Board), and because Petitioners due process rights have not been infringed. Petitioners admit they did not actually comply with the Board's service requirements, and they do not dispute the Board's finding that they did not have a justifiable excuse for failing to actually comply with the Board's service requirements.

An agency is given great deference when it interprets its own rules, and its decision will only be overturned if it was arbitrary and capricious. On August 29, 2019, the Board, in a 10-page order, dismissed Petitioners Kenmore MHP LLC, Jim Perkins, and Kenmore Village MHP, LLC's (Petitioners) Petition for Review (Petition) challenging the City of Kenmore's (City) Ordinance No. 19-0481. The Board

dismissed the Petition because it found that Petitioners failed to substantially comply with the Board's service requirements, as laid out in WAC 242-03-230. Petitioners appealed the Board's decision. On July 22, 2020, in an approximately one-page order, the Thurston County Superior Court (Superior Court) improperly replaced the Board's decision with its own, and remanded the matter to the Board. On February 8, 2022, Division Two of the Washington State Court of Appeals issued a published opinion upholding the Board's decision to dismiss Petitioners' Petition. This Court should let the opinion stand, as it is well reasoned and gives the proper deference agencies are afforded under the law.

The Board was created by the state Legislature. The Legislature directed the Board to create rules and regulations to carry out its mandated duties, which include the expeditious and summary dispositions of appeals. RCW 36.70A.270(7). To effectuate its mandate, 25 years ago, the Board adopted WAC

242-03-230, which establishes the service requirements of a petition. Relevant to this matter, a respondent (the City here) must be served with, and receive, the petition on or before the date the petition is filed with the Board. WAC 242-03-230(2)(a). WAC 242-03-230(4) states the Board may dismiss a petition if the petitioner fails to substantially comply with WAC 242-03-230.

There is no dispute that Petitioners failed to actually comply with WAC 242-03-230, as they did not serve the City with their Petition on or before the date they filed it with the Board. After reviewing all the evidence presented by both parties, the Board decided that, based off the facts presented to it, Petitioners failed to substantially comply with WAC 242-03-230, and the Board thus dismissed the Petition. Specifically, the Board found that (1) the City did not have actual knowledge of the filing of the Petition, and (2) Petitioners did not have a justifiable excuse for their failure to properly serve their

Petition. The Court of Appeals has held that the Board acted within its discretion and the law when it dismissed the Petition, which is the correct ruling.

## II. ISSUE PRESENTED FOR REVIEW

While Petitioners have the right to frame their issue however they would like, the City believes what Petitioners are asking is whether this Court should decide that all agencies must explicitly find that a party was prejudiced by another party's failure to properly serve a petition before the agency can dismiss a petition for failure to comply with service rules? As held by the Court of Appeals, the answer is no.

## III. STATEMENT OF THE CASE

### A. 2018 Comprehensive plan amendments.

On November 26, 2018, the Kenmore City Council adopted Ordinance No. 18-0476 ("Ord. 18-0476"), which, among other things, amended the City's Comprehensive Plan to: 1) amend Land Use (LU) Element Policy 2.1.2 to create a

Manufactured Housing Community (MHC) Land Use/Zone District; 2) adopt MHC LU Element Policies and 3) amend Figure LU-3, the Kenmore Land Use Plan, to redesignate two existing mobile home parks to MCH. Ord. 18-0476 was published on November 29, 2018. No person or entity timely appealed Ord. 18-0476, and it became final and valid. CP 96, 97-98, 99-182.[1]

**B. 2019 Development regulations amended.**

On April 15, 2019, the City Council adopted Ordinance No. 19-0481 ("Ord. 19-0481"), which amended the City's development regulations to implement Ord. 18-0476. CP 96, 97-98, 137-182. The City Council adopted Ord. 19-0481 to implement and align the City's zoning code with the comprehensive plan amendments adopted under Ord. 18-0476.

[1] Unless otherwise cited to, CP 99-182 were not submitted with this Answer, as they are not necessary but are the actual ordinances and supporting documents.

Ord. 19-0481 was published on April 18, 2019. *Id.*[1]

Petitioners filed their Petition challenging Ord. 19-0481 on June 14, 2019, with the Board. CP 1, 89, 94. The City was not served with the Petition until June 17, 2019. CP 97-98. At no time prior to service on June 17, 2019, did the City have actual knowledge of the Petition filed with the Board on June 14, 2019. *Id.* The City was open during its regular business hours (9:00 a.m. – 5:00 p.m.) on June 10, 2019, June 11, 2019, June 12, 2019, June 13, 2019, and June 14, 2019. *See id.*

**C. <u>Summary judgment dismissal.</u>**

On July 29, 2019, the City filed a motion to dismiss because Petitioners failed to substantially comply with WAC 242-03-230. CP 95. Petitioners responded on August 7, 2019, and the City replied on August 19, 2019. CP 183-184. On August 29, 2019, after reviewing all submissions, the Board

[1] The ordinance the City's ordinance was modeled off (CP 139) was held to be lawful, and there is no reason to believe the City's ordinance will not also be held to be lawful. *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180 (9th Cir. 2012).

dismissed the Petition for failure to substantially comply with WAC 242-03-230. CP 16-25. Specifically, after in-depth analysis, the Board found

> [t]he opposition to the City's motion for dismissal from the Petitioners ignore[s] the plain language of the GMHB rules of practice and procedure that every attorney practicing before the Board should be prepared to comply with, unless a justifiable excuse as in *Your Snoqualmie Valley*, or substantial compliance is present in the facts of that particular case. Here, the Petitioners cannot demonstrate any reason why the City was not served in a timely manner, any explanation for their failure to meet the requirements of the regulation, relying instead on arguments that are factually untrue or on cases that do not apply.

CP 22. After additional analysis, the Board further found

> That there is no evidence that the [City] had actual knowledge of the action, nor that the Petitioners made any effort to comply with the regulation requiring prior or contemporaneous service to the [City], nor that the doctrine of substantial compliance applies to these facts.

CP 25. After finding Petitioners failed to substantially comply with WAC 242-03-230, the Board dismissed the Petition. *Id.*

### D. Superior Court order and Court of Appeals Decision.

The Petitioners timely appealed the Board's dismissal of their Petition, and on July 22, 2020, the Superior Court, in its administrative appellate capacity, reversed the Board's dismissal. CP 427-28. The City timely appealed the Superior Court's July 22, 2020, order to the Court of Appeals. On February 8, 2022, the Court of Appeals issued its published opinion upholding the Board's dismissal of the Petition.

## IV. SUMMARY OF ARGUMENT

Notice of the proceedings is an indispensable requirement to ensure a party's due process rights are protected, and as such, the Board has the authority to create rules to ensure notice is given. Not only is notice an integral part of a party's due process rights, but the State Legislature mandated that the Board create rules to carry out its statutory duties. RCW 36.70A.270(7). 25 years ago, the Board determined that,

in order to carry out its statutory duties (including the requirement to issue a final order within 180 days of **filing** of a petition), and provide parties with due process, it needed to create a rule that required the petitioner serve the petition on the respondent. Thus, the Board created WAC 242-03-230, which requires the petition to be served on the respondent the same day or before the petition is filed with the Board. WAC 242-03-230(2). To enforce its service rule, the Board created WAC 242-03-230(4), which states "[t]he board may dismiss a case for failure to substantially comply with this section." *Id.*

If a party fails to actually comply with the Board's service rule, the Board will determine whether the party substantially complied with the service rule. To determine whether a petitioner has substantially complied with the Board's service requirements, the Board has adopted a test that has been used in the federal courts since 1984. CP 325-42 (*Your Snoqualmie Valley, et. al. v. City of Snoqualmie*, GMHB No.

11-3-0012 (Order on Motions, March 8, 2012) at 5 (citing *S.J. v. Issaquah School District No. 411*, WL 764916 at *2, U.S. District Court, W.D. of Washington at Seattle (March 8, 2007), citing *Borzeka v. Heckler*, 739 P.2d 444, 447 (9th Cir. 1984))). To determine substantial compliance, the Board looks to see whether the petitioner satisfies four requirements:

> (a) the party that had to be served personally had actual notice, (b) the [respondent] would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the [petitioner] would be severely prejudiced if his [petition] were dismissed.

CP 18, (citing *Your Snoqualmie Valley* at 5, Case No. 11-3-0012 (Order on Motions, March 8, 2012)). In the instant matter, the Board found Petitioners failed to satisfy (a) and (c), and as such, dismissed the Petition. CP 25.

It is undisputed in the instant matter that the City did not have actual notice of the filing before June 17, 2019. CP 97-98. The only evidence Petitioners submitted for why they failed to serve their Petition timely was that the Petition was not given to

the process server in time to guarantee the Petition would be served on June 14, 2019. CP 185. Petitioners acknowledge that the process server informed Petitioners that the process server could not guarantee service on June 14, 2019, and yet Petitioners took no additional steps to attempt to comply with the Board's service rules. *See Id.* Petitioners also admit that there is no evidence that the Petition could not have been driven from Petitioners' attorney's office to the City timely on June 14, 2019. *Id.*[1]

The City would like to reiterate that there has never been any evidence submitted to support the statement that it was traffic that caused the Petition to not be timely served. This must be reiterated because throughout this appeal process, Petitioners have continually stated that it was traffic that caused their failure to actually comply. The statements Petitioners

[1] According to Google Maps, the distance between Petitioners' attorney's office and Kenmore City Hall is 14.7 miles. On January 26, 2021, at 2:32 p.m., the drive time between the two was 23 minutes.

continue to put forth as evidence of such come from the declaration of Petitioners' attorney, which states in relevant part

> At 2:37 p.m., there was insufficient time for a process server to serve the City of Kenmore that day. Regardless of whether it was physically possible given traffic conditions for someone to have left my office with a copy of the Petition and arrive at Kenmore City Hall that day, the legal messenger service which we use indicated it needed to have the copy of the Petition to serve earlier than 2:37 p.m. to guarantee service that day. Because the Petition was not ready for service earlier in the day to guarantee service on Friday, June 14, 2019, the legal messenger service served the Petitioner on the following Monday, June 17, 2019.

CP 185. This is the only evidence Petitioners submitted to the Board for their reason for failing to comply with the Board's service rules. Furthermore, the Court of Appeals did not hold that it was traffic that caused the Petition to not be properly served. Rather, the Court of Appeals stated, "[a]pparently due to traffic, the legal messenger was unable to serve the City on June 14 before the close of business." P. 2 of COA opinion.

While Petitioners are not requesting this Court take up the issue of whether they had a justifiable excuse, and thus waived the right to contest they did not, Petitioners continue to put forth the false narrative that it was traffic that stopped them from timely serving.

## V. ARGUMENT

### A. Standards of review.

The Court reviews the Board's decision.

The judicial review of a Growth Management Board's decision is based on the record made before the Board. *The Cooper Point Ass'n v. Thurston County*, 108 Wn. App. 429, 436, 31 P.3d 28 (2001). "The burden of demonstrating that the Board erroneously interpreted or applied the law, or that the Board's order is not supported by substantial evidence, remains on the party asserting the error – in this case, [Petitioners]." *Id*. "[The Court] review[s] the Board's legal conclusions de novo,

giving substantial weight to the Board's interpretation of the statute it administers." *Id*.

The Scope of review of an order alleged to be arbitrary and capricious is narrow, and the challenger carrier a heavy burden. *Brown v. State, Dept. of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 16, 972 P.2d 101 (1998) (internal quotes and citation omitted).

> Arbitrary and capricious action is willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached. Action taken after giving respondent ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary and capricious.

*Id.* (internal quotes and citations omitted).

A court will not set aside a discretionary agency decision "absent a clear showing of abuse." *ARCO Prods. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995).

In reviewing agency action, the court views the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-fining authority. *Arishi v. Washington State University*, 196 Wn. App. 878, 895, 385 P.3d 251 (2016). Petitioners bear the burden of showing invalid action, and relief is only available to them if they show they were substantially prejudiced by the action complained of. *Id.* (citing RCW 34.05.570(1)(a)). To determine whether a party was prejudiced by agency action, they must show a reasonable probability that had they been provided a full adjudication, the result of the proceeding would have been different. *Arishi*, 196 Wn. App. at 908.

A court will only invalidate a rule if it finds (1) the rule violates constitutional provisions; (2) the rule exceeds the statutory authority of the agency; (3) the rule was adopted without compliance with statutory rule-making procedures; or (4) the rule is arbitrary and capricious. RCW 34.05.570(2)(c).

### B. The Board has the statutory authority to adopt WAC 242-03-230.

The State Legislature explicitly authorized and directed the Board to create rules to carry out its decision-making functions in RCW 36.70A.260(7), which states in relevant part

> [a]ll proceedings before the board … shall be conducted in accordance with such administrative rules of practice and procedure as the board prescribes. The board shall develop and adopt rules of practice and procedure, including rules regarding expeditious and summary disposition of appeals…

As recognized by the Board

> The GMA [Growth Management Act] contains no express language requiring service of a PFR [Petition for Review] on any respondent. The GMA does, however, require the Board to adopt "rules regarding expeditious and summary disposition of appeals." [RCW 36.70A.270(7)] The requirement for the Petitioner to promptly serve the PFR on the respondent city, county or state agency has therefore been a part of the Board's Rules of Practice and Procedure from their first promulgation. [WAC 242-03-230(2), formerly WAC 242-02-230(1)] Disposition of cases will not be "expeditious" if service requirements are disregarded.

CP 327 (*Your Snoqualmie Valley, et. al., v. City of Snoqualmie*, Case No. 11-3-0012 (Order on Motions, March 8, 2012) at 3). Thus, the Board has had a published rule since its inception that a party must serve the petition on the respondent on or before the date the party files it, and the Board has affirmatively stated that it has determined that if parties are allowed to disregard the Board's service requirements, then it will not be able to dispose of cases expeditiously, which is a mandate from the Legislature.

It is important to remember that the Legislature has mandated that the Board issue its final order on a petition within 180 days of receipt of the petition. RCW 36.70A.300(2)(a). The Board has no authority to extend this deadline. Ensuring that respondents have the petition before or at the same time the Board receives the petition ensures that the Board can comply with its statutory requirement to enter final orders within 180 days, as the rule ensures that respondents are

given notice at the beginning of the case. Not only does this ensure that the Board obtains jurisdiction over the respondent at the beginning of the case, but it also ensures that the respondent has the most time allowed for by law to present its defense in the matter, as the Board has no mechanism for extending the time allowed for it to provide a ruling. The Board acted well within its statutory authority when it created WAC 242-03-230 to ensure the expeditious and summary disposition of appeals, and to ensure it is able to issue its final order on an appeal within 180 days of filing. RCW 36.70A.270(5), (7).

### C. The Board has the authority to adopt its substantial compliance test.

"An agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its interpretation is entitled to considerable deference by the courts." *D.W. Close Co., Inc. v. Washington State Dept. of Labor and Industries*, 143 Wn. App. 118, 129, 177 P.3d 143

(2008) (internal quotes and citations omitted). When it enacted WAC 242-03-230, the Board decided to allow for a party to substantially comply with its service requirements. WAC 242-03-230(4). To determine whether a party has substantially complied with service pursuant to WAC 242-03-230, the Board looks to see if the petitioner satisfies four requirements:

> (a) the party that had to be served personally had actual notice, (b) the [respondent] would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the [petitioner] would be severely prejudiced if his [petition] were dismissed.

CP 329 (*Your Snoqualmie Valley*, Case No. 11-3-0012 (Order on Motions, March 8, 2012) at 5). In the instant matter, the Board found Petitioners failed to satisfy (a) and (c), and as such, dismissed the Petition.[1] CP 25.

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[1] There is nothing unique or wrong with the Board requiring a party have a justifiable excuse for failing to properly serve. For example, excusable neglect will often be a key factor when a court determines whether to set aside a default order, and the trial court has considerable discretion when determining to set aside a default order. *Sellers v. Longview Orthopedic Associates, PLLC*, 11 Wn. App.2d 515,

The Board has the authority to determine whether its rules are complied with, is granted deference in making determinations on its rules and the laws it administers, and absent a due process violation, the Court should not substitute a different test than the one adopted by the Board. *W.D. Close Co., Inc.* 143 Wn. App. at 129; *See also Stevens County v. Futurewise*, 146 Wn. App. 493, 502, 192 P.3d 1 (2008) (Board is given deference on statutes it administers). Petitioners did not argue below that the substantial compliance test adopted by the Board violated their due process rights because it does not. In fact, Petitioners have never even attempted to perform a *Mathews* analysis, which is a prerequisite to even argue that its due process rights have been violated. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *see Arishi v.*

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525, 455 P.3d 166 (2019). *See also In re Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999) (to set aside a default, a party must show excusable neglect and due diligence. To set aside a default judgment, a party must show (1) excusable neglect, (2) due diligence, (3) a meritorious defense, and (4) no substantial hardship on opposing party.)

*Washington State University*, 196 Wn. App. 878, 899, 385 P.3d 251 (2016) (performing a *Mathews* due process analysis).

The method chosen by the Board does not need to be the most just and reasonable, but rather only a reasonable way of determining whether Petitioners substantially complied with WAC 242-03-230. *See ARCO Prods.*, 125 Wn.2d at 814. Unless a decision is arbitrary and capricious, a Court must uphold an agency decision, even if the Court disagrees with the decision. *Stewart v. State, Dept. of Social & Health Services*, 162 Wn. App. 266, 273, 252 P.3d 920 (2011). The Board's substantial compliance test is the same test that has been used in the federal courts since at least 1984. CP 329 (*Your Snoqualmie Valley*, Case No. 11-3-0012 (Order on Motions, March 8, 2012) at 5 (citing *S.J. v. Issaquah School District No.* 411, WL 764916, at *2, U.S. District Court, W.D. of Washington at Seattle (March 8, 2007), citing *Borzeka v. Heckler*, 739 P.2d 444, 447 (9th Cir. 1984))). The substantial compliance test

adopted by the Board does not violate Petitioners' due process rights, and as such, is valid.

### D. The Board's decision to dismiss the Petition is not arbitrary and capricious.

The Petition for Review should also be denied because Petitioners failed to argue below that the outcome would have been different had the appeal been heard. *Arishi*, 196 Wn. App. at 908 (petitioner must show a reasonable probability that had there been a full hearing the outcome would be different.); RAP 2.5*; State v. Sinrud*, 200 Wn. App. 643, 653, 403 P.3d 96 (2017) ("But, under RAP 2.5(a), an argument not made below is waived on appeal.)

Furthermore, the facts presented to the Board are more than enough to uphold the Board's decision to dismiss the Petition. "A[n] [agency] decision is arbitrary and capricious if it is willful and unreasoning and disregards or does not consider the facts and circumstances underlying the decision." *Stewart*,

162 Wn. App. at 273. "A decision is not arbitrary or capricious if there is room for more than one opinion and the decision is based on honest and due consideration, even if this court disagrees with it." *Id*. Action taken after giving respondent ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary and capricious. *Brown*, 94 Wn. App. at 16.

Petitioners admit they did not serve the Petition as required by WAC 242-03-230, and Petitioners provided the Board with no evidence to establish two of the four elements of the Board's substantial compliance test. CP 18, 22, 25. First, Petitioners did not even attempt to argue that the City had actual knowledge of the Petition prior to filing, and the City provided evidence that it did not. CP 97-98. Second, the Board found that Petitioners statement that the Petition was not given to the process server in enough time to serve it the same day the

Petition was filed did not constitute a justifiable excuse. CP 22, 25, 185.

Petitioners admit that they knew there was a risk that the process server would not be able to timely serve the Petition (as the process server told them this), and admit they took no action to ensure they complied with WAC 242-03-230. CP 185. Petitioners admit that there is no evidence to support the proposition that additional efforts could not have been taken by Petitioners to inform the City of its filing of the Petition and to actually serve the Petition as required by WAC 242-03-230. *Id.* To the contrary, the evidence shows that Kenmore's City Hall was only 14.7 miles away, and that the distance could be covered in under 30 minutes. *See State ex rel. Wenatchee-Beebe Orchard Co. v. Superior Court of Chelan County*, 57 Wn.2d 662, 666, 359 P.2d 146 (1961) (Supreme Court took judicial notice of distance between two points). Whether to dismiss a case due to failure to substantially comply with service

requirements is a case specific analysis, with each instance having different facts that are weighed by the Board to determine whether to dismiss. CP 24. In the instant matter, the Board reviewed all the evidence, and determined that Petitioners did not substantially comply, and thus dismissed the Petition. CP 16-25.[1]

In *Your Snoqualmie Valley*, the Board made clear that if the petitioner fails to comply with WAC 242-03-230, then it must provide a justifiable excuse for why it failed to do so. CP 325-342. Petitioners' lack of diligence, and thus lack of justifiable excuse, in the instant matter is in marked contrast to the facts in *Your Snoqualmie*, where the Board found substantial compliance. In *Your Snoqualmie*, Petitioner attempted to personally serve the City on multiple occasions, but was unable to timely do so because (1) of an unannounced early pre-Christmas closure of City Hall, and then (2) the

[1] As found by the Court of Appeals, Petitioners have presented no case with indistinguishable facts to this case where the Board has held differently.

absence of the Mayor and City Clerk on December 27, which was the next business day. It was only after those two failed efforts that petitioner in that case served via FedEx. CP 330. Under those facts, the Board determined petitioner was reasonable and diligent in efforts to serve the City. *Id*. An important fact that the Board stressed in *Your Snoqualmie* when making its ruling was that it found that the petitioner's failure to timely serve was due to circumstances outside the petitioner's control (the obstacles to service were "the City's making, not a result of Petitioners' misjudgment.") *Id*.

In the instant matter, there were no unannounced closures of City Hall, and the City Clerk was available for service at the City the entire week prior to the filing deadline, on the day Petitioners filed, and on the day of the filing deadline, and despite actual knowledge that the Petition may not be timely served, Petitioners chose to make no effort to comply WAC 242-03-230. Under these facts, the Board determined that

Petitioners failed to provide a justifiable excuse for their failure to comply with WAC 242-03-230, and dismissed the action. This was not arbitrary and capricious, but rather a reasoned decision after Petitioners were given every chance to explain to the Board why they substantially complied. This Court should uphold the Board's dismissal.

