

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

KITTITAS COUNTY CONSERVATION, et al.,

Case No. 06-1-0011

Petitioners,

**ORDER FINDING COMPLIANCE**

v.

KITTITAS COUNTY, a political sub-division  
of the State of Washington,

Respondent,

CENTRAL WASHINGTON HOME BUILDERS  
ASSOCIATION, MITCHELL F. WILLIAMS,  
d/b/a MF WILLIAMS CONSTRUCTION CO.  
INC, and BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON, a non-  
profit corporation, MISTY MOUNTAIN, LLC,  
PAT DENEEN,

Intervenors.

**I. PROCEDURAL HISTORY**

On October 12, 2006, KITTITAS COUNTY CONSERVATION, PAULA J. THOMPSON, JAN SHARAR, DAWN DOUGLAS, MARGE BRANDSRUD, JOHN JENSEN, and ROGER OLSEN, by and through their representative, JAMES CARMODY, filed a Petition for Review.

On October 27, 2006, CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, (CWHBA), MITCHELL F. WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., INC. and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, (BIAW), filed a Motion to Intervene. Also on October 27, 2006, MISTY MOUNTAIN, LLC, filed a Motion to Intervene.

On October 31, 2006, PAT DENEEN, filed a Motion to Intervene.

1 On November 6, 2006, the Board received Petitioner's Memorandum in Opposition to  
2 Motions to Intervene.

3 On November 7, 2006, the Board received CWHBA, Declaration of Jerry T. Martens.

4 On November 7, 2006, prior to the Prehearing conference, the Board heard the  
5 Motions to Intervene. The Board granted all Motions to Intervene limiting the briefing to  
6 one coordinated brief filed by the Intervenors. The Intervenors were instructed to  
7 determine which attorney would argue which issue(s). An Intervenor with a separate and  
8 distinct argument for a particular issue should include their argument in the coordinated  
9 brief and would be allowed to argue their issue at the Hearing on the Merits separately if  
10 necessary. The Board would accept one brief from Respondent and one additional  
11 coordinated brief from the Intervenors.

12 On November 7, 2006, the Board held a telephonic Prehearing conference. Present  
13 were, John Roskelley, Presiding Officer, and Board Members Judy Wall and Dennis Dellwo.  
14 Present for Petitioners was James Carmody. Present for Respondent was James Hurson.  
15 Present for Intervenors were Andrew Cook, William Crittenden, and Jeff Slothower.

16 On November 8, 2006, the Board issued its Prehearing Order.

17 On November 28, 2006, the Board received Intervenors' Motion to Dismiss and  
18 Declaration in Support.

19 On November 29, 2006, the Board received Respondent's Motion and Memorandum  
20 in Support of Motion to Dismiss.

21 On December 13, 2006, the Board received Petitioners' Memorandum in Opposition  
22 to Motion to Dismiss and Declaration in Support.

23 On December 20, 2006, the Board received Respondent's Reply Brief in Support of  
24 Motion to Dismiss. Also on December 20, the Board received Intervenors' Rebuttal on  
25 Motion to Dismiss.

26 January 3, 2007, the Board held a telephonic motion hearing. Present were, John  
Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Joyce Mulliken. Present

1 for Petitioners was James Carmody. Present for Respondent was James Hurson. Present for  
2 Intervenors were Andrew Cook, William Crittenden, and Jeff Slothower.

3 On February 5, 2007, the Board issued its Order on Motions.

4 On February 8, 2007, the Board received Intervenors' Application for Prehearing  
5 Conference.

6 On February 12, 2007, the Board issued its Order on Application for Prehearing  
7 Conference.

8 On February 5, 2007, the Board received Petitioners' Hearing on the Merits Brief.

9 On February 26, 2007, the Board received Respondent's and Intervenors' Hearing on  
10 the Merits Briefs.

11 On March 2, 2007, the Board received Petitioners' Hearing on the Merits Reply Brief.

12 On March 6, 2007, the Board received Intervenors' Motion to Strike Improper Brief.

13 On March 7, 2007, the Board received Intervenors' Surreply Brief.

14 On March 7, 2007, the Board held the hearing on the merits. Present were, John  
15 Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Joyce Mulliken. Present  
16 for Petitioners was James Carmody. Present for Respondent was James Hurson. Present for  
17 Intervenors were Andrew Cook, William Crittenden, and Jeff Slothower.

