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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

LARSON BEACH NEIGHBORS and JEANIE
WAGENMAN,

Petitioner,

v.

STEVENS COUNTY,

Respondent.

Case No. 04-1-0010

FINAL DECISION AND ORDER

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I. SYNOPSIS

The Petitioners are challenging the lack of the required public participation prior to the adoption of a certain amendment to Stevens County's Critical Area Ordinance, Amended Title 13, Section 13.10.034, subsection 3C. The Petitioners contend the amendment redefined, re-designated, critical habitat areas for endangered, threatened or sensitive species and how they are reviewed during the Critical Areas application process. The Respondent does not contend this change was an insignificant change. They contend, however, that the amendment was one of the alternatives available for public comment and additional public testimony was unnecessary.

The Petitioners ask the Eastern Washington Growth Management Hearings Board (Hearings Board) to order the Respondent, Stevens County, to provide an additional opportunity for public comment on the subject amendment of Stevens County Code (DCC) Title 13, Section 13.10.034. The Petitioners contend the County failed to allow for adequate public participation prior to the adoption of a substantial change to Title 13. The Hearings Board finds that this was an important change to Title 13. The failure to broadly disseminate the proposed change to ensure the availability of such documents by the public and make it available 10 days prior to the public hearing scheduled for public comment is a

1 violation of the County's Public Participation Program (PPP) and GMA. The action of the
2 County is clearly erroneous. The County is found out of compliance.

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 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF**
4 **REVIEW**

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

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

19 Pursuant to RCW 36.70A.320(3) we "shall find compliance unless [we] determine
20 that the action by [Jefferson County] is clearly erroneous in view of the entire record before
21 the Board and in light of the goals and requirements of [the GMA]." In order to find the
22 County's action clearly erroneous, we must be "left with the firm and definite conviction that
23 a mistake has been made." *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179,
24 201, 849 P.2d 646 (1993).

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

1 **IV. MOTIONS MADE AT HEARING ON MERITS**

2 **A.** The Respondent, at the Hearing on the Merits, renewed its motion to dismiss. They
3 contended the Petitioners were seeking a finding of invalidity of the provision already found
4 in compliance by the Hearings Board in a previous case, Case No. 03-01-0006c. They
5 argued further that the issue had been decided and should not be renewed through this
6 procedural challenge.

7 The Board referred to its previous order herein denying a similar motion and further
8 pointed out the remedy sought by the Petitioners was a finding of noncompliance for the
9 County's violation of their own Public Participation Program (PPP) and the GMA public
10 participation requirements. The Petitioners further sought the remand of the subject
11 amendment so there might be public comment on such changes. There was also a request
12 for a finding of invalidity. (See Petition herein). The Hearings Board continues to find that it
13 has jurisdiction and this matter is properly before the Board. The Motion to Dismiss is
14 denied.

15 **B.** The County also sought the amendment of the index of record to include the Minutes
16 of Public Meetings, hand written meeting summaries and an affidavit of the attorney for the
17 County. Upon review of the material and without objection of the parties, the Minutes and
18 affidavit of the County's attorney were admitted. The remaining proffered items were
19 excluded or were already part of the index of record.

20 **V. LEGAL ISSUES AND DISCUSSION**

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?

1 **DISCUSSION AND ANALYSIS:**

2 **The Parties' Positions:**

3 The Petitioners are challenging Stevens County's lack of public participation prior to
4 the adoption of a certain amendment to Stevens County's Critical Area Ordinance, Amended
5 Title 13, Section 13.10.034, subsection 3C. The Petitioners contend this amendment
6 redefined, re-designated, critical habitat areas for endangered, threatened or sensitive
7 species and how they are reviewed during the Critical Areas application process. The
8 Petitioners ask the Hearings Board to order the Respondent to provide an opportunity for
9 public participation to correct the failure to provide such public comment.

10 The Respondent does not contend this change was an insignificant change. It
11 contends, however, that this was one of the alternatives available for public comment and
12 additional public testimony was unnecessary. The County admits the amendment was not
13 presented in writing to the public for their review and the language itself was not crafted
14 and added to the available drafts until after the last public hearing, June 22, 2004, or later.
15 It does, however, contend that the issue that resulted in the amendment was discussed
16 publicly by at least two parties during the public hearings. The County believes that
17 "alternatives" as referenced in the law, RCW 36.70A.035(2), includes the suggestions raised
18 by the public during the hearings provided. The County contends that if the public raises
19 such alternatives, and the County adopts them, no additional hearing is needed. This is
20 claimed by the County to be the case, even if the language is not available or the decision
21 clear that the amendment suggested will be considered a viable alternative. The County
22 contends that to do otherwise would require the County to have hearings again and again
23 each time they wish to accept a suggestion made by the public or they must have a hearing
24 fully intending to ignore the suggestions from the public.

25 The County also points out the wording in RCW 36.70A.035(2)(a), where it speaks to
26 where "the change is proposed after the opportunity for review and comment has passed
under the county's or city's procedures, an opportunity for review and comment on the
proposed change shall be provided before the local legislative body votes on the proposed

1 change." The County contends that the change incorporated within the amendment had
2 been proposed prior to the closure of public comment and therefore would not require
3 additional public comment.