### E. The Board has never required a showing of prejudice as a prerequisite for dismissal of an untimely served petition.

Petitioners' assertion that prior to *Your Snoqualmie*, the Board always required a showing of prejudice to dismiss a case is inaccurate. While the cases cited by Petitioners do discuss prejudice, as noted by the Court of Appeals, those orders on dismissal do not have sufficient facts to determine whether there was a justifiable excuse for failing to actually serve. Furthermore, there are many Board cases where petitions that were not properly served and were dismissed without a finding

of prejudice. *Salisbury v. Bonney Lake*, CPSGMHB No. 95-3-0058 (Order Granting Bonney Lake's Motion to Dismiss, October 27, 1995) (Board dismissed because petitioner did not serve City according to the rules of WAC 242-02-230(1) (requiring that service be made upon the mayor, city manager, or city clerk, rather than just the "City of Bonney Lake")); *City of Tacoma v. Pierce County*, CPSGMHB No. 6-3-0011c (Order on Motion to Dismiss and Order on Intervention, May 1, 2006) (Board denied intervention because the third party improperly served Pierce County in violation of WAC service rules); *Keesling v. King County*, CPSGMHB No. 95-3-0078 (Order Granting Motion to Dismiss for Lack of Timely Service, March 8, 1996) (Board dismissed because petitioner published a notice in the *Seattle Times* to the County at large rather than addressing it to the designated official indicated in the WAC); *Whidbey Environmental Action Network v. Island County*, WWGMHB No. 06-2-0027 (Order on Motion to Dismiss

Petition for Review, November 16, 2006) (Petitioner objected to Island County growth plan, but filed service of the petition by email sixty days after the change was published (the statutory maximum allowed under RCWs) and then served paper copies after; WAC does not allow for electronic service via email, so petition was properly dismissed); *Abercrombie v. Chelan County*, EWGMHB No. 00-1-0008 (Order on Dispositive Motions, June 16, 2000) (petition dismissed because it was not properly served on the County Auditor as required by the WAC.)

The Board looks at the unique facts of every case to determine whether there was substantial compliance with the service requirements. In the instant matter, after giving Petitioners a full opportunity to be heard on the issue, held in a 10-page order that Petitioners failed to substantially comply. There is no due process violation, the rule is valid, and it was applied in the instant matter fairly and correctly.

## VI. CONCLUSION

For the reasons discussed above, this Court should deny the Petition for Review.

Respectfully submitted this 16th day of June, 2022.

I certify that this Answer to Petition for Review to Washington State Supreme Court contains 4,921 words, in compliance with RAP 18.17(b) and 18.17(c)(10).

INSLEE, BEST, DOEZIE & RYDER, P.S.

By *s/Curtis J. Chambers*

Dawn F. Reitan, W.S.B.A. #23148
Curtis J. Chambers, W.S.B.A. #42984
Attorneys for City of Kenmore
10900 NE 4th Street, Suite 1500
Bellevue, WA 98004
Tel: (425) 455-1234 / Fax: (425) 635-7720
E-mail: dreitan@insleebest.com
cchambers@insleebest.com

## DECLARATION OF SERVICE

I, Jerilyn K. Kovalenko, hereby declare under penalty of perjury under the laws of the State of Washington that on June 16, 2022, I caused to be served a true and correct copy of the foregoing document on the individuals named below in the specific manner indicated:

*Attorneys for Petitioners/Plaintiffs*

Richard M. Stephens
Stephens & Klinge, LLP
601 - 108th Avenue, Suite 1900
Bellevue, WA 98004
Phone: (425) 453-6206
stephens@sklegal.pro
klinge@sklegal.pro
jills@sklegal.pro

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☒ Email
☒ E-service

*Attorneys for City of Kenmore*

Jeff Myers
Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S.
P.O. Box 11888
Olympia, WA 98508
Phone: (360) 754-3480
Fax: (360) 357-3511
jmyers@lldkb.com
lisa@lldkb.com
tam@lldkb.com

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☒ E-service

*Attorneys for Growth Management Hearings Board*

Lisa Petersen, WSBA #3072
Assistant Attorney General
Attorney for Growth Management Hearings Board
lisa.petersen@atg.wa.gov

☐ Hand Delivered
☐ U.S. Mail
☐ Certified Mail
☐ Overnight Mail
☒ Email

lalseaef@atg.wa.gov ☒ E-service
jennifer.bancroft@atg.wa.gov

DATED June 16, 2022, at Bellevue, Washington.

*s/Jerilyn K. Kovalenko*

Jerilyn K. Kovalenko, Legal Assistant
Inslee, Best, Doezie & Ryder, P.S.
10900 NE 4th Street, Suite 1500
Bellevue, WA 98004
Phone: (425) 455-1234
Fax: (425) 635-7720
jkovalenko@insleebest.com

## DAVID J. LAWYER

## June 16, 2022 - 3:45 PM

## Transmittal Information

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| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 100,934-8 |
| **Appellate Court Case Title:** | Kenmore MHP, LLC, et al v. City of Kenmore, et al. |
| **Superior Court Case Number:** | 19-2-04781-7 |

**The following documents have been uploaded:**

- 1009348_Answer_Reply_20220616145554SC931997_8125.pdf
  This File Contains:
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- 1009348_Other_20220616145554SC931997_5843.pdf
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**Filing on Behalf of:** Curtis J. Chambers - Email: cchambers@insleebest.com (Alternate Email: jkovalenko@insleebest.com)

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Phone: (425) 450-4214

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# APPENDIX A

**Whidbey Environmental Action Network**
**v.**
**Island County**

BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

| | |
|---|---|
| WHIDBEY ENVIRONMENTAL ACTION NETWORK,<br><br>Petitioner,<br><br>v.<br><br>ISLAND COUNTY,<br><br>Respondent. | Case No. 06-2-0027<br><br>**ORDER ON MOTION TO DISMISS PETITION FOR REVIEW** |

**This Matter** comes before the Board upon motion of Island County. The County filed its Motion to Dismiss Petition for Review on November 3, 2006. Petitioner Whidbey Environmental Action Network (WEAN) filed its response to the motion on November 13, 2006.[1] Island County requested a hearing on the motion be held at the time of the scheduled prehearing conference, November 15, 2006. WEAN had no objection and so a hearing on the motion was held telephonically on November 15, 2006. All three board members attended, Holly Gadbaw presiding.

Having heard the arguments of the parties, reviewed the pleadings filed by the parties, the Petition for Review, and this case's files and records, the Board grants the County's motion to dismiss for WEAN's failure to timely file its petition for review. Electronic (e-mail) filing of a petition for review is not permitted by the Board's rules of practice and procedure, WAC 242-02-230.

[1] Petitioner's Response to County's Motion to Dismiss



Western Washington
Growth Management Hearings Board
905 24th Way SW, Suite B-2
Olympia, WA 98502
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-8966
Fax: 360-664-8975

## ISSUE PRESENTED IN MOTION

*Is timely filing with the Board of a petition for review accomplished by e-mail filing on the sixtieth day after publication, followed by same-day mailing of copies of the petition for review?*

## DISCUSSION

### Positions of the Parties

The County argues that the Petition for Review was not filed with the Board in the time specified by RCW 36.70A.290(2)(b), that is, within sixty days after publication of the adoption of the challenged enactment. Ordinance C-97-06 was adopted on August 21, 2006 and notice of the adoption was published on August 26, 2007, the County asserts.[2] The County points out that the mailed copies of the petition for review in this case were not filed with the Board until October 27, 2006.[3] Therefore, the County argues that the filing was not timely.

Petitioner WEAN responds that it filed the petition for review with the Board by e-mail on October 25, 2006.[4] WEAN argues that the Board's rules allow e-mail filing because the rule on filing of petitions is not "exclusionary", and does not restrict the electronic method of filing petitions to telefacsimile filings.[5] WEAN also argues that WAC 242-02-310 and 242-02-320 allow all "papers" to be filed with the Board by e-mail so that petitions may also be filed in that manner.[6] WEAN includes in its response a declaration from the Board's executive assistant establishing that it sent the petition on October 25, 2006 and the Board received it on that date.[7]

---

[2] Motion to Dismiss Petition for Review at 1-2.
[3] *Ibid.*
[4] Petitioner's Response to County Motion to Dismiss.
[5] *Ibid* at 3
[6] *Ibid* at 4-5
[7] Declaration of Paulette Yorke



Western Washington
Growth Management Hearings Board
905 24th Way SW, Suite B-2
Olympia, WA 98502
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-8966
Fax: 360-664-8975

**Board Discussion:**

Petitions for review to the growth boards must be filed with the Board within 60 days of the date of publication of the legislative enactment. RCW 36.70A.290 (2).

> 2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.

The acceptable procedure for filing a petition for review with the Board is set forth in WAC 242-02-230:

> (1) The original and four copies of the petition for review shall be filed with a board personally, or by first class, certified, or registered mail. Filings may also be made with a board by electronic telefacsimile transmission as provided in WAC 242-02-240. A copy of the petition for review shall be personally served upon all other named parties or deposited in the mail and postmarked on or before the date filed with the board. When a county is a party, the county auditor shall be served in noncharter counties and the agent designated by the legislative authority in charter counties. The mayor, city manager, or city clerk shall be served when a city is a party. When the state of Washington is a party, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law. Proof of service may be filed with the board pursuant to WAC 242-02-340.
>
> (2) A board may dismiss a case for failure to substantially comply with subsection (1) of this section.

WAC 242-02-230 sets the requirements for filing a petition for review and does not provide that petitions for review may be filed by e-mail.

Original filings, that is, filing of petitions for review, are governed by WAC 242-02-230. This rule is clear on its face and does not allow for e-mail filings. WAC 242-02-230 specifies the ways in which petitions for review may be filed: personally, by first-class mail, by certified mail, by registered mail, or by electronic facsimile transmission. There is no provision for email filing. It is a well-established rule of statutory construction that the express mention of one item implies the exclusion of all others. Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). Thus, WAC 242-02-320's authorization of filing by



Western Washington
Growth Management Hearings Board
905 24th Way SW, Suite B-2
Olympia, WA 98502
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-8966
Fax: 360-664-8975

telefacsimile (in addition to filing personally or by mail) implies that e-mail filing of the petition for review is not authorized.

WEAN argues that WAC 242-02-320 controls because it applies to all papers. Under WAC 242-02-320, papers may be filed with the Board by e-mail followed by same-day mailing:

> Service of papers, specified in WAC 242-02-310(1), shall be made personally or by first class, registered or certified mail, or by facsimile transmission. The board may be served by e-mail filings, provided that an original and three copies are deposited in the mail and postmarked no later than the same day. Exhibits shall not be served electronically but shall be deemed timely filed if included in the mailed copies.

WAC 242-02-320.

However, the papers listed in this rule do not include petitions for review. "Service of papers" is defined in WAC 242-02-310 as applying to "pleadings, briefs, exhibits and other documents or papers". By its terms, WAC 242-02-310 does not include the petition for review, which has its own rule because it initiates the action. WAC 242-02-230.

Further, the rules must be construed so that no rule is mere "surplusage". If WAC 242-02-320 applied to filing of petitions, then there would be no reason for the more specific provisions of WAC 242-02-230. As a matter of statutory construction, the more specific rule takes precedence over the general rule. See *State v. Munson,* 22 Wn.App.522, 526, 597 P.2d 440, 1979 Wash. LEXIS 2512 (Div. II, 1979).

WEAN also argues that it substantially complied with WAC 242-02-230 because it met the purpose and intent of the rules.[8] WEAN argues that the County and the Board received the e-mail filing in a timely manner and that the County is only "hair-splitting".[9] WEAN also

[8] Petitioner's Response to County's Motion to Dismiss at 6.
[9] *Ibid* at 7.



Western Washington
Growth Management Hearings Board
905 24th Way SW, Suite B-2
Olympia, WA 98502
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-8966
Fax: 360-664-8975

maintains that the Board would exceed its authority and the statutory requirements for filing if it were to impose a rule that limited Board jurisdiction based on the method of filing.[10]

WEAN is essentially arguing that it can choose any method it wants to place a petition before the Board because the GMA does not define acceptable methods of filing. This argument is unpersuasive. The Boards properly adopted the rules for practice and procedure pursuant to the delegation in RCW 36.70A.270(7). Proper methods of filing are typically the province of rules, rather than statutes. See CR 5(e). There are no contrary rules in the GMA itself, so the Boards' rules govern.

WEAN would have the Board find that the rules do not apply because the Board received the petition within 60 days of publication and so did the County. However, procedural rules are in place for the purpose of establishing an orderly process that is known and fair to both sides. The Growth Management Hearings Boards jointly agreed upon and passed rules for filing petitions. When WAC 242-02-310 and 242-02-320 were adopted in 2004 to allow e-mail service of papers, WAC 242-02-230 was not modified to also allow e-mail filings of petitions. This Board has no authority to modify WAC 242-02-230 unilaterally merely because WEAN believes e-mail filings are sufficient. If WEAN wishes to see such a change in board rules, it may propose a rule change pursuant to WAC 242-02-052. In that event, the boards would follow the process set forth in WAC 242-02-054 for consideration of a rule change. By finding substantial compliance as WEAN urges, this Board would short-cut the rule-making process and deprive the other boards and the public of the opportunity to participate in the decision to change the methods for filing petitions.

In addition, we note that e-mail filing differs from the methods set forth in WAC 242-02-230 in an important respect. The methods established for filing a petition for review with the

[10] *Ibid* at 8-9.



Western Washington
Growth Management Hearings Board
905 24th Way SW, Suite B-2
Olympia, WA 98502
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-8966
Fax: 360-664-8975

boards in WAC 242-02-230 all require that a paper petition for review be in the hands of the board to initiate a case. Personal service and service by US mail inherently require that a physical petition be filed. Filing by fax is expressly conditioned on the risk being on the sender that the fax copy be received by the board. WAC 242-02-240(2). An e-mail filing does not present the board with a paper petition upon receipt. In fact, e-mail service is only completed some days later when the paper copies arrive by mail. WAC 242-02-320. Thus, allowing e-mail filing would on occasion actually *extend* the statutory deadline for filing a petition for review because the filing would not be completed until after the mailed copies were received. Clearly, the Board cannot extend its jurisdiction through adoption of rules of practice and procedure. See *In the Matter of the Petition of Bert Loomis for a Declaratory Ruling,* WWGMHB Case No. 06-2-0006 (Decision on Petition for Declaratory Ruling, March 28, 2006) at 4.

***Conclusion**:* Sending the Board an e-mail version of a petition for review does not constitute "filing" for purposes of WAC 242-02-230. That rule requires the petition to be filed with the Board personally, by mail, or by electronic telefacsimile (FAX). In this case, WEAN did not file the petition for review with the Board until more than sixty days after the County published its notice of adoption of the challenged ordinance, because mailed copies were not filed until October 27, 2006.

**ORDER**

Based on the foregoing, the Board finds that the petition for review in this case was not timely filed and GRANTS the County's motion to dismiss. The petition for review is therefore hereby DISMISSED.

Entered this 16th day of November 2006.

_____
Holly Gadbaw, Board Member



Western Washington
Growth Management Hearings Board
905 24th Way SW, Suite B-2
Olympia, WA 98502
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-8966
Fax: 360-664-8975

_____
Margery Hite, Board Member

_____
James McNamara, Board Member

**Pursuant to RCW 36.70A.300 this is a final order of the Board.**

**Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.**

**Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.**

**Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)**



Western Washington
Growth Management Hearings Board
905 24th Way SW, Suite B-2
Olympia, WA 98502
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-8966
Fax: 360-664-8975

# APPENDIX B

**Abercrombie**
**v.**
**Chelan County**

**STATE OF WASHINGTON**
**GROWTH MANAGEMENT HEARINGS BOARD**
**FOR EASTERN WASHINGTON**

| | |
|---|---|
| DAVID M. ABERCROMBIE,<br><br>Petitioner,<br><br>v.<br><br>CHELAN COUNTY,<br><br>Respondent | Case No.: 00-1-0008<br><br>ORDER ON DISPOSITIVE MOTIONS |

THIS MATTER having come before the Board upon the motions of Respondent Chelan County, by and through Susan E. Hinkle, Deputy Prosecuting Attorney, and Petitioner David M. Abercrombie, an attorney, representing himself, the Board having reviewed the files and records herein, the briefing of counsel, having considered the oral arguments of the parties, and being duly advised in the premises, makes the following findings:

## I. PROCEDURAL HISTORY

On March 30, 2000, David M. Abercrombie filed a Petition for Review with this Board. A Prehearing Conference was conducted on Friday, April 21, 2000. At that hearing, Respondent Chelan County filed a Notice of Appearance, Answer, and Statement of Issues.

At the Prehearing Conference, the parties were directed to redraft the issues, make them more specific and present them to the Board no later than April 28, 2000.

Counsel for Respondent submitted a Proposed Amended Statement of Issues on April 28, 2000.

Petitioner filed a letter agreeing only with issues five through nine of the Amended Statement of

Issues, but did not file an alternative version of the Statement of Issues.

Respondent Chelan County filed an Index of the Record on April 28, 2000.

The Board issued its Prehearing Order on May 4, 2000, listing the issues with changes as agreed to by Petitioner.

On May 9, 2000, Respondent Chelan County filed eight dispositive motions, a brief in support thereof, and the Affidavits of Kathleen L. Ward and Lisa M. Riibe.

On May 10, 2000, Petitioner Abercrombie filed Petitioner's Motions to Require Respondent to Complete Record, to Transcribe Proceedings and to Extend Base Calendar to Allow Respondent to Comply, together with the Affidavit of David M. Abercrombie.

On May 15, 2000, this Board issued an Order Setting Motion Hearing and directing the Respondent to respond by May 18, 2000, for a hearing on May 19, 2000.

On May 17, 2000, Respondent Chelan County's Response to Petitioner's Motions to Require Response to Complete Record, to Transcribe Proceedings and to Extend Calendar to Allow Respondent to Comply, Affidavit of Christy Osborn, Motion to Disqualify, and Affidavit of Susan E. Hinkle were filed.

On May 18, 2000, Petitioner Abercrombie filed a Response to Chelan County's Motion to Disqualify and Affidavit of David M. Abercrombie.

On May 19, 2000, the Board conducted a hearing via telephone regarding Petitioner's Motions to Require Respondent to Complete Records, to Transcribe Proceedings and to Extend Base Calendar to Allow Respondent to Comply and Respondent Chelan County's Motion to Disqualify.

At the hearing, Chelan County withdrew its Motion to Disqualify.

On May 19, 2000, Petitioner Abercrombie filed a Response to Dispositive Motions, Affidavit of David M. Abercrombie, and Affidavit of Catherine Freeman.

On May 23, 2000, the Board issued its Order Denying Petitioner's Motion to Require Respondent to Complete Record, to Transcribe Proceedings and to Extend Base Calendar to Allow Respondent to Comply. Motion to Disqualify had been withdrawn by Respondent.

On May 24, 2000, the Board issued an Order Resetting Motion Hearing for the dispositive motions on June 6, 2000.

On May 25, 2000, Respondent Chelan County's Reply to Petitioner's Response to Dispositive Motions was filed.

On June 6, 2000, the Board conducted the hearing on dispositive motions and the oral arguments of the parties were presented.

## II. DISPOSITIVE MOTION

The Respondent's second motion moved this board for an order dismissing the Petitioner's petition for failure to promptly serve the Respondent. The Respondent filed 8 motions before the Board. Because of the decision of this board, Motions 1 and 3 through 8 need not be addressed.

## III. FINDINGS

A copy of the Petition was mailed through the U. S. Mail to the board of commissioners and received on April 3, 2000. The envelope had not been received by nor processed through the Chelan County Auditor's Office. She placed a date received stamp for the commissioner's office in the upper right-hand corner of the first page of the Petition. Attached to her affidavit as Exhibit "A" is a copy of the front page of Petition for Review containing in the upper right-hand corner a faint remnant of the date received stamp from the commissioner's office and on top of it a date received stamp for the Chelan County Prosecuting Attorney's Office. Further, affiant Kathleen L. Ward reported that according to county procedures there is no record that the Petition

was ever received by nor served upon the Chelan County Auditor's Office.

Pursuant to the Affidavit of Lisa M. Riibe, Deputy Auditor, she maintains the official Acceptance of Service and Summons Log for the auditor which documents the service of legal matters upon the county. According to her affidavit, Ms. Riibe has been responsible for all entries in that log from the beginning of 1998 to the present and her review of that log indicates that no record exists in said log that a Petition to the Eastern Washington Growth Management Hearings Board was ever filed with the auditor on behalf of or by David M. Abercrombie. The absence of such an entry supports the contention that said Petition was neither personally served upon nor mailed to the Auditor for Chelan County. Further, affiant Riibe indicates that any mail addressed to the Chelan County Auditor is date stamped received with the auditor's office stamp on the outside of the envelope and then also the cover sheet of the document is so stamped. Affiant Riibe also refers to an example of the auditor's office stamp incorporated into her affidavit and a copy of the front page of the Petition and verifies that the copy of the Petition was never date stamped received with an auditor's office stamp, rather only by the commissioner's office and by the prosecuting attorney's office.

At the hearing on dispositive motions, counsel for Respondent Chelan County submitted a clearer copy of the front page of the Petition which better shows that the stamp of the commissioner's office in the upper right-hand corner of the first page of the Petition is indeed not the date received stamp of the Chelan County Auditor. This document is admitted as part of the record of this proceeding as Respondent's Exhibit 1.

Petitioner submitted the Affidavit of David M. Abercrombie which stated that affiant Abercrombie directed his legal assistant, Catherine Freeman, to fax a copy of the Petition to this Board, to place in the mail the original addressed to this Board and a copy of the same to be addressed and mailed to the Auditor of Chelan County.

The Affidavit of Catherine Freeman states that she was instructed by Mr. Abercrombie to fax and mail the original to this Board and to mail a copy to the Chelan County Auditor's Office and that on March 31, 2000, she mailed a copy to the auditor.

Petitioner did not file an Affidavit of Service contemporaneously with the filing of the Petition; the Affidavit of Catherine Freemen filed in response to Respondent's motion is the only affidavit regarding service of a copy upon the Respondent ever filed by Petitioner in this case. The Petitioner prepared an Affidavit of the Petitioner prepared an Affidavit of Service on the 19th day of May, 2000. While the service is claimed to have occurred on March 31, 2000.

