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5 **State of Washington**
6 **GROWTH MANAGEMENT HEARINGS BOARD**
7 **FOR EASTERN WASHINGTON**

8 LARSON BEACH NEIGHBORS and JEANIE
9 WAGENMAN,

10 Petitioner,

11 v.

12 STEVENS COUNTY,

13 Respondent.

Case No. 04-1-0010

ORDER ON COMPLIANCE

14
15 **I. SUMMARY OF DECISION**

16 This matter has come before the Board for consideration of whether Stevens County
17 has brought themselves into compliance with the Final Decision and Order (FDO) in this
18 matter. In its February 3, 2005, FDO, the Board found Stevens County out of compliance for
19 its preclusion of public comment on the proposed amendment adopted by the County,
20 Resolution No. 80-2004. After extensive public participation on the original draft, new
21 language was adopted without giving the general public notice of what it was and an
22 opportunity to comment. The amendment made a substantial change and was not one of
the minor changes listed in the exceptions found at RCW 36.70A.035(2)(b)(iii).

23 After this Board remanded Resolution No. 80-2004 to the County, the County
24 adequately notified the public of the subject amendment and the time for receiving
25 comments both written and oral. A hearing was held, comments were received and the
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1 amendment was again adopted. The Board finds that the County has brought themselves
2 into compliance in this matter.

3 II. PROCEDURAL HISTORY

4 On September 10, 2004, LARSON BEACH NEIGHBORS and JEANIE WAGENMAN, by
5 and through its representative, Jeanie Wagenman, filed a Petition for Review.

6 On October 5, 2004, the Hearings Board held a telephonic Prehearing conference.
7 Present were Dennis Dellwo, Presiding Officer, and Hearings Board Member John Roskelley.
8 Hearings Board Member Judy Wall was unavailable. Present for Petitioners was Jeanie
9 Wagenman. Present for Respondent was Peter Scott and Lloyd Nickel.

10 On October 11, 2004, the Hearings Board issued its Prehearing Order.

11 On October 15, 2004, the Respondent County filed a Motion to Dismiss the Petition in
12 this matter.

13 On October 26, 2004, the Hearings Board received Petitioners' motion seeking
14 additions to the Index of Record and clarification of Admitted Exhibits.

15 After receiving the briefing of the parties, a telephonic motion hearing was held on
16 the 22nd day of November 2004. Present were Dennis Dellwo, Presiding Officer, and
17 Hearings Board Members John Roskelley and Judy Wall. Present for the Petitioners was
18 Jeanie Wagenman. Present for the Respondent was Peter Scott.

19 On November 29, 2004, the Hearings Board issued an Order on Motions.

20 On December 27, 2004, the Hearings Board received Respondent's Motion to
21 Consolidate Case Nos. 04-1-0010 and 04-1-0011 and Affidavit of Peter G. Scott in Support
22 of Motion to Consolidate.

23 On December 29, 2004, the Hearings Board issued its Order denying the County's
24 Motion to Consolidate.

25 On January 24, 2005, the Hearings Board held the Hearing on the Merits in Colville
26 with all the parties present. Present for the Hearings Board was Dennis Dellwo, Presiding
Officer and Hearings Board Member John Roskelley. Hearings Board Member Judy Wall was
unable to attend. Present for the Petitioners was Jeanie Wagenman. Present for the

1 Respondent was Peter Scott. All three Stevens County Commissioners were present for the
2 hearing.

3 On February 3, 2005, the Board issued its Final Decision and Order.

4 On May 13, 2005, the Board received Petitioner's request for Compliance Hearing.

5 On May 26, 2005, the Board received Petitioner's First Compliance brief.

6 On June 24, 2005, the Board received a signed Order Granting Motion to Stay
7 Compliance Hearing and Briefing Schedule signed by Superior Court Judge Allen C. Nielson.

