No. 100934-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 54915-8-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KENMORE MHP LLC, JIM PERKINS, AND KENMORE VILLAGE MHP, LLC

Respondents and Petitioners Below
v.

CITY OF KENMORE,

Appellants and Respondents Below and Defendants Below, and

ENVIRONMENTAL LAND USE HEARINGS OFFICE and the GROWTH MANAGEMENT HEARINGS BOARD FOR THE CENTRAL PUGET SOUND REGION,

Respondents Below,

PETITION FOR REVIEW

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Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Administrative Code

Introduction

Faced with the City of Kenmore's (City) violation of the Growth Management Act (GMA), Petitioners timely filed a petition for review in the Growth Management Hearings Board (Board)—a filing done electronically with the push of a computer key. But the City had to be served personally. The petition for review was sent for service that day, but due to traffic issues, the City could not be served until the next business day.

The Board has a unique rule at WAC 242-03-230(2)(a) that a petition must be served on or before the day the petition is filed. Because the petition was filed instantaneously, it could not be "unfiled" and refiled on the next business day when service could occur. Although the City suffered no prejudice from receiving the petition a day after filing, the Board treated its rule that petitions must be served when filed as jurisdictional and dismissed the petition. Under the Board's interpretation, once the

petition was electronically filed and service could not be completed that day, Petitioners' case was doomed—nothing could be done to cure.

The Board's interpretation of its rule has nothing to do with the purpose of service—providing timely notice to the opposing party. Instead, the rule has become an arbitrary procedural trap which dissenting Board member Cheryl Pflug called "a technical booby trap to deprive a party of redress." App. D:15.

The trial court rightly found the Board's dismissal in the absence of prejudice to be contrary to due process. However, in a published opinion, Division II concludes it must defer to the Board's new interpretation of substantial compliance with the service timing rule even though the interpretation is completely contrary to the Board's historical interpretation, namely, that dismissal is appropriate only if prejudice is shown.

This case is worthy of this Court's review to restore public confidence in the State's processes for resolving legal claims. Quasi-judicial processes are critical to living in a complex society, but public confidence is shaken when a significant dispute-resolving agency throws out one's case because of a hyper-technicality that prejudiced no one. In light of the uncertainties of modern life—traffic, weather, pandemics—service will not always be possible as the Board demands. Service one business day after filing and still within the statute of limitations should not be fatal to having one's case heard.

Identity of Petitioners

Petitioners to this Court are Kenmore MHP LLC, Jim Perkins and Kenmore Village MHP, LLC—the Respondents in the Court of Appeals.[1]

[1] Petitioners are referred to as "Petitioners" herein because the issue revolves around their status as those who filed a petition with the Board.

Citation to the Court of Appeals' Decision

The Decision Petitioners seeks reviewed was filed on February 8, 2022, App. A, and an order denying Petitioners' motion for reconsideration was filed on April 18, 2022. App. B.

Issue Presented for Review

Whether an adjudicatory agency may dismiss a case before it and deprive the petitioner of a hearing on the merits because of a non-jurisdictional procedural rule when there was no prejudice to anyone and when the agency's interpretation is inconsistent with its historical interpretation, rules of statutory construction and legislative intent.

Statement of the Case

A. Petitioners filed a petition for review seeking a quasi-judicial hearing before the Board.

Petitioners are three separate owners of three mobile home parks within downtown City of Kenmore. Years of

municipal planning resulted in the designation of Petitioners' properties for redevelopment to facilitate the City's community-generated plans for a vibrant downtown community. Higher levels of residential development on Petitioners' properties is essential for the City to meet its population goals as required by the GMA, RCW 36.70A.110-115. Higher density downtown was essential to the promise made to King County and neighboring jurisdictions which would otherwise experience pressure from growth if the City did not take its fair share.

Despite these obligations, the City ignored its historical planning for the area and selected the Petitioners' mobile home parks for special treatment whereby they would be prohibited from providing more housing even though that was promised to King County and nearby cities.

B. A majority of the Board dismissed the petition because it was not served by the day it was filed.

The following referenced dates are important to this case. Petitioners challenged the City's decision under the GMA by timely filing a Petition for Review with the Board on Friday, June 14, 2019—three days before the 60-day statute of limitations provided in RCW 36.70A.290(2) would expire on the following Monday. App. D:2. This filing was accomplished electronically (literally with the push of a computer key) at 2:37 p.m. on that Friday. App D:9.

Although Petitioners gave their Petition to a process server on that date to personally serve the City as required by WAC 242-03-230(2)(a) (service by email is not allowed), traffic conditions thwarted the process server's ability to reach City Hall to serve the City before it closed. App A:2. Moreover, City Hall is roughly only 15 miles away from Petitioners' counsel's office so the

inability to serve the same day was completely unexpected. Nevertheless, service of the Petition was accomplished on Monday, June 17, 2019—one business day later—which was within the statutory deadline for filing a Petition for Review. App D:2.

Thereafter, City filed a motion for summary judgment on the ground that the *service* of the Petition was technically ineffective because it occurred one business day after the electronic *filing* of the petition. The City asserted no prejudice in being served one business day after filing.[2]

Nonetheless, a two-member majority of the Board granted the City's motion—concluding that this one-day delay in service resulted in the loss of the Board's jurisdiction requiring dismissal. CP 22. The lack of

[2] *See* App D:16 ("the City tacitly acknowledges that it suffered no prejudice") (Pflug, C, dissenting).

prejudice to the City and extreme prejudice to Petitioners was irrelevant. App D:8 (prejudice is merely *dicta*).

In a seven-page opinion, Board Member Pflug—the required attorney member of the Board—dissented, concluding that the Board's service on or before filing rule "is not a technical booby trap to deprive a party of redress." App D:15 (footnotes and citations omitted). "Petitioners complied with 'every reasonable objective' of the Board's procedural rules." App D:16.

The conclusion that

> service on or before the date of filing a challenge is a *jurisdictional* requirement is at odds with the statutory language of the GMA, inconsistent with the purpose and language of the Board's rules, and conflicts with the Supreme Court's direction that rules should place substance over form to the end that cases be resolved on the merits

App D:15 (emphasis by Boardmember Pflug).

Under the Board's decision, once the Petition was electronically filed and Petitioners' counsel learned that a

paper copy could not be delivered to the City that day, there was nothing that could be done to save the Petition.

C. The Superior Court reversed the Board's decision because denying a party's right to be heard for a failure that caused no prejudice is contrary to due process.

After their Petition before the Board was dismissed, Petitioners sought judicial review. Thurston County Superior Court Judge Chris Lanese reversed, concluding:

> [T]the Court finds the decision below that Petitioners failed to satisfy that [substantial compliance] 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.

App C:1 (emphasis added).

D. The Court of Appeals reverses, concluding that it must defer to the Board's interpretation of its rules even if that interpretation deprives a party of its right to be heard.

The Court of Appeals reverses and upholds the Board's decision to dismiss Petitioners' case for a violation of a procedural rule that prejudiced no one. App A. The Court of Appeals takes this significant position on the basis that the Court must defer to the Board's interpretation of substantial compliance in WAC 242-30-230(4). App A:6. Petitioners' motion for reconsideration was denied. App B.

Argument Why Review Should be Accepted

I.
This Court should review the published Division II decision that upholds dismissal due a procedural technicality in service despite no showing of prejudice.

Division II's published Decision represents a significant change in bedrock principles of justice. Incredibly, the Decision held that, even though the City was served one business day after filing—which date was even within the

statute of limitations—dismissal of a petition was mandatory despite the obvious lack of any prejudice.[3] These are issues involving significant questions of law and issues of substantial public interest. *See* RAP 13.4(b).

The issues raised in this petition go to the heart of public confidence in quasi-judicial processes which only this Court can restore.

A. A state agency charged with adjudicating disputes should not be entitled to deference when it dismisses a case because of a technicality that prejudiced no one.

Division II makes a significant precedent-setting error in a case which it recognizes as being one of "first impression" (App A:8) in granting deference to a state agency's interpretation of "substantial compliance" in the context of a service timing requirement. Ultimately, it is the court's job to determine the meaning and purpose of

[3] *See* App D:15 (Boardmember Pflug, dissenting) (rejecting a "sporting theory of justice").

the law,[4] even to agency interpretations of its own regulations. *See In re Peterson*, 99 Wn.App. 673, 677 (2000).

As further explained below, applying deference in this context is unjust for several reasons. Deference is not appropriate because the regulation at issue is the key to whether one's dispute may be resolved, unlike merely a regulation of business operations. Deference is contrary to the legislature's call for liberal construction. Deference is also not appropriate because the agency has historically ruled that prejudice is essential to cause dismissal. Moreover, deference is not appropriate because the rule does not involve technical expertise beyond the competence of courts. Finally, the Court of Appeals should not have deferred because the changing

[4] *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46 (1998).

of interpretation was without prior notice and was contrary to everyday rules of statutory construction.

1. Deference should not apply to enable a procedural service rule to prohibit a party's case from being heard because of the impact on First Amendment concerns and the right to petition government for redress.

Appeal-processing regulations that close the door to an adjudication raises First Amendment concerns and implicates the right to petition government for redress. In response to Petitioners' argument "substantial compliance" should be interpreted in light of the common law, Division II concludes "substantial compliance" has been defined by different administrative agencies in multiple ways. App A:10. For example, Division II refers to substantial compliance with a regulatory standard in nursing homes and schools, maritime vessel construction and crane and derrick safety. App A:10-11.

While substantial compliance may mean differing things when referring to safety regulations or other

business activities, these regulations have nothing to do with the right to petition an adjudicatory body as in the present case. Division II ignores the obvious implication of the right to petition government for redress and First Amendment concerns—completely absent in related administrative regulations unrelated to resolving claims. *See generally, Dillon v. Seattle Deposition Reps, LLC*, 179 Wn.App. 41, 75 (2014); *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 429 (1963) (adjudication has First Amendment implications). Mere compliance with a regulation of an activity like operating cranes or building marine vessels typically does not raise any First Amendment concerns.

Petitioners sought resolution of a controversy that requires quasi-judicial action. In the resolution of controversies, the overriding policy in Washington state is "that controversies be determined on the merits." *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581 (1979)

(citation omitted). By interpreting a rule in a way that elevates form over substance, Division II authorizes the deprivation of people's opportunity to have their cases decided for no substantial or legitimate reason.

The public cares about government agencies treating fairly people who come to have disputes resolved. A bedrock principle is that justice is not done if a party's defense or claim cannot be heard, as in the case of a default. *See Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn.App. 231, 238 (1999). A decision-maker

> should exercise its discretion liberally and equitably, so that substantial rights are preserved and justice between the parties is "fairly and judiciously done."

Id. (footnotes omitted).

At this basic level, adjudicatory bodies should operate consistent with modern rules of procedure that recognize the right of a party to have its claim heard on the merits, "as opposed to disposition on technical niceties." *Sheldon*

v. Fettig, 129 Wn.2d 601, 609 (1996) (citations omitted). Or, as dissenting Boardmember Pflug described, based on a "technical booby trap." App D:15.

