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STATE OF WASHINGTON

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MASON COUNTY
PROSECUTOR

84501-8

ADVOCATES FOR RESPONSIBLE DEVELOPMENT and JOHN E. DIEHL,

Appellants,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, MASON COUNTY, and SHAW FAMILY LLC,

Respondents.

REPLY BRIEF OF APPELLANTS

John E. Diehl pro se
and for Advocates for Responsible Development

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PM 8/29/09

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Respondent Shaw Family LLC (“Shaw”) has chosen to address only one of the three issues on appeal, the question of whether Appellant John Diehl had standing before the Western Washington Growth Management Hearings Board (“Board”) on the basis of his letter to the Mason County Commissioners addressing issues he and Advocates for Responsible Development (“ARD”) subsequently appealed to the Board.¹

Shaw’s response focuses mainly on statements by the Central Puget Sound Growth Management Hearings Board in a case that also involved standing. Shaw has little to say about the two main arguments on this issue advanced by Appellants: (1) that Diehl’s letter conformed to the plain meaning of the standing requirement in the statute; and (2) that even if the meaning of the standing requirement were not plain on its face, the legislative intent was clearly

¹ It was on Shaw’s motion that Diehl was dismissed as a party by the WWGMHB. In a letter dated July 16, 2009, to the clerk of the Court of Appeals, Shaw has expressly disavowed any interest in the other two issues Diehl and ARD appeal. Neither has Respondent Mason County shown much interest, for it did not file a brief in this matter when it was before the Superior Court, and has not filed a response brief in this current appeal.

to encourage public participation and not to set traps that might catch an unwary citizen in a technicality that deprived him of his opportunity to obtain review by an administrative tribunal.

A. If the meaning of the standing requirement is plain, then the court must give effect to that plain meaning as an expression of legislative intent.

The meaning of a statute is a question of law reviewed de novo. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001); *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *J.M.*, 144 Wn.2d at 480; cited in *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10 (2002).

B. Given the plain meaning of the statute, Diehl had participatory standing.

The Growth Management Act provides a variety of ways by which a person, broadly defined, may establish standing to petition a hearings board for review of a state agency or local government action or failure to act under the terms of the Act. See RCW 36.70A.280(2). One of these ways, called "participatory standing," is for an individual to participate "orally or in writing before the county or city regarding the matter on which a review is being requested." RCW 36.70A.280(2)(b) Because Diehl participated in writing before

the county regarding the matter for which he and ARD later sought review by the Board, Diehl established participatory standing.

Without claiming that the statute is vague or ambiguous, Shaw simply asserts, without support from relevant authority, that someone who writes on behalf of a group is not acting as an individual, and loses the standing that would otherwise be his by virtue of his participation. Shaw Family LLC Reply [sic] Brief at 3. But it does not follow that when a member of a group speaks or writes on behalf of a group that he is not ~~also~~ acting as an individual, participating in a hearing to express both his own concerns as well as those of the group he represents.

Akers v. Sinclair, 37 Wash. 2d 693, 226 P.2d 225 (1951), a case cited by Shaw concerning the reformation of negotiable instruments, is inapposite. Citing Section 20 of the uniform negotiable instruments law (Rem. Rev. Stat., § 3411 [P.P.C. § 757-39]), the *Akers* court held that when a person signs a negotiable instrument on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized, "but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal does not exempt him from personal liability." *Akers*, 37 Wash. 2d at 706. The present case is not about reformation of negotiable instruments. Nor, if it had been, would Diehl's statement that he was writing on

behalf of his group exempt him from liability if his group were somehow found liable, given that as an unincorporated association, its individual members remain individually responsible for whatever acts might be ascribed to the group.²

The inescapable fact is that Diehl participated in the county's hearing, and so acquired participatory standing. He did not disavow his individual participation in saying that he was writing on behalf of his group. To the contrary, beyond simply saying his comments were on behalf of his group, he said, "I am writing to comment . . . ," and made it plain that he was expressing both his own views and those of his group by his use of "we" and "our" -- e.g., "We agree with the staff recommendation to deny this request . . ." and "we here incorporate by reference our earlier comments . . ."-- as he stated the views of ARD and himself. **216-21**.³ It is understandable that he did not think it necessary to expressly assert that he was writing to state both his own views and those of his group. The statute requires no such assertion to obtain participatory standing.

² An unincorporated association is not ordinarily a legal entity distinct from its component individuals; whereas, a corporation is always and necessarily a distinct and separate legal entity. *Schroeder v. Meridian Imp. Club*, 36 Wn.2d 925, 930 (1950). As essentially an aggregate of individuals, members of an unincorporated association may not claim the powers of a corporation, including immunity from liability for association debts.

³ Bold-faced numbers in parentheses refer to page numbers of the Bates-stamped record as prepared by the Board, omitting the initial three zeros (so that, e.g., "000216" is shown as "216"); these are not to be confused with pagination assigned by the clerk of the superior court.

C. Given the legislative intent to provide relatively informal opportunities for public participation and review by a quasi-judicial administrative agency, Diehl's participation before Mason County gave him participatory standing.

In a string of recent decisions, the Washington Supreme Court has connected the concept of plain meaning to that of legislative intent. In its most extensive discussion, the court contrasted "theories" that words have inherent or fixed meanings with a "second approach," viz.,

[T]he plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Upon reflection, we conclude that this formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent.

Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d at 11-12.