Respondent Chelan County first apprised the Board and Petitioner of the lack of service issue at the Prehearing Conference in this case on April 21, 2000.

To date, Petitioner Abercrombie has not served a copy of the Petition upon the Chelan County Auditor since learning of Respondent Chelan County's claim of failure to properly serve a copy of the Petition upon the auditor.

## IV. DISCUSSION

WAC 242-02-230(1) requires a copy of the Petition be served promptly upon Respondent, and as Respondent is a county in this matter, the county auditor shall be served.

Pursuant to WAC 242-02-230(2), this Board may dismiss this case for failure to substantially comply with §(1) of this WAC.

It is a proper exercise of the discretion granted this Board when ruling upon dispositive motions to make determinations as to the credibility and weight to be given the various evidence presented.

The evidence with respect to this motion shows that the Petitioner does not have a mechanism independent of memory by which to verify that service of a copy of the Petition was made upon the Chelan County Auditor. The Petitioner did not file a Certificate and/or Affidavit of Service on March 31, 2000 or soon thereafter, the time the copy of the Petition was claimed to have been mailed to the auditor.

The Chelan County Auditor's Office maintains an Acceptance of Service and Summons Log which is an independent mechanism which verifies the lack of service of the Petition herein upon

the county auditor.

The credible evidence shows that at no time did the Chelan County Auditor receive a copy of the Petition as filed herein, therefore, no compliance with WAC 242-02-230(1) occurred.

-

## V. CONCLUSIONS

Respondent Chelan County's motion two, requesting dismissal of this case for failure of Petitioner to timely serve a copy of the Petition on the Chelan County Auditor in compliance with the provisions of WAC 242-02-230 is hereby granted. Motions 1 and 3 through 8 need not be addressed at this time.

Now, therefore, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Respondent Chelan County's dispositive motion two is granted and Petitioner's Petition is dismissed for failure to promptly serve a copy of such petition on the Chelan County Auditor or to substantially comply with said requirement.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that a clearer copy of the face sheet of the Petition provided by counsel for Respondent at the dispositive motion hearing is made a part of the record in this matter as Respondent's Exhibit 1.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Hearing on the Merits set for August 3, 2000, is stricken.

**Pursuant to RCW 36.70A.300, this is a final order for purposes of appeal**.

**Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this final decision and order**.

SO ORDERED this 16th day of June, 2000.

EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD

_____

D. E. "Skip Chilberg, Presiding Officer

_____

Judy Wall, Board Member

_____

Dennis A. Dellwo, Board Member

# APPENDIX C

**City of Tacoma**
**v.**
**Pierce County**

**CENTRAL PUGET SOUND**
**GROWTH MANAGEMENT HEARINGS BOARD**
STATE OF WASHINGTON

| | |
|---|---|
| CITY OF TACOMA ~~and WALLER ENTERPRISES LLC~~, | **CPSGMHB Consolidated Case No. 06-3-0011c** |
| Petitioners, | ***(Tacoma IV)*** |
| v. | |
| PIERCE COUNTY, | **ORDER ON MOTION to DISMISS and ORDER ON INTERVENTION** |
| Respondent, | |
| and | |
| WALLER ENTERPRISES LLC, | |
| Intervener. | |

## I. BACKGROUND

On February 23, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the City of Tacoma (**City** or **Tacoma**). The matter was assigned Case No. 06-3-0009. The matter is hereafter referred to as *Tacoma IV v. Pierce County*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges Pierce County's (**Respondent** or the **County**) adoption of Ordinance Nos. 2005-93s and 2005-94s2 amending the County's Comprehensive Plan and development regulations regarding a "Rural Neighborhood Center" (**RNC**) in the vicinity of E. 72nd Street and Waller Road. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**). Tacoma asserts that the County's expansion of the RNC (a limited area of more intensive rural development – LAMIRD) does not comply with the Act, indicating the prior rural designation should be retained.

On February 24, 2006, the Board issued a Notice of Hearing in the *Tacoma IV* matter.

On February 27, 2006, the Board received a PFR from Waller Enterprises LLC (hereafter **Waller**). The case was assigned CPSGMHB Case No. 06-3-0011. Edward G. McGuire is also the PO in this matter. Waller too, challenges Pierce County's adoption of Ordinance Nos. 2005-93s and 2005-94s2 amending the County's Comprehensive Plan and development regulations regarding the County's RNC designation in the vicinity of E. 72nd Street and Waller Road. Again, the basis for the challenge is noncompliance with

various provisions of the GMA. Waller asserts that the RNC designation is in error because the area should have been included in the County's urban growth area (**UGA**).

On March 1, 2006, the Board issued a Notice of Hearing and Order of Consolidation in the above captioned matter. The Order Consolidated the *Tacoma* PFR and the *Waller* PFR into one consolidated case – *Tacoma IV v. Pierce County*, CPSGMHB Consolidated Case No. 06-3-0011c.

On March 22, 2006, the Board received "Respondent Pierce County's Motion to Dismiss Petitioner Waller Enterprises" (**Co. Motion – Dismiss**). The County asserted that Petitioner Waller did not properly serve a copy of the PFR on the County; therefore, Petitioner's PFR should be dismissed.

On March 30, 2006, the Board received Pierce County's Index of the Record (**Index**).

On March 31, 2006, the day after the prehearing conference, the Board issued its "Prehearing Order" (**PHO**) in this matter. The PHO set forth the deadlines for filing motions, responses and replies, as well as the legal issues to be decided in this matter.

On April 11, 2006, the Board received "Respondent Pierce County's Amended Index of the Record" (**Amended Index**).

On April 12, 2006, the Board received "Motion of Waller Enterprises to Become a Party or to Intervene" (**Waller Motion – Intervene**).

On April 19, 2006, the Board received "Waller Enterprises Opposition to Pierce County's Motion to Dismiss" (**Waller Response – Dismiss**).

The Board did not receive any responses to the motion to intervene or a reply brief from the County on the motion to dismiss.

All filings were timely made and received by the Board.

## II. INTERVENTION

WAC 272-020-270 enables the Board to grant intervention[1] if such intervention is in the interest of justice and will not impair the orderly and prompt conduct of the proceedings.

The Board's rules of Practice and Procedure allow a party served with a motion, ten days to respond to that motion. WAC 242-02-534.

Waller moved to intervene on behalf of Pierce County against the City of Tacoma challenge on April 12, 2006. Neither the County nor Tacoma responded.

[1] In reaching its decision, the Board may turn to the superior court's civil rules for guidance. *See* WAC 242-02-270.

Waller's Motion

The Board notes that Waller filed a PFR with the Board challenging Pierce County. However, while Waller challenges the County's action on one hand, it seeks to support the County's action on the other. *See* PHO, Section IX, Legal Issues 1 and 2, at 7.

The City of Tacoma challenges the County's expansion of an existing RNC to include additional property, including property owned by Waller. Waller, as the property owner, seeks to intervene on behalf of the County in opposition to the City of Tacoma.

The Board has reviewed the motion, and noting no objections filed by the parties, the Board has determined that Waller's intervention in this matter is in the interest of justice and will not impair the orderly and prompt conduct of the proceedings. Therefore, the Board will **grant** Waller's motion to intervene.

Waller may file a prehearing response brief in support of Respondent Pierce County in accordance with the briefing schedule set forth for Respondent in the PHO and limited to responding to the three City of Tacoma Issues [Legal Issues 1, 2 and 3]. *See* PHO, at 7. Respondent Pierce County, at its discretion, may share allotted time for oral argument at the Hearing on the Merits (**HOM**) with Intervener Waller.

Waller is entitled to notice of any settlement discussions that occur between Petitioner City of Tacoma and Respondent Pierce County regarding the RNC designation, and may participate in such discussions, if any. However, because of the Board's disposition of the Waller PFR, discussed *infra*, a settlement only requires the agreement of Tacoma and Pierce County.

## III. MOTION TO DISMISS

The County alleges that Waller failed to serve the County in accordance with the Board's Rules of Practice and Procedure; therefore, the PFR should be dismissed. In response, Waller argues: 1) the County Council was served, even if the Auditor was not; 2) the County is not prejudiced by the appeal since the Waller PFR challenges the same property; 3) there is no legal authority for dismissal; and 4) any error was inadvertent. Waller Response, at 1-6.

The Board's Rules of Practice and Procedure specify the filing and service requirements for a PFR. WAC 242-02-230 provides:

> (1) The original and three copies of the petition for review shall be filed with a board personally, or by first class, certified or registered mail. Filings may also be made with a board by electronic telefacsimile transmission as provided in WAC 242-02-240. *A copy of the petition for review shall be* personally *served upon all other named parties* or deposited in the mail and postmarked on or before the date filed with the board. *When a county is a party, the county auditor shall be*

*served in noncharter counties and the agent designated by the legislative authority in charter counties*.[2] The mayor, city manager, or city clerk shall be served when a city is a party. When the state of Washington is a party, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law. Proof of service may be filed with the board pursuant to WAC 242-02-340.

(2) *A board may dismiss a case for failure to substantially comply with subsection (1) of this subsection*.

(Emphasis supplied). Additionally, the Board's Rules provide, "Any action may be dismissed by a board: . . . (4) Upon a board's own motion for failure by the parties to comply with these rules or any order of the board." WAC 242-02-720(4).

The Board received the City of Tacoma PFR on February 23, 2006. See PFR No. 06-3-0009. The Declaration of Service attached to Tacoma's PFR indicates that the Board, Pierce County *Auditor* and Council *and Petitioner Waller's attorney* were served a copy of the PFR by legal messenger. *See* Declaration of Service with PFR No. 06-3-0009; and Co. Motion – Dismiss, Attachment B.

After receiving the City of Tacoma PFR on February 23, 2006, the Board issued a "Notice of Hearing" (**NOH**). The Board's NOH was served on Petitioners attorneys, the Pierce County *Auditor* and Council as well as *Petitioner Waller's attorney*. *See* NOH and attached Declaration of Service.

It is undisputed that the Board received the Waller's PFR on February 27, 2006.[3] *See* PFR No. 06-3-0011. However, the County contends that contrary to the Board's rules, the County Council, not the County Auditor was served with the Waller PFR on February 28, 2006. *See* Co. Motion – Dismiss, at 5-7; Attachments C and D.

On March 1, 2006, the Board issued a "Notice of Hearing and Order of Consolidation" involving the two PFRs challenging the County's action. This Notice and Order set March 30, 2006 as the prehearing conference (**PHC**) date. Subsequently, but prior to the PHC, the County filed its motion to dismiss. *See infra*.

At the PHC on March 30, 2006, the Board acknowledged the early motion by the County and noted that Waller need not respond to the motion until the date indicated in the

[2] The Pierce County Charter designates the County Auditor as the "Filing Officer." *See* Pierce County Charter, Section 5.90; Co. Motion – Dismiss, at 6; footnote 1.

[3] The Board notes that Waller's Declaration of Service that accompanied the Board's PFR indicates, "On the date below [February 27, 2006] written copies of the foregoing document [PFR] were served as follows: [listing addresses of clerk of the CPSGMHB, Mayor of Tacoma, Pierce County Council and courtesy copy to Attorneys for Tacoma]." *See also* Co. Motion, Attachment D. The Declaration of Service did not indicate what form of service (i.e. legal messenger, mail, fax etc.) was employed.

schedule. Waller did file a timely response. *Infra*. Also at the PHC, Waller's attorney provided Pierce County's attorney with a copy of the PFR filed by Waller.

There is no documentary evidence before the Board, or explanation by Petitioner, why Petitioner Waller *never* attempted to properly serve its PFR on Pierce County. First, prior to filing its PFR, Petitioner's attorney was served with a copy of the City of Tacoma PFR; likewise, Petitioner's attorney was served with a copy the Board's Notice of Hearing in the Tacoma case. As the Declarations of Service indicate, both the PFR and NOH were served upon the Pierce County Auditor. Second, the Board's Rules of Practice and Procedure specify who must be served. Even though these examples of proper service upon the County were available to Waller, as well as the Board's Rules, Waller simply filed a PFR with the Board and the County Council, ignoring the proper service requirements. Third, even after the County filed its motion to dismiss, Petitioner did not attempt to correct the faulty service. Instead, Petitioner provided a copy of the PFR to the County at the PHC – over a month after the date the PFR should have been served on the County.

It is undisputed that the Waller PFR was not served on the Pierce County Auditor. Failure to serve the Auditor, the "filing official" designated by the Pierce County Charter, fails to comply with the Board's Rules of Practice and Procedure. The Board cannot construe Petitioner's lack of effort to properly serve the County as "substantial compliance" with the Board's service provisions. Therefore, pursuant to WAC 242-02-230 and -720(4), the Board will **dismiss** the Waller's PFR.

Petitioner's attorney should be aware that there is significant Board precedent[4] for this Board's dismissal of a PFR for improper service; however, improper service has been a rare event in the CPS region since the millennium.

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[4] *See* for example:

> A letter addressed only to "the city" does not meet the requirements that the mayor, city manager, or city clerk be served personally or by mail with a copy of the PFR. WAC 242-02-230(1). *Salisbury v. Bonney Lake,* CPSGMHB Case No. 95-3-0058, Order Granting Bonney Lake's Motion to Dismiss, (Oct. 27,1995), at 3.
>
> The County demonstrated that there was no record that the County had been served with one of the petitions for review; the Board dismissed the challenged PFR. *Sky Valley, et al., v. Snohomish County*, CPSGMHB Consolidated Case No. 95-3-0068, Order on Dispositive Motions, (January 9, 1996), at 7.
>
> The prosecutor was served, not the County Council Clerk as required by local ordinance; mail service is proper, but must be served on the proper agent. *Keesling v. King County*, CPSGMHB Case No. 95-3-0078, Order Granting Motion to Dismiss for Lack of Timely Service, (Mar. 18, 1996), at 3.
>
> Petitioner failed to properly serve the respondent, in accordance with the Board's rules of practice and procedure. *Wallock and DÉJÀ VU of Everett v. City of Everett*, CPSGMHB Case No. 96-3-0037, Order Granting Motion to Dismiss, (Feb. 20, 1997), at 3-4.

## III. ORDER

Based upon review of the Petition for Review, Declarations of Service, the motions and materials submitted by the parties, the Act, Board Rules of Practice and Procedure, and prior decisions of this Board, the Board enters the following ORDER:

- Waller's Motion to Intervene is **granted**. Waller may intervene in support of the County's action designating the area as RNC as specified *supra*.

- The County's Motion to Dismiss for failure to properly serve the PFR upon the County is **granted**. Therefore, the Waller Enterprises LLC PFR, No. 06-3-0011[5] – is **dismissed with prejudice**.

- The only matters remaining in this case [*City of Tacoma IV v. Pierce County*, CPSGMHB Case No. 06-3-0011c] are the City of Tacoma's three Legal Issues. *See* PHO, at 7.

So ORDERED this 1st day of May, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

_____
Margaret A. Pageler
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

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The service provisions in the Board's rules are jurisdictional, not just procedural. *Sky Valley and Dwayne Lane v. Snohomish County*, CPSGMHB Consolidated Case No. 98-3-0033c, Order Granting Motion to Dismiss, (Jan. 20, 1999), at 2-3

[5] **Note that this matter will retain the case number of 06-3-0011c for the remainder of this proceeding**.

# APPENDIX D

**Sky Valley**
**v.**
**Snohomish County**

**CENTRAL PUGET SOUND**
**GROWTH MANAGEMENT HEARINGS BOARD**
STATE OF WASHINGTON

| | | |
|---|---|---|
| SKY VALLEY, et al.,<br>Petitioners,<br>v.<br>SNOHOMISH COUNTY,<br>Respondent,<br>ASSOCIATION OF RURAL LANDOWNERS, CITY OF GOLD BAR, SNOHOMISH COUNTY FIRE PROTECTION DISTRICT NO. 7, and CORINNE HENSLEY,<br>Intervenors. | ) | **Consolidated**<br>**Case No. 95-3-0068**<br>**ORDER ON**<br>**DISPOSITIVE MOTION**<br>**AND MOTIONS**<br>**TO SUPPLEMENT** |

## I. Procedural Background

On March 12, 1996, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its Final Decision and Order in the above-captioned case.The Order found Snohomish County's (the **County)** Comprehensive Plan (the **Plan**) to be compliance with the Growth Management Act, except for five portions of the Plan.Those portions were remanded to the County, with a deadline of September 6, 1996 to bring them into compliance.The Order was modified by an Order on Motions to Reconsider and Motion to Correct, issued by the Board on April 15, 1997.

The Board conducted a compliance hearing on October 17, 1996.

On November 5, 1996, the board entered a "Finding of Noncompliance, Order on Motions, Notice of Second Compliance Hearing, and Briefing Schedule."

On December 16, 1997, the Board issued an "Order Clarifying Purpose of Second Compliance Hearing" (**Clarifying Order**).

On December 19, 1996, the Board held a second compliance hearing.

On January 31, 1997, the Board issued a Notice of Third Compliance Hearing.The Board stated that it would hear argument on, and make a determination of, the County's substantive and procedural compliance with the GMA and the Board's Final Decision and Order, specifically items 1 through 5 in the remand portion of the Order.

On February 26, 1997, the Board held a Pre-ComplianceHearing Conference in the above-captioned matter.

On March 26, 1997, the Board issued a Pre-Compliance Hearing Order, setting deadlines for filing dispositive motions, motions to supplement, and briefs.The Board opted not to hold a hearing on motions.

Since March 27, 1997, the Board has received the following motions, briefs, exhibit lists exhibits and letters:

| **Date Received** | **Title** |
|---|---|
| Mar. 28, 1997 | Letter from Woodinville re: Pre-Compliance Hearing Order |
| Apr. 1, 1997 | Motion to Supplement the Record (John Postema) |
| Apr. 1, 1997 | CCSV's (Concerned Citizens for Sky Valley) Amended Request for Official Notice, Motion to Supplement the Record, and Notice of Availability |
| Apr. 1, 1997 | Snohomish County-Camano Association of Realtors' (**SCCAR**) Dispositive Motion and Memorandum in Support |
| Apr. 1, 1997 | SCCAR's Motion to Supplement the Record, Motion for Official Notice, and Memoranda in Support |
| Apr. 2, 1997 | Snohomish County's Motion to Supplement the Record and Joinder in Realtors' Dispositive Motion, Motion to Supplement the Record, and Motion for Official Notice |
| Apr. 11, 1997 | Association of Rural Landowners' Preliminary Exhibit List |
| Apr. 11, 1997 | SCCAR's Preliminary Exhibit List |

| | |
|---|---|
| Apr. 12, 1997 | 1000 Friends of Snohomish County's (**1000 Friends**) Response to Snohomish County-Camano Assoc. of Realtors' Dispositive Motion and Memorandum in Support |
| Apr. 14, 1997 | Snohomish County's Preliminary Exhibit List |
| Apr. 14, 1997 | CCSV's (Concerned Citizens for Sky Valley) Preliminary Exhibit List for Third Compliance Hearing |
| Apr. 14, 1997 | Corinne R. Hensley's (**Hensley**) Response to SCCAR's Dispositive Motion and Memorandum in Support |
| Apr. 14, 1997 | Hensley's Preliminary Exhibit List for Third Compliance Hearing |
| Apr. 14, 1997 | PAS' (Pilchuck Audubon Society) Preliminary Exhibit List for Third Compliance Hearing |
| Apr. 15, 1997 | (John Postema's) Preliminary Exhibit List |
| Apr. 15, 1997 | 1000 Friends' Response to SCCAR's Dispositive Motion and Memorandum in Support |
| Apr. 15, 1997 | City of Woodinville's Preliminary Witness and Exhibit List for Compliance Hearing |
| Apr. 15, 1997 | Snohomish County's Response in Opposition to Motions to Supplement and Motions for Official Notice by John Postema and CCSV III |
| Apr. 15, 1997 | SCCAR's Response to CCSV's Amended Request for Official Notice and Motion to Supplement the Record |
| Apr. 15, 1997 | 1000 Friends' Preliminary Exhibit List for Third Compliance Hearing |
| Apr. 16, 1997 | Pilchuck Audubon Society's (**Pilchuck**) and CCSV's Response to Snohomish County's and SCCAR's Dispositive Motions |
| Apr. 16, 1997 | Letter from SCCAR re: Service of Pre-Compliance Hearing Order |
| Apr. 21, 1997 | Postema's Reply to Snohomish County Opposition to His Motion to Supplement the Record |
| Apr. 22, 1997 | CCSV's Reply to Snohomish County and SCCAR's Response to Motions to Supplement |
| Apr. 22, 1997 | Snohomish County's List of Core Documents for Third Compliance Hearing |
| Apr. 23, 1997 | Snohomish County's Motion to Amend the Index of the Record re:<br>Compliance Action Taken November 27, 1996 |

| | |
|---|---|
| Apr. 24, 1997 | (Snohomish County's) Submittal of Core Documents for Third Compliance Hearing |
| Apr. 30, 1997 | Core Documents received |

## II. SCCAR's Dispositive Motion

SCCAR, joined by the County, asks the Board to limit the scope of issues to be heard to those remand actions, set forth in the final Decision and Order, dealing solely with the County's Plan. Specifically, it asks that briefing and argument related to implementing development regulations be excluded during this third compliance proceeding.

Pilchuck, CCSV, 1000 Friends and Hensley oppose the motion, arguing that the regulations in question allow for urban growth in rural areas, which demonstrates that the remand amendments to the Plan fail to include "sufficient policy direction and parameters" as directed by the Board in its remand order. PAS & CCSV's Response, at 3.

The Board has determined that it lacks sufficient time to decide SCCAR's motion prior to the filing of prehearing briefs and the hearing on the merits

-

## III. motions to supplement the record

The parties are cautioned that each exhibit submitted be **relevant** to the specific legal issues before the Board when they file their briefs.Its listing on the Index as a part of the record below, or its admission as a supplemental exhibit, does not necessarily mean that a specific exhibit is relevant to the legal issues, as set forth in the Pre-Compliance Hearing Order.