4 **Hearings Board Discussion:**

5 The Growth Management Act (GMA) emphasizes public participation throughout the
6 Act. RCW 36.70A.020(11) is a listed Goal of the Growth Management Act:

7 **Citizen Participation and Coordination.** Encourage the involvement of
8 citizens in the planning process and ensure coordination between communities
9 and jurisdictions to reconcile conflicts.

10 RCW 36.70A.035(2) is another GMA section that provides for public participation, but
11 in the specific area of comment upon amendments to a comprehensive plan or development
12 regulations. This section speaks directly to the issue before the Hearings Board:

13 (2)(a) Except as otherwise provided in (b) of this subsection, if the legislative
14 body for a county or city chooses to consider a change to an amendment to a
15 comprehensive plan or development regulation, and the change is proposed
16 after the opportunity for review and comment has passed under the county's
17 or city's procedures, an opportunity for review and comment on the proposed
18 change shall be provide before the local legislative body votes on the
19 proposed change.

20 (b) An additional opportunity for public review and comment is not required under
21 (a) of this subsection if...

22 (ii) The proposed change is within the scope of the alternatives
23 available for public comment;

24 (iii) The proposed change only corrects typographical errors, corrects
25 cross-references, makes address or name changes, or clarifies
26 language of a proposed ordinance or resolution without changing its
effect....

RCW 36.70A.140 is another, but more universal provision for public participation
under the GMA. In that statute, the County is required to:

1 ...establish and broadly disseminate to the public a public participation
2 program identifying procedures providing for early and continuous public
3 participation in the development and amendment of comprehensive land use
plans and development regulations implementing such plans. . . .

4 The County has developed its own Public Participation Program and it has been
5 found compliant with the GMA. The County now is required to follow the plan. A portion of
6 the Public Participation Program for Stevens County provides as follows:

7 CHAPTER 4
8 BROAD DISSEMINATION OF PROPOSALS AND ALTERNATIVES

9 Proposals, drafts, maps and other documents which are being considered for
10 adoption, amendment or revisions should be readily available and accessible
11 well in advance of opportunities for public discussion.... Stevens County will
12 ensure the availability of such documents by implementing the following:

13 Proposals or initial preliminary drafts being considered for official
14 county action such as adoption, revision or amendment shall be
15 available 10 days prior to a public meeting or hearing scheduled for
16 public comment or testimony.... All recommended changes proposed by
17 the Planning Department to a proposal or preliminary draft shall be
18 disseminated as the earliest convenience.

19 The above sections of the GMA convince us that the legislature intended that public
20 participation enjoy a high priority under the Growth Management Act. "This Board has
21 always held that public participation was the very core of the Growth Management Act."
22 *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c Final Decision and Order p.
23 6 of 16 (May 21, 1999). At a minimum, this means that the public must have an opportunity
24 to comment on amendments prior to adoption by the local legislative body unless the
25 amendments fall under one of the exceptions in RCW 36.70A.035(2)(b).

26 "Amendment," as it's used in RCW 36.70A.035(2)(a) refers to amendments or
changes made to a planning document during the legislative body's consideration of the
plan or development regulations. Each amendment or change made during this process,
which is not exempted under RCW 36.70A.035(2)(b), therefore requires at least one

1 additional opportunity for public comment with appropriate notice and time to review the
2 amendments prior to adoption. No other interpretation makes sense given the importance
3 the GMA places on public participation as evidenced by the three statutes at issue in this
4 case. Nor is any other interpretation reconcilable with the clause contained in 36.70A.140
5 that requires "early and continuous public participation in the development and amendment
6 of comprehensive land use plans and development regulations . . ."

7 The use of the word "proposal" in RCW 36.70A.035(2)(a) speaks to proposals by the
8 County, not to the many and often unclear suggestions or objections made at the hearings
9 by the public. If the County believes there is merit in a suggestion made at a hearing or in
10 some other manner, the County may add that as one of the proposed changes they will
11 consider and seek public input at a properly noticed public hearing. Without this, the public
12 would have a moving target, there being no understanding of what they need to object to.
13 The general public must be given notice of the changes they are asked to comment upon.
14 If not, only those present at the hearing will discover all the potential changes or proposals
15 that are being considered. A person believing the change advertised was appropriate and
16 does not appear to testify, may discover later that an objectionable amendment was
17 suggested at the hearing and adopted without further notice to the public. This is not what
18 is meant by the requirements of public participation.

19 The Hearing Board finds that the amendment at issue here was an "amendment" to
20 the Comprehensive Plan or Development Regulations under the meaning of RCW
21 36.70A.035(2)(a). This amendment was a "proposal" that was "considered" after the
22 opportunity for public review and comment had passed and therefore an additional
23 opportunity for review and comment on the proposed change was required before adoption
24 by the BOCC. RCW 36.70A.035(2)(a). Cities and counties have discretion under RCW
25 36.70A.035(2) on how to give notice and how to provide opportunities for public comment.
26 The County's Public Participation Program outlines what they should have done, and they
did not do it.