2. Deference to the Board's interpretation conflicts with the legislature's directive for liberal construction.

The legislature has made clear that all statutory interpretations require liberal construction. *Sheldon*, 129 Wn.2d at 609 (citing RCW 1.12.010 which directs that "[t]he provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction"); *see also Stikes Woods Neighborhood Ass'n v. City of Lacey*, 124 Wn.2d 459, 465 (1994) (liberal construction of a statute of limitations to extend deadline falling on a weekend "to provide the greatest degree of fairness").

By not applying basic fairness to a proceeding before the Board, Division II has essentially concluded that the Board is free to disregard public policy favoring the resolution of disputes on the merits and instead rely on

technicalities which did nothing to protect anyone from prejudice or further resolution of disputes.

The use of judicial, and now quasi-judicial, bodies are how civil societies resolve disputes. As a matter of public policy, when it comes to the requirements for having one's case heard, there should not be "slavish adherence" to technical requirements. *Adkins v. Hollister*, 47 Wn.App. 381 (1987). Liberal construction and basic concepts of justice require not treating a non-jurisdictional requirement as fatal when no one was prejudiced.

3. Division II defers to an agency's interpretation of a rule which is completely at odds with its historical interpretation.

Traditionally, an agency's interpretation of its regulations is entitled to deference only if its interpretation has been consistent. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646 (2007).[5] But the Court should determine

[5] Division II's Decision conflicts with *Sleasman,* triggering review to resolve such conflicts under RAP 13.4(b).

whether this principle is still true, given Division II's affirmation of an interpretation which is at odds with all prior Board decisions. The Board's new position on "substantial compliance" is not consistent with its quite clear message to the public and practitioners that service immediately after filing does not result in dismissal absent a showing a prejudice.

a. The Board's decision in *Your Snoqualmie Valley* did not clearly jettison prejudice as necessary to dismiss a case on service timing issues.

Division II concludes that the Board in *Your Snoqualmie Valley v. City of Snoqualmie*, No. 11-3-0012 (Wash. Growth Mgmt. Hr'gs Bd. March 8, 2012), established a rigid four-part test for finding substantial compliance with the Board's service rule. App A:4. Furthermore, the Board found Petitioners' excuse for filing a day late—traffic delay rendering it impossible—to be not good enough. App A:22. Nevertheless, the Board in *Your*

Snoqualmie Valley did not indicate it was establishing any such rigid test.

Rather, the Board in *Your Snoqualmie Valley* considered two different ways of analyzing service timing issues without identifying which one it was adopting. After referring to the four-part test, in the very next paragraph, the Board describes a different test from *Continental Sports Corp. v. Dep't of Lab. and Indus.*, 128 Wn.2d 594, 602-04 (1996).

> The Court 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.

Your Snoqualmie Valley, at *3 (quoting *Continental Sports,* 128 Wn.2d at 604). Being "in as good a position" is another way of saying there is no prejudice.

A reasonable person would not conclude that the Board in *Your Snoqualmie Valley* was actually establishing an inflexible four-part test for substantial

compliance when it also relies on *Continental Sports Corp.*, which is a prejudiced-based test consistent with all prior Board decisions on this subject.

b. Before and after *Your Snoqualmie Valley,* the Board required prejudice before dismissing a case for service after filing.

The Board had never dismissed a case without the showing of prejudice. The clearest example is *Port Orchard v. Kitsap County,* No. 26-3-0012, at 1, 2016 WL 6993679 (Cent. Puget Sd. Growth Mgmt. Hr'gs. Bd. 2016). Importantly, it post-dates *Your Snoqualmie Valley*. The Board ruled that "the city substantially complied with the Board's rules for service and the County has not been prejudiced by any technical errors in service." *Port Orchard*, at * 2 (emphasis added). The petition was filed on one day and service on the County was mailed on the following day. App E:2. The day of filing with the Board was the day the 60-day statute of limitations expired. Unlike the present case where the City was served within

the statute of limitations, the Board found substantial compliance when the County was served *beyond* the statute of limitations for one reason only—the lack of prejudice. *Id.* The reason or excuse for the one-day delay in service is not even mentioned.

Prejudice has always been the critical factor on the Board's service on the day of filing rule. *See Humphrey v. Douglas County*, No. 07-1-00210, 2007 WL 4117921 (Wash. Growth Mgmt. Hr'gs. Bd. Sept. 21, 2007); *Taxpayers for Responsible Gov't,* No. 97-2-0061, 1997 WL 772753 (1997) and *Achen v. Clark County*, No. 95-2-0067, at 2, 1995 WL 903178 (Wash. Growth Mgmt. Hr'gs. Bd. Sept. 20, 1995)); *Cove Heights Condominium Ass'n v. Chelan County*, No. 08-1-0013, 2008 WL 4618390 (Wash. Growth. Mgmt. Hr'gs. Bd. Sept. 3, 2008).[6] "[A]

[6] Although WAC 242-03-230 read differently at the time, it still required service "on or before the dated filed with the board." *Id*. at *1.

motion to dismiss will be denied when the jurisdiction does not demonstrate any prejudice from the failure to properly serve." *Id*. at *2.

In all the Board's prior cases, the reason for denying motions to dismiss had nothing to do with the reason for untimely service, but the fact that there was no prejudice shown. Thus, the Board has now arbitrarily changed course. To a casual reader of Division II's Decision, let alone a land use practitioner, the incongruity is obvious and alarming.

The law had been clear: "Agencies may not treat similar situations in different ways." *Seattle Area Plumbers v. Wash. State Apprent. and Trng. Council*, 131 Wn. App. 862, 879 (2006). That is exactly how Petitioners have been treated by the Board in concluding that unexpected traffic, coupled with early and instantaneous filing, was not a justifiable excuse, while the petitioners who served after filing in *Port Orchard, Cove Heights,*

Humphrey, Achen and *Taxpayers* needed no excuse whatsoever—just a lack of prejudice to the defending party.

This Court should accept review to determine whether the policy of this state remains to not give deference to an agency's interpretation which has been "inconsistent and not conclusive." *Glen Park Assocs, LLC v. State, Dept. of Revenue*, 119 Wn.App. 481, 492 (2003).

4. Unlike agency regulations involving complex technical issues, deference is not appropriate for agency interpretation of regulations involving procedural processing of an adjudication.

The courts should not be deferring to state agencies on procedural issues because they do not involve complexity uniquely within the agency's expertise. In giving deference to the Board, Division II defers on a procedural service rule and not a complex issue beyond the Court's competence. One rationale for deferring to administrative agencies is that administrative regulations

often involve complex, technical issues in which agencies have a particular expertise that courts do not share. *See Washington State Dairy Fed'n v. State*, 18 Wn.App.2d 259, 274 (2021) ("technical issues specifically within the agency's expertise").

This is simply not true when it comes to issues of filing and service and substantial compliance with service deadlines. *Cf Fode v. Dep't of Ecology,* 2022 WL 1494597 at 14 ("Interpreting a statute of limitations does not fall with Ecology's 'special expertise.'").[7] The timing of service issue is one with which courts are well-equipped to handle, rendering the rationale for deference inappropriate.

5. A quasi-judicial body may not change its interpretation in the course of an adjudication without prior notice.

While Petitioners are not arguing that *stare decisis* applies, agencies cannot change long-standing

[7] This calls for review under RAP 13.4(b)(2) as well.

interpretation of rules without prior notice. *See CBS Corp. v. F.C.C.*, 663 F.3d 122 (3rd Cir. 2011); *Perez v. Loren Cook Co.*, 803 F.3d 935 (8th Cir. 2015). The Board's decision did not give fair notice.

Rather, changing the rules in the course of a matter before the Board is repugnant to basic fairness.

> (There is a) "basic human claim that the law should provide like treatment under like circumstances.". … Thus, courts have … held that agencies may not "treat similar situations in dissimilar ways."
>
> *A fundamental of justice is equality of treatment.*

Vergeyle v. Employment Sec. Dept., 28 Wn. App. 399, 404 (1981) (citations omitted and emphasis added), *disapproved on other grounds, Davis v. Emp. Sec. Dept.*, 108 Wn.2d 272, 276 (1987).

> Our state constitution has entrusted to the judiciary the ultimate responsibility for the peaceful adjudication of controversies in a spirit of fairness and justice.

Hous. Auth. of King Cnty v. Saylors, 87 Wn.2d 732, 752 (1976) (Horowitz, J., concurring).

Previously, this Court has recognized that an agency changing the interpretation of a regulation in the course of a matter before it is not equitable. *See Silverstreak, Inc.*, *v. Wash. State Dep't of Lab. & Indus.*, 159 Wn.2d 868, 890 (2007); *see also Wilson v. Wash. State. Dep't of Ret. Sys.*, 15 Wn.App.2d 111, 128 (2020). To experienced practitioners throughout the state, or the public generally, it is plainly not equitable to switch the interpretation of regulations midstream and thereby give a non-jurisdictional rule a jurisdictional effect, depriving people of a right to have their controversy solved because of technical noncompliance with a rule that prejudiced no one.

6. Deference is not appropriate because the Board's conclusion is contrary to multiple rules of legal construction.

Division II finds the term "substantial compliance" to be ambiguous (App A:10) and, therefore, rules of statutory construction apply. *See Jametsky v. Olsen*, 179 Wn.2d

756, 762 (2014); *Children's Hosp. v. Dep't of Health*, 95 Wn.App. 858, 864 (1999) (rules of statutory construction apply to regulations). Division II ignores fundamental rules of construction.

a. The Board's new interpretation of "substantial compliance" is not a matter of agency policy.

In deciding whether an agency's interpretation of ambiguities is entitled to "great weight," "it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815 (1992) (emphasis added).

> While the construction does not have to be memorialized as a formal rule, it cannot merely "bootstrap legal argument into the place of agency interpretation," but must prove an established practice of enforcement.

Sleasman, 159 Wn.2d at 646 (emphasis added) (quoting *Bosley,* 118 Wn.2d at 815).

The lack of an agency policy is evident for two reasons. One, there is no established, consistent practice of interpreting substantial compliance as the Board did in this case. Rather than following policy, the Board is completely inconsistent. Two, policy for a five-member Board should not be established by two members. Of course, two members can decide a case as was the situation here, but their decision should not be sufficient to establish an agency policy. Division II should not have granted deference.

b. The dismissal of a party's case on a technicality that prejudiced no one based on a new interpretation of substantial compliance in WAC 242-03-230(4) leads to strained results.

This Court has instructed courts to interpret regulations so as to avoid strained results. *Overlake Hosp. Ass'n v. Dep't of Health of State of Washington,* 170 Wn.2d 43, 52 (2010). Similarly, "regulations are to be given a rational,

sensible interpretation." *State, Dep't of Licensing v. Cannon,* 147 Wn.2d 41, 57 (2002).

The Court of Appeals and Board's analysis of the regulation is strained and the results are absurd. Petitioners filed a day early by a computer keystroke but unexpectedly could not get a printed copy personally to the City that day. But it did serve on the next business day and within the statute of limitations. It is absurd to prohibit a party from having its case heard by inadvertent noncompliance with a technical rule when absolutely no one was prejudiced.