The legislature enacted the Growth Management Act to minimize the threats that unplanned growth poses to the environment, economic development, and public welfare. RCW 36.70A.010; *Diehl v. Mason County*, 94 Wn. App. 645, 650, 972 P.2d 543 (1999). It was never intended to make participation, either at the local level, or on review by one of the growth management hearings boards, the arcane domain of legal specialists. It is one of the Act's basic goals "to encourage the involvement of citizens in the planning process . . ." RCW 36.70A.020(11). There are specific requirements to ensure opportunities for

public participation. RCW 36.70A.035 and .140. The Act provides for three regional growth management hearings boards to hear challenges to local governments' growth management and shoreline planning, giving such quasi-judicial boards a much more limited range of powers than courts. RCW 36.70A.250 and .280. Each board is comprised of three members, only one of whom need be a lawyer. RCW 36.70A.260(1). The provisions for establishing standing to bring a case to one of these boards are much less stringent than, for example, under the Land Use Petition Act; no direct economic interest is required. Inevitably, given that the GMA framework assumes planning from the "bottom up," challenges to local government action frequently come from individuals and grass-roots groups who are attempting to obtain compliance with the goals and requirements of the Act.

In obtaining standing, citizens do "not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney during a public hearing." *Citizens v. Mount Vernon*, 133 Wn.2d 861, 871, 947 P.2d 1208 (1997). In short, the legislative intent was clearly to make it relatively simple for citizens to acquire participatory standing allowing them to seek review by one of the hearings boards.

Beginning in 1995, Diehl has on numerous occasions appeared, either in person or by writing, before the County on growth management issues. On those

occasions when his group was concerned to establish participatory standing, he would indicate that he was speaking or writing on behalf of the group. Until Shaw raised the issue, no one had ever questioned whether Diehl somehow lost standing if he said he was speaking or writing on behalf of his group.

In agreeing with Shaw, the Board confused Diehl's expressly participating on behalf of his group, which he unquestionably did, with his expressly not participating as an individual, which he did not. See 290. By his use of "we" and "our" in his written comments, Diehl was clearly identifying his group's views with his own. He certainly was not disclaiming, expressly or by implication, participation in his individual capacity, and it is a non sequitur to infer, as the Board did, that a statement that one is writing on behalf of a group entails the proposition that one is not also writing jointly, both for one's group and for oneself.

If the legislature had wanted to impose more stringent requirements for standing, such as a requirement that an individual who announces that he or she is speaking or writing on behalf of a group, must additionally say that he or she is participating on behalf of himself, then it might have written a statute that said so. But the entire thrust of public policy in this area is to encourage public participation, and to provide relatively informal means by which citizens may influence local government and seek relief before a growth management hearings

board if they are dissatisfied with the action taken by the local government. The supposition that certain 'magic words' are needed for individuals to retain their individual standing when they are also speaking or writing for a group to which they belong is far removed from the requirements of the Act or any implied legislative intent. Although Shaw alleges that Diehl is attempting to expand the meaning of the statute, it is instead Shaw's interpretation that attempts to impose a restrictive clause not to be found in either the statute itself or in the statutory framework expressive of legislative intent.

D. The hearings board decision in *Friends of the Law v. King County*, though not controlling, is illuminating.

Of course, the decision of the Central Puget Sound Growth Management Hearings Board in *Friends of the Law v. King County*, CPSGMHB Case No. 94-3-0003, holding that an individual has individual standing even if she stated at a hearing that she was representing a group, would not be determinative before this court even if it were not dicta. But it is noteworthy that the Central Puget Sound board reached an opposite conclusion than the Western Board and treated this conclusion as obvious and not requiring argument.

While it may be important for an organization to give express notice that certain persons are representing it collectively, since an organization cannot literally participate, but must rely on an actual person to speak or write on its

behalf, no such rationale applies to individuals. When an individual participates, and especially when he or she communicates views held jointly with others through the use of the pronouns "we" and "our," he or she has met the requirements for participatory standing.

E. Conclusion

Pursuant to RCW 34.05.570(3), this court should conclude, regarding the issue of standing, that the Board erroneously interpreted the law. Petitioners also ask, with regard to the other issues they have brought for judicial review, that this court determine that the Board erroneously interpreted or applied the law and that it reached legal conclusions here appealed that are not supported by evidence that is substantial when viewed in light of the whole record before the court, both in dismissing Petitioners' challenge to the exemption from critical areas regulations for agricultural lands and in sustaining a regulation declaring the minimum reasonable use to be the average use, allowing average-sized houses in critical areas where they would otherwise be excluded. Petitioners also ask the court to remand this matter to the Board for modification of its rulings consistent with the court's determinations.

Dated: August 28, 2009

Submitted by:

John E. Diehl

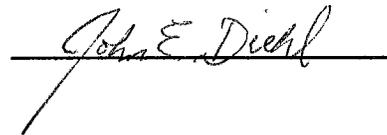
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Declaration of Service

I declare under penalty of perjury under the laws of the State of Washington that on the date indicated below I served by U.S. mail, postage prepaid, and/or fax the above Reply Brief of Appellants on Monty Cobb, Deputy Prosecuting Attorney for Mason County, at P.O. Box 639, Shelton WA 98584; Stephen T. Whitehouse, attorney for Shaw Family LLC, at 601 W. Railroad Ave., Suite 300, Shelton WA 98584; and Diane L. McDaniel and Alan D. Copey, Attorney General's Office, P.O. Box 40110, Olympia 98504-0110

Dated: August 28, 2009

A handwritten signature in cursive script, reading "John E. Diehl", is written over a horizontal line.