18 On April 3, 2007, the Board issued its Final Decision and Order.

19 On September 5, 2007, the Board held a telephonic compliance hearing. Present  
20 were, John Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Joyce  
21 Mulliken. Present for Petitioners was James Carmody. Present for Respondent was Neil  
22 Caulkins. Present for Intervenors were William Crittenden, Michael Murphy and Jeff  
23 Slothower.

## 24 II. DISCUSSION

25 On April 3, 2007, the Eastern Washington Growth Management Hearings Board  
26 (Board) issued its Final Decision and Order (FDO) for Case No. 06-1-0011. The Board found  
the Petitioners, Kittitas County Conservation, et al., failed to carry their burden of proof in  
Issue Nos. 1, 2 and 3 and had abandoned Issue No. 4. In Issue No. 5, the Petitioners

1 requested the Board to enter a finding of invalidity. To make such a finding, the Board must  
2 first find the Respondent, Kittitas County (County), out of compliance in one or more issues  
3 and second, that the continued validity of the subject provisions would substantially  
4 interfere with the goals of the Growth Management Act (GMA). The Board did not find the  
5 County out of compliance in the first four issues, and the sixth issue involves pre-GMA  
6 regulations, so a finding of invalidity was denied.

7 However, in Issue No. 6 the Board found the County failed to act by failing to adopt  
8 regulations implementing its Comprehensive Plan (CP) or properly reviewing existing  
9 regulations for consistency with the County's CP with proper notice and public participation.  
10 The County was ordered to take the appropriate legislative action to bring itself into  
11 compliance by July 23, 2007.

12 To comply with the Board's Order, the County reviewed its existing regulations,  
13 provided public notice, held hearings, invited public participation, and then adopted  
14 Ordinance No. 2007-22 on July 19, 2007.

15 The Petitioners, in their initial brief, Comments on Kittitas County's Statement of  
16 Actions Taken to Comply, submitted August 13, 2007, argue the County did engage in the  
17 public process as ordered, but the process failed to "meaningfully and effectively address  
18 critical issues related to urban level development in rural areas." Petitioners brief at 14.  
19 They contend deferral of review of the Agricultural-3 and Rural-3 zoning, and adoption of  
20 Performance Based Cluster Platting, among other development and zoning regulations are  
21 inappropriate and the adopted development regulations are out of compliance with the  
22 GMA.

23 The County disagrees. The Respondent contends the County complied with the FDO  
24 and even the Petitioners agree with this in their brief. The objections being made by the  
25 Petitioners are without legal or factual support, not authorized by the FDO, and are  
26 violations of the GMA and impermissible collateral attacks.

The Intervenors contend the County complied with the Board's FDO by reviewing its  
development regulations as required and provided the necessary public notice and public

1 participation. They ask the Board to enter a finding of compliance under RCW  
2 36.70A.330(3) and dismiss the case. The Intervenors contend the Board's Order did not  
3 direct the County to adopt any particular comprehensive plan amendments or development  
4 regulations; to amend its Performance Based Cluster Platting, KCC Chapter 16.09; nor to  
5 achieve any particular maximum rural densities.

6 The Petitioners, in their Reply brief, argue the County's adoption of non-compliant  
7 development regulations fails to comply with the requirements of the GMA as stated in RCW  
8 36.70A.330(1). The Petitioners contend the Board has jurisdiction to consider procedural, as  
9 well as substantive compliance in the context of a failure to act determination. Despite the  
10 Intervenors' contention that a review of substantive provisions must, "...arise from a new  
11 petition for review and many not be heard in the compliance hearing", the Petitioners  
12 contend this argument is inconsistent with both the statutory directive and sound reasoning  
13 set forth in *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008, FDO (May 24,  
14 1996. Reply brief at 6. In addition, the Petitioners argue the compliance proceeding requires  
15 specific consideration of Rural-3 and Agricultural-3 zoning districts; that the process should  
16 have further briefing; that the Board may consider all regulations adopted by Ordinance  
17 2007-22; that three-acre zoning is non-compliant with the GMA; and that a finding of  
18 invalidity is authorized by RCW 36.70A.330(4). In conclusion, the Petitioners request that  
19 the Board determine the referenced development regulations are non-compliant with the  
20 GMA and enter a finding of invalidity.