B. The Board's new interpretation of substantial compliance for purposes of disposing of parties' claims is inconsistent with legislative intent in the GMA.

Administrative rules and regulations must be reasonably consistent with the statute being implemented and with the intent and purpose of the legislation. *Howell v. Dep't of Social and Health Servs*., 7 Wn.App.2d 899, 916 (2019), *as amended*. More forcefully, this Court has

described the role of legislative intent and policy in the interpretation of regulations, and not just statutes, as "paramount." *Overlake Hosp.,* 170 Wn.2d at 52 (citation omitted); *see also Ctr. for Biological Diversity v. Dep't of Fish and Wildlife*, 14 Wn.App.2d 945, 967 (2020).

If alternative interpretations of a regulation are possible, the interpretation that best advances the overall legislative purpose should be adopted. *Hospice of Spokane v. Washington State Dept. of Health*, 178 Wn.App. 442, 454 (2013) (citation omitted). Because "substantial compliance" is ambiguous as the Court of Appeals concludes, then it is important to consider which interpretation best advances the overall legislative purpose.

The legislative purpose of the GMA is completely contrary to the conclusion of the Board and Division II. The GMA has one of the broadest standing rules in that one can file a petition for review without any injury to the

petitioner; the only requirement is that the petitioner participated—spoke or wrote—about the local government decision at hand. RCW 36.70A.280(2)(b). This generous standing rule is clearly intended to implement the obvious purpose of encouraging public involvement with GMA issues.

All GMA regulations should be consistent with that overall policy of encouraging public involvement. No policy of the GMA is furthered by a rule that service only one day after timely filing results in dismissal. The Board's conclusion in this case is a classic example of form over substance and there is no basis for concluding it furthers the Legislature's intent.

The Board has interpreted its own regulations in a highly strict manner, imposing strictness without any connection to reason. This is contrary to the legislative purpose of the GMA generally and the underlying policy favoring public involvement. There is no requirement for

service of the petition in the GMA. As this Court has recently warned, even strict "deadlines should not be so woodenly interpreted" to deny review on the merits. *Confederated Tribes and Bands of Yakama Nation v. Yakima County*, 195 Wn.2d 831, 838 (2020) (noting the Land Use Petition Act (RCW 36.70C) petition was filed only one day past the deadline).

Division II's approval of the Board's strict application of its rule is not only contrary to public policy. It conflicts with the broad public involvement policy established in the GMA.

II.
This petition raises significant questions and issues of due process.

Because the Board is an adjudicatory body, its interpretation of rules that exclude parties raise issues of due process which are historically significant and important to the public interest. Judge Lanese understood that a deprivation of one's right to have a case heard

based on a non-jurisdictional requirement is severely prejudicial to the petitioner and should not be denied unless there is overriding prejudice to another party. App C:1. Here, it is clear that the prejudice to Petitioners is great and the prejudice to the City and the Board is nonexistent.

People expect that an adjudicatory body would be primarily concerned with fairness. Deciding that one's case is forever dismissed and will never be heard because of an inability to serve on the day of filing which prejudiced no one is to the average person the epitome of unfairness.

In explaining the due process requirement for a neutral decisionmaker, Justice Marshall describes one of the central concerns of procedural due process:

> the promotion of participation and dialogue by affected individual in the decisionmaking process. …preserves both the appearance and reality of

> fairness "generating the feeling, so important to popular government, that justice has been done."

Marshall v. Jerrico, *Inc.,* 446 U.S. 238, 242 (1980) (citation omitted).

Courts have an overriding concern to minimize technical miscarriages of justice inherent in archaic procedural concepts. *First Fed. Savings & Loan Ass'n v. Ekanger*, 93 Wn.2d 777, 781 (1980). Division II completely ignores these basic due process principles—making its Decision a glaring outlier in the law's protection of due process and basic fairness.

In light of the vagaries of modern life—traffic, extreme weather, pandemics—service after filing, but within the statute of limitations and only one business day after filing, should not be fatal on these facts. The Court should accept review to ensure justice in adjudicatory agencies.

Conclusion

Petitioners request the Court to grant this Petition and ultimately reverse Division II's decision and allow

Petitioners' claims to be heard for the first time on the merits.

The undersigned certifies that this motion contains 4,995 words in compliance with RAP 18.17(c)(8).

Respectfully submitted this 17th day of May, 2022, by

STEPHENS & KLINGE LLP

/s/ Richard M. Stephens
Richard M. Stephens, WSBA 21776

Attorneys for Petitioners,
Respondents and Petitioners Below

Declaration of Service

I, Richard M. Stephens, declare as follows pursuant to GR 13 and RCW 9A.72.085:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On May 17, 2022, I caused the foregoing document to be served on the following persons via email:

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Lisa Petersen
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Management Hearings Board

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

Executed this 17th day of May, 2022 at Woodinville, Washington.

/s/ Richard M. Stephens
Richard M. Stephens

Appendix A

Filed
Washington State
Court of Appeals
Division Two

February 8, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KENMORE MHP LLC; JIM PERKINS; and KENMORE VILLAGE MHP, LLC, Respondents, v. CITY OF KENMORE, Appellant, ENVIRONMENTAL LAND USE HEARINGS OFFICE; GROWTH MANAGEMENT HEARINGS BOARD FOR THE CENTRAL PUGET SOUND REGION, Respondents below.	No. 54915-8-II PUBLISHED OPINION

WORSWICK, J. — The City of Kenmore (the City) appeals the superior court's order reversing the Growth Management Hearings Board's order for summary judgment that dismissed Kenmore MHP LLC, Jim Perkins, and Kenmore Village MHP, LLC's (collectively "MHP") petition for review of a city ordinance. MHP filed its petition for review within the statutory time limit but served the City after filing the petition with the Board, in violation of WAC 242-03-230. The Board ruled that MHP's failure to comply with WAC 242-03-230 deprived the Board of jurisdiction and did not substantially comply with service requirements. The Board also summarily denied MHP's request to amend its petition to add legal authorities. The superior court reversed and remanded to the Board, ruling that the Board's decision was arbitrary and capricious.

We hold that (1) we defer to the Board's interpretation of substantial compliance under WAC 242-03-230, (2) MHP did not substantially comply under the Board's interpretation because it had no justifiable excuse for late service, and (3) the Board's dismissal of MHP's petition was not arbitrary and capricious. Thus, we reverse the superior court and affirm the Board.

FACTS

I. BACKGROUND

On April 15, 2019, the City implemented Ordinance No. 19-0481, which amended the municipal code and updated the City's zoning map to rezone certain areas as a "manufactured housing community" zoning district. Administrative Record (AR) at 25-27. The ordinance stated, among other things, that manufactured homes and mobile homes were "allowed only in manufactured housing communities." AR at 32. The ordinance was published on April 18.

MHP filed a petition for review with the Board on Friday, June 14. That same day, MHP attempted to serve the petition on the City via legal messenger. Apparently due to traffic, the legal messenger was unable to serve the City on June 14 before the close of business. The legal messenger served the petition on the City on the following business day, Monday, June 17. The City had no notice that the petition had been filed until June 17.

II. PROCEDURE BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

On July 17, MHP moved to amend its petition, requesting to add citations to two statutes in a single paragraph of its petition for review. The Board denied MHP's motion to amend, but made no written record of its analysis and concluded only, "This motion is denied." AR at 124.

On July 29, the City filed a motion for summary judgment. The City argued that MHP failed to comply with the Board's service requirements and that the Board should therefore dismiss MHP's petition. The City based this argument on WAC 242-03-230(2)(a), which requires a petitioner to the Board to serve "the respondent(s) on or before the date filed with the board." The City further argued that the Board should apply a test for substantial compliance that the Board had previously applied in its 2012 order on motions in the case of *Your Snoqualmie Valley v. City of Snoqualmie*, No. 11-3-0012 (Wash. Growth Mgmt. Hr'gs Bd. March 8, 2012). The City argued that under that test, MHP failed to comply with the mandated service requirements because MHP had no justifiable excuse for improper service and that the Board lacked jurisdiction to rule on the merits.

In opposition to the City's motion, MHP argued that it substantially complied with the service requirements of RCW 36.70A.290(2) of the Growth Management Act (GMA), which places a 60 day statute of limitation on service of a petition for review. MHP also argued that WAC 242-03-230(2)(a) does not create a jurisdictional issue, and if it does, then the regulation impermissibly conflicts with the statute of limitations by "shorten[ing] the statutory 60 day statute of limitations."[1] AR at 269. In the alternative, MHP argued that the Board had no authority to adopt WAC 242-03-230 because that regulation impermissibly conflicts with the statute of limitations. MHP also noted that dismissing its petition would result in severe

[1] MHP argued, "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." AR at 273.

prejudice to its cause whereas the City suffered no prejudice by receiving service on the Monday following a Friday filing.

In a divided decision, the Board granted the City's motion to dismiss the petition on summary judgment on August 29. The Board ruled that it had the statutory authority to create a service deadline by regulation. The Board also applied the test for substantial compliance it had referred to in *Your Snoqualmie Valley*. This test included four parts: (1) The party that had to be served personally had actual notice, (2) the respondent would suffer no prejudice from the defect in service, (3) there is a justifiable excuse for the failure to serve properly, *and* (4) the petitioner would be severely prejudiced if its Petition were dismissed. The Board then ruled that MHP did not substantially comply with WAC 242-03-230(2)(a) because it had "no justifiable excuse" for improper service. Clerk's Papers (CP) at 19. The Board concluded, "The service provisions in the Board's rules are jurisdictional, not just procedural, and absent effective service, the Board has no authority and the case must be dismissed."[2] CP at 22.

III. Procedure Before the Superior Court

In September 2019, MHP petitioned for review with the superior court. MHP argued that it was prejudiced by the Board's decision to dismiss, that the Board erroneously interpreted or applied the law when it applied the *Your Snoqualmie Valley* test, and that the Board's decisions to dismiss and deny MHP's motion to amend its petition were arbitrary and capricious.

[2] One member of the Board dissented and stated that she would have ruled that MHP substantially complied with the statute of limitations as required under Washington precedent, and that she would not have applied the *Your Snoqualmie Valley* standard.

In a July 2020 "Ruling on Merits," the superior court reversed and remanded the Board's dismissal. CP at 427. The court assumed without deciding that the Board properly promulgated WAC 242-03-240 and adopted the *Your Snoqualmie Valley* substantial compliance test. However, the court reversed the Board's decision because of the prejudice to MHP, and the lack of prejudice to the City. The court specifically ruled that the Board's decision that MHP did not substantially comply was arbitrary and capricious. The court also ruled that the record was insufficient for it to determine whether the Board properly denied MHP's motion to amend and ordered the Board to articulate its reasoning on remand.

The City appeals the superior court's ruling on the merits.

ANALYSIS

The City argues that the Board's dismissal of MHP's petition was not arbitrary and capricious. The City argues that the Board has the authority to interpret its regulation and adopt its own legal test for whether a party substantially complies with its regulation. The City then argues that we should give deference to the Board's interpretation of its own regulation and hold that the Board properly acted within its discretion when it dismissed MHP's petition for failure to substantially comply with WAC 242-03-230.