8 On July 6, 2005, the Board was informed Stevens County Superior Court dismissed
9 the pending appeal.

10 On August 3, 2005, the Board issued its Order Setting Compliance Hearing and
11 Briefing Schedule.

12 On August 16, 2005, the Board received Respondent's Compliance Brief.

13 On August 24, 2005, the Board received Petitioner's Optional Reply Brief.

14 On August 31, 2005, the Board held a telephonic compliance hearing. Present were
15 Dennis Dellwo, Presiding Officer and Hearings Board Members Judy Wall and John
16 Roskelley. Present for the Petitioners was Jeanie Wagenman. Present for the Respondent
17 was Peter Scott.

18 **III. STANDARD OF REVIEW**

19 Comprehensive plans and development regulations (and amendments thereto)
20 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
21 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to
22 demonstrate that any action taken by the respondent jurisdiction is not in compliance with
23 the Act.

24 The Washington Supreme Court has summarized the standards for Board review of
25 local government actions under Growth Management Act. It was stated:

26 The Board is charged with adjudicating GMA compliance, and, when
necessary, with invalidating noncompliant comprehensive plans and
development regulations. RCW 36.70A.280.302. The Board "shall find
compliance unless it determines that the action by the state agency, county or

1 city is clearly erroneous in view of the entire record before the county, or city
2 is clearly erroneous in view of the entire record before the Board and in light
3 of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an
4 action "clearly erroneous" the Board must be "left with the firm and definite
5 conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util.*
6 *Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

7 *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543,
8 552, 14 P.3d 133, 138 (2000).

9 The Board will grant deference to counties and cities in how they plan under Growth
10 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is
11 bounded, however, by the goals and requirements of the GMA." *King County v. Central*
12 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133
13 (2000). It has been further recognized that "[c]onsistent with *King County*, and
14 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
15 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and
16 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31
17 P.3d 28 (2001).

18 The Board has jurisdiction over the subject matter of the Petition for Review. RCW
19 36.70A.280(1)(a).

20 **IV. LEGAL ISSUES PRESENTED**

21 **ISSUE:** Has Stevens County failed to follow their own Public Participation Policy,
22 County Wide Planning Policy, as well as the requirements for Public Participation set forth in
23 the Growth Management Act, including but not limited to RCW 36.70A.020 (11), RCW
24 36.70A.060, RCW 36.70A.035, RCW 36.70A.130, RCW 36.70A.140, and WAC 365-195-600,
25 WAC 365-195-640, when it adopted Amended Title 13, Critical Areas Ordinance #80-2004,
26 on July 6, 2004?

27 **V. ARGUMENT, DISCUSSION AND ANALYSIS**

28 **THE PARTIES POSITIONS:**

29 The Petitioners contend that the County remains out of compliance by its failure to
30 follow its own Public Participation Policy (PPP) and the GMA provisions regarding public

1 participation in the consideration of the amendment adopted. The Petitioners believe that
2 the County failed during the present compliance process to provide for broad dissemination
3 of proposals and alternatives, opportunity for public meetings, provision for open
4 discussion, and consideration of and response to public comments. They believe the
5 County also failed to inform several of the interested parties.

6 The Petitioners believe that the County's PPP requires early and continuous
7 participation and one hearing is not enough. The Planning Councils and Planning
8 Commission were not used in the compliance process. There were no additional workshops
9 or other meetings, only the one hearing cited. They believe the bypassing of these bodies
10 violates their own Public Participations Policy.

11 The Petitioners believe that because the previous public process on Title CAO did not
12 include the proposed amendment, the County must go through the full public participation
13 required under the County's PPP.

14 The Petitioners argued that the Tribal and Governmental Agencies should have been
15 given notice. This was not done. The Petitioners also believe the County failed to respond
16 to the questions raised at the hearing. They contend that every citizen should have equal
17 opportunity to understand, ask questions, comment, provide suggestions, and make
18 objections to regulations being written by the County. The County did not do this.

19 The County contends that it did what it was asked to do. Give the public an
20 opportunity to comment on the new amendment prior to its adoption. The County believes
21 the FDO in this matter found the County out of compliance because the amendment
22 adopted had not been available to the public during the comment period. Because of this
23 failure, the County provided notice to the public and opportunity to participate prior to the
24 adoption of the amendment. Stevens County believes they are in compliance with the FDO
25 in this matter.