In the summary tables below:

- Exhibits that indicate "Admitted" become supplemental exhibits.
- Exhibits "Admitted as part of record" are, instead, exhibits from the record below that were inadvertently omitted from the Index; the Board will deem the Index to have been amended.
- "Board takes notice" means that the Board recognizes the existence of a statute, ordinance, or resolution; because it may not have access to a copy of Respondent's documents, the Respondent shall provide a copy.
- "Already in Record" means that the exhibit is already listed on the Index and therefore is automatically admitted and need not be the subject of a motion to supplement.
- Exhibits that "May be offered" are not admitted at this time; they may be offered at the hearing on the merits, at which time the Presiding Officer will rule on their admissibility.

**A. CCSV**

| Proposed Exhibit | Ruling |
|---|---|
| Title 7.42.020 Snohomish County Code | **Board Takes Notice** |
| 1992 National Agriculture Statistics | **Denied** |
| County Agriculture Statistics | **Denied** |
| County Service Zone Map | **Denied** |
| County Motion No. 90-356 | **Board Takes Notice** |
| Nelson Letter, Nov. 26, 1996 | **Denied** |
| RCS Permit Status Report | **May Be Offered** |
| Area Market Survey | **Denied** |
| Project Application Activity Report, Feb. 28, 1997 | **May Be Offered** |
| Interoffice Memo re: Pilchuck Estates, Jan. 21, 1997 | **Denied** |
| Fire District Letter re: Pilchuck Estates, Dec. 10, 1996 | **Denied** |
| PDS Rural Cluster Report, Mar. 31, 1997 | **Denied** |
| Pilchuck RCS, Sep. 25, 1996 | **Denied** |

**B. Postema**

| Proposed Exhibit | Ruling |
|---|---|
| Amended Ordinance No. 96-073 | **Admitted as Part of Record** |
| Letter to Planning Comm. (Ex. 1341) | **Already in Record** |
| Letter to Council | **Not in File** |
| New Map 4 Showing Property A and E | **Not in File** |
| Maltby Map, August, 1996 | **Already in Record** |
| Map 5, Showing Parcel A and E (Ex. 997) | **Already in Record** |
| Notice, Nov. 16, 1996 | **Already in Record** |
| Shockey Brent Inc. 871 (Ex. 1156) | **Already in Record** |
| First Western Dev. Services, plus Map 6 (ex. 997) | **Already in Record** |
| Emergency Ord. No. 94-036 | **Board Takes Notice** |
| Land Capacity Analysis, June, 1995 | **Admitted** |

**C. county's motion to amend index**

| Proposed Exhibit | Ruling |
|---|---|
| Comprehensive Plan, Dec., 1996 | **Admitted as Part of Record** |
| County-wide Planning Policies, Dec. 20, 1995 | **Admitted as Part of Record** |

**D. SCCAR**

| Proposed Exhibit | Ruling |
|---|---|
| Chronology - Rural Cluster Subdivision Ordinances | **Admitted** |
| Excerpt: Opinion Survey | **Admitted** |

So ORDERED this 9th day of May, 1997.
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Joseph W. Tovar, AICP
Board Member

_____
Chris Smith Towne
Board Member

# APPENDIX E

**Your Snoqualmie Valley**
**v.**
**City of Snoqualmie**

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

YOUR SNOQUALMIE VALLEY, DAVE EIFFERT, WARREN ROSE, and ERIN ERICSON,

Petitioners,

v.

CITY OF SNOQUALMIE

Respondent,

and,

SNOQUALMIE MILL VENTURES, LLC and ULTIMATE RALLY, LLC,

Intervenors.

**CASE NO. 11-3-0012**

**ORDER ON MOTIONS**

THIS Matter came before the Board on Respondent's dispositive motions and Petitioners' motions to supplement the record. Petitioners oppose the City's actions related to proposed annexation of a portion of its associated UGA known as the Mill Planning Area. Snoqualmie Mill Ventures, LLC (SMV) and Weyerhaeuser Real Estate Development Company (WREDCo) are the property owners of the potential annexation area, a former Weyerhaeuser lumber mill. SMV leases a substantial portion of its property to Ultimate Rally, LLC dba DirtFish Rally School (DirtFish), which operates a specialized rally car driving instructional school. The property is also used for special events.



Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The annexation was proposed by King County in January, 2011.[1] In March, 2011, the Snoqualmie City Council authorized negotiations with King County for annexation by interlocal agreement.[2] The City then undertook four actions:[3]

- Zoning to become effective upon annexation [Pre-Annexation Zoning] adopted as Ordinance 1086 on October 24, 2011
- Approval of a Pre-Annexation Agreement with SMV, WREDCo, and DirtFish, adopted by Resolution 1115, October 24, 2011
- Interlocal Agreement for annexation, adopted by the City November 28, 2011, and still pending before King County Council
- Annexation Ordinance – not yet introduced

In this matter, Petitioners challenge the City's adoption of Ordinance 1086, adopting Pre-Annexation Zoning, and Resolution 1115, authorizing the Mayor of Snoqualmie to enter into a Pre-Annexation Agreement with the property owners and DirtFish.

## RESPONDENT'S MOTIONS TO DISMISS

The City of Snoqualmie moves to dismiss the Petition for Review for untimely and improper service in violation of WAC 242-03-230. Alternatively, the City moves for dismissal of the challenge to Resolution 1115 on the grounds that the Pre-Annexation Agreement approved in the resolution is not within the Board's jurisdiction under RCW 36.70A.280(1).[4]

Petitioners responded, arguing substantial compliance with the service requirement. Petitioners also asserted Resolution 1115 is a *de facto* amendment to the City's Comprehensive Plan and development regulations, within the Board's jurisdiction.[5]

---

[1] Declaration of [Mayor] Matthew Larson in Support of City of Snoqualmie's Dispositive Motion (Feb. 9, 2012), at 2.
[2] Resolution 992, March 20, 2011
[3] Summarized in City of Snoqualmie's Response to Motion for Leave to File Supplemental Evidence, at 6
[4] City of Snoqualmie's Dispositive Motions (Feb.9, 2012). Intervenors on the same date filed Intervenors' Joinder in City's Dispositive Motions.
[5] Petitioners' Response to City of Snoqualmie's Dispositive Motions (Feb.21, 2012)



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For the reasons set forth below, the Board declines to dismiss for deficiencies in service. The Board also concludes Resolution 1115 is a *de facto* comprehensive plan amendment as to which it has jurisdiction, but the Resolution is not a *de facto* amendment of the City's development regulations.

**DEFECTS OF SERVICE**

The GMA contains no express language requiring service of a PFR on any respondent. The GMA does, however, require the Board to adopt "rules regarding expeditious and summary disposition of appeals."[6] The requirement for the Petitioner to promptly serve the PFR on the respondent city, county or state agency has therefore been a part of the Board's Rules of Practice and Procedure from their first promulgation.[7] Disposition of cases will not be "expeditious" if service requirements are disregarded.

The Board's Rules of Practice and Procedure, WAC 242-03-230, contain the following provisions concerning service of the PFR:[8]

> (2)(a) A copy of the petition for review shall be served upon the named respondent(s) and must be received by the respondent(s) on or before the date filed with the board. Service of the petition for review may be by mail or personal service, so long as the petition is received by respondent on or before the date filed with the board.
>
> (b)…When a city is the respondent, the mayor, city manager, or city clerk shall be served….
>
> (4) The board may dismiss a case for failure to substantially comply with this section.

[6] RCW 36.70A.270(7).
[7] WAC 242-03-230(2), formerly WAC 242-02-230(1)
[8] WAC 242-03-230(2)



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The City asserts service of the PFR was fatally defective. The City points out the PFR was filed with the Board on December 23, 2011, but not received by the City until December 28, 2011 when it was delivered to a City Hall receptionist by FedEx courier. The City argues:

> The Petition for Review was filed on December 23, 2011, and no effort at service was made until December 27, 2011, four days after filing. The Petition for Review was not received by the Respondent City until December 28, 2011, five days after filing. … No effort at service compliant with the requirements of WAC 242-03-230 has yet been made…[9]

In response, Petitioners provide affidavits indicating

- personal service on the Mayor or City Clerk was attempted on December 23 at 2:17 p.m. but City Hall was closed;[10]
- personal service was attempted December 27 at 11:09 a.m. but neither the Mayor nor City Clerk was in the office that day;[11]
- the PFR was sent by FedEx overnight delivery December 27 addressed to the Mayor and delivered to a front desk receptionist December 28 at 1:21 p.m.[12]

The Board notes Christmas Day fell on a Sunday. Snoqualmie City Hall took Monday, December 26 as an official holiday, posting the closure on its website calendar.[13] However, without public announcement, City Hall closed its doors after 1:30 December 23, the Friday before the holiday weekend.[14] And in the days following Christmas, the Mayor and other city hall employees did not keep regular hours.

The City contends Petitioners could have made less-risky choices and their failure to effect timely service was therefore "of their own making."[15] According to the City, Petitioners chose to file the PFR on December 23 instead of December 27, which was the statutory deadline,

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[9] Motion at 13
[10] Declaration of Julie Ainsworth-Taylor (Feb. 21, 2012), Ex. A and B
[11] Ainsworth-Taylor Declaration, Ex. D
[12] Ainsworth-Taylor Declaration, Ex. E and F
[13] Ainsworth-Taylor Declaration, Ex.C
[14] City of Snoqualmie's Reply re Dispositive Motions (Feb. 28, 2012), at 6, fn. 3
[15] City's Reply, at 5



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1111 Israel Road SW, Suite 301
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Olympia, Washington 98504-0953
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and opted to attempt personal service on Respondent instead of putting the PFR in the US Mail. Thus, the City argues, Petitioners' failure to strictly comply with the Board's service rules is grounds for dismissal.

WAC 242-03-230(4) provides:

> The board may dismiss a case for failure to substantially comply with this section.

The test for "substantial compliance" used by the federal courts to evaluate sufficiency of service upon local governments, while not directly applicable, is instructive. Failure to strictly comply with Rule 4 of the Federal Rules of Civil Procedure does not require dismissal of the complaint if the plaintiff satisfies four requirements: "(a) the party that had to be served personally had actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed." *S.J. v Issaquah School District* No. 411, US District Court, Western District of Washington at Seattle (March 8, 2007), citing *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984).

In *Continental Sports Corp. v Department of Labor and Industries (DLI)*,[16] our Supreme Court reviewed a decision of the Board of Industrial Insurance Appeals which dismissed an appeal filed by FedEx delivery and received a day after the last day to appeal. Construing the DLI service requirement in RCW 51.48.131, the Court ruled that delivery by FedEx did not satisfy the statutory requirement for service "by mail." But the Court continued:

> Although we conclude the postal matter delivered by Federal Express is not mail,… we must still decide whether Continental … substantially complied with the provisions of RCW 51.48.131 when it employed Federal Express to deliver its notice of appeal.

The Court noted the FedEx receipt sent to the DLI indicated the date the notice of appeal was deposited with the carrier, which was the last date for filing an appeal. The Court

[16] 128 Wn.2d 594, 602-604, 910 P.2d 1284 (1996)



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1111 Israel Road SW, Suite 301
P.O. Box 40953
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Phone: 360-664-9170
Fax: 360-586-2253

concluded DLI "was in as good a position as it would have been had the notice of appeal been sent to the Board 'by mail'." On these facts, the Court ruled the appellant *substantially complied* with the service requirements.

On the record before us, the Board finds Petitioners' reasonable and diligent effort to effect personal service on the day they filed their PFR with the Board was frustrated by the unannounced early pre-Christmas closure of City Hall. There was a justifiable excuse for failure to serve properly.[17] When a second attempt at personal service on the next business day – December 27 - was thwarted by the post-Christmas absence of the Mayor and City Clerk, Petitioners reasonably effected service by FedEx next-day delivery. The Board notes the City acknowledges it was previously notified of Petitioner's intent to file a GMA challenge[18] and the City cannot reasonably claim to have been prejudiced by the technical defect of delivery by FedEx.

Conclusion Re: Service

The Board finds and concludes Petitioners' failure of strict compliance with the service requirements of WAC 242-03-230(2) was occasioned by the unscheduled closure of City Hall. By diligent and prompt efforts to complete service, Petitioners substantially complied with the Board's service rules. The motion to dismiss for insufficiency of service is **denied.**

**JURISDICTION TO REVIEW RESOLUTION 1115**

- Resolution 1115 – Pre-Annexation Agreement

Resolution 1115 authorizes the Mayor to enter into a Pre-Annexation Agreement with SMV, WREDCo and DirtFish. The Agreement spells out a number of conditions and mitigations for continued operation of the uses on the property, including the DirtFish rally school, special events run by SMV, and a wood recycling business operated as Northfork Enterprises. The

[17] While not reaching the City's hypothetical of "getting hit by a bus on the way to the post office" (City's Reply, at 8), the obstacle was of the City's making, not a result of Petitioners' misjudgment.22

[18] The City states Your Snoqualmie Valley announced on November 14, 2011, in a Land Use Petition (LUPA) filed in King County Superior Court, that it intended to file a PFR with the Growth Board. City Reply at 5.



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Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

requirement for an annexation implementation plan is deferred, and the City commits to future consideration of shoreline designations and unspecified code amendments.

The City, joined by Intervenors, contends Resolution 1115 is a development agreement that is not subject to the Board's jurisdiction. The City moves to dismiss the challenge to the Resolution. Petitioners contend Resolution 1115 is a *de facto* amendment of the City's comprehensive plan annexation policies and a *de facto* amendment of City development regulations for which the Board has jurisdiction.[19]

- Applicable Law

The Legislature has defined a limited jurisdiction for the Growth Board. RCW 36.70A.280(1) provides, in pertinent part: "The growth management hearings board shall hear and determine only those petitions alleging" that "a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter [GMA] . . . or chapter 43.21C RCW [SEPA] as it relates to plans, development regulations, or amendments."

Under RCW 36.70A.290(1), the Board hears "[a]ll petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto is in compliance with the goals and requirements of [the GMA, SEPA, or SMA]."

"Comprehensive Plan" or "Plan" is defined in the GMA, RCW 36.70A.030(4):

> **"Comprehensive land use plan," "comprehensive plan," or "plan"** means a generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to this chapter.

A comprehensive plan consists of a future land use map, planning elements, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan.[20] The comprehensive plan itself does not directly regulate site-specific

[19] See Legal Issues 2 and 4

[20] RCW 36.70A.070.



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

land use decisions. Rather, it is development regulations which directly control the development and use of the land. Such regulations must be consistent with the comprehensive plan and be sufficient in scope to carry out the goals set forth in the comprehensive plan. [21]

Development regulations are defined in the GMA, RCW 36.70A.030(7):

> "**Development regulations**" or "**regulation**" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto…. [22]

Thus, the jurisdiction of the GMHB is statutorily established by RCW 36.70A.280(1) and .290(1).[23] The GMHB has jurisdiction to hear appeals of local decisions adopting or amending comprehensive plans, including subarea plans, and adopting or amending development regulations, including area-wide rezones.

In this statutory framework, the courts have long recognized the GMHB lacks jurisdiction to hear challenges to development agreements.[24] Development agreements are individual agreements between cities and property owners regarding the development, use, and mitigation of the development of a specific property. Development agreements are authorized by RCW 36.70B.170, which expressly provides for development agreements outside the city limits:

> A city may enter in to a development agreement for real property outside its boundaries as part of a proposed annexation or a service agreement.[25]

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[21] *Woods v. Kittitas County,* 162 Wn.2d 597, 613 (2007)*;* RCW 36.70A.040 (Development regulations must implement comprehensive plan).
[22] See also, WAC 365-196-800 ("Development regulations under the [GMA] are specific controls placed on development or land use activities by a county or city.")
[23] This is reinforced by the exclusions from the LUPA process in RCW 36.70C.020, RCW 36.70C.030, and RCW 36.70B.020(4).
[24] *Citizens for Mount Vernon v City of Mount Vernon*, 133 Wash. 2d 861, 947 P.2d 1208 (1997); *City of Burien v CGMHB,* 113 Wash.App. 376, 53 P.3d 1028 (2002).
[25] RCW 36.70B.170(1), also providing that in GMA cities a development agreement must be consistent with the city's adopted development regulations.



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Only if a development agreement constitutes a *de facto* amendment to a comprehensive plan or development regulation is it within the Board's jurisdiction for review.

In *Alexanderson v Board of Clark County Commissioners*, 135 Wash.App. 541, 144 P.3d 1219 (2006) the Court of Appeals ruled that a Memorandum of Understanding between Clark County and the Cowlitz Tribe for provision of water service to a proposed development was a *de facto* amendment to the County's comprehensive plan policy prohibiting such water service. The Court reversed the Board's dismissal for lack of jurisdiction and remanded for Board decision on the merits. In light of *Alexanderson*, the Board must address the jurisdictional question independent of the caption of the City's action.

- *De Facto* Amendment of Comprehensive Plan

Snoqualmie Comprehensive Plan Chapter 8 contains the City's annexation policies, including general annexation policies and policies specific to each of the City's four annexation planning areas. At issue here, Policy Objective 8.B.2 provides:

> Maintain effective control over growth and development within the urban growth area and encourage consistency with comprehensive plan goals and policies by requiring more specific area planning prior to annexation.

Policy 8.B.2.1 requires:

> *Require the preparation*, whether by the City or property owner, *of an annexation implementation plan* for the entire applicable planning area *prior to annexation* of any individual property to the City. *The annexation implementation plan shall be reviewed and approved by the City prior to approval of an annexation*. Ensure annexation of individual properties conform substantially to the policies of the annexation implementation plan. Require the preparation of a pre-annexation zoning regulation pursuant to the provisions of RCW 35A.14.330 and .340.

The annexation implementation plan must indicate proposed land uses, primary road networks, and utility systems,[26] include a sensitive areas study,[27] buffer rural and resource

[26] Policy 8.B.2.3



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

lands,[28] and protect the 100-year floodplain.[29] Policies specific to the Mill Planning Area, which includes the property at issue here, spell out additional requirements for this area's annexation implementation plan, including removal of fill in the floodway, soil contamination testing, buffering of neighboring residences from the gravel quarry and waste water treatment operations, upgrading Meadowbrook Bridge, and provision of trail right-of-way. [30]

Resolution 1115 expressly defers the requirement of an annexation implementation plan until development or redevelopment of the Mill Planning Area is proposed. The Pre-Annexation Agreement authorized by the Resolution states:[31]

> **Comprehensive Plan Policies**. The Snoqualmie Vicinity Comprehensive Plan contains both general annexation policies and policies specific to annexation of the Mill Planning Area, which includes the Annexation Area. The City will *defer applying the comprehensive plan annexation policies*:
> 4.1. To the WREDCO Property until development or redevelopment of the WREDCO Property is proposed.
> 4.2. To the SMV Property until development or redevelopment is proposed on the SMV Property….

Petitioners contend the Pre-Annexation Agreement amends the Comprehensive Plan by *deferring* the requirement of an annexation implementation plan for this particular area despite the Policy 8.B.2.1 mandate requiring the preparation, review and approval of an annexation implementation plan *prior to approval* of an annexation.

The City argues the Pre-Annexation Agreement does not ignore or abandon application of the annexation policies but simply defers them until actual development is proposed.[32] The City asserts:

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[27] Policy 8.B.2.9
[28] Policy 8.B.2.8
[29] Policy 8.B.4
[30] Policies 8.C.3.1 to 8.C.3.13
[31] Resolution 1115, A.4, emphasis added
[32] See Resolution 1115, A.6: The City will not approve any new or additional site development until review of applicable Comprehensive Plan policies, approval of an Annexation Implementation Plan, and for any development within the PCI zone, a Planned Commercial Industrial Plan, and for any development in the PR



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

- This proposed annexation was initiated at the request of King County to change the jurisdiction having land use control over the property. No change of use, new development or redevelopment is proposed or approved, and so analysis would be pre-mature.[33]
- The Pre-Annexation Agreement simply applies the City's existing zoning to the existing uses on the property. Transportation, water, and sewer service are already available for these uses.[34]
- Many of the specifics called out in the annexation policies have already been resolved, such as renovation of Meadowbrook Bridge,[35] agreement on flood control measures,[36] and soil contamination studies and remediation agreements.[37]
- Other annexation policy requirements are incorporated in the Pre-Annexation Agreement, including the sensitive areas study[38] and commitments to dedicate trail right-of-way.[39]

Under the circumstances, the City says, where jurisdiction over existing uses is simply being transferred from county to city and no new development has been proposed, requiring an annexation implementation plan at this time would be a wasted exercise; thus deferral was a reasoned exercise of the City's discretion.

The Board only reaches the question of the City's discretion if the Pre-Annexation Agreement is a *de facto* amendment of the comprehensive plan which the Board has

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zone a Planned Residential Plan, and associated environmental review under the State Environmental Policy Act have been completed.

[33] Policy 8.B.2.3 indicates the intention of an annexation implementation plan is to provide "the general policy guide for *development* of any property proposed for annexation."

[34] Resolution 1115, B.5; see also Ex. F. to City Motions, Staff Report, at 8.B.1.2. comment b

[35] Ex. F at 8.C.3.10

[36] Ex. F at 8.C.3.3 and 8.C.3.8

[37] Ex. F at 8.C.3.7

[38] Resolution 1115, B.4 and Ex. F at 8.B.2.9

[39] Ex. F at 8.C.3.12 and Resolution 1115, A.11 and A.14



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

jurisdiction to review. The Board looks to the Court's analysis in *Alexanderson* to determine whether there was a *de facto* plan amendment. The *Alexanderson* Court stated:

- [The memorandum] requires the County to act inconsistently with planning policies.[40]
- Although the language of [the memorandum] does not explicitly amend [a goal] of the County's comprehensive plan, it has the actual effect of doing so.[41]
- Because the MOU has the legal effect of amending the plan, just as if the words of the plan itself had been changed to mirror the MOU, the MOU was a *de facto* amendment and the Board has jurisdiction. [42]
- [Because] the MOU directly conflicts with the comprehensive plan and will override [a] Goal … of the comprehensive plan … the MOU is not a development agreement. We hold that the MOU is a *de facto* amendment to the comprehensive plan within the Board's jurisdiction and not a development agreement outside the Board's jurisdiction.[43]

In the case before us, the Board finds a direct conflict between the City's comprehensive plan annexation policies – requiring an annexation implementation plan prior to approval of a proposed annexation – and the Resolution 1115 agreement to annex first and "defer applying the comprehensive plan annexation policies." The Board notes again the mandatory language of Policy 8.B.2.1:

> *Require* the preparation … of an annexation implementation plan …*prior to* annexation …. The annexation implementation plan *shall be* reviewed and approved by the City *prior to* approval of an annexation. [44]

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[40] *Alexanderson*, at 548-49
[41] *Alexanderson*, at 549
[42] *Alexanderson*, at 550
[43] *Id.*
[44] Policies 8.B.2.10 and 11 allow consideration of exceptions in two circumstances, neither of which is applicable here: for "public health and safety" to provide necessary public services to a property, and for location of City facilities or utilities.