MHP argues that the Board improperly determined that the service requirement in WAC 242-03-230 was a jurisdictional requirement. MHP further argues that substantial compliance should be determined by Washington case law and not a different standard adopted by the board. Thus, although MHP admits that it did not strictly comply with the service requirements in WAC 242-03-230, it argues that it substantially complied with the service requirements because it strictly complied with the statute of limitations and did not frustrate the purpose of the statute.

Although we agree with MHP that WAC 242-03-230 creates a procedural requirement and not a jurisdictional one, we also defer to the Board's interpretation of its own regulation and application of its own test for substantial compliance. Accordingly, we agree with the City that the Board properly dismissed MHP's petition.

I. LEGAL PRINCIPLES

The Administrative Procedures Act (APA) governs our review of the Board's decisions. RCW 34.05.570(3); *Clark County v. Growth Mgmt. Hr'gs Bd.*, 10 Wn. App. 2d 84, 100-01, 448 P.3d 81 (2019) *review denied sub nom. Clark County Citizens United, Inc. v. Growth Mgmt. Hr'gs Bd.*, 194 Wn.2d 1021, 455 P.3d 130 (Table) (2020). We review the record before the Board and sit in the same position as the superior court. *Concrete Nor'West v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 185 Wn. App. 745, 751, 342 P.3d 351 (2015). We review the Board's legal conclusions de novo but grant "substantial weight to the Board's interpretation of the GMA." *Clark County*, 10 Wn. App. 2d at 98-99 (quoting *Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 186 Wn.2d 648, 667, 381 P.3d 1 (2016)); *see also* chapter 36.70A RCW.

"'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. v. Dep't of Lab. & Indus.*, 143 Wn. App. 118, 129, 177 P.3d 143 (2008) (quoting *Pac. Wire Works v. Dep't of Labor & Indus.*, 49 Wn. App. 229, 236, 742 P.2d 168 (1987)). The party challenging the Board's decision has the burden of establishing that the decision is improper. *Clark County*, 10 Wn. App. 2d at 99. Because MHP is challenging the Board's decision, it has the burden of persuasion here.

To resolve this case, we must examine RCW 36.70A.290 and WAC 242-03-230. RCW 36.70A.290(2) provides the statute of limitations for petitions to the Board, mandating that petitions for review of a city ordinance must be filed with the board "within sixty days after publication" of the city's notice that it has adopted an ordinance. WAC 242-03-230(2)(a) provides, in pertinent part that "[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." WAC 242-03-230(4) states, "The board may dismiss a case for failure to substantially comply with this section."

"Where a statute—or in this case, a regulation—says that a matter 'may' be dismissed for failure to substantially comply with the service requirement, we review a decision to dismiss for abuse of discretion." *Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 173 Wn. App. 310, 323-24, 293 P.3d 1248 (2013); *see also Whatcom County v. Hirst*, 186 Wn.2d 648, 694, 381 P.3d 1 (2016). "An agency abuses its discretion when it exercises its discretion in an arbitrary and capricious manner." *Conway v. Wash. Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 419, 120 P.3d 130 (2005), *as amended on reconsideration in part* (Feb. 24, 2006). An agency's decision is arbitrary and capricious if it is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Whidbey Envtl. Action Network v. Growth Mgmt. Hr'gs Bd.*, 14 Wn. App. 2d 514, 526, 471 P.3d 960 (2020) (internal quotation marks omitted). Likewise, we grant relief from an agency order in an adjudicative proceeding if the agency has erroneously interpreted or applied the law. RCW 34.05.570(3)(d).

The APA provides, in pertinent part:

> The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
> . . . .
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> (d) The agency has erroneously interpreted or applied the law; [or]
> . . . .
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

II. SUBSTANTIAL COMPLIANCE

It appears to be a matter of first impression whether substantially complying with service requirements in a statute but failing to follow those in an attendant regulation is fatal to a claim. Here, whether a petitioner substantially complied with the service requirements in WAC 242-03-230(2)(a) depends on the regulatory definition of "substantial compliance" that appears within that same WAC section. "Substantial compliance" is not otherwise defined in chapter 242-03 WAC or the GMA. Accordingly, we hold that the Board may interpret its own regulation.

A. *Deference To Board's Interpretation of "Substantially Comply" in WAC 242-03-230*

The Board determined, under the test it adopted (the *Your Snoqualmie Valley* test), that MHP failed to substantially comply with the service requirement of WAC 242-03-230(2)(a) because MHP served the City after it filed its petition and did not have a justifiable excuse for failing to properly serve its petition.[3] MHP argues that the Board erred when it adopted the test

[3] The City also argues that the Board possessed the statutory authority to adopt WAC 242-03-230 under RCW 36.70A.270. Br. of Appellant at 11. This is not at issue on appeal because MHP conceded this point in superior court, and does not raise it again on appeal. CP at 394.

discussed in *Your Snoqualmie Valley*, and we should not defer to the Board's interpretation of "substantial compliance," which incorporates that four-part analysis.

MHP further argues that we should not defer to the Board's interpretation of its regulation in this case because the Board's interpretation (1) was not previously adopted, (2) is "inconsistent and not conclusive," (3) reverses decades of precedent that construes "substantial compliance," and (4) conflicts with WAC 242-03-555(1). Br. of Resp't at 25-6. We disagree, and grant deference to the Board's interpretation. Accordingly, we hold that the Board did not err in dismissing the petition.

We apply the error of law standard in determining whether an agency erroneously interpreted or applied the law. RCW 34.05.570(3)(d). As stated above, we review the issue de novo, but grant considerable deference to an agency's interpretation of its own regulations. *D.W. Close Co.*, 143 Wn. App. at 129. If a regulation is unambiguous, we do not look beyond the plain meaning of its words. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 473, 70 P.3d 931 (2003). A regulation is ambiguous if there is more than one reasonable interpretation of the regulation. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010).

Where we deem a regulation ambiguous, we may resort to statutory construction, legislative history, and case law to resolve the ambiguity. *Overlake Hosp.*, 170 Wn.2d at 52. However, we uphold an agency's interpretation of ambiguous regulatory language so long as the agency's interpretation is plausible and consistent with the legislative intent. *Alpine Lakes Prot. Soc'y v. Dep't of Nat. Res.*, 102 Wn. App. 1, 14, 979 P.2d 929 (1999). "'Where there is room for two opinions, and the agency acted honestly and upon due consideration, this court should not find that an action was arbitrary and capricious, even though this court may have reached the

opposite conclusion.'" *Ctr. for Envtl. Law & Policy v. Dep't of Ecology*, 196 Wn.2d 17, 34, 468 P.3d 1064 (2020) (quoting *Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 589, 90 P.3d 659 (2004)).

WAC 242-03-230(4) states that the Board may dismiss a petition for failure to "substantially comply" with the provisions of that section. This includes the requirement for MHP to serve the City on or before the date it files its petition with the Board. WAC 242-03-230(2)(a). "Substantially comply" is not defined in the APA, the GMA, or the Board's regulations.

The term "substantial compliance" is ambiguous. A review of various regulatory and statutory schemes shows that there is more than one reasonable interpretation of the term. Various regulations and statutes define the term in ways specific to their purview, and differ from the common law test used by courts.

For example, the Department of Social and Health Services' (DSHS) Nursing Home regulations define "substantial compliance" specifically within the context of its regulations as "the nursing home has no deficiencies higher than severity level 1 as described in WAC 388-97-4500, or for medicaid certified facility, no deficiencies higher than a scope and severity 'C.'" WAC 388-97-0001. Similarly, DSHS regulations for other facilities define "not in substantial compliance" as being defined by federal regulations. WAC 388-96-211(3). Thus even within one agency, "substantial compliance" may have different interpretations.

Education regulations state that substantial compliance is determined in different ways as well. For example, Board of Education regulations define substantial compliance as a measurement determined by inspection reports. Its regulations for private schools state,

> The physical facilities of the school are adequate to meet the program offered, and all school facilities and practices are in substantial compliance with reasonable health and fire safety standards, as substantiated by current inspection reports of appropriate health and fire safety officials which are on file in the chief administrator's office.

WAC 180-90-160(1)(f).

Alternatively, Professional Educator Standards Board regulations give the Board the authority to define substantial compliance:

> The filing of a notice of appeal shall cause a stay of any order by the superintendent of public instruction until the professional educator standards board makes an independent determination on the issue of substantial compliance. . . . [T]he professional educator standards board shall prescribe the corrective action necessary to achieve substantial compliance.

WAC 181-85-225.

Other regulatory schemes follow suit in allowing agencies to define the term. Housing Finance Commission regulations place the definition within ambit of the Commission: "An applicant shall demonstrate *to the commission's satisfaction* substantial compliance with all contractual obligations to the commission before the commission issues an Internal Revenue Service low-income housing credit certificate." WAC 262-01-130(12) (emphasis added).

Still, other regulations do not define "substantial compliance" but require that regulated entities obtain a variance when they are unable to strictly comply. Maritime vessel construction regulations require "substantial compliance" but also allow, "Where strict compliance is impractical, the assistant director may grant a temporary variance to allow a modification or a permanent variance if the intent of these requirements is met." WAC 296-115-040(1)(b). Likewise, crane and derrick safety regulations require that a crane "substantially comply" with the regulations, but imply that regulated entities seek a variance. WAC 296-24-23503(2). These

regulations therefore imply different definitions of the term based on each agency's specific requirements.

Additionally, the legislature has defined "substantial compliance" in multiple ways across statutory schemes. *See, e.g.*, RCW 84.14.010(16) ("'Substantial compliance' means compliance with local building or housing code requirements that are typically required for rehabilitation as opposed to new construction."); RCW 74.60.020(4)(f) ("[S]ubstantial compliance" means, in the prior period, the hospital has submitted at least nine of the twelve monthly reports by the due date."). Many other regulations and statutes mandate substantial compliance with various provisions of the WACs, but do not define the term. Moreover, our courts have not defined the term in the context of each of these various regulatory schemes. Accordingly, due to the wide variety of regulatory schemes, it makes sense for each agency to be able to define what "substantial compliance" means as it relates to its own regulations.

To determine the meaning of "substantially comply" in the context of its regulation, the Board, in *Your Snoqualmie Valley*, No. 11-3-0012 (March 8, 2012), previously applied a test used by the federal courts. In *Your Snoqualmie Valley*, the Board relied on the Ninth Circuit Court of Appeals' test to evaluate whether a party substantially complied with service requirements on the federal government under the federal rules of civil procedure. *Your Snoqualmie Valley*, No. 11-3-0012 at 5 (citing *Borzeka v. Heckler*, 739 F.2d 444 (9th Cir. 1984)). The test, taken from *Borzeka* and cited in the Western District's unpublished order in *S.J. ex rel.*

S.H.J. v. Issaquah School Dist.,[4] states requirements for a party to substantially comply with a service rule:

> (a) the party that had to be served personally received 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.