26 On May 3, the County passed Resolution 65-2005, adopting SCC 13.10.034(3) C. The
County believes it is not required to start at the beginning and again have all the hearings it
has previously held in adopting this same amendment. Nothing in the FDO or the County's

1 PPP required the additional meetings or workshops the Petitioner contend. The County
2 contends the notice was adequate and the public had an opportunity to review and
3 comment on the changes to the proposed amendment of SCC 13 that were made in
4 response to earlier public comments.

5 The County further contends that they did respond to the Petitioners' comments.
6 Evidence in the record was given showing that the questions were answered.

7 **LEGAL ANALYSIS:**

8 In finding the County out of compliance, the Board found that the County adopted an
9 amendment to their CAO prior to the public having an opportunity comment on it. (FDO
10 February 3, 2005). The Board found the County precluded public comment on the
11 proposed amendment adopted by the County, Resolution No. 80-2004. The amendment
12 made a substantial change and was not one of the minor changes listed as exceptions to
the required hearings found in RCW 36.70A.035(2)(b)(iii).

13 To bring themselves into compliance, the County published notice of their process for
14 complying with the FDO on March 24, and March 31, 2005. The notices detailed the
15 language to be considered and the reasons for the additional hearing. Notice was also
16 mailed to 318 interested parties. Written comments were accepted between March 28, and
17 April 12, 2005. The public hearing was held April 12, 2005. The hearing was well attended.
18 The April 12, hearing was continued to May 3, to allow for the County's consideration of the
19 record and all comments received. On May 3, the County adopted Resolution 65-2005, SCC
13.10.034(3) C.

20 When a County has been found out of compliance due to their failure to provide the
21 public an opportunity to review an amendment and have an opportunity to comment, the
22 County must provide that opportunity. RCW 36.70A.035(2) requires an additional
23 opportunity for public review and comment if the county chooses to consider an
24 amendment to a comprehensive plan or development regulations and the change is
25 proposed after the opportunity for review and comment has passed. This is what the Board
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1 found in the FDO in this matter. The County has provided this hearing and has given
2 adequate notice.

3 The record itself refutes the Petitioners contention that the County did not respond
4 to her questions. While the Petitioner could wish for more details, she has not carried her
5 burden of proof. The Board does not find that the County is out of compliance with the GMA
6 or its FDO.

7 **Conclusion:**

8 The County has complied with the February 3, 2004, FDO in this matter and is now
9 in compliance with the GMA.

10 **VIII. ORDER**

11 The Petitioners have not carried their burden of proof; Stevens County is in
12 compliance with the Board's FDO and the GMA on this issue.

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

14 **Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the**
15 **mailing of this Order to file a petition for reconsideration. The original and four**
16 **copies of a motion for reconsideration, together with any argument in support**
17 **thereof, should be filed with the Board by mailing, faxing, or otherwise**
18 **delivering the original and four copies of the motion for reconsideration directly**
19 **to the Board, with a copy served on all other parties of record. Filing means**
20 **actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-**
21 **02-240, WAC 242-02-330. The filing of a motion for reconsideration is not a**
22 **prerequisite for filing a petition for judicial review.**

23 **Judicial Review. Any party aggrieved by a final decision of the Board may appeal**
24 **the decision to superior court as provided by RCW 36.70A.300(5). Proceedings**
25 **for judicial review may be instituted by filing a petition in superior court**
26 **according to the procedures specified in chapter 34.05 RCW, Part V, Judicial**
27 **Review and Civil. The petition for judicial review of this Order shall be filed with**
28 **the appropriate court and served on the Board, the Office of the Attorney**
29 **General, and all parties within thirty days after service of the final order, as**
30 **provided in RCW 34.05.542. Service on the Board may be accomplished in person**
31 **or by mail. Service of the Board means actual receipt of the document at the**
32 **Board office within thirty (30) days after service of the final order. A petition for**
33 **judicial review may not be served on the Board by fax or electronic mail.**

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

4 **SO ORDERED** this 13th day of September 2005.

5 EASTERN WASHINGTON GROWTH MANAGEMENT
6 HEARINGS BOARD

7 _____
8 Dennis Dellwo, Board Member

9 _____
10 Judy Wall, Board Member

11 _____
12 John Roskelley, Board Member