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1111 Israel Road SW, Suite 301
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Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Resolution 1115 effectively amends the requirement of Policy 8.B.2.1 and related provisions as applied to the Mill Planning Area. An exception for the Mill Planning Area, which could have been allowed through a comprehensive plan amendment, is instead granted in a Pre-Annexation Agreement. Under the reasoning in *Alexanderson,* the Pre-Annexation Agreement is a *de facto* amendment to the comprehensive plan within the Board's jurisdiction and not a development agreement outside the Board's jurisdiction.[45]

The Board concludes Resolution 1115 is a *de facto* amendment of the Snoqualmie Comprehensive Plan annexation policies insofar as it defers preparation of an annexation implementation plan which the policies require to be approved prior to annexation. As such, Resolution 1115 is within the Board's jurisdiction to review.[46] The City's motion to dismiss for lack of jurisdiction on this basis is denied.

- *De Facto* Amendment of Development Regulations

The City moves to dismiss the challenge to Resolution 1115 on the grounds the Pre-Annexation Agreement is not a development regulation or amendment and thus not within the Board's jurisdiction.

Petitioners' characterization of Resolution 1115 as an amendment of the City's development regulations is the basis for Legal Issue 4 of the PFR, which alleges the Pre-Annexation Agreement "sets forth controls on land." Petitioners assert the Resolution guarantees the City will amend its code provisions to assure continued use of the property for the DirtFish rally school and special events; thus the Resolution is a *de facto* amendment of regulations, according to Petitioners.[47]

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[45] *Id.*
[46] Some of the City's arguments, though not persuasive on the question of jurisdiction, may be relevant to the question of GMA compliance or to a future amendment of the plan policies.
[47] Petitioners also assert the City's recognition of DirtFish as a conforming use in Resolution 1115, B.1 is an amendment of City Code provisions, but supporting facts and analysis are not provided.



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The Board finds Resolution 1115 largely applies the City's existing zoning code designations to the comparable lands in the Mill Planning Area (Section A.2).[48] Other sections of the Pre-Annexation Agreement commit the City to "commence the process" for consideration of shoreline designations (A.3), to "present amendments" to the code's allowable use tables to the Planning Commission and City Council "for their consideration" (A.7), and to "present amendments" to the temporary use permits code provisions (A.8).

Petitioners contend these provisions pre-judge the outcome and constitute *de facto* code amendments that "set forth controls on land." The Board is not persuaded. The proposed shoreline designations are not controls on land; they still must go through the City's process and Department of Ecology review and approval. The possible code amendments are not even specified; they cannot possibly be considered controls on land. The Board will not assume the City acts in bad faith when it commits to considering or undertaking a process for review of planning actions.[49] Petitioners will have opportunities to comment in the shoreline designation process as well as on any City code revisions, and the Pre-Annexation does not dictate a particular legislative result.

Board concludes Resolution 1115 is not a *de facto* amendment to the City's development regulations; the City's motion to dismiss that aspect of Petitioners' challenge is granted and Legal Issue 4 is **dismissed.**

Conclusion Re: Jurisdiction

The City's motion to dismiss Petitioners' challenge to Resolution 1115 for lack of jurisdiction is denied in part and granted in part. The Board finds Resolution 1115, by deferring

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[48] The Pre-Annexation Zoning is adopted in Ordinance 1086 and is within the Board's acknowledged jurisdiction.

[49] The Board assumes good faith on the part of the City. See, *Petso v City of Edmonds*, CPSGMHB Case No. 09-3-0005, Final Decision and Order, (Aug. 17, 2009) at 32; *Fallgatter V. v City of Sultan*, CPSGMHB Case No. 06-3-0003, Final Decision and Order (June 29, 2006), at 21; *Central Puget Sound Regional Transit Agency v. City of Tukwila*, CPSGMHB Case No. 99-3-0003, Final Decision and Order (Sep. 15, 1999), at 7; *Pilchuck v. Snohomish County*, CPSGMHB Case No. 95-3-0047, Final Decision and Order (Dec. 6, 1995), at 38.



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

application of the City's annexation policies – specifically, the requirement of an annexation implementation plan – is a *de facto* amendment to Chapter 8 of the City's Comprehensive Plan. The Board concludes it has subject matter jurisdiction to review Resolution 1115 on this basis.

The Board finds and concludes Resolution 1115 is not a *de facto* amendment to the City's development regulations. The City's motion to dismiss as to that issue is granted. Legal Issue 4 is **dismissed**. The scope of the Board's review of Resolution 1115 in Legal Issues 5 and 6 will be limited to comprehensive plan issues.

## PETITIONERS' MOTIONS FOR LEAVE TO SUPPLEMENT THE RECORD

Petitioners filed two motions for leave for additional time to request supplementation of the record, only one of which is still at issue.[50] Petitioners' remaining motion asks for additional time to file motions to supplement the record if Petitioners find relevant documents in response to public disclosure requests.[51] The requests, directed to King County and the City of Snoqualmie, ask for:

> Any and all public records, including but not limited to documents, emails, letters, memorandum between the City of Snoqualmie and King County – all departments (Staff, City Council, Mayor, County Council, County Executive) related to the proposed annexation of the Weyerhaeuser Mill Site.

Petitioners indicate they have received "no records from King County, and Snoqualmie's response has not been fully responsive."[52] Petitioners want the opportunity to move for supplementation if disclosed records are relevant to the matter before the Board.

The City and Intervenors object on several grounds:

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[50] The Second Motion for Leave to File Supplemental Evidence (Feb.9, 2012), concerned records of certain City Council and Planning Commission Meetings not included in the City's Index. An Amended Index has now been filed by the City and the matter is resolved. Petitioners' Reply to Motion for Leave (Feb. 27, 2012).
[51] Motion for Leave to File Supplemental Evidence (Feb. 8, 2012).
[52] Petitioners' Reply, at 3



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1111 Israel Road SW, Suite 301
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Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

- No documents are attached to the motion and there is no statement of why such evidence would be necessary or of substantial assistance to the Board, as required by WAC 242-03-565.
- The material sought in the Petitioners' record requests is irrelevant, because the Board does not have jurisdiction over annexations or over interlocal agreements.
- The Board's rules specify the Index and record evidence should consist of material used by the city "in taking the action that is the subject of review."[53] The subject of review in this case is not the Interlocal Agreement or annexation, but only Ordinance 1086 and Resolution 1115.
- Finally, some of the documents responsive to the requests post-date the adoption of the Ordinance 1086 and Resolution 1115.

The Board notes it has no authority over the public records request process. Parties to Board proceedings who request documents under the Public Disclosure Act do so for their own purposes, which may be broader than the action before the Board. However, if the disclosure provides information that is necessary or of substantial assistance to the Board's decision, a motion to supplement is appropriate.

The Board grants the Petitioners additional time to review the disclosures and determine whether to move to supplement the record, as follows:

- A motion to supplement the record may be filed with the Petitioners' prehearing brief.
- The requested document[s] shall be attached to the motion.
- The motion shall clearly state why the document is necessary or of substantial assistance to the Board in reaching its decision concerning (a) Ordinance 1086 or (b) Resolution 1115. The Board is not reviewing the Interlocal Agreement or annexation.
- Material post-dating the adoption of Ordinance 1086 and Resolution 1115 will not be considered.

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[53] WAC 242-03-510(10 and WAC 242-03-565



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1111 Israel Road SW, Suite 301
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- The City and/or Intervenors may respond to the motion when they file their responsive briefs on the merits. The Board will rule on the motion at the outset of the Hearing on the Merits.

Conclusion on Supplementation

Petitioners' motion for leave for additional time to file supplementation is **granted** on the conditions indicated above.

**ORDER**

Based upon review of the Petition for Review, the motions and briefs submitted by the parties, the GMA, prior Board Orders and case law, having deliberated on the matter the Board ORDERS:

1. Respondent's motion to dismiss for failure to serve the PFR is **denied.**
2. Respondent's motion to dismiss Petitioners' challenge to Resolution 1115 for lack of jurisdiction is **granted in part and denied in part**.
   (a) The Board concludes Resolution 1115 is a *de facto* amendment of the City's Comprehensive Plan which the Board has jurisdiction to review. Respondent's motion to dismiss as to that issue is denied.
   (b) The Board concludes Resolution 1115 is not an amendment or *de facto* amendment of the City's development regulations. Respondent's motion to dismiss as to that issue is granted. Legal Issue 4 is dismissed.



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

3. Petitioners' motion for leave for additional time to file a motion for supplementation is **granted** on the conditions indicated above.

Dated this 8th day of March, 2012.

_____
William P. Roehl, Board Member

_____
Margaret A. Pageler, Board Member

_____
Joyce Mulliken, Board Member



Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

# APPENDIX F

**Salisbury**
**v.**
**City of Bonney Lake**

**CENTRAL PUGET SOUND**
**GROWTH MANAGEMENT HEARINGS BOARD**
STATE OF WASHINGTON

| | | |
|---|---|---|
| JON T. SALISBURY, GERALD C. SCHMITZ, and CONNELLS PRAIRIE COMMUNITY COUNCIL,<br><br>Petitioners,<br><br>v.<br><br>CITY OF BONNEY LAKE,<br><br>Respondent. | ) | **Case No. 95-3-0058**<br><br>**ORDER GRANTING BONNEY LAKE'S MOTION TO DISMISS** |

## I. PROCEDURAL BACKGROUND

On August 21, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from Jon T. Salisbury, Gerald C. Schmitz, and Connells Prairie Community Council (hereafter referred to as **Salisbury**). Salisbury challenges the Capital Facilities Element of the City of Bonney Lake Comprehensive Plan (the **Plan**) on grounds that it violates the Growth Management Act (**GMA** or the **Act**) and is not consistent with the Pierce County County-wide Planning Policies, and the Pierce County Comprehensive Plan.

On August 22, 1995, the Board entered a Notice of Hearing in the case.

On September 20, 1995, the City of Bonney Lake (the **City**) filed a 'Motion to Dismiss or to Vacate or Modify the August 21 Order of the Board" (**City's Motion to Dismiss**) with the Board.

The Board held a prehearing conference at 9:30 a.m. on Tuesday, October 3, 195, at the Metropolitan Park District in Tacoma, Washington. Board member M. Peter Philley, Presiding Officer in this matter, conducted the hearing. Douglas Hales and Paul Cyr represented Salisbury, and Gregory M. Miller and Jim Dionne represented the City.

On October 10, 1995, Salisbury filed with the Board a Response Memorandum to the City's Motion to Dismiss. On October 13, 1995, the City filed with the Board a Reply Brief to Salisbury's Response.



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2329 One Union Square • 600 University Street
Seattle, WA 98101-1129
(206)389-2625 • Fax: (206)389-2588

## II. FINDINGS OF FACT

The City of Bonney Lake adopted the Bonney Lake Comprehensive Plan Update on May 30, 1995. In the Plan, the City made a recommendation that the Connells Prairie area be incorporated as part of the urban growth area (UGA) for Bonney Lake. The County has not taken final action on the City's proposal.

On June 2, 1995, notice of the Plan's adoption was published in the Tacoma News Tribune (the **TNT**). The June 2 notice did not indicate any information regarding the issue of UGAs.

On June 22, 1995, another notice of the Plan's adoption was published in the TNT. This notification did state that the Plan had addressed UGAs.

## III. MOTION TO DISMISS

***Should the Petition for Review be dismissed on the grounds that the City was not properly or timely served with the Petition?***

In a superior court action, RCW 4.28.080[1] requires personal service of a summons in a case against an incorporated city to be made during normal business hours to the mayor's or city manager's designated agent or to the city clerk.

By contrast, the growth management hearings boards have less stringent rules for service. The boards have not required parties to personally serve copies of the petition. Instead, a petition for review may be filed personally, or by first class, certified, or registered mail. WAC 242-02-230(1). Once a petition is filed with a board, petitioners must promptly serve a copy of the petition for review on all named parties. WAC 242-02-230(1). When a party is a city, the copy shall be served on the mayor, city manager, or city clerk. WAC 242-02-230(1). The Board may dismiss any case for failure to substantially comply with the service requirements. WAC 242-03-230(2).

In this case, the Petition for Review was filed with the Board on August 21, 1995. Salisbury alleges that they served the City, by mail, with a copy of the Petition on August 30, 1995. Petition for Review, at 1. The City maintains that a copy of a "transmittal" letter along with a copy of the Petition was received on August 31, 1995.

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[1] RCW 4.28.080 provides:

> The summons shall be served by delivering a copy thereof, as follows:
>
> (2) If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.



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The City Clerk alleges that this transmittal letter was addressed to the "City of Bonney Lake" and not to herself, the city manager, or the mayor.[2] Clayton Declaration, at 2. This allegation was not refuted by Salisbury in its response to the City's Motion to Dismiss. Therefore the Board must presume that the transmittal letter was addressed to "the City" only.

Even though the Board's rules for service are relaxed, parties must still substantially comply with them. The Board holds that a letter addressed only to "the city" does not meet the requirements that the mayor, city manager, or city clerk be served with a copy of the petition. The Board can only imagine the delays and confusion that might result should a petition be addressed simply to the "City of Seattle" or the "City of Tacoma."

The service of the Petition on the City also fails to meet the requirement of "promptness." Assuming that the Petition had been properly addressed, it was not received by the City until August 30 (assuming Salisbury is correct) or August 31 (assuming the City is correct), nine or ten days from the time the original was filed with the Board. The Board holds that, absent a compelling reason justifying a delay, nine or ten days or more clearly is not "prompt" within the meaning of WAC 242-02-230(1). Salisbury provided no such justification for its delay in serving the City.

The Board thus holds that Salisbury did not properly or timely serve the City with the Petition for Review because the Petition was not addressed to the city clerk, the city manager, or the mayor, and it was received by the City nine or ten days after the Petition was filed with the Board.

[2] The City also argues that even though a copy of the Petition was attached to the letter, the letter was signed by a paralegal and did not appear to be an initiation of a new lawsuit.



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**Growth Management Hearings Board**
2329 One Union Square • 600 University Street
Seattle, WA 98101-1129
(206)389-2625 • Fax: (206)389-2588

## CONCLUSION

Salisbury's Petition for Review was not properly or timely served on the City. Salisbury did not substantially comply with the requirements of WAC 242-02-230(1).

## IV. ORDER

Having reviewed the above-referenced documents and having deliberated on the matter, the Board enters the following order:

1) The City's Motion to Dismiss is **granted**. Petitioner Salisbury did not properly or timely serve the City with a copy of the Petition for Review. Therefore, the Petition for Review is **dismissed with prejudice**.

2) The hearing on the merits of Salisbury's Petition for Review is **stricken**.

So ordered this 27th day of October, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member



**Central Puget Sound**
**Growth Management Hearings Board**
2329 One Union Square • 600 University Street
Seattle, WA 98101-1129
(206)389-2625 • Fax: (206)389-2588

# APPENDIX G

**Keesling**
**v.**
**King County**

**CENTRAL PUGET SOUND**
**GROWTH MANAGEMENT HEARINGS BOARD**
STATE OF WASHINGTON

| | |
|---|---|
| Keesling,<br><br>Petitioner,<br><br>v.<br><br>King County,<br><br>Respondent. | **Case No. 95-3-0078**<br><br>**ORDER GRANTING MOTION TO DISMISS FOR LACK OF TIMELY SERVICE** |

## I. PROCEDURAL BACKGROUND

On December 27, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (the **Petition**) from Maxine Keesling (hereafter referred to as **Keesling**). The matter was assigned Case No. 95-3-0078. Keesling challenges adoption by King County (the **County**) of Ordinance 12016 (proposed ordinance No. 95-568) (the **Ordinance**), which extends clearing and drainage standards adopted for the Bear Creek basin to the remainder of the Bear Creek Community Planning Area. Keesling claims that the County, in adopting the Ordinance, did not act in conformity with policies in the County's Comprehensive Plan pursuant to the requirements of RCW 36.70A.120.

On January 17, 1996, the Board received from Keesling an "Amendment to Petition for Review" (the **Amended Petition**).

On January 25, 1996, the Board issued a Prehearing Order setting forth the legal issues, establishing deadlines for motions, responses and replies thereto and adopting a briefing schedule.

On January 29, 1996, the Board received a "Declaration of Service" (the **Declaration**) and "Another Declaration of Service" from Keesling (the **Second Declaration**).



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On February 14, 1996, the Board received from the County a "Motion to Dismiss for Lack of Timely Service" (the **Motion to Dismiss**). Exhibit A to the Motion to Dismiss was County Ordinance No. 12016. Exhibit B to the Motion to Dismiss was a letter dated November 3, 1995 to Linda Querin of the *Seattle Times* Classified Ads Department from Gerald A. Peterson, Clerk of the King County Council, transmitting for publication a Notice of Adoption of Ordinance 12016. Also attached to Exhibit B was a copy of an Affidavit of Publication including a copy of the Notice of Adoption as published in the *Seattle Times* dated November 15, 1995.

On this same date, the Board received from the County an "Affidavit of Joanne Rasmussen" (the **Affidavit**). Exhibit A to the Affidavit were copies of the Keesling Petition for Review, a copy of the Keesling Amendment to Petition for Review, the Declaration and the Second Declaration, all of which bore two stamps: one reading "RECEIVED 96 JAN 29 PM 12:49 CLERK KING COUNTY COUNCIL" and a second reading "COPY RECEIVED PROSECUTING ATTORNEY 96 JAN 29 PM 4:01 CIVIL DIVISION."

On February 16, 1996, the Board received from Keesling "Motion to NOT Dismiss." (Emphasis in original).

## II. FINDINGS OF FACT

1. King County adopted Ordinance No. 12016 on October 30, 1995.

2. On November 15, 1995, notice of the adoption of Ordinance No. 12016 was published in the *Seattle Times*.

3. On December 26, 1995, Keesling mailed a copy of the Petition to the King County Prosecuting Attorney's Office.

4. On January 13, 1996, Keesling mailed a copy of the Amended Petition to R. David Allnutt and Gail D. Riseberg of the King County Prosecuting Attorney's Office CIVIL DIVISION.

5. KCC 2.04.010 designates the Council Clerk as the County's agent for receipt of process.

6. Keesling's Second Declaration, dated January 25, 1996, stated that a copy of both the Petition and the Amended Petition was mailed to the Council Clerk's Office.

7. Keesling's Second Declaration, with copies of the Petition and Amended Petition were received by the Clerk of the King County Council on January 29, 1996.



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## III. MOTION TO DISMISS

The County's Motion to Dismiss argues that Keesling failed to serve the proper agent of the County, the Clerk of the County Council, within the 60 day period following the publication of the adoption of Ordinance 12016. It further argues that service by mail is inadequate and that Keesling did not perform service "promptly."

In her Motion to NOT Dismiss, which the Board construes to be a response to the County's Motion to Dismiss, Keesling argues that her document service on the County's Prosecuting Attorney's Office, rather than the Council Clerk's office, was the result of oral instruction which she received from a County official in a prior matter before this Board, Case No. 95-3-0008. Keesling further argues that this Board should concur with the determination of the Western Washington Growth Management Hearings Board in *Achen v. Clark County*, WWGMHB Case No. 95-2-0067, where the Western Board declined to dismiss petitions for improper service, stating that no prejudice was suffered by the municipality. With respect to the method of service, Keesling argues that her use of first class mail was proper, citing the choices listed in the Boards' rules of practice and procedure.

## CONCLUSION

The Boards' rules of practice and procedure at WAC 242-02-230 provide:

> (1) The original and three copies of the petition for review shall be filed with a board personally, or by first class, certified, or registered mail. Filings may also be made with a board by telegraph or by electronic telefacsimile transmission as provided in WAC 242-02-240 . A copy of the petition for review shall be served promptly upon all other named parties. When a county is a party, the county auditor shall be served in noncharter counties and the agent designated by the legislative authority in charter counties. The mayor, city manager, or city clerk shall be served when a city is a party. When the state of Washington is a party, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law. Proof of service may be filed with the board pursuant to WAC 242-02-340 .
> (2) A board may dismiss a case for failure to substantially comply with subsection (1) of this section.

The Board concludes that Keesling's use of first class mail was a proper means to serve the County. However, she did not serve the "agent designated by the legislative authority" in King County namely, the Clerk of the County Council. This Board has had a number of cases and a number of *pro se* parties filing petitions for review of King County actions and to date, all of them were able to comply with WAC 242-02-230 and serve the Council Clerk prior to the expiration of the 60 day appeal period. Pursuant to RCW 36.70A.290(2), the last date to file a timely appeal of Ordinance



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12016 was 60 days after the November 15, 1995 date of publication of the Notice of Adoption, or by January 14, 1996. Therefore, Keesling's January 25, 1996 service on the Clerk of the Council was not timely.

The Board concludes that Keesling's Petition for Review was not timely served on the County. Keesling did not substantially comply with the requirements of WAC 242-02-230(1).

## IV. ORDER

Having reviewed the above-referenced documents and having deliberated on the matter, the Board enters the following order;

1) The County's Motion to Dismiss is **granted**. Petitioner Keesling did not timely serve the County with a copy of the Petition for Review. Therefore, the Petition for Review is **dismissed with prejudice.**

2) The hearing on the merits of Keesling's Petition for Review is **stricken.**

So ordered this 18th day of March, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member



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**CENTRAL PUGET SOUND**
**GROWTH MANAGEMENT HEARINGS BOARD**
STATE OF WASHINGTON

| | |
|---|---|
| MAXINE KEESLING<br><br>Petitioner,<br><br>v.<br><br>KING COUNTY<br><br>Respondent. | **DECLARATION OF SERVICE**<br>**Case No. 95-3-0078** |

I, Patience W. Jones, being duly sworn upon oath, depose and say:

1. I am an employee of the Central Puget Sound Growth Management Hearings Board, a United States Citizen, over the age of eighteen years, and am competent to testify to the matters set forth herein.