Borzeka, 739 F.2d at 447. This definition is plausible, relates to a service rule, is consistent with the statutory language of the GMA, and has not been overturned. Accordingly, we defer to the Board's interpretation of what it is to "substantially comply" with the regulation.

B. *MHP's Arguments*

1. *Interpretation Not Previously Adopted*

MHP first argues that deference to the Board's interpretation is not appropriate because we should not defer to the Board's "new" test. Br. of Resp't at 25-27. MHP argues that the interpretation is inconsistent with agency rules and conflicts with past Board rulings. We disagree.

Division One of this court has noted that agencies have a "not inconsiderable realm of reasonable discretion" that they possess to "determine how to apply [their] own past precedents." *Am. Fed'n of Teachers, Loc. 1950 v. Pub. Emp't Relations Comm'n*, 18 Wn. App. 2d 914, 929, 493 P.3d 1212 (2021) (quoting *Boch Imports, Inc. v. Nat'l Labor Relations Bd.*, 826 F.3d 558, 568-69 (1st Cir. 2016)). Additionally, stare decisis plays only a limited role in agency context,

[4] No. C04-1926RSL, W.D. Wash. (March 8, 2007), 2007 WL 764916 (order denying motion to dismiss) (not reported in F. Supp. 2d).

although agencies should strive for equality of treatment. *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 173 n.9, 173-74, 256 P.3d 1193 (2011).

Here MHP makes no showing that stare decisis binds the Board to a prior decision. Moreover, they cite to no law that prohibits an agency from adopting a new definition of a previously undefined regulatory term. "Where a party does not cite to such authority, we assume there is none." *Peterson v. Dep't of Labor & Indus.*, 17 Wn. App. 2d 208, 237, 485 P.3d 338 (2021).

MHP cites *Vergeyle v. Employment Security Department*, 28 Wn. App. 399, 403-04, 623 P.2d 76 (1981), to argue that agencies should provide "'like treatment under like circumstances.'" Br. of Resp't at 27. That case involved a woman who lost her job after leaving on a vacation she believed her employer approved. *Vergeyle*, 28 Wn. App. at 400-401. The department denied her benefits after determining that she had voluntarily resigned without good cause. *Vergeyle*, 28 Wn. App. at 401. Division One of this court determined that in a previous case with indistinguishable facts, the department had determined the petitioner had established good cause. The *Vergeyle* court held that because the department presented no reason for its departure from its prior reasoning, Vergeyle did have good cause. 28 Wn. App. at 403-04.

Here, MHP cites to no factually indistinguishable case. Although MHP relies on several past Board decisions, none of them provide enough factual background for us to determine that the Board departed from its prior reasoning. *See* section 2, *infra* (*analyzing City of Port Orchard v. Kitsap County*, No. 16-3-0012, 2016 WL 6993679 (Wash. Growth Mgmt. Hr'gs Bd., Order on Mot. to Dismiss, Nov. 14, 2016); and *Cove Heights Condo. Ass'n v. Chelan County*, No. 08-1-0013, 2008 WL 4618390 (Wash. Growth Mgmt. Hr'gs Bd., Order on Mots. to Dismiss, Sept. 3,

2008)). Moreover, the Board here clearly explained that it was convinced MHP did not substantially comply because MHP did not have a "justifiable excuse" for its noncompliance, which was a reason for its decision not referenced in the prior cases MHP cites. CP at 18-19; *see* section 2, *infra*. Accordingly, we conclude that the Board used its "not inconsiderable discretion" to apply its past precedents; here, that precedent was *Your Snoqualmie Valley*.

2. *Inconsistent and Inconclusive*

MHP next argues that deference to the Board in this case is improper because the Board's interpretation of its regulation is "'inconsistent and not conclusive.'" Br. of Resp't at 26, quoting *Glen Park Assocs., LLC v. Dep't of Revenue*, 119 Wn. App 481, 492, 82 P.3d 664 (2003). MHP argues that the Board did not clearly establish its definition of "substantial compliance" in *Your Snoqualmie Valley*, and has issued decisions that conflict with its most recent interpretation of WAC 242-03-230. Br. of Resp't at 25-27, 30-32.

MHP contends that the Board's decision was inconsistent with other decisions on substantial compliance post-*Your Snoqualmie Valley*. MHP first cites *City of Port Orchard v. Kitsap County*, No. 16-3-0012, 2016 WL 6993679 (Wash. Growth Mgmt. Hr'gs Bd., Order on Mot. to Dismiss, Nov. 14, 2016). There, the respondent Kitsap County moved to dismiss Port Orchard's petition for failure of service, asserting "technical requirements on the time, method, and recipient of service were not met, citing a variety of cases in which previous Board's [sic] dismissed petitions for failure of service." *Port Orchard*, No. 16-3-0012 at *1. The Board denied Kitsap's motion. *Port Orchard*, No. 16-3-0012 at *2. However, the Board made only a conclusory statement and did not elucidate on what the "technical requirements on the time, method, and recipient" were. The Board did not rely on *Your Snoqualmie Valley*. Accordingly,

we have no way of knowing whether the *Port Orchard* decision is inconsistent with the Board's decision here.

MHP then cites *Cove Heights Condo. Ass'n v. Chelan County*, No. 08-1-0013, 2008 WL 4618390 (Wash. Growth Mgmt. Hr'gs Bd., Order on Mots. to Dismiss, Sept. 3, 2008). This case was decided in the months following *Your Snoqualmie Valley* and its facts are similar to those here. Cove Heights filed a petition for review on June 18, 2008, and sent the petition to a process server for service on Chelan County. "[F]or some unknown reason actual service on Chelan County was delayed until July 22." *Cove Heights*, No. 08-01-0013 at *2. The Board ruled that the county did not show that it was prejudiced by the delay and that Cove Heights substantially complied with the regulation. *Cove Heights,* No. 08-01-0013 at *3.

MHP is correct that *Cove Heights* is inconsistent with the Board's application of the *Your Snoqualmie Valley* test here. There, the Board's decision appears to have turned on whether the respondent was prejudiced by the improper service. Here, the Board's decision was based on MHP's failure to have any "justifiable excuse" for improper service. CP at 18. There is not enough information in the *Cove Heights* order, and without the record, we cannot determine whether the "unknown reason" service was improper there was unjustifiable as it was here. Apparently, the Board did not determine it to be. Without more, we conclude that *Cove Heights* and the intervening decade between it and the Board's decision here do not prevent the Board from now "clearly establishing" the four part test from *Your Snoqualmie Valley*.

3. *Board's Interpretation Versus Common Law Precedent*

MHP also argues that a different test for substantial compliance is more apt. It argues that the Board's interpretation reverses decades of common law precedent. MHP notes that in its

Your Snoqualmie Valley decision, the Board also cited *Continental Sports Corp. v. Dep't of Labor and Indus.*, 128 Wn.2d 594, 602-04, 910 P.2d 1284 (1996), where our Supreme Court laid out a more traditional standard for substantial compliance with a service statute under state law. There, our Supreme Court followed longstanding Washington precedent and stated the standard as:

> 'Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute.' *City of Seattle v. Public Emp't Relations Comm'n*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991) (quoting *In re Santore*, 28 Wn. App. 319, 327, 623 P.2d 702, *review denied*, 95 Wn.2d 1019 (1981)). Substantial compliance has been found where there has been compliance with the statute albeit with procedural imperfections. *Public Emp't Relations Comm'n*, 116 Wn.2d at 928, 809 P.2d 1377.

Continental Sports, 128 Wn.2d at 602.

However, the court's common law definition of substantial compliance cited above is one of many tests for whether a party substantially complied with a statute or regulation. *See* Part II.A *Substantial Compliance*, *supra*. Thus, as explained above, the definition of "substantial compliance" is ambiguous, and we defer to the Board's interpretation.

Moreover, the *Continental Sports* standard is not at odds with the Board's decision here. Tellingly, the *Continental Sports* court did not enter its own definition of "substantial compliance" to supplant the agency's definition, but rather resolved the question of whether the doctrine applied at all. 128 Wn.2d at 602-03. *Continental Sports* refers to compliance with a statute; here compliance with the regulation is at issue. Applying the *Continental Sports* standard to a regulation reveals that a party should comply with the substance essential to the reasonable objective of the *regulation*. As explained above, we give great deference to the Board's interpretation of its own regulations. We grant the Board that deference here because

the Board applied a reasonable standard to determine whether MHP substantially complied with the reasonable objectives of WAC 242-03-230.[5,]

a. Substantial Compliance under the Common Law

MHP argues that under the *Continental Sports* standard, it substantially complied with the reasonable objectives of the law and that the reasonable objective of the law is to avoid prejudice. It is undisputed here that MHP complied with the statute of limitations, RCW 36.70A.290(2). But compliance with the statute is not at issue here; compliance with the regulation is. Although MHP complied with the statute of limitations, it did not substantially comply with the regulation regarding service under the Board's interpretation of "substantial compliance."

MHP further argues that it is not possible that its delayed service frustrated the Board's ability to issue its decision within the statutory 180 day deadline. And this is likely correct. But it is within the Board's purview to draw this procedural line to prevent a petitioner from delaying service following its filing. A broad interpretation of compliance with the statute could swallow the regulation. The Board drew the procedural line at or before the time of filing. It also chose to define substantial compliance using the four part *Your Snoqualmie Valley* test.

[5] Because no service requirements exist in the GMA and because the Board only has 180 days to issue a final decision, time is of the essence for a respondent in these cases. RCW 36.70A.300(2)(a). It is likely that a reasonable objective of WAC 242-03-230(2)(a)—requiring service before or contemporaneous with filing—is related to this deadline. Here, the 180 day deadline started to toll from the time MHP filed its petition with the Board. Service not being completed until the Monday after filing deprived the City of three days toward this deadline. If this court (or the Board) were to liberally allow compliance with the statute of limitations but not the WAC filing regulation, it could set a precedent where petitioners could file early and serve late, potentially depriving respondents of up to 60 days' notice into the 180-day decision deadline. This would be detrimental to both a respondent and the Board.

b. Substantial Compliance under Your Snoqualmie Valley

The City argues that under the *Your Snoqualmie Valley* test that the Board adopted, MHP failed to substantially comply with the service regulation. We agree.

Under that four part test,

> (a) the party that had to be served personally received 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.

Borzeka, 739 F.2d at 447 (emphasis added). All four parts must be fulfilled for substantial compliance.[6] As the Board determined, here MHP had no justifiable excuse for its failure of service. MHP gave the petition to a messenger on the Friday afternoon before the statutory deadline and the messenger was unable to reach the City for service that day. Although MHP was prejudiced by Board's dismissal, prejudice is only one part of the test. MHP still failed to substantially comply under the Board's definition of regulatory substantial compliance.

4. *Conflict with WAC 242-03-555(1) and Prejudice To MHP*

MHP then argues that the Board's decision conflicts with WAC 242-03-555(1). That regulation states, "The board rarely entertains a motion for summary judgment except in a case of failure to act by a statutory deadline." WAC 242-03-555(1). MHP cites public policy reasons

[6] At oral argument, the City stated that the *Your Snoqualmie Valley* test is a balancing test. Wash. Court of Appeals oral argument, *Kenmore MHP, LLC v. City of Kenmore*, No. 54915-8-II (Dec. 10, 2021), at 28 min., 40 sec., *audio recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-2-court-of-appeals-2021121042/?eventID=2021121042. As explained above, it is not. All four elements must be fulfilled and are given equal weight. *Accord Borzeka*, 739 F.2d at 447-48.

for the Board reaching the merits. But WAC 242-03-555(1) does not place any mandate on the Board. "Rarely" does not mean "never."