1 **Changes Were Not Within the Scope of the Alternatives Available for Comment**
2 **at the Public Hearings**

3 Stevens County argues that the challenged amendment was within the scope of
4 alternatives available for public comment at the public hearings held prior to its adoption.
5 The County points to several comments that refer to the general area covered or the
6 difficulty the amendment is claimed to correct. The County argues that no public hearing
7 was therefore required pursuant to RCW 36.70A.035(2)(b)(ii).

8 The Hearings Board declines to adopt the County's arguments. The fact that the
9 County received comments from certain citizens requesting or discussing problems or
10 changes that resulted in changes adopted later as amendments, does not demonstrate that
11 the public received an opportunity to comment on the amendment later adopted by the
12 County. The Growth Management Act requires that the public have the opportunity to
13 contribute its voice to the development of comprehensive plans and development
14 regulations. Preceding that opportunity must be effective notice, reasonably calculated to
15 alert the public to the alternatives that may become part of the final comprehensive plan.
16 There was nothing in either of the notices for the public hearings or in the text of the
17 proposed draft of changes that would alert the general public that the adopted amendment
18 at issue was on the table for consideration. Nor was there any public notice that the County
19 had received requests for changes and inviting the public to review and comment on the
20 changes being considered. We therefore find that the challenged amendment was not
21 among the scope of alternatives available for public comment.

22 The County's contention that this requirement would cause the County to have
23 unending hearings unless they have one, knowing full well that the suggestions will be
24 ignored, is disingenuous. All counties under the GMA have these hearings. If the hearing
25 raises credible problems or beneficial suggestions and the County believes the changes are
26 appropriate, they could adopt them as their proposed language. A new hearing would be
held. After all comments are heard, the county could prepare a draft with the appropriate
language, have a final hearing and proceed.

1 **Conclusions:**

2 The Hearings Board concludes Stevens County's adoption of the subject amendment,
3 without giving the public an opportunity to comment further, does not comply with the
4 public participation requirements of the GMA and the County's own Public Participation
5 Program. The Petitioners have carried their burden of proof and the Hearings Board finds
6 these actions to be clearly erroneous and remands Stevens County Code, Title 13, with
7 directions to the County to provide for appropriate public participation as directed by the
8 GMA and the County's own PPP.

8 **VI. FINDINGS OF FACT**

- 9 1. On July 6, 2004, Stevens County Board of County Commissioners
10 adopted Resolution No. 80-2004, Amending Title 13 Critical Areas
11 Ordinance.
- 12 2. On July 15, 2004, Stevens County published adoption of Resolution No.
13 80. 80-2004.
- 14 3. On September 10, 2004, Larson Beach Neighbors and Jeanie
15 Wagenman filed a Petition for Review.
- 16 4. Public notice given prior to the adoption of the objected to amendment
17 did not include notice of the objected to amendment.
- 18 5. Two comments in the record, which generally discuss the issue later
19 addressed by the amendment, did not suggest the language finally
20 adopted by the County.
- 21 6. The County adopted the subject amendment to their Comprehensive
22 Plan Development Regulations without giving the general public notice
23 of the amendment, its language and an opportunity to comment.
- 24 7. The amendment that is the subject of this Petition made a substantial
25 change and was not one of the minor changes listed in RCW
26 36.70A.035(2)(b)(iii).

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VII. CONCLUSIONS OF LAW

1. The County is required by its Public Participation Program and by the Growth Management Act to provide early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans.
2. The County must give the required public notice even where a suggestion or the basis for the proposal arises from a public comment at a hearing on an existing draft.
3. The Public must be given an opportunity to see the proposed language prior to having an opportunity to comment. (Sevens County Code, Chapter 4, Resolution No. 20-2002.)
4. The knowledge of those at a hearing that the County would consider a change suggested therein for adoption is not considered adequate public notice.

VIII. ORDER

1. The County's adoption of Resolution No. 80-2004 was clearly erroneous in precluding public comment on the proposed amendment due to failure to follow its own GMA compliant public participation rules. The adoption of Resolution No. 80-2004 does not comply with the public participation requirements of RCW 36.70A.140 and RCW 36.70A.035 nor does it follow the guidance provided by RCW 36.70A.020(11).
2. The Hearings Board remands Resolution No. 80-2004 to the County with directions to take appropriate legislative action to bring it into compliance with the goals and requirements of the Act.
3. The County is further directed, by no later than February 28, 2005, to talk with the Petitioners and to determine if there is an opportunity to consolidate a hearing for this "amendment" with any hearing that may be required for Case No. 04-1-0011. Upon completion of such

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discussions, the County is directed to notify the Hearings Board of the time needed for doing what is necessary to have the County in Compliance.

Pursuant to RCW 36.70A.300(5), this is a Final Order for purposes of appeal. Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this Final Decision and Order.

SO ORDERED this 3rd day of February 2005.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD

Dennis Dellwo, Board Member

Judy Wall, Board Member

John Roskelley, Board Member