2. On March 18, 1996, and in the manner indicated below, I caused the **Order Granting Motion to Dismiss For Lack of Timely Service** to be served upon:

*Petitioner:*
Maxine Keesling
15241 N.E. 153rd St.
Woodinville, WA 98072
Tel: (206) 483-8523
Fax: Unknown

(X) By United States Mail
( ) By Facsimile

*Petitioner: King County*
Charles E. Maduell, WSBA No. 15491
H. Kevin Wright, WSBA No. 19121
King County Prosecutor's Office
E550 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Telephone (206)296-9015
FAX (206)296-0191

(X) By United States Mail
( ) By Facsimile



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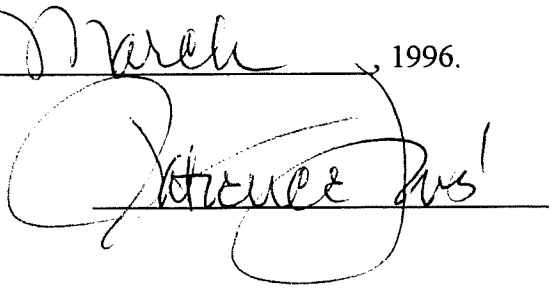
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 18th day of March, 1996.





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# APPENDIX H

**Selected Clerk's Papers**

| | |
|---|---|
| KENMORE MHP LLC ET AL<br>VS<br>CITY OF KENMORE ET AL | COURT OF APPEALS NO. 54915-8-II<br><br>SUPERIOR COURT NO. 19-2-04781-34<br><br>**PAGES 1 – 431** |

CLERK'S PAPERS INDEX

IN THE STATE OF WASHINGTON SUPERIOR COURT FOR THURSTON COUNTY

| | |
|---|---|
| KENMORE MHP LLC, JIM PERKINS, and KENMORE VILLAGE MHP, LLC<br><br>Petitioners and Plaintiffs,<br><br>vs.<br><br>CITY OF KENMORE, ENVIRONMENTAL LAND USE HEARINGS OFFICE and the GROWTH MANAGEMENT HEARINGS BOARD FOR THE CENTRAL PUGET SOUND REGION<br><br>Respondents and Defendants. | No. 19-2-04781-34<br><br>**Petition for Judicial Review and Complaint** |

Petitioners and Plaintiffs allege as follows:

## Introduction

1. The City of Kenmore (City) adopted Ordinance No. 19-0481, which created a ten year moratorium on redevelopment of five properties within the

STEPHENS & KLINGE LLP
601 – 108th Avenue, Suite 1900
Bellevue, WA 98004
(425) 453-6206
stephens@sklegal.pro

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

STATE OF WASHINGTON

| | |
|---|---|
| KENMORE MHP LLC, JIM PERKINS, and KENMORE VILLAGE MHP, LLC,<br><br>Petitioners,<br><br>v.<br><br>CITY OF KENMORE,<br><br>Respondent. | **CASE No. 19-3-0012**<br><br>**ORDER ON CITY'S MOTION FOR SUMMARY JUDGMENT** |

## I. INTRODUCTION

This matter comes before the Board pursuant to the City of Kenmore's Motion for Summary Judgment. The Board has before it the following submittals from the parties:

- City of Kenmore's Motion for Summary Judgment;
- Declaration of Kelly Chelin in Support of the City of Kenmore's Motion for Summary Judgment;
- Petitioners' Opposition to City's Motion for Summary Judgment;
- Declaration of Richard M. Stephens in Support of Opposition to City's Motion for Summary Judgment;
- City of Kenmore's Reply Supporting its Summary Judgment Motion;
- Declaration of Dawn Reitan in Support of the City of Kenmore's Reply Supporting its Motion for Summary Judgment.

## II. STATEMENT OF FACTS

- On Nov. 26, 2018, the City Council adopted Ordinance No.18-0476 which amended their comprehensive plan to: 1) amend the Land Use (LU) element, Policy 2.1.2 to create a Manufactured Housing Community (MHC) Land Use/Zone District; 2) adopt MHC LU Element Policies and 3) amend Figure LU-3, the Kenmore Land Use Plan, to re-designate two existing mobile home parks to MCH.
- There was no timely appeal of Ordinance No.18-0476 and it became final and



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P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

valid.

- On April 15, 2019, the City of Kenmore adopted Ordinance No. 19-0481 in order to implement and align the City's zoning code with the comprehensive plan amendments that were adopted in Ordinance No. 18-0476.
- On April 18, 2019, Ordinance No. 19-0481 was published.
- On June 14, 2019, Petitioners filed the Petition for Review in this case with the Board, challenging Ordinance 19-0481.
- On June 17, 2019, the City of Kenmore was served with the Petition.

## III. ANALYSIS

**Applicable Law:**

**RCW 36.70A.270 - Growth management hearings board—Conduct, procedure, and compensation.** The growth management hearings board shall be governed by the following rules on conduct and procedure:

...

(7) All proceedings before the board, or any of its members, or a hearing examiner appointed by the board shall be conducted in accordance with such administrative rules of practice and procedure as the board prescribes. The board shall develop and adopt rules of practice and procedure, including rules regarding expeditious and summary disposition of appeals and the assignment of cases to regional panels. The board shall publish such rules and decisions it renders and arrange for the reasonable distribution of the rules and decisions.

**WAC 242-03-230(2)** Service of petition for review. (a) A copy of the petition for review shall be served upon the named respondent(s) and **must be** received by the respondent(s) **on or before the date filed with the board.** Service of the petition for review may be by mail, personal service, or a commercial parcel delivery service, **so long as the petition is received by respondent on or before the date filed with the board.**...

(4) The board may dismiss a case for failure to **substantially comply** with this section.

**WAC 242-03-240 Filing and service of all other papers.**

(2) Service: Parties shall serve copies of all filings on all other named parties by electronic mail, **on or before the date filed with the board**, unless a party lacks technical capability. Service is accomplished when the document is transmitted electronically, or, by agreement



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

among the parties or exception granted by the presiding officer, is postmarked or commercially sent by the required date.

**WAC 242-03-555 Dispositive motions.** (1) Dispositive motions on a limited record to determine the board's jurisdiction, the standing of a petitioner, **or the timeliness of the petition are permitted**. The board rarely entertains a motion for summary judgment except in a case of failure to act by a statutory deadline.
[Emphasis added.]

**Position of the Parties**

The City's Motion asks the Board to dismiss the case because the Petitioners failed to serve the City in accordance with WAC 242-03-230(2)(a) which requires that service "must be received by the respondent(s) **on or before the date filed with the board**." The regulation permits service "by mail, personal service, or a commercial delivery service, so long as the petition is received by the respondent **on or before the date filed with the board**." [Emphasis added.]

The City states, and the Petitioners do not dispute, that while the petition was filed with the Board on June 14, 2019,[1] the City did not receive the petition until June 17, 2019.

The City argues that failure to comply with the Board's service requirements is a cause for dismissal, unless the Petitioners can show that they substantially complied. In this assertion, the City advances the analysis in *Your Snoqualmie Valley, et al. v. City of Snoqualmie* GMHB No. 11-3-0012 (Order on Motions, March 8, 2012) at 5. There, this Board applied the substantial compliance test used by federal courts in denying a motion to dismiss for failure of service which evaluates four criteria:

> "(a) [T]he party that had to be served personally had actual notice, (b) the [Respondent] would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) [Petitioner] would be severely prejudiced if [its Petition] were dismissed."[2]

Substantial compliance is a question of fact, dependent on the facts of a particular

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[1] Prehearing Order at 3.
[2] *Your Snoqualmie Valley, et al. v. City of Snoqualmie,* GMHB No. 11-3-0012 (Order on Motions, March 8, 2012) at 5.



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1111 Israel Road SW, Suite 301
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Olympia, WA 98504-0953
Phone: 360-664-9170
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case. The Board in *Your Snoqualmie Valley* found that the unannounced and early pre-Christmas closure of City Hall occasioned the late service. "There was a justifiable excuse for failure to serve properly."[3] Further, the board noted that "the obstacle was of the City's making, not a result of Petitioners' misjudgment." The Board noted that the City acknowledged that it had actual notice and so assertions of prejudice would not be reasonable on these facts.[4] The Board made no observation concerning the prejudice to Petitioner on dismissal.

In summary, in denying the motion to dismiss, the Board found that the City had actual notice, and that there was a justifiable excuse for the failure to serve properly.

Here, the City asserts, and provides a declaration in support of, the proposition that the City had no actual notice until the June 17 service.[5] Further, they point out that Petitioners offer no justifiable excuse, such as was the case in *Your Snoqualmie Valley*.

During the Prehearing Conference, as stated in the Prehearing Order, the Respondent City of Kenmore did indicate its intention to file a dispositive motion.[6] The Motion is supported by the declaration of the City Clerk, which states that the Petition was received by the City on June 17, 2019, that the City was not aware of this action until served, and that the City was open regular business hours on June 10 and thereafter for proper service.[7]

The Petitioners do not dispute failing to meet the rule, offer no justifiable excuse for having failed to meet the rule, but opposes the Motion on four bases:

**(1) The motion was not identified in the Prehearing Order.** This assertion is factually untrue, as the Prehearing Order clearly states: "Dispositive motions: Respondent does anticipate dispositive motions."[8] Additionally, there is no requirement that a declaration of the possibility of a dispositive motion be made in the Prehearing Conference, nor would the absence of such declaration preclude a properly filed dispositive motion.

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[3] *Id.* at 6.
[4] *Id.* at 6.
[5] City's Motion at 5.
[6] Prehearing Order at 1.
[7] Declaration of Kenmore City Clerk Kelly Chelin pp. 1-2.
[8] *Ibid.* fn. 3.



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1111 Israel Road SW, Suite 301
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**(2) There is no precedent for an interpretation of WAC 242-03-230(2) to require dismissal.** Petitioners assert that the City's reliance on *Your Snoqualmie Valley* is inappropriate. "In essence, the City asks the board to penalize Petitioners for filing with the Board one day early and shorten the statutory 60 day statute of limitations. There is no support for such an extreme rule."[9] The Board observes that the assertion of "no support" is factually untrue, as the 60 day statute of limitations is uncharged and the regulation requiring contemporaneous or prior service exists in law.[10]

(3) **WAC 242-03-230(4) provides for substantial compliance**. Petitioners rely on the regulation's provision that "[t]he board may dismiss a case for failure to **substantially comply** with this section" and claims that they have substantially complied with it. In support of that assertion, they point out that there is no prejudice to the City here and that dismissal is a "drastic result."[11]

Petitioners argue the federal criteria used by the Board in *Your Snoqualmie Valley* do not supply an appropriate legal analysis. Those criteria, Petitioners claim, are addressing a filing deadline and not, as here, a rule concerning the order of filing and service, i.e., failing to abide by the language specifying service "on or before the date filed with the board." And yet, while distinguishing the context of the use of these criteria in evaluating substantial compliance, the Petitioners wish to be absolved of its failure to properly serve the petition by arguing that WAC 242-03-230(4) provides for substantial compliance. Petitioners rely on a different approach to determining substantial compliance, based on ascertaining the objective of the regulation and whether that objective was met. This is in accordance with the general legal definition of substantial compliance:

> compliance with the substantial or essential requirements of something (as a statute or contract) that satisfies its purpose or objective even though its formal requirements are not complied with.[12]

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[9] Petitioners' Opposition to Motion for Summary Judgment at 4.
[10] Analysis of the requirements that would save the petition by analogy to Federal cases is not addressed here, as the Board in *Your Snoqualmie Valley* found them helpful but "not directly applicable."
[11] Petitioners' Opposition to Motion for Summary Judgment at 7.
[12] https://www.merriam-webster.com/legal/substantial%20compliance



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P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
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Petitioners suggest that the objective of the regulation is "obtaining notice, notice within a reasonable time and avoiding unnecessary delay in the resolution of this case,"[13] but offers no legal argument for why we should accept that objective as being the right objective for this regulation's requirement of service "on or before" filing of the petition with the Board.

Petitioners cite two cases in support of its argument that substantial compliance saves this case, but fails to note some important differences in the facts in one case and misstates the holding in the second one. In *City of Port Orchard v. Kitsap County*, GMHB No. 16-3-0012, this Board noted that the respondent in that case did have actual "full and immediate" knowledge of the filing,[14] a fact missing in this scenario. Petitioners cite *Salisbury v. City of Bonney Lake*, GMHB No. 95-3-0058, Order Granting Bonney Lake's Motion to Dismiss, for the proposition that a 9 or 10 day delay is not grounds for dismissal.[15] Yet, that case held that the petition was not properly or timely served and the City's Motion to Dismiss was granted,[16] so Petitioners are inaccurate in use of the citation. The Board is not persuaded that the holding in either of these cases remotely supports the Petitioners' claim to substantial compliance.

(4) **The Board has no authority to adopt a rule that Petitioner must be served before it is filed.** The Petitioners remind us that administrative agencies only have authority to promulgate rules if such power is expressly granted or necessarily applied from statutory grants of authority. "The City's interpretation of WAC 242-03-230 means that – as a jurisdictional matter – the legislature's 60 day deadline is shortened if a petitioner files early," thus creating a "moving deadline" in conflict with RCW 36.70A.290.[17] Petitioners misstate the proposition made by the City; the City is not citing RCW 36.70A.290 for the authority to promulgate WAC 242-03-230. The Board's jurisdiction to develop substantive procedural rules appears in RCW 36.70A.270.

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[13] Petitioners' Opposition to Motion for Summary Judgment at 5.
[14] *City of Port Orchard v. Kitsap County*, GMHB No. 16-3-0012 (Order on Motion, November 14, 2016) at 2.
[15] Petitioners' Opposition to Motion for summary Judgment at 7.
[16] *Salisbury v. City of Bonney Lake*, CPSGMHB No. 95-3-0058 (Order Granting Motion, October 27, 1995) at 4.
[17] *Id.* at 8.



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The Respondent City of Kenmore was served within 60 days of the date of the Petitioner's filing of the Petition and the provision of RCW 36.70A.290 requiring filing within 60 days of publication is met; however, the City was not served "on or before the date filed with the Board," as required by WAC 242-03-230(2), a procedural rule established under RCW 36.70A.270. The statutory deadline did not move. The service requirement was not met.

Petitioners attempt to argue that the regulation somehow shortens the legislature's 60-day deadline "if a petitioner files early,"[18] and thus "conflicts with RCW 36.70A.290 and is therefore beyond the scope of the Board's authority."[19] This argument fails because it is not the decision to "file early" that creates the failure of service under WAC 242.030230; the error is in the choice to file with the Board without at least simultaneous service on the Respondent.

The language of this regulation, specifying the order of filing and service, "on or before the date filed with the Board," appears twice in WAC 242-03-230(2). It appears again in WAC 242-03-240, concerning the filing of all other papers in the case. The specification of the order of service has been a part of the Board's procedural rules for twenty-five years.

The opposition to the City's motion for dismissal from the Petitioners ignore the plain language of the GMHB rules of practice and procedure that every attorney practicing before the Board should be prepared to comply with, unless a justifiable excuse, as in *Your Snoqualmie Valley*, or substantial compliance is present in the facts of that particular case. Here, the Petitioners cannot demonstrate any reason why the City was not served in a timely manner, any explanation for their failure to meet the requirements of the regulation, relying instead on arguments that are factually untrue or on cases that do not apply.

The service provisions in the Board's rules are jurisdictional, not just procedural,[20] and absent effective service, the Board has no authority and the case must be dismissed.

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[18] Petitioners' Opposition to Motion for Summary Judgment at 8.
[19] Petitioners' Opposition to Motion for Summary Judgment at 8.
[20] *Sky Valley and Dwayne Lane v. Snohomish County*, CPSGMHB No. 98-3-0033c (Order Granting Motion to Dismiss, January 20, 1999) at 2-3.



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

**Prejudice**

The Petitioners here rely heavily on arguments involving the concepts of prejudice, either the failure of prejudice to the Respondent or the presence of prejudice to the Petitioners on these facts. Prejudice does appear in the evaluative criteria suggested by the federal court analogy and used by the Board in *Your Snoqualmie Valley.* To repeat, those criteria are:

> "(a) [T]he party that had to be served personally had actual notice, (b) the [Respondent] would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) [Petitioner] would be severely prejudiced if [its Petition] were dismissed."[21]

In the case before us here, as in *Your Snoqualmie Valley*, the question of (a) actual notice, and (c) justifiable excuse appear in and are central to the Motion. The question of prejudice, as it appears in (b) and (d) of the federal evaluative criteria, does not appear to come up in any of the Board cases cited by the parties, appears largely as an observation or *dicta*, and doesn't provide a single holding in any Board case dealing with dismissal. The dismissal of a case is clearly prejudicial to the non-moving party, but this Board has seen fit to dismiss cases for failure to follow the WACs governing practice before this Board, including service, in many cases on a variety of facts.

In *Salisbury v. Bonney Lake*, CPSGMHB No. 95-3-0058 (Order Granting Bonney Lake's Motion to Dismiss, October 27, 1995) the City was served 10 days after filing with the Board. The Board in that case appears to have been interpreting the language of WAC 242-03-230(1) at that time which required "prompt" service after filing. The Board found that the nine or ten day delay was not timely and dismissed the case.

In *City of Tacoma v. Pierce county*, CPSGMHB No. 06-3-0011c (Order on Motion to Dismiss and Order on Intervention, May 1, 2006) the issue revolved around precisely who could effectively receive service, and the Board noted that even with notice of the Board's rules, the Petitioner in that case had made no attempt to comply with the rules. The Board

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[21] *Your Snoqualmie Valley, et al. v. City of Snoqualmie*, GMHB No. 11-3-0012 (Order on Motions, March 8, 2012) at 5.



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noted that "Petitioner's attorney should be aware that there is significant Board precedent for this Board's dismissal of a PFR for improper service; however, improper service has been a rare event in the CPS region since the millennium."[22]

In none of these cases is the prejudice to the Respondent or the Petitioner considered central to or germane to resolving the issue of procedural compliance and the suitability of dismissal.[23] Every case concerning sufficiency of service is dependent on a particular and unique set of facts, as is this case. The Board is persuaded that the Petitioners failed to serve the City in a timely manner, and the case should be dismissed.

**Motion to Dismiss Issue 3**

The City also brings a motion for dismissal of Legal Issue 3 on the grounds that it is a collateral attack on a prior City action. The Board does not reach this issue, as it dismisses the case on procedural grounds.

**Findings and Conclusions**

**The Board finds** that the Petitioners filed the petition for review electronically with the Board on June 14, 2019, at 2:37 pm, a Friday, and that the mailed copy subsequently received by the Board was postmarked June 14, 2019.

**The Board finds** that WAC 242-03-230(2)(a) requiring service of the petition for review on the respondent "on or before the date filed with the board" and "so long as the petition is received by respondent on or before the date filed with the board " are applicable to the facts in this case.

**The Board finds** that the City was served on June 17, 2019, a Monday, after the petition was filed with the board, and was open regular business hours, i.e., 9 a.m. to 5 p.m., on weekdays prior to this date and fully available for service.

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[22] *City of Tacoma v. Pierce County*, CPSGMHB No. 06-3-0011c (Order on Motion to Dismiss and Order on Intervention, May 1, 2006) at 5.

[23] Accord. *Sky Valley, et al., v. Snohomish County,* CPSGMHB No. 95-3-0068 (Order on Dispositive Motions, January 8, 1996); *Keesling v. King County*, CPSGMHB No. 95-3-0078, (Order Granting Motion to Dismiss for Lack of Timely Service, March 8,1996); *Whidbey Environmental Action Network v. Island County*, WWGMHB No. 06-2-0027 (Order on Motion to Dismiss Petition for Review, November 16, 2006); *Abercrombie v. Chelan County,* EWGMHB No. 00-1-0008 (Order on Dispositive Motions, June16, 2000).



Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

**The Board finds that** there is no evidence that the Respondent had actual knowledge of the action, nor that the Petitioners made any effort to comply with the regulation requiring prior or contemporaneous service to the Respondent, nor that the doctrine of substantial compliance applies to these facts.

**The Board concludes** that the Petitioners failed to serve the City of Kenmore in a timely manner as required by WAC 242-03-230.

## IV. ORDER

The City of Kenmore's motion for Summary Judgment is granted. The Case is dismissed.

DATED this 29th day of August 2019.

Bill Hinkle, Presiding Officer

Deb Eddy, Board Member

*See Dissent*
Cheryl Pflug, Board Member



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

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|---|---|
| June 14, 2019 | Petition Filed |
| June 20, 2019 | Notice of Hearing and Preliminary Schedule |
| **July 15, 2019 10:00 a.m.** | **Telephonic Prehearing Conference** – Call 1 (800) 704-9804 and use pin 8796590# |
| July 15, 2019 | Index Due (Respondent to file) |
| July 22, 2019 | Prehearing Order |
| July 22, 2019 | Additions to Index (parties to confer) |
| July 29, 2019 | Deadline for Dispositive Motions and for Motions to Supplement the Record (proposed supplements to be attached) |
| August 8, 2019 | Deadline for Response to Dispositive Motions or Motions to Supplement the Record |
| August 15, 2019 | Deadline for Reply to Motions (optional) |
| August 29, 2019 | Anticipated date of Order on Motions |
| September 12, 2019 | Deadline for Petitioners' Prehearing Brief (with exhibits) |
| October 3, 2019 | Deadline for Respondent's Prehearing Brief (with exhibits) |
| October 17, 2019 | Deadline for Petitioners' Reply Brief (optional) |
| **October 31, 2019 10:00 a.m.** | **Hearing on Merits of Petition** Location to be determined |
| **December 11, 2019** | **Final Decision and Order** |

## III. PREHEARING CONFERENCE

At the Prehearing Conference, the parties should be prepared to discuss the action being challenged, the nature of the claims asserted in the Petition for Review, and the framing of the legal issues to be decided.

The parties should be prepared to indicate the nature of any dispositive motions it intends to file. The parties are advised that the Board will normally only decide the following issues on motions: timeliness of the filing of the petition for review, standing to raise the claims in the petition, and subject-matter jurisdiction. The Presiding Officer may ask for stipulations concerning threshold matters that are not in dispute, if any.