Next, MHP cites *Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 855, 232 P.3d 558 (2010), to argue that the test for substantial compliance "hinges on prejudice." Br. of Resp't at 39. *Skinner* states, "In determining whether a party has substantially complied with service requirements, the relevant inquiry is whether the party to be served has received actual notice of appeal or the notice was served in a manner reasonably calculated to give notice to the opposing party." 168 Wn.2d at 855. Here, however, the City did not receive actual notice until after the filing, in violation of the regulation. Additionally, the test the Board adopted considers prejudice, but appears to place it on an equal footing with justifiable excuse. Accordingly, under the Board's definition of substantial compliance, we hold that MHP did not substantially comply with the service regulation.

C. *Board's Jurisdiction under WAC 242-03-230(2)(a)*

MHP argues that the Board erred when it concluded that the service provisions in the Board's regulation are jurisdictional. Although we agree, this issue is not determinative.

We give substantial deference to the Board's interpretation of the GMA, however, "'we do not defer to an agency the power to determine the scope of its own authority.'" *Shaw Family LLC v. Advocates For Responsible Dev.*, 157 Wn. App. 364, 372, 236 P.3d 975 (2010) (quoting *US W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997)).

As MHP points out: "Noticeably absent in RCW 36.70A.290 is any provision indicating that service, or the manner or timing of service, is a jurisdictional matter and neither a Court, nor

the Board, shall 'read into statutes matters that are not there.'" Br. of Resp't at 13 (quoting *W, Telepage, Inc. v. City of Tacoma*, 95 Wn. App. 140, 147, 974 P.2d 1270 (1999), *aff'd*, 140 Wn.2d 599 (2000)). Moreover, failure to serve indispensable parties does not deprive an adjudicative body of jurisdiction. *Crosby v. County of Spokane*, 137 Wn.2d 296, 310, 971 P.2d 32 (1999).

Additionally, a discretionary rule cannot be jurisdictional. *See Nat'l Parks Conservation Ass'n v. Dep't of Ecology*, 12 Wn. App. 2d 977, 984, 460 P.3d 1107 (2020); *see also Biomed Comm, Inc. v. Dep't of Health Bd. of Pharm.*, 146 Wn. App. 929, 942, 193 P.3d 1093 (2008). "The use of the word 'may,' when used in a court rule, indicates that the referenced course of action is discretionary rather than mandatory." *Nat'l Parks*, 12 Wn. App. 2d at 984.

WAC 242-03-230(4) states that the "board *may* dismiss a case for failure to substantially comply with this section." (Emphasis added.) The "may" makes the regulation regarding service discretionary. Accordingly, we hold that the service requirement is not jurisdictional and the Board is only authorized to apply and enforce rules of practice and procedure. Thus, the regulation is procedural.

D. *Arbitrary and Capricious*

MHP argues that the Board's decision to dismiss the petition is arbitrary and capricious. We disagree.

As explained above, an agency's decision is arbitrary and capricious if it is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Whidbey Envtl. Action Network*, 14 Wn. App. 2d at 526 (internal quotation marks omitted). "'Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious

even though a reviewing court may believe it to be erroneous.'" *Probst v. State Dep't of Ret. Sys.*, 167 Wn. App. 180, 192, 271 P.3d 966 (2012), *as amended on denial of reconsideration* (May 8, 2012). The Board's decision here was not willful and unreasoning.

The Board examined the record and applied a legal test that it adopted from the federal courts. Applying that test to the facts, the Board determined that MHP did not substantially comply because it failed one element of the test: a justifiable excuse. Accordingly, we hold that the Board took a reasoned approach to the decision and that its decision to dismiss was not arbitrary and capricious.[7]

CONCLUSION

We defer to the Board's interpretation of its own regulations. WAC 242-30-230(4) provides that the Board may dismiss a petition for failure to substantially comply with its regulation. The Board interpreted "substantial compliance" to require a "justifiable excuse" when a party issues improper service. We defer to the Board's interpretation of this rule. Accordingly, we hold that MHP did not substantially comply with the service requirement in WAC 242-30-230(2)(a) because it had no justifiable excuse for its delayed service. Thus, we hold that the Board's decision to dismiss MHP's petition was not arbitrary and capricious.

[7] MHP also argues that the Board erred when it denied MHP's motion to amend its petition. Because we conclude that the Board did not err when it dismissed MHP's petition, we do not reach this argument.

Finally, we do not reach the Board's denial of MHP's motion to amend. We reverse the superior court and affirm the Board.

Worswick, J.

We concur:

I[illegible], C.J.

Veljacic, J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

April 18, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KENMORE MHP LLC; JIM PERKINS; and KENMORE VILLAGE MHP, LLC, Respondents, v. CITY OF KENMORE, Appellant, ENVIRONMENTAL LAND USE HEARINGS OFFICE; GROWTH MANAGEMENT HEARINGS BOARD FOR THE CENTRAL PUGET SOUND REGION, Respondents below.	No. 54915-8-II ORDER DENYING MOTION FOR RECONSIDERATION

The published opinion in this matter was filed February 8, 2022. Respondents, Kenmore MHP LLC, Jim Perkins, and Kenmore Village MHP, LLC, filed a motion for reconsideration on February 28, 2022. The court having reviewed the motion and documents herein, it is hereby

ORDERED that respondents' motion for reconsideration is DENIED.

Panel: Jj. Worswick, Lee, Veljacic

FOR THE COURT:

Worswick, P.J.

Appendix C

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

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.

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

Appendix D

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

STATE OF WASHINGTON

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

Petitioners,

v.

CITY OF KENMORE,

Respondent.

CASE No. 19-3-0012

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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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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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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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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(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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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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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

[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).

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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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Dissent of Board Member Pflug

Because I believe the Board's rules and court authority set forth a standard for determining adequacy of service under the GMA as (1) whether there was strict compliance with statutory requirements; (2) whether there was "substantial" compliance with procedural rules; and (3) whether there was prejudice to the other party, I respectfully dissent.

Facts

The Petitioners challenge a City action[24] published on April 18, 2019. Given the statutory requirement that requests for review be filed within 60 days of publication to the action, Petitioners' petition for review (PFR) to the GMHB needed to be filed by June 17, 2019. The Board received Petitioners electronically submitted PFR on June 14, 2019, at 2:37 pm, a Friday. The mailed copy of the PFR received by the Board was also postmarked June 14, 2019. The Declaration of Service attached to the PFR attests that "[o]n June 14, 2019, [Petitioners' counsel] caused a true copy of the foregoing Petition for Review and this Declaration of Service to be served on the … [City Manager via legal messenger]."[25] In response to the City's motion to dismiss, Petitioners again declare that the PFR was delivered to a legal messenger service on June 14, 2019, to effectuate delivery to the City,[26] and provide a copy of the Declaration of Service of Petition for Review showing that service on the City was ultimately accomplished on Monday, June 17, 2019, at 1:19 pm.[27]

Statutory requirement

In establishing the program to review government actions taken to comply with the Growth Management Act, Chapter 36.70A RCW, the legislature established the limited jurisdiction of the Board. Compliance with the procedural requirements of the GMA is necessary in order to invoke the Board's jurisdiction. Those requirements are met when a person with standing, as defined by the GMA:

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[24] Ordinance No. 18-0476.
[25] Decl. of Service attached to PFR.
[26] Stephens Decl. at 2.
[27] Decl. of Timothy Peterson, Reg. #9307747, King County.

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1. Files a petition for review including a detailed statement of the issues presented for Board resolution;

2. Files the petition for review within 60 days following publication of adoption by the adopting jurisdiction's legislative body;

3. Alleges in the petition for review that the action taken by the jurisdiction fails to comply with GMA requirements.[28]

Under the Board's Rules of Practice and Procedure, 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.[29] The Board rarely entertains a motion for summary judgment except in a case of failure to act by a statutory deadline.[30] Additionally, the Board may dismiss a frivolous petition.[31]

Here, Petitioners' standing is undisputed, there is no allegation that the PFR is frivolous, and the PFR was filed 57 days after the publication of the challenged action – *i.e.,* within the statutory period. The statute sets forth no requirement for service of the respondent,[32] and the City does not allege that Petitioners have failed to comply with the statute. Petitioners have strictly complied with the *statutory* requirements necessary to invoke the Board's jurisdiction.

Procedural rules

Although the statute sets forth no requirement for service of the respondent, the Board used the rule-making authority conferred under RCW 36.70A.270(7) to set

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[28] RCW 36.70A.280 and RCW 36.70A.290.

[29] 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. (2) Dispositive motions and responses shall be filed by the dates established in the prehearing order. The board may refuse to hear a motion that is not timely filed, except where good cause is shown. (3) The presiding officer, taking into consideration the complexity and finality of the issues raised, may, in the presiding officer's discretion, request a reply brief from the moving party, schedule a telephonic hearing for argument of the motion or may defer the board's consideration of the motion until the hearing on the merits.
(4) Unless the order on dispositive motions is a final order pursuant to WAC 242-03-030(9), no motion for reconsideration will be allowed.

[30] WAC 242-03-555.

[31] RCW 36.70A.290(3).

[32] *Id.*

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procedures governing practice and procedure before the Board, *inter alia,* service. WAC 242-03-230(2)(a) provides that a petitioner shall serve the respondent(s) *on or before* the date filed with the board. The Board's rule goes on to state that the board "*may* dismiss a case for failure to *substantially* comply with this section." The Boards' rules cannot, however, elevate a procedural service directive to a jurisdictional requirement.[33]

The City admonishes that the Board should look to the substantial compliance test used by federal courts to determine whether Petitioners have complied with the Board's procedural rules. However, Washington courts have looked to Washington civil rules to determine how procedural rules impact a petitioner's ability to invoke the jurisdiction of an administrative tribunal.

To begin, over the many years since legislative enactment of civil rules of procedure, the Washington Supreme Court has determined that:

> The basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized ... as 'the sporting theory of justice.' Thus, whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.[34]

Thus the Washington Supreme Court has long distinguished between the standard of strict compliance applicable to statutory requirements, and the standard of *substantial* compliance applicable to regulatory requirements. *See, e.g., Crosby v. Spokane,*[35] in which the Court observed that:

> The doctrine of substantial compliance ... has been applied when determining compliance with notice of appeal requirements under the industrial insurance act, RCW 51.51.110. *In re Discipline of Saltis,* 94 Wn.2d 889, 621 P.2d 716 (1980).

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[33] *See First Fed. Sav. & Loan Ass'n v. Ekanger,* 93 Wn.2d 777, 781, 613 P.2d (1980) (*quoting* Curtis *Lumber Co. v. Sorto,* 83 Wn.2d 764, 767, 522 P.2d 822 (1974)).