21 The Board's Final Decision and Order was specific: "Kittitas County failed to act by  
22 failing to adopt regulations implementing its Comprehensive Plan or properly reviewing  
23 existing regulations for consistency with the County's CP with proper notice and public  
24 participation." FDO at 31. The record shows Kittitas County followed the Board's Order by  
25 reviewing its regulations for consistency with the County's CP, including KCC Chapters 16.09  
26 and Chapter 17, and advertised its meetings and hearings appropriately to include the  
public.

1 In light of the Board's wording in the FDO, the County complied with the FDO. This  
2 does not mean the Board agrees with the County's adopted development regulations,  
3 zoning regulations, or the Performance Based Cluster Platting. It simply means the County,  
4 relying on RCW 36.70A.3201, believes its development regulations and zoning code is in  
5 compliance with the GMA. The County's Comprehensive Plan up-date process and adoption  
6 of Ordinance 2007-22 came prior to the Board's Final Decision and Order in Case No. 07-1-  
7 0004c, which determined portions of KCC Chapters 16 and 17 out of compliance, including  
8 Performance Based Cluster Platting and the Agriculture-3 and Rural-3 zoning.

9 The Board agrees it has the authority to look at substantive compliance in the  
10 context of a failure to act determination. The Board could choose to review the changes  
11 substantively if it determines that the circumstances are appropriate. The Board will  
12 consider its schedule, the number of parties in the case, the scope and nature of the legal  
13 issues before the Board, and whether new petitions have been timely filed challenging the  
14 substance of the remand amendment. In this case, the Board did not provide notice of its  
15 intention to review the substance of the changes or allowed time for the detailed briefing  
16 necessary. The issue is complex and involves several parties.

17 In addition, in *Diehl v. Mason County*, WWGMHB 95-2-0073, Compliance Order (Feb.  
18 22, 1996), the Western Board determined a review of the substantive issues raised by the  
19 Petitioners requires the same process that the Board would employ if a party filed a new  
20 petition for review.

21 "It is important to note that, if we decided to consider substantive elements of  
22 the Ordinance within the compliance hearing process, we likely would still  
23 have had to set up a de facto petition process; including a prehearing  
24 conference, a motions hearing, a briefing schedule, establishment of the  
25 record, and a full hearing on the merits."

26 The Board agrees with the Intervenors. "If the Petitioners believe the development  
regulations adopted or amended by Ordinance No. 2007-22 do not comply with the GMA

1 then Petitioners have until September 17, 2007, to file a petition for review pursuant to  
2 RCW 36.70A.290(2).

### 3 **III. ORDER**

4 The Board finds Kittitas County in compliance with the Board's Final Decision and  
5 Order issued April 3, 2007.

6  
7 Pursuant to RCW 36.70A.300 this is a final order of the Board.

#### 8 **Reconsideration:**

9 Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this  
10 Order to file a petition for reconsideration. Petitions for reconsideration shall  
11 follow the format set out in WAC 242-02-832. The original and four (4) copies of  
12 the petition for reconsideration, together with any argument in support thereof,  
13 should be filed by mailing, faxing or delivering the document directly to the  
14 Board, with a copy to all other parties of record and their representatives. **Filing**  
15 **means actual receipt of the document at the Board office.** RCW 34.05.010(6),  
16 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite  
17 for filing a petition for judicial review.

#### 18 **Judicial Review:**

19 Any party aggrieved by a final decision of the Board may appeal the decision to  
20 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial  
21 review may be instituted by filing a petition in superior court according to the  
22 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

#### 23 **Enforcement:**

24 The petition for judicial review of this Order shall be filed with the appropriate  
25 court and served on the Board, the Office of the Attorney General, and all parties  
26 within thirty days after service of the final order, as provided in RCW 34.05.542.  
Service on the Board may be accomplished in person or by mail. Service on the  
Board means **actual receipt of the document at the Board office** within thirty  
days after service of the final order.

1 **Service:**

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

4 **SO ORDERED** this 11<sup>th</sup> day of September 2007.

5 EASTERN WASHINGTON GROWTH MANAGEMENT  
6 HEARINGS BOARD

7 \_\_\_\_\_  
8 John Roskelley, Board Member

9 \_\_\_\_\_  
10 Dennis Dellwo, Board Member

11 \_\_\_\_\_  
12 Joyce Mulliken, Board Member