The case schedule will be discussed at the Prehearing Conference and may be modified to fit the needs of the parties insofar as the Board determines it can reasonably



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1111 Israel Road SW, Suite 301
P O. Box 40953
Olympia, WA 98504-0953
Phone 360-664-9170
Fax 360-586-2253

Legal Issues in this case are as follows:

1. Whether Kenmore is not in compliance with RCW 36.70A.390 because Ordinance No. 19-0481 is essentially a ten year moratorium on redevelopment which exceeds the time and procedural limitations in RCW 36.70A.390.

2. Whether Kenmore is not in compliance with RCW 36.70A.110 and RCW 36.70A.070 by removing potential urban housing for at least a decade, because it causes Kenmore to fail to meet its obligation to provide sufficient dwelling units under RCW 36.70A.110(2), (3) and (4), thereby forcing the creation of new dwelling units on other cities or unincorporated areas of King County.

3. Whether Kenmore is not incompliance with RCW 36.70A.210 and RCW 36.70A.100, by removing potential urban housing for at least a decade because Kenmore's actions conflict with County-wide planning policies and, therefore, RCW 36.70A. 210(1) and RCW 36.70A.100.

4. Whether Kenmore is not in compliance with RCW 36.70A.040, RCW 36.70A.130 and WAC 365-196-800 because Ordinance No. 19-0481 is inconsistent with and fails to implement numerous provisions of the City's Comprehensive Plan regarding the vision for downtown Kenmore in relation to redevelopment goals to concentrated and dense pedestrian and transit-oriented residential and multiuse development in the downtown area.

**Petitioners have the obligation to review these issue statements to ensure that they properly set forth the issues raised. If Petitioners object to the completeness or accuracy of these issue statements, it must file a written motion for change together with the proposed changed issue or issues in their entirety no later than seven (7) days from the date of this order.**

## II. SCHEDULE

The following schedule shall remain in effect unless modified in writing by subsequent order:

| | |
|---|---|
| June 14, 2019 | Petition Filed |
| June 20, 2019 | Notice of Hearing and Preliminary Schedule |
| July 15, 2019 | Telephonic Prehearing Conference |
| July 15, 2019 | Index received |



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

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|---|---|
| KENMORE MHP LLC, JIM PERKINS, and KENMORE VILLAGE MHP LLC,<br><br>Petitioners,<br><br>vs.<br><br>CITY OF KENMORE,<br><br>Respondent. | NO. 19-3-0012<br><br>CITY OF KENMORE'S SUMMARY JUDGMENT MOTION |

## I. RELIEF REQUESTED

The City of Kenmore ("City") requests the Growth Management Hearings Board, Central Puget Sound Region ("Board") dismiss the above captioned Petition for Review ("Petition") because Petitioners failed to timely serve the City. In the alternative, the City also requests the Board dismiss Legal Issue 3, as set forth in the Board's Prehearing Order, because Countywide Planning Policies ("CPPs") provide substantive direction to comprehensive plans, not to development regulations. The City amended its comprehensive plan in November 2018, and there was no timely appeal of these amendments. Lastly, Petitioners' collateral attacks to



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the City's comprehensive plan amendments must be dismissed because those amendments were not timely appealed, and as such, the Board does not have jurisdiction to review the same.

## II. STATEMENT OF FACTS

A. 2018 Comprehensive Plan Amendments.

On November 26, 2018, the City Council adopted Ordinance No. 18-0476 ("Ord. 18-0476"), which, among other things, amended the City's Comprehensive Plan to: 1) amend Land Use (LU) Element Policy 2.1.2 to create a Manufactured Housing Community (MHC) Land Use/Zone District; 2) adopt MHC LU Element Policies and 3) amend Figure LU-3, the Kenmore Land Use Plan, to redesignate two existing mobile home parks to MCH. Ord. 18-0476 was published on November 29, 2018. No person or entity timely appealed the Ord. 18-0476, and it became final and valid.[1]

B. 2019 Development Regulations Amended.

On April 15, 2019, the City Council adopted Ordinance No. 19-0481 ("Ord. 19-0481"), which amended the City's development regulations to implement Ord. 18-0476.[2] The City Council adopted Ord. 19-0481 to implement and align the City's zoning code with the comprehensive plan amendments adopted under Ord. 18-0476. Ord. 19-0481 was published on April 18, 2019.[3] Petitioners filed their Petition on June 14, 2019 with the Board.[4] However, the City was not served with the Petition until June 17, 2019.[5] At no time prior to this service

[1] *See* Declaration of Kelly Chelin in Support of the City of Kenmore's Motion for Summary Judgement (hereinafter "Chelin Decl.") at ¶ 2.
[2] *Id.* at ¶ 3.
[3] *Id.*
[4] *See* Prehearing Order at 3.
[5] Chelin Decl. at ¶ 4



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| KENMORE MHP LLC, JIM PERKINS, and KENMORE VILLAGE MHP LLC,<br><br>Petitioners,<br><br>vs.<br><br>CITY OF KENMORE,<br><br>Respondent. | NO. 19-3-0012<br><br>DECLARATION OF KELLY CHELIN IN SUPPORT OF THE CITY OF KENMORE'S MOTION FOR SUMMARY JUDGMENT |

I, Kelly Chelin, under penalty of perjury under the laws of the State of Washington, state and declare as follows:

1. I am the City Clerk for the City of Kenmore ("the City"). I am over 21 years of age and am competent to testify to the matters set forth herein. The matters set forth herein are personally known to me to be true and accurate.

2. On November 26, 2018, the City passed Ordinance 18-0476 ("Ord. 18-0476"), which was published November 29, 2019. To date, the City has not received any appeal for Ord. 18-0476. Attached is a true and correct copy of Ord. 18-0476.

3. On April 15, 2019, the City passed Ordinance 19-0481 ("Ord. 19-0481"), which was published on April 18, 2019. Attached is a true and correct copy of Ord. 19-0481.



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4. The City was not served with the Petition for Review in this matter until June 17, 2019. Attached is a true and correct copy of the first page of the Petition for Review, which is stamped received June 17, 2019. It is the standard practice of the City to stamp the date received on such documents.

5. The City was not aware of this action until June 17, 2019, when it was served with the Petition for Review.

6. The City was open regular business hours (i.e., 9:00 a.m. to 5:00 p.m.) on June 10, 2019, June 11, 2019, June 13, 2019, and June 14, 2019. The City could have been served at any time it was open on those days.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Kenmore, Washington, on the 29th day of July, 2019.

Kelly Chelin
Kenmore City Clerk



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# EXHIBIT A

# CITY OF KENMORE
# ORDINANCE NO. 18-0476

# CITY OF KENMORE
WASHINGTON
**ORDINANCE NO. 18-0476**

**AN ORDINANCE OF THE CITY OF KENMORE, WASHINGTON, RELATING TO THE COMPREHENSIVE PLAN; AMENDING THE LAND USE ELEMENT, INCLUDING THE LAND USE PLAN MAP; AMENDING THE DOWNTOWN SUB-ELEMENT; AMENDING THE HOUSING ELEMENT; AND AMENDING THE NATURAL ENVIRONMENT SUB-ELEMENT OF THE COMPREHENSIVE PLAN; AND PROVIDING AN EFFECTIVE DATE.**

WHEREAS, over the past year, the City's Planning Commission has reviewed and recommended options related to the preservation of existing mobile home parks, consistent with the the City's Housing Strategy Plan and RCW 36.70A.070(2)(c) which requires that sufficient land be available for all types of housing including manufactured housing; and

WHEREAS, on July 9, 2018, the Planning Commission presented recommended options to the City Council related to preservation of the existing mobile home parks; and

WHEREAS, on July 9, July 16, July 23, and September 17, 2018 the City Council reviewed the Planning Commission's recommendations, received additional background information, and requested the formulation of new policy options; and

WHEREAS, on September 17, 2018, the City Council requested that amendments be prepared for consideration that would preserve two of the existing mobile home parks for the long term and preserve the four other existing mobile home parks for 10 years, followed by an upzoning with affordability requirements; and

WHEREAS, on October 16, the Planning Commission reviewed Comprehensive Plan amendments to the Land Use Element, including the Land Use Plan Map, the Downtown Sub-Element, and the Housing Element to support preservation of existing mobile home parks; and

WHEREAS, on October 16, the Planning Commission also considered amendments to the Natural Environment Sub-Element related to the critical areas regulations update that has been underway since last spring; and

WHEREAS, throughout the mobile home park and critical area update projects, a concerted effort has been made to generate public involvement, including holding public open houses; advertising public meetings; and creating comprehensive and regularly-updated web pages; and

assigned the MHC designation to existing manufactured housing communities within the City proposed for long-term preservation; and

WHEREAS, on March 11, 2019, the City Council reviewed Municipal Code amendments to codify the MHC zoning designation in the zoning code and to rezone the existing manufactured housing communities to the MHC zoning designation; and

WHEREAS, the City's Responsible Official under the State Environmental Policy Act has issued a determination of non-significance for the proposal; and

WHEREAS, the Washington State Department of Commerce was notified of the proposed amendments pursuant to RCW 36.70A.106; and

WHEREAS, the City Council held a public hearing on the Municipal Code amendments on March 25, 2019; and

WHEREAS, the City Council finds that the proposed amendments meet the criteria found in KMC Section 19.20.090; and

WHEREAS, in *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180 (9th Cir. 2012) the Ninth Circuit Court of Appeals held that Tumwater could similarly preserve existing mobile home parks by rezoning the properties as "Manufactured Home Parks" with permissible land uses consistent with the operation of a mobile home park because the city had a valid public interest in preserving affordable housing and the rezone did not infringe upon the park owners' property rights, was not an unconstitutional taking of property without just compensation, and was not unlawful spot zoning. The Court held:

- "As a general rule, zoning laws do not constitute a taking, even though they affect real property interests: This Court has upheld land-use regulations that destroy or adversely affect recognized real property interests. Zoning laws are, of course, the classic example, which have been viewed as permissible government action even when prohibiting the most beneficial use of the property."

- "... the submission that [the mobile home park property owners] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable ... [the owners] retain the ability to continue operating the properties as manufactured home parks. So the law does not interfere with what must be regarded as [the owners'] primary expectation concerning the use of the parcel."

- "The [zoning] ordinances restrict to some extent the owners' ability to *use* their properties, because they can no longer build multi-family housing, for example. But imposing *use* restrictions on property – as distinct from restrictions on alienation – is the essence of zoning." And;

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND
STATE OF WASHINGTON

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| KENMORE MHP LLC, JIM PERKINS, and KENMORE VILLAGE MHP, LLC<br><br>Petitioners,<br><br>vs.<br><br>CITY OF KENMORE,<br><br>Respondent. | Case No. 19-3-0012<br><br>**Opposition to City's Motion for Summary Judgment** |

## INTRODUCTION

The City of Kenmore (City) has filed a motion for summary judgment on three issues, despite the Prehearing Order indicating that there would be no dispositive motions. For the reasons that follow, the motion should be denied.

While the Board sometimes defers rulings on motions until the hearing on the merits (WAC 242-03-550), Petitioners encourage the Board not to wait on this

STEPHENS & KLINGE LLP
601 – 108th Avenue, Suite 1900
Bellevue, WA 98004
(425) 453-6206
stephens@sklegal pro

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HEARINGS BOARD

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND – STATE OF WASHINGTON

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| KENMORE MHP LLC, JIM PERKINS, and KENMORE VILLAGE MHP LLC,<br><br>Petitioners,<br><br>vs.<br><br>CITY OF KENMORE,<br><br>Respondent. | NO. 19-3-0012<br><br>CITY OF KENMORE'S REPLY SUPPORTING ITS SUMMARY JUDGMENT MOTION |

**REPLY**

Petitioners' Response contains no facts or law to defeat the City's Summary Judgment Motion ("Motion"), and as such the City requests the Board dismiss the Petition, or in the alternative, dismiss Petitioners' claims related to CCPs and Ord. 18-0476.

A. The Prehearing Order States Respondent **DOES** anticipate dispositive motions.

Petitioners attempt to defeat the City's Motion by claiming that the "Prehearing Order states: Dispositive Motions: Respondent does not anticipate dispositive motions."[1] However, Petitioners' have misread the Prehearing Order, which actually states:

- Dispositive motions: Respondent does anticipate dispositive motions.[2]

[1] Petitioners' Opposition to Motion for Summary Judgement (Opposition) at 2.
[2] Prehearing Order at 1 (emphasis added).



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Petition states, it was given to a legal messenger for delivery on June 14, 2019, but service was not accomplished until Monday, still within the 60 day deadline.

3. At 2:37 p.m., there was insufficient time for a process server to serve the City of Kenmore that day. Regardless of whether it was physically possible given traffic conditions for someone to have left my office with a copy of the Petition and arrive at Kenmore City Hall that day, the legal messenger service which we used indicated it needed to have the copy of the Petition to serve earlier than 2:37 p.m. to guarantee service that day. Because the Petition was not ready for service earlier in the day to guarantee service on Friday, June 14, 2019, the legal messenger service served the Petition on the following Monday, June 17, 2019.

4. Attached hereto as Exhibit A is a true and correct copy of the Declaration of Service of the Petition.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 7th day of August, 2019 in Woodinville, Washington.

By: */s/ Richard M. Stephens*
Richard M. Stephens, WSBA #21776
Attorneys for Petitioners

STEPHENS & KLINGE LLP
601 – 108th Avenue, Suite 1900
Bellevue, WA 98004
(425) 453-6206
stephens@sklegal.pro

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

STATE OF WASHINGTON

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| YOUR SNOQUALMIE VALLEY, DAVE EIFFERT, WARREN ROSE, and ERIN ERICSON,<br><br>Petitioners,<br><br>v.<br><br>CITY OF SNOQUALMIE<br><br>Respondent,<br>and,<br><br>SNOQUALMIE MILL VENTURES, LLC and ULTIMATE RALLY, LLC,<br><br>Intervenors. | **CASE NO. 11-3-0012**<br><br>**ORDER ON MOTIONS** |

THIS Matter came before the Board on Respondent's dispositive motions and Petitioners' motions to supplement the record. Petitioners oppose the City's actions related to proposed annexation of a portion of its associated UGA known as the Mill Planning Area. Snoqualmie Mill Ventures, LLC (SMV) and Weyerhaeuser Real Estate Development Company (WREDCo) are the property owners of the potential annexation area, a former Weyerhaeuser lumber mill. SMV leases a substantial portion of its property to Ultimate Rally, LLC dba DirtFish Rally School (DirtFish), which operates a specialized rally car driving instructional school. The property is also used for special events.



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1111 Israel Road SW, Suite 301
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The annexation was proposed by King County in January, 2011.[1] In March, 2011, the Snoqualmie City Council authorized negotiations with King County for annexation by interlocal agreement.[2] The City then undertook four actions:[3]

- Zoning to become effective upon annexation [Pre-Annexation Zoning] adopted as Ordinance 1086 on October 24, 2011
- Approval of a Pre-Annexation Agreement with SMV, WREDCo, and DirtFish, adopted by Resolution 1115, October 24, 2011
- Interlocal Agreement for annexation, adopted by the City November 28, 2011, and still pending before King County Council
- Annexation Ordinance – not yet introduced

In this matter, Petitioners challenge the City's adoption of Ordinance 1086, adopting Pre-Annexation Zoning, and Resolution 1115, authorizing the Mayor of Snoqualmie to enter into a Pre-Annexation Agreement with the property owners and DirtFish.

## RESPONDENT'S MOTIONS TO DISMISS

The City of Snoqualmie moves to dismiss the Petition for Review for untimely and improper service in violation of WAC 242-03-230. Alternatively, the City moves for dismissal of the challenge to Resolution 1115 on the grounds that the Pre-Annexation Agreement approved in the resolution is not within the Board's jurisdiction under RCW 36.70A.280(1).[4]

Petitioners responded, arguing substantial compliance with the service requirement. Petitioners also asserted Resolution 1115 is a *de facto* amendment to the City's Comprehensive Plan and development regulations, within the Board's jurisdiction.[5]

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[1] Declaration of [Mayor] Matthew Larson in Support of City of Snoqualmie's Dispositive Motion (Feb. 9, 2012), at 2.
[2] Resolution 992, March 20, 2011
[3] Summarized in City of Snoqualmie's Response to Motion for Leave to File Supplemental Evidence, at 6
[4] City of Snoqualmie's Dispositive Motions (Feb.9, 2012). Intervenors on the same date filed Intervenors' Joinder in City's Dispositive Motions.
[5] Petitioners' Response to City of Snoqualmie's Dispositive Motions (Feb.21, 2012)



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For the reasons set forth below, the Board declines to dismiss for deficiencies in service. The Board also concludes Resolution 1115 is a *de facto* comprehensive plan amendment as to which it has jurisdiction, but the Resolution is not a *de facto* amendment of the City's development regulations.

**DEFECTS OF SERVICE**

The GMA contains no express language requiring service of a PFR on any respondent. The GMA does, however, require the Board to adopt "rules regarding expeditious and summary disposition of appeals."[6] The requirement for the Petitioner to promptly serve the PFR on the respondent city, county or state agency has therefore been a part of the Board's Rules of Practice and Procedure from their first promulgation.[7] Disposition of cases will not be "expeditious" if service requirements are disregarded.

The Board's Rules of Practice and Procedure, WAC 242-03-230, contain the following provisions concerning service of the PFR:[8]

> (2)(a) A copy of the petition for review shall be served upon the named respondent(s) and must be received by the respondent(s) on or before the date filed with the board. Service of the petition for review may be by mail or personal service, so long as the petition is received by respondent on or before the date filed with the board.
>
> (b)…When a city is the respondent, the mayor, city manager, or city clerk shall be served….
>
> (4) The board may dismiss a case for failure to substantially comply with this section.

[6] RCW 36.70A.270(7).
[7] WAC 242-03-230(2), formerly WAC 242-02-230(1)
[8] WAC 242-03-230(2)



Growth Management Hearings Board
1111 Israel Road SW, Suite 301
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The City asserts service of the PFR was fatally defective. The City points out the PFR was filed with the Board on December 23, 2011, but not received by the City until December 28, 2011 when it was delivered to a City Hall receptionist by FedEx courier. The City argues:

> The Petition for Review was filed on December 23, 2011, and no effort at service was made until December 27, 2011, four days after filing. The Petition for Review was not received by the Respondent City until December 28, 2011, five days after filing. … No effort at service compliant with the requirements of WAC 242-03-230 has yet been made…[9]

In response, Petitioners provide affidavits indicating

- personal service on the Mayor or City Clerk was attempted on December 23 at 2:17 p.m. but City Hall was closed;[10]
- personal service was attempted December 27 at 11:09 a.m. but neither the Mayor nor City Clerk was in the office that day;[11]
- the PFR was sent by FedEx overnight delivery December 27 addressed to the Mayor and delivered to a front desk receptionist December 28 at 1:21 p.m.[12]

The Board notes Christmas Day fell on a Sunday. Snoqualmie City Hall took Monday, December 26 as an official holiday, posting the closure on its website calendar.[13] However, without public announcement, City Hall closed its doors after 1:30 December 23, the Friday before the holiday weekend.[14] And in the days following Christmas, the Mayor and other city hall employees did not keep regular hours.

The City contends Petitioners could have made less-risky choices and their failure to effect timely service was therefore "of their own making."[15] According to the City, Petitioners chose to file the PFR on December 23 instead of December 27, which was the statutory deadline,

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[9] Motion at 13
[10] Declaration of Julie Ainsworth-Taylor (Feb. 21, 2012), Ex. A and B
[11] Ainsworth-Taylor Declaration, Ex. D
[12] Ainsworth-Taylor Declaration, Ex. E and F
[13] Ainsworth-Taylor Declaration, Ex.C
[14] City of Snoqualmie's Reply re Dispositive Motions (Feb. 28, 2012), at 6, fn. 3
[15] City's Reply, at 5



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1111 Israel Road SW, Suite 301
P.O. Box 40953
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and opted to attempt personal service on Respondent instead of putting the PFR in the US Mail. Thus, the City argues, Petitioners' failure to strictly comply with the Board's service rules is grounds for dismissal.

WAC 242-03-230(4) provides:

> The board may dismiss a case for failure to substantially comply with this section.

The test for "substantial compliance" used by the federal courts to evaluate sufficiency of service upon local governments, while not directly applicable, is instructive. Failure to strictly comply with Rule 4 of the Federal Rules of Civil Procedure does not require dismissal of the complaint if the plaintiff satisfies four requirements: "(a) the party that had to be served personally had actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed." *S.J. v Issaquah School District* No. 411, US District Court, Western District of Washington at Seattle (March 8, 2007), citing *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984).

In *Continental Sports Corp. v Department of Labor and Industries (DLI)*,[16] our Supreme Court reviewed a decision of the Board of Industrial Insurance Appeals which dismissed an appeal filed by FedEx delivery and received a day after the last day to appeal. Construing the DLI service requirement in RCW 51.48.131, the Court ruled that delivery by FedEx did not satisfy the statutory requirement for service "by mail." But the Court continued:

> Although we conclude the postal matter delivered by Federal Express is not mail,… we must still decide whether Continental … substantially complied with the provisions of RCW 51.48.131 when it employed Federal Express to deliver its notice of appeal.

The Court noted the FedEx receipt sent to the DLI indicated the date the notice of appeal was deposited with the carrier, which was the last date for filing an appeal. The Court

[16] 128 Wn.2d 594, 602-604, 910 P.2d 1284 (1996)



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1111 Israel Road SW, Suite 301
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concluded DLI "was in as good a position as it would have been had the notice of appeal been sent to the Board 'by mail'." On these facts, the Court ruled the appellant *substantially complied* with the service requirements.

On the record before us, the Board finds Petitioners' reasonable and diligent effort to effect personal service on the day they filed their PFR with the Board was frustrated by the unannounced early pre-Christmas closure of City Hall. There was a justifiable excuse for failure to serve properly.[17] When a second attempt at personal service on the next business day – December 27 - was thwarted by the post-Christmas absence of the Mayor and City Clerk, Petitioners reasonably effected service by FedEx next-day delivery. The Board notes the City acknowledges it was previously notified of Petitioner's intent to file a GMA challenge[18] and the City cannot reasonably claim to have been prejudiced by the technical defect of delivery by FedEx.