[34] First Fed. Sav. & Loan Ass'n v. Ekanger, 93 Wn.2d 777, 781, 613 P.2d (1980 (quoting Curtis Lumber Co. v. Sorto, 83 Wn.2d 764, 767, 522 P.2d 822 (1974).

[35] *Crosby v. Spokane County,* 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

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"Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute."[36]

At common law, service of process is the mechanism by which one party gives another party notice that legal action has been initiated so that the challenged party is able to respond to the proceeding. Thus, under the grant of rule-making authority conferred by RCW 36.70A.270, the Board adopted regulations governing, *inter alia,* service. The Board's enabling statute does not allow it to delay the case calendar until the respondent has been served. Thus, in order to meet its statutory obligation to render a decision within 180 days, the Board has adopted rules *the purpose of which are to insure it accomplishes that mandate.*[37]

The Board's rules require that it issue a notice of hearing within 10 days of receipt of a PFR[38] and hold a Prehearing Conference 21 days after the filing of the PFR.[39] A respondent must file its Index of the Record within 30 days *of being served,*[40] after which a petitioner has a specific time to review the record before the deadline for motions to supplement. Particularly in an administrative proceeding based solely on the record,[41] motions to supplement and dispositive motions must be presented and decided expeditiously so that the parties can meet their briefing deadlines. Therefore, in order for the case to proceed, it is important for the respondent to have prompt notice that a challenge has been filed. For example: if a PFR was filed 40 days after publication of an action, but the respondent was not served until the 60th day, that respondent would likely first learn of the challenge when it received the Board's notice of hearing and have only 11 days to

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[36] *Continental Sports Corp. v. Department of Labor & Indus*, 128 Wn.2d 394, 602, 91- P.2d 1284 (1996) (quoting *City of Seattle v. Public Employment Relations Com*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991) (quoting In re Writ of Habeas Corpus of Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981)))).

[37] WAC 242-03-035 provides that "[w]here a time frame is different in these rules from those in chapter 10-08 WAC, it is because the board is required to act pursuant to the time frames set forth in the act. Chapter 10-08 WAC sets forth the Model Rules of Procedure for Administrative Hearings. **The model rules provide that "[s]ervice by commercial parcel delivery shall be regarded as completed upon delivery to the parcel delivery company, properly addressed with charges prepaid." WAC 10-08-110.**

[38] WAC 242-03-500.

[39] Unless otherwise scheduled in the notice of hearing. WAC 242-03-535.

[40] WAC 242-03-510.

[41] RCW 36.70A.290(4) reads, in pertinent part, "The board shall base its decision on the record developed by the city…"

obtain counsel to appear at the hearing (many smaller jurisdictions do not employ full time counsel). The Board desires to prevent such a *potentially* prejudicial situation. However, the Board's rule does *not* require that the case be dismissed *unless* a petitioner fails to substantially comply.[42] In other words, the Board's rule is not a technical booby trap to deprive a party of redress.

As emphasized by the State Supreme Court, "[p]ublic policy favors allowing a citizen to have your day in court…" The City's argument that service on or before the date of filing a challenge is a *jurisdictional* requirement is at odds with the statutory language of the GMA, inconsistent with the purpose and language of the Board's rules,[43] and conflicts with the Supreme Court's direction that rules should place substance over form to the end that cases be resolved on the merits.[44] Sound public policy favors the adjudication of controversies on their merits rather than their dismissal on technical procedural grounds.[45]

The City overlooks WAC 242-03-555(1) which states that "[t]he board rarely entertains a motion for summary judgment except in a case of failure to act by a *statutory* deadline." The important rationale behind this rule is that the Board is required to render its decision in 180 days, regardless of the number of other cases pending and without any additional legal resources. Excessive motions practice aimed at dismissal on technical grounds or, as the Supreme Court put it, "a sporting theory of justice," is not helpful to the Board in efficiently deciding cases.

In sum, the Board must determine whether a petitioner has complied with the regulatory purpose of the procedural rule by looking to the purpose of the WAC, which is to insure that the Board accomplishes its mission to decide the case within the required 180 days *from the date of filing.* Here, Petitioners accomplished service the day *after* filing with the Board, within the 60-day deadline.[46] The City obtained counsel, who appeared within

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[42] WAC 242-3-230(4) provides that it may only dismiss if "substantial compliance" is not found.
[43] *See Griffith v. City of Bellevue,* 130 Wn.2d 189, 192, 922 P.2d 83 (1996).
[44] *Crosby v. Spokane Co.,* 137 Wn.2d 296, 303, 971 P.2d 32 (1999) (citing Griffith, 130 Wn.2d, 189, 192-193.)
[45] *See Crosby v. Spokane Co.,* 137 Wn.2d 296, 301, 971 P.2d 32 (1999).
[46] The Board received a notice of appearance from the City's counsel on June 19, 2019.

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two days and participated, fully-prepared, in the prehearing conference.[47] Petitioners complied with "every reasonable objective" of the Board's procedural rules.

The Board should find that Petitioners substantially complied with WAC 242-03-230.

Prejudice

The City does not attempt to explain how failure to receive service by close of business Friday prejudiced the City in responding to this case. Instead, the City argued the Board should dismiss the Petition unless the Petitioners were able to satisfy all of the following four requirements which it paraphrased from *Your Snoqualmie Valley*:

> "(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) [Petitioner] would be severely prejudiced if [its Petition] were dismissed." ... Petitioners cannot meet requirements a and c, and as such the Petition *must* be dismissed.[48]

In asserting that Petitioners could not prove (a) or (c), the City tacitly acknowledges that it suffered no prejudice (b) and that Petitioners would be severely prejudiced (d) if the City's motion were granted. Further, the City's use of *must* where the WAC uses *may* misstates the Board's rule, and the City's assertion that the Petitioners were required to serve the City *prior* to filing with the Board also misrepresents WAC 242-03-230 and -240, which specifies respondent(s) be served *on or before the date* the PFR is filed with the Board.[49]

The Board should find that there was no prejudice to the City as a result of the defect in service.

Precedent

Petitioners assert that there is no prior Board decision supporting dismissal of a PFR

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[47] (Prehearing Order, July 23, 2019) at 1.
[48] Motion for Summary Judgment at 4-5 (citing *Your Snoqualmie Valley, et al., v. City of Snoqualmie,* GMHB Case No. 11-3-0012 (Order on Motions, March 8, 2012) at 5. Italics added.
[49] WAC 242-03-230(2)(a) and -240.

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filed one day late, citing *Your Snoqualmie Valley*.[50] In that case, the petitioners served the City five days late after finding the City, *inter alia,* closed for Christmas and the Board found that service was effective and, as here, still within the 60-day deadline. The City attempts to distinguish the situation before us from *Your Snoqualmie Valley* by pointing out that the Petitioner failed to offer a justifiable excuse, but that point is inapposite where the City hasn't shown that the regulation requires a justifiable excuse. As discussed above, Petitioners did respond with evidence that timely service was attempted and thwarted by the inability of the legal messenger to reach the City the same day.

In sum, this case is more like *Your Snoqualmie Valley,* in which the City received notice that a challenge had been initiated within 60 days from the date of publication of the challenged action and the Board determined that the delay was not prejudicial to the City, which could not be served because of the holiday. As in *Your Snoqualmie,* the City was not available over the weekend and thus the delay in service was inconsequential.

Conclusion

The Petitioners did not fail to serve the City but, rather, served the City the next business day; and the City makes no claim that it has been prejudiced in any way. The City has not carried its burden to show that the Petitioners failed to substantially comply with WAC 242-03-555.

I would find and conclude that Petitioners substantially complied with WAC 242-03-230 and -240 and deny the City's motion for summary judgment.

Cheryl Pflug, Board Member

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

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION

Case No. 19-3-0012

Kenmore MHP LLC, Jim Perkins, and Kenmore Village MHP, LLC v. City of Kenmore

DECLARATION OF SERVICE

I, DESIREE ORTIZ, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Legal Assistant to the Growth Management Hearings Board. On the date indicated below a copy of the ORDER ON CITY'S MOTION FOR SUMMARY JUDGMENT in the above-entitled case was sent to the following through the United States postal mail service:

Inslee Best Doezie & Ryder P.S.
Dawn F. Reitan
Rosemary A. Larson
Charlotte A. Archer
Skyline Tower, NE 4th St #1500
Bellevue WA 98004

Richard M. Stephens
Stephens & Klinge LLP
601 108th Ave NE, Suite 1900
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DATED this 29th day of August 2019.

Desiree Ortiz, Legal Assistant

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Appendix E

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

CITY OF BREMERTON, THOMAS HAMILTON, BARBARA LOTT, JOHN HANSEN, JIM GROSE, ALBERT MILLER, JERRY HARLESS, KITSAP ALLIANCE OF PROPERTY OWNERS, WEST SOUND UTILITY DISTRICT, AND CITY OF PORT ORCHARD,

Petitioners,

-vs-

KITSAP COUNTY,

Respondent.

NO. 16-3-0012c

RESPONDENT KITSAP COUNTY'S MOTION TO DISMISS THE CITY OF PORT ORCHARD PETITION FOR REVIEW

I. INTRODUCTION

Kitsap County respectfully moves the Central Puget Sound Growth Management Hearings Board ("CPSGMHB" or "Board") for dismissal of the Petition for Review ("PFR") filed by the City of Port Orchard ("Port Orchard"). Port Orchard's PFR is fatally defective because of improper and untimely service. The defects cannot be cured because it is past the jurisdictional sixty-day deadline to refile. The City's PFR must be dismissed.

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II. FACTS

Kitsap County adopted the 2016 update to its comprehensive plan and development regulations on June 27, 2106 by Ordinance 534-2016. The Ordinance was effective on June 30, 2016 and a Notice of Adoption was published on July 8, 2016. Under RCW 36.70A.290(2), the publication of the notice of adoption begins the sixty-day appeal period, thus making September 6, 2016 the final day for filing challenges to Ordinance 534-2016.

According to the Board's website, Port Orchard filed its PFR with the Board sometime on September 6, 2016.[1] Kitsap County offices close at 4:30 p.m., a fact that is easily obtainable in the County code[2] and on the County's website.[3] Declaration of Dana Daniels, ¶ 2, Ex. A, B. After the close of business, at 4:56 p.m., Port Orchard *e-mailed* a copy of its PFR to the clerk of the Board. Daniels Decl., ¶ 3, Ex. D. The Declaration of Service that was e-mailed with the PFR states the PFR was also sent to the County by "overnight delivery" (rather than the option of the United States Postal Service (USPS)) on September 6, 2016. Daniels Decl., ¶ 3, Ex. D. However, the PFR was actually sent by USPS, and according to the tracking number it was not placed in the mail until September 7, 2016. Daniels Decl., ¶ 5, Ex. F. Additionally, the Declaration of Service accompanying the hard copy of the PFR that was mailed is dated *September 7, 2016,* a day after the deadline.[4] Daniels Decl., ¶ 5, Ex. G. Finally, the PFR has never been served on the Kitsap County Auditor as required under the Board's rules. Daniels Decl., ¶ 3, Ex. D.

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[1] The PFR posted on the CPSGMHB website is date-stamped as being received on September 6, 2016, but is not time-stamped. We presume it was received prior to 5:00 p.m. as required under the Board's rules.
[2] Kitsap County Code § 3.16.010.
[3] The City of Port Orchard also closes business at 4:30 p.m. according to its website.
[4] The discrepancy between the date on the Declaration of Service filed with the Board and the Declaration that physically served on Kitsap County is puzzling, but could be explained if the template for the document has an "auto-date" feature. If so, this would mean it was printed and mailed on September 7, 2016, the day after the statutory deadline.

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III. LEGAL ARGUMENT

A. Petitioner's Service Failed to Meet the Board's Rules of Procedure in Every Respect

Port Orchard failed to properly serve Kitsap County with respect to every aspect of the Board's rules for proper service: (1) the PFR was served on the wrong individual; (2) the PFR was served by e-mail rather than by the prescribed methods in the Board's rules of practice; and (3) the PFR was not received by the respondent on or before the date it was filed with the Board.

The proper method of filing and serving a PFR is clearly set out in the Board's Rules of Practice and Procedure, chapter 242-03 WAC.[5] WAC 242-03-230(2), entitled "Petition for review -- Filing and service," states as follows:

> (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.***
>
> (b) ***When a county is a respondent, the petition for review shall be served on the county auditor or on the agent designated by the legislative authority of the county***. When a city is a respondent, the mayor, city manager, or city clerk shall be served. When the state of Washington is a respondent, 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. In a challenge to the adoption of, or amendment to, a shoreline master program approved by the department of ecology, the department of ecology shall be named as a respondent and served.

The Board's rules clearly explain "*when*," "*how*" and "*to whom*" a PFR must be served. Service of the City's PFR did not meet any of these requirements. It did not meet WAC 242-03-230(2)(a) because it was neither served on the named respondent "on or before the date filed

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[5] In addition, the Growth Management Hearings Boards have developed a Handbook for Petitioners entitled "Practicing Before the Growth Management Hearings Board," which is easily accessible on the website at: http://www.gmhb.wa.gov/Reader.aspx?pg=AppealProcess.htm.

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with the board," nor was it "received by respondent on or before the date filed with the board" (i.e., "*when*"). The City's PFR was not served "by mail, personal service, or a commercial parcel delivery service" (i.e., "*how*"). Finally, the City's service did not meet the requirement in WAC 242-03-230(2)(b), requiring it to be served on the county auditor (i.e., "*to whom*").[6]

All three Boards (Eastern, Western, and Central Puget Sound) have dismissed improperly-served PFRs in similar instances. The CPSGMHB dismissed a PFR in *City of Tacoma v. Pierce County,* CPSGMHB No. 06-3-0011c, Order on Motion to Dismiss and Order on Intervention (5/1/2006), because the petitioner served a PFR on the county council, rather than the county auditor, and served it the day after it was filed with this Board. The CPSGMHB held:

> 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) will **dismiss** the Waller's PFR.

Id. at 5 (bold in original).[7] The CPSGMHB noted there is "significant Board precedent for this Board's dismissal of a PFR for improper service." *Id.* (internal footnote omitted). The "significant precedent" this Board cited includes: *Salisbury v. Bonney Lake,* CPSGMHB Case No. 95-3-0058, Order Granting Bonney Lake's Motion to Dismiss at 3 (19/27/1995) (A letter addressed only to "the city" did not meet the requirements for service upon a city); *Sky Valley, et al., v. Snohomish County*, CPSGMHB Consolidated Case No. 95-3-0068, Order on Dispositive Motions at 7 (1/9/1996) (Failure to properly serve grounds for dismissal); *Keesling v. King*

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[6] State statutes designate the County Auditor as the proper recipient of service for actions against non-charter counties, such as Kitsap County. RCW 4.28.080(a). For charter counties, the legislative authority of the county has the ability to designate another officer or department as the proper recipient of legal service. *Id.*

[7] The Board's Rules of Practice were revised in 2011 and recodified in Chapter 242-03 WAC. WAC 242-03-230 is substantially similar to its predecessor WAC 242-02-242.

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County, CPSGMHB Case No. 95-3-0078, Order Granting Motion to Dismiss for Lack of Timely Service at 3 (3/18/1996) (The petitioner served the prosecutor instead of the designated agent); and *Wallock and Déjà Vu of Everett v. City of Everett*, CPSGMHB Case No. 96-3-0037, Order Granting Motion to Dismiss at 3-4 (2/20/1997) (PFR dismissed because petitioner served the city attorney rather than the proper city official)[8]. Notably, even these cases that are "significant Board precedent" involved situations where some aspects of service were proper, contrasted with this situation where every aspect of service was defective.[9]

In another case, *Whidbey Environmental Action Network (WEAN) v. Island County,* WWGMHB No. 06-02-0027, Order on Motion to Dismiss Petition for Review (11/16/2006), the Western Board dismissed a PFR that was filed by e-mail. The Western Board noted that the Rules of Procedure, former WAC 242-02-230 did not allow for e-mail filing of the PFR.

> 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.

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[8] See also, *1000 Friends of Washington et al. v. Kitsap County,* CPSGMHB No. 04-3-0031c, Order on Motions (3/15/2005) (dismissing Petitioner Harless' PFR as untimely when it was filed one day late).

[9] In those cases where the CPSGMHB has denied motions to dismiss for improper service, the Board found that the Petitioner had made good faith attempts at proper service. For example, in *Kent Cares, et al. v. City of Kent,* CPSGMHB No. 03-3-0012, Order on Motions (7/31/2003), the petitioner addressed the PFR to the proper party but the courier service changed the label so it was mis-delivered. In *Your Snoqualmie Valley et al. v. City of Snoqualmie,* CPSGMHB No. 11-3-0012, Order on Motions (3/8/2012), the petitioner attempted service on the city, but the city offices had been unexpectedly closed. Neither of these situations is present here.

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Id. at 5. While the Board's current rules now allow filing of the initial PFR to the Board by e-mail, the rules do not allow *service on the Respondent* by e-mail. Accordingly, as noted by the Western Board, this Board lacks the authority to allow e-mail service of the PFR on the Respondent or amend the statutorily established sixty-day deadline on a case-by-case basis.

Finally, in *Abercrombie v. Chelan County,* EWGMHB No. 00-1-0008, Order on Dispositive Motions (6/16/2000), the Eastern Board dismissed a petition that had not been served on the county auditor. In *Abercrombie,* as here, the county commissioners had been served with the PFR rather than the auditor. Although Abercrombie claimed he had mailed a copy of the PFR to the auditor, he had not filed a declaration or certificate of service to that effect. In contrast here, the Declaration of Service filed by the City of Port Orchard clearly states the PFR was sent to the Clerk of the Board of Commissioners, and the evidence shows it was actually mailed the day after the sixty-day deadline.

The Board precedent is compelling and cannot be ignored. Port Orchard's PFR must be dismissed for failing to meet the deadline, for failing to serve the proper person and for failing to use the required mode of service.

B. Petitioner Cannot Claim Substantial Compliance

The City may attempt to claim "substantial compliance" with the rules, but that argument fails when the service failed to meet any requirement in the Board's Rules of Procedure. The PFR was not served in the proper manner, was not served on time, and was not served on the proper person. The City's service is as far from "substantial compliance" as can be possible.

If the Board is inclined to apply the "substantial compliance" standard, it has previously required that four elements must be met prior to meeting the standard. In *Your Snoqualmie Valley, supra,* this Board applied the test set forth by the federal courts:

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> 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."

Your Snoqualmie Valley, Order on Motions at 5 (citing *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)) (emphasis supplied).

All four of these requirements must be met. As explained below, Port Orchard cannot meet three of the four requirements: Respondent Kitsap County will suffer prejudice if this case goes forward; there is no justifiable excuse for the errors in service; and Port Orchard cannot show that it will be severely prejudiced if the PFR is dismissed. Port Orchard's defective service cannot be considered "substantial compliance."

1. Kitsap County will suffer prejudice if this case is allowed to go forward.

This Board can take official notice of its own files. WAC 242-03-630(6). The Board is aware that five other PFRs have been filed challenging the Kitsap County comprehensive plan update.[10] Kitsap County is a relatively small county with limited resources. Allowing a case to go forward that clearly is fatally defective with respect to service would create added strain on Kitsap County's resources. Moreover, dismissal at an early state would be a more efficient use of taxpayer's money, be it the City, County or state taxpayers, because it would conserve the resources of agencies at each level, including this Board.

[10] *City of Bremerton et al. v. Kitsap County,* CPSGMHB No. 16-3-0012c, Order of Consolidation and Notice of Hearing and Preliminary Schedule (9/9/2016).

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2. Port Orchard will not be severely prejudiced if the PFR is dismissed.

The criteria invoked previously by this Board requires a showing of *severe* prejudice to the City if the PFR were dismissed. This Board encourages settlement of appeals, and has already stated that it expects settlement discussions to occur among the parties.[11] The Kitsap County Board of County Commissioners had already reached out to Port Orchard to attempt to resolve their issues short of an appeal. Daniels Decl., ¶ 6, Ex. H. Port Orchard did not respond to the letter and instead filed the appeal.

Moreover, it is likely that Port Orchard's issues cannot even be considered by this Board because they are substantively untimely. The issues in the City's PFR pertain to one aspect of the County's transportation element of its comprehensive plan, i.e., the concurrency requirement of RCW 36.70A.070(6)(b). The County's concurrency standards were *not changed* in the update and have been in place since 1998. So a challenge to the standards now is very likely untimely and should ultimately be dismissed in any event. Thus, it is most efficient to dispose of the case immediately, before any party, or the Board expends further public resources on the matter.

3. Port Orchard has no justifiable excuse for failing to properly serve the PFR.

The City of Port Orchard had well over sixty days from the date of adoption to serve its PFR. Port Orchard is represented by counsel, who presumably has access to statute, the Board's rules of procedure and the Board's handbook. The rules are not ambiguous, they are clear. There is no possible "justifiable excuse" that Port Orchard could possibly give to explain all the different defects in service. Moreover, to allow this case to go forward when the Boards have previously dismissed PFRs that at least met part of the procedural requirements would be highly inequitable.

[11] Order of Consolidation at 5.

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IV. CONCLUSION

Port Orchard's PFR should be dismissed because it fails to comply with even one of the standards for service under WAC 242-03-230(2). Further, Port Orchard cannot show substantial compliance because it cannot meet the requirements set out in previous Board decisions including lack of prejudice to Kitsap County, justifiable excuse, or severe prejudice to Port Orchard. For all of these reasons, failing to dismiss would be inequitable, would be inconsistent with prior Board decisions, and would substantially prejudice Kitsap County.

Respectfully submitted this 15 day of September, 2016.

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CERTIFICATE OF SERVICE

I Laurie A. Hughes, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the 15th day of September, 2016, I caused to be served in the manner noted a copy of the foregoing document upon the following:

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EXECUTED this 15th day of September, 2016 at Port Orchard, Washington.

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