Conclusion Re: Service

The Board finds and concludes Petitioners' failure of strict compliance with the service requirements of WAC 242-03-230(2) was occasioned by the unscheduled closure of City Hall. By diligent and prompt efforts to complete service, Petitioners substantially complied with the Board's service rules. The motion to dismiss for insufficiency of service is **denied.**

**JURISDICTION TO REVIEW RESOLUTION 1115**

- Resolution 1115 – Pre-Annexation Agreement

Resolution 1115 authorizes the Mayor to enter into a Pre-Annexation Agreement with SMV, WREDCo and DirtFish. The Agreement spells out a number of conditions and mitigations for continued operation of the uses on the property, including the DirtFish rally school, special events run by SMV, and a wood recycling business operated as Northfork Enterprises. The

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[17] While not reaching the City's hypothetical of "getting hit by a bus on the way to the post office" (City's Reply, at 8), the obstacle was of the City's making, not a result of Petitioners' misjudgment.22

[18] The City states Your Snoqualmie Valley announced on November 14, 2011, in a Land Use Petition (LUPA) filed in King County Superior Court, that it intended to file a PFR with the Growth Board. City Reply at 5.



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requirement for an annexation implementation plan is deferred, and the City commits to future consideration of shoreline designations and unspecified code amendments.

The City, joined by Intervenors, contends Resolution 1115 is a development agreement that is not subject to the Board's jurisdiction. The City moves to dismiss the challenge to the Resolution. Petitioners contend Resolution 1115 is a *de facto* amendment of the City's comprehensive plan annexation policies and a *de facto* amendment of City development regulations for which the Board has jurisdiction.[19]

- Applicable Law

The Legislature has defined a limited jurisdiction for the Growth Board. RCW 36.70A.280(1) provides, in pertinent part: "The growth management hearings board shall hear and determine only those petitions alleging" that "a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter [GMA] . . . or chapter 43.21C RCW [SEPA] as it relates to plans, development regulations, or amendments."

Under RCW 36.70A.290(1), the Board hears "[a]ll petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto is in compliance with the goals and requirements of [the GMA, SEPA, or SMA]."

"Comprehensive Plan" or "Plan" is defined in the GMA, RCW 36.70A.030(4):

> **"Comprehensive land use plan," "comprehensive plan," or "plan"** means a generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to this chapter.

A comprehensive plan consists of a future land use map, planning elements, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan.[20] The comprehensive plan itself does not directly regulate site-specific

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[19] See Legal Issues 2 and 4

[20] RCW 36.70A.070.



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Phone: 360-664-9170
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land use decisions. Rather, it is development regulations which directly control the development and use of the land. Such regulations must be consistent with the comprehensive plan and be sufficient in scope to carry out the goals set forth in the comprehensive plan. [21]

Development regulations are defined in the GMA, RCW 36.70A.030(7):

> "**Development regulations**" or "**regulation**" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto…. [22]

Thus, the jurisdiction of the GMHB is statutorily established by RCW 36.70A.280(1) and .290(1).[23] The GMHB has jurisdiction to hear appeals of local decisions adopting or amending comprehensive plans, including subarea plans, and adopting or amending development regulations, including area-wide rezones.

In this statutory framework, the courts have long recognized the GMHB lacks jurisdiction to hear challenges to development agreements.[24] Development agreements are individual agreements between cities and property owners regarding the development, use, and mitigation of the development of a specific property. Development agreements are authorized by RCW 36.70B.170, which expressly provides for development agreements outside the city limits:

> A city may enter in to a development agreement for real property outside its boundaries as part of a proposed annexation or a service agreement.[25]

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[21] *Woods v. Kittitas County,* 162 Wn.2d 597, 613 (2007)*;* RCW 36.70A.040 (Development regulations must implement comprehensive plan).
[22] See also, WAC 365-196-800 ("Development regulations under the [GMA] are specific controls placed on development or land use activities by a county or city.")
[23] This is reinforced by the exclusions from the LUPA process in RCW 36.70C.020, RCW 36.70C.030, and RCW 36.70B.020(4).
[24] *Citizens for Mount Vernon v City of Mount Vernon*, 133 Wash. 2d 861, 947 P.2d 1208 (1997); *City of Burien v CGMHB,* 113 Wash.App. 376, 53 P.3d 1028 (2002).
[25] RCW 36.70B.170(1), also providing that in GMA cities a development agreement must be consistent with the city's adopted development regulations.



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P.O. Box 40953
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Only if a development agreement constitutes a *de facto* amendment to a comprehensive plan or development regulation is it within the Board's jurisdiction for review.

In *Alexanderson v Board of Clark County Commissioners*, 135 Wash.App. 541, 144 P.3d 1219 (2006) the Court of Appeals ruled that a Memorandum of Understanding between Clark County and the Cowlitz Tribe for provision of water service to a proposed development was a *de facto* amendment to the County's comprehensive plan policy prohibiting such water service. The Court reversed the Board's dismissal for lack of jurisdiction and remanded for Board decision on the merits. In light of *Alexanderson*, the Board must address the jurisdictional question independent of the caption of the City's action.

- *De Facto* Amendment of Comprehensive Plan

Snoqualmie Comprehensive Plan Chapter 8 contains the City's annexation policies, including general annexation policies and policies specific to each of the City's four annexation planning areas. At issue here, Policy Objective 8.B.2 provides:

> Maintain effective control over growth and development within the urban growth area and encourage consistency with comprehensive plan goals and policies by requiring more specific area planning prior to annexation.

Policy 8.B.2.1 requires:

> *Require the preparation*, whether by the City or property owner, *of an annexation implementation plan* for the entire applicable planning area *prior to annexation* of any individual property to the City. *The annexation implementation plan shall be reviewed and approved by the City prior to approval of an annexation*. Ensure annexation of individual properties conform substantially to the policies of the annexation implementation plan. Require the preparation of a pre-annexation zoning regulation pursuant to the provisions of RCW 35A.14.330 and .340.

The annexation implementation plan must indicate proposed land uses, primary road networks, and utility systems,[26] include a sensitive areas study,[27] buffer rural and resource

[26] Policy 8.B.2.3



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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

lands,[28] and protect the 100-year floodplain.[29] Policies specific to the Mill Planning Area, which includes the property at issue here, spell out additional requirements for this area's annexation implementation plan, including removal of fill in the floodway, soil contamination testing, buffering of neighboring residences from the gravel quarry and waste water treatment operations, upgrading Meadowbrook Bridge, and provision of trail right-of-way. [30]

Resolution 1115 expressly defers the requirement of an annexation implementation plan until development or redevelopment of the Mill Planning Area is proposed. The Pre-Annexation Agreement authorized by the Resolution states:[31]

> **Comprehensive Plan Policies**. The Snoqualmie Vicinity Comprehensive Plan contains both general annexation policies and policies specific to annexation of the Mill Planning Area, which includes the Annexation Area. The City will *defer applying the comprehensive plan annexation policies*:
> 4.1. To the WREDCO Property until development or redevelopment of the WREDCO Property is proposed.
> 4.2. To the SMV Property until development or redevelopment is proposed on the SMV Property….

Petitioners contend the Pre-Annexation Agreement amends the Comprehensive Plan by *deferring* the requirement of an annexation implementation plan for this particular area despite the Policy 8.B.2.1 mandate requiring the preparation, review and approval of an annexation implementation plan *prior to approval* of an annexation.

The City argues the Pre-Annexation Agreement does not ignore or abandon application of the annexation policies but simply defers them until actual development is proposed.[32] The City asserts:

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[27] Policy 8.B.2.9
[28] Policy 8.B.2.8
[29] Policy 8.B.4
[30] Policies 8.C.3.1 to 8.C.3.13
[31] Resolution 1115, A.4, emphasis added
[32] See Resolution 1115, A.6: The City will not approve any new or additional site development until review of applicable Comprehensive Plan policies, approval of an Annexation Implementation Plan, and for any development within the PCI zone, a Planned Commercial Industrial Plan, and for any development in the PR



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- This proposed annexation was initiated at the request of King County to change the jurisdiction having land use control over the property. No change of use, new development or redevelopment is proposed or approved, and so analysis would be pre-mature.[33]
- The Pre-Annexation Agreement simply applies the City's existing zoning to the existing uses on the property. Transportation, water, and sewer service are already available for these uses.[34]
- Many of the specifics called out in the annexation policies have already been resolved, such as renovation of Meadowbrook Bridge,[35] agreement on flood control measures,[36] and soil contamination studies and remediation agreements.[37]
- Other annexation policy requirements are incorporated in the Pre-Annexation Agreement, including the sensitive areas study[38] and commitments to dedicate trail right-of-way.[39]

Under the circumstances, the City says, where jurisdiction over existing uses is simply being transferred from county to city and no new development has been proposed, requiring an annexation implementation plan at this time would be a wasted exercise; thus deferral was a reasoned exercise of the City's discretion.

The Board only reaches the question of the City's discretion if the Pre-Annexation Agreement is a *de facto* amendment of the comprehensive plan which the Board has

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zone a Planned Residential Plan, and associated environmental review under the State Environmental Policy Act have been completed.

[33] Policy 8.B.2.3 indicates the intention of an annexation implementation plan is to provide "the general policy guide for *development* of any property proposed for annexation."

[34] Resolution 1115, B.5; see also Ex. F. to City Motions, Staff Report, at 8.B.1.2. comment b

[35] Ex. F at 8.C.3.10

[36] Ex. F at 8.C.3.3 and 8.C.3.8

[37] Ex. F at 8.C.3.7

[38] Resolution 1115, B.4 and Ex. F at 8.B.2.9

[39] Ex. F at 8.C.3.12 and Resolution 1115, A.11 and A.14



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jurisdiction to review. The Board looks to the Court's analysis in *Alexanderson* to determine whether there was a *de facto* plan amendment. The *Alexanderson* Court stated:

- [The memorandum] requires the County to act inconsistently with planning policies.[40]
- Although the language of [the memorandum] does not explicitly amend [a goal] of the County's comprehensive plan, it has the actual effect of doing so.[41]
- Because the MOU has the legal effect of amending the plan, just as if the words of the plan itself had been changed to mirror the MOU, the MOU was a *de facto* amendment and the Board has jurisdiction. [42]
- [Because] the MOU directly conflicts with the comprehensive plan and will override [a] Goal … of the comprehensive plan … the MOU is not a development agreement. We hold that the MOU is a *de facto* amendment to the comprehensive plan within the Board's jurisdiction and not a development agreement outside the Board's jurisdiction.[43]

In the case before us, the Board finds a direct conflict between the City's comprehensive plan annexation policies – requiring an annexation implementation plan prior to approval of a proposed annexation – and the Resolution 1115 agreement to annex first and "defer applying the comprehensive plan annexation policies." The Board notes again the mandatory language of Policy 8.B.2.1:

> *Require* the preparation … of an annexation implementation plan …*prior to* annexation …. The annexation implementation plan *shall be* reviewed and approved by the City *prior to* approval of an annexation. [44]

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[40] *Alexanderson*, at 548-49
[41] *Alexanderson*, at 549
[42] *Alexanderson*, at 550
[43] *Id.*
[44] Policies 8.B.2.10 and 11 allow consideration of exceptions in two circumstances, neither of which is applicable here: for "public health and safety" to provide necessary public services to a property, and for location of City facilities or utilities.



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1111 Israel Road SW, Suite 301
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Resolution 1115 effectively amends the requirement of Policy 8.B.2.1 and related provisions as applied to the Mill Planning Area. An exception for the Mill Planning Area, which could have been allowed through a comprehensive plan amendment, is instead granted in a Pre-Annexation Agreement. Under the reasoning in *Alexanderson,* the Pre-Annexation Agreement is a *de facto* amendment to the comprehensive plan within the Board's jurisdiction and not a development agreement outside the Board's jurisdiction.[45]

The Board concludes Resolution 1115 is a *de facto* amendment of the Snoqualmie Comprehensive Plan annexation policies insofar as it defers preparation of an annexation implementation plan which the policies require to be approved prior to annexation. As such, Resolution 1115 is within the Board's jurisdiction to review.[46] The City's motion to dismiss for lack of jurisdiction on this basis is denied.

- *De Facto* Amendment of Development Regulations

The City moves to dismiss the challenge to Resolution 1115 on the grounds the Pre-Annexation Agreement is not a development regulation or amendment and thus not within the Board's jurisdiction.

Petitioners' characterization of Resolution 1115 as an amendment of the City's development regulations is the basis for Legal Issue 4 of the PFR, which alleges the Pre-Annexation Agreement "sets forth controls on land." Petitioners assert the Resolution guarantees the City will amend its code provisions to assure continued use of the property for the DirtFish rally school and special events; thus the Resolution is a *de facto* amendment of regulations, according to Petitioners.[47]

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[45] *Id.*
[46] Some of the City's arguments, though not persuasive on the question of jurisdiction, may be relevant to the question of GMA compliance or to a future amendment of the plan policies.
[47] Petitioners also assert the City's recognition of DirtFish as a conforming use in Resolution 1115, B.1 is an amendment of City Code provisions, but supporting facts and analysis are not provided.



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The Board finds Resolution 1115 largely applies the City's existing zoning code designations to the comparable lands in the Mill Planning Area (Section A.2).[48] Other sections of the Pre-Annexation Agreement commit the City to "commence the process" for consideration of shoreline designations (A.3), to "present amendments" to the code's allowable use tables to the Planning Commission and City Council "for their consideration" (A.7), and to "present amendments" to the temporary use permits code provisions (A.8).

Petitioners contend these provisions pre-judge the outcome and constitute *de facto* code amendments that "set forth controls on land." The Board is not persuaded. The proposed shoreline designations are not controls on land; they still must go through the City's process and Department of Ecology review and approval. The possible code amendments are not even specified; they cannot possibly be considered controls on land. The Board will not assume the City acts in bad faith when it commits to considering or undertaking a process for review of planning actions.[49] Petitioners will have opportunities to comment in the shoreline designation process as well as on any City code revisions, and the Pre-Annexation does not dictate a particular legislative result.

Board concludes Resolution 1115 is not a *de facto* amendment to the City's development regulations; the City's motion to dismiss that aspect of Petitioners' challenge is granted and Legal Issue 4 is **dismissed.**

Conclusion Re: Jurisdiction

The City's motion to dismiss Petitioners' challenge to Resolution 1115 for lack of jurisdiction is denied in part and granted in part. The Board finds Resolution 1115, by deferring

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[48] The Pre-Annexation Zoning is adopted in Ordinance 1086 and is within the Board's acknowledged jurisdiction.

[49] The Board assumes good faith on the part of the City. See, *Petso v City of Edmonds*, CPSGMHB Case No. 09-3-0005, Final Decision and Order, (Aug. 17, 2009) at 32; *Fallgatter V. v City of Sultan*, CPSGMHB Case No. 06-3-0003, Final Decision and Order (June 29, 2006), at 21; *Central Puget Sound Regional Transit Agency v. City of Tukwila*, CPSGMHB Case No. 99-3-0003, Final Decision and Order (Sep. 15, 1999), at 7; *Pilchuck v. Snohomish County*, CPSGMHB Case No. 95-3-0047, Final Decision and Order (Dec. 6, 1995), at 38.



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application of the City's annexation policies – specifically, the requirement of an annexation implementation plan – is a *de facto* amendment to Chapter 8 of the City's Comprehensive Plan. The Board concludes it has subject matter jurisdiction to review Resolution 1115 on this basis.

The Board finds and concludes Resolution 1115 is not a *de facto* amendment to the City's development regulations. The City's motion to dismiss as to that issue is granted. Legal Issue 4 is **dismissed**. The scope of the Board's review of Resolution 1115 in Legal Issues 5 and 6 will be limited to comprehensive plan issues.

## PETITIONERS' MOTIONS FOR LEAVE TO SUPPLEMENT THE RECORD

Petitioners filed two motions for leave for additional time to request supplementation of the record, only one of which is still at issue.[50] Petitioners' remaining motion asks for additional time to file motions to supplement the record if Petitioners find relevant documents in response to public disclosure requests.[51] The requests, directed to King County and the City of Snoqualmie, ask for:

> Any and all public records, including but not limited to documents, emails, letters, memorandum between the City of Snoqualmie and King County – all departments (Staff, City Council, Mayor, County Council, County Executive) related to the proposed annexation of the Weyerhaeuser Mill Site.

Petitioners indicate they have received "no records from King County, and Snoqualmie's response has not been fully responsive."[52] Petitioners want the opportunity to move for supplementation if disclosed records are relevant to the matter before the Board.

The City and Intervenors object on several grounds:

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[50] The Second Motion for Leave to File Supplemental Evidence (Feb.9, 2012), concerned records of certain City Council and Planning Commission Meetings not included in the City's Index. An Amended Index has now been filed by the City and the matter is resolved. Petitioners' Reply to Motion for Leave (Feb. 27, 2012).
[51] Motion for Leave to File Supplemental Evidence (Feb. 8, 2012).
[52] Petitioners' Reply, at 3



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- No documents are attached to the motion and there is no statement of why such evidence would be necessary or of substantial assistance to the Board, as required by WAC 242-03-565.
- The material sought in the Petitioners' record requests is irrelevant, because the Board does not have jurisdiction over annexations or over interlocal agreements.
- The Board's rules specify the Index and record evidence should consist of material used by the city "in taking the action that is the subject of review."[53] The subject of review in this case is not the Interlocal Agreement or annexation, but only Ordinance 1086 and Resolution 1115.
- Finally, some of the documents responsive to the requests post-date the adoption of the Ordinance 1086 and Resolution 1115.

The Board notes it has no authority over the public records request process. Parties to Board proceedings who request documents under the Public Disclosure Act do so for their own purposes, which may be broader than the action before the Board. However, if the disclosure provides information that is necessary or of substantial assistance to the Board's decision, a motion to supplement is appropriate.

The Board grants the Petitioners additional time to review the disclosures and determine whether to move to supplement the record, as follows:

- A motion to supplement the record may be filed with the Petitioners' prehearing brief.
- The requested document[s] shall be attached to the motion.
- The motion shall clearly state why the document is necessary or of substantial assistance to the Board in reaching its decision concerning (a) Ordinance 1086 or (b) Resolution 1115. The Board is not reviewing the Interlocal Agreement or annexation.
- Material post-dating the adoption of Ordinance 1086 and Resolution 1115 will not be considered.

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[53] WAC 242-03-510(10 and WAC 242-03-565



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- The City and/or Intervenors may respond to the motion when they file their responsive briefs on the merits. The Board will rule on the motion at the outset of the Hearing on the Merits.

Conclusion on Supplementation

Petitioners' motion for leave for additional time to file supplementation is **granted** on the conditions indicated above.

**ORDER**

Based upon review of the Petition for Review, the motions and briefs submitted by the parties, the GMA, prior Board Orders and case law, having deliberated on the matter the Board ORDERS:

1. Respondent's motion to dismiss for failure to serve the PFR is **denied.**
2. Respondent's motion to dismiss Petitioners' challenge to Resolution 1115 for lack of jurisdiction is **granted in part and denied in part**.
   (a) The Board concludes Resolution 1115 is a *de facto* amendment of the City's Comprehensive Plan which the Board has jurisdiction to review. Respondent's motion to dismiss as to that issue is denied.
   (b) The Board concludes Resolution 1115 is not an amendment or *de facto* amendment of the City's development regulations. Respondent's motion to dismiss as to that issue is granted. Legal Issue 4 is dismissed.



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1111 Israel Road SW, Suite 301
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3. Petitioners' motion for leave for additional time to file a motion for supplementation is **granted** on the conditions indicated above.

Dated this 8th day of March, 2012.

_____
William P. Roehl, Board Member

_____
Margaret A. Pageler, Board Member

_____
Joyce Mulliken, Board Member



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1111 Israel Road SW, Suite 301
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Thurston County Clerk

**SUPERIOR COURT OF WASHINGTON**
**IN AND FOR THURSTON COUNTY**

KENMORE MHP LLC, JIM PERKINS, and KENMORE VILLAGE MHP, LLC,
Plaintiff/Petitioner

v.

CITY OF KENMORE, ENVIRONMENTAL LAND USE HEARINGS OFFICE and the GROWTH MANAGEMENT HEARINGS BOARD FOR THE CENTRAL PUGET SOUND REGION,
Defendant/Respondent.

NO. 19-2-04781-34

**RULING ON MERITS**

*Clerk's Action Required

**EX PARTE**

The Court assumes without deciding that the Growth Management Hearings Board appropriately promulgated WAC 242-03-240 and that it appropriately adopted the "substantial compliance" standard articulated in Your Snoqualmie Valley, et al. v. City of Snoqualmie, GMHB No. 11-3-0012. Nonetheless, the Court finds the decision below that the Petitioners failed to satisfy that standard to be arbitrary and capricious. Any suggestion in the decision below that prejudice is not "central" or "germane" to a decision whether to dismiss a petition for a purported lack of substantial compliance with service requirements is incorrect. Rather, to comport with bedrock constitutional due process requirements, prejudice must be the primary consideration for any such decision. It is unclear in the decision below whether prejudice was either ignored or whether it was considered and dismissal was nonetheless deemed appropriate under these facts. Regardless of which was the case, based on the record in this case, the decision to that the actions by the Petitioner in this case did not constitute substantial compliance was arbitrary and capricious. The decision to dismiss the petition is REVERSED and the case is REMANDED for proceedings consistent with this decision.



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Additionally, the Court cannot decide on this record whether the Board properly denied Petitioners Motion to Amend, as the Board did not articulate the basis for that decision. On remand, the Board should articulate its basis for the denial of Petitioners' Motion to Amend to permit for proper review of that decision.

Signed on July 22, 2020.

Judge Chris Lanese



THURSTON COUNTY SUPERIOR COURT
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(360) 786-5560

## DAVID J. LAWYER

## June 16, 2022 - 3:45 PM

## Transmittal Information

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| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 100,934-8 |
| **Appellate Court Case Title:** | Kenmore MHP, LLC, et al v. City of Kenmore, et al. |
| **Superior Court Case Number:** | 19-2-04781-7 |

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