

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

WARREN DAWES, JOHN E. DIEHL, GORDON)	
JACOBSON, JUTTA RIEDIGER, VERN RUTTER, and)	No. 96-2-0023c
KERRY HOLM, individually and as members of the)	
KERRY HOLM, individually and as members of the)	COMPLIANCE
MASON COUNTY COMMUNITY DEVELOPMENT)	ORDER
COUNCIL (MCCDC), a non-profit association,)	
)	(For Compliance
Petitioners,)	Hearing #7)
)	
v.)	
)	
)	
MASON COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
PETER E. OVERTON, et al., McDONALD LAND)	
COMPANY, HUNTER CHRISTMAS TREES, HUNTER)	
FARMS, SOUTH 101 CORRIDOR GROUP, Inc., and)	
MANKE LUMBER COMPANY,)	
)	
Intervenors,)	
_____)	

SYNOPSIS OF THE ORDER

Allyn Development Regulations

Mason County has brought the development regulations (DRs) for the Allyn urban growth area (UGA) into compliance.

Delineate and Map Rural Densities

In our March 2001 order, we required the County to delineate limited areas of more intensive development (LAMIRDs) and other rural area densities on a final map. The County has complied in part with this requirement. Clear maps for three RACs (Taylor Towne I and II counting as one), 9 hamlets and 14 isolated commercial industrial areas (ICIAs) are now part of the record in Exhibits #3230, #3232, #3233, and #3234. Further, densities in the rural area are clearly mapped in Exhibit #3230. The new 194 LAMIRDs designated as a means of replacing the matrix of permitted uses, however, remain unmapped. The regulations and policies governing their expansion are unclear. Therefore, the requirement for final mapping remains noncompliant.

SEPA Requirements

The most egregious failure of the County involves its treatment of our requirement to assess the effects of new LAMIRDs under the State Environmental Policy Act (SEPA). The County, in contending that this did not necessarily mean a final supplementary environmental impact statement (FSEIS), has ignored the March 2001 Compliance Order and the obvious cumulative effect of creating 194 new LAMIRDs. In the order we said failure to address SEPA effects of 13 LAMIRDs precluded compliance. We then required the County to consider the “cumulative effects of LAMIRDs” through an appropriate SEPA process. This failure to properly assess LAMIRD effects now substantially interferes with the fulfillment of the goals of the Act.

Matrix of Permitted Uses

We find elimination of the matrix of permitted uses and instead designating uses within zoned areas a device which likely would comply with the Act, but only when

the cumulative environmental effect of such an action is clearly assessed under SEPA and the mapping is complete.

Open Space Corridors

The County has complied in part with the requirement to identify open space corridors (between Allyn and Belfair) but has failed to comply regarding a corridor between Allyn and Shelton.

**THE PROCEDURAL HISTORY IS APPENDED AS APPENDIX II AND
INCORPORATED HEREIN BY REFERENCE.**

**STANDARD OF REVIEW, PRESUMPTION OF VALIDITY,
BURDEN OF PROOF**

Ordinance amendments made in response to a finding of noncompliance are presumed valid. RCW 36.70A.320.

The burden is on petitioners to demonstrate that the action taken by Mason County is not in compliance with the requirements of the Growth Management Act (GMA, Act). RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we “shall find compliance unless [we] determine that the action by [Mason County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” In order to find the County’s action clearly erroneous, we must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 19, 201 (1993).

To rescind or modify a Board's previous findings of invalidity, respondent Mason County must demonstrate that the provisions of Ordinance #23-02 and associated documents enacted in response to a determination of invalidity, "will no longer substantially interfere with fulfillment of the goals of [the Growth Management Act]..." RCW 36.70A.320(4).

SUMMARY OF REQUIREMENTS AND ISSUES

The requirement and issues in 96-2-0023c (*Dawes*) are summarized as follows:

1. Bring the matrix of permitted uses in rural lands, Figure 01.03.02, excluding urban growth areas, into compliance (currently invalid and noncompliant).
2. Delineate and map open space and recreation areas (currently noncompliant).
3. Assess the effect of 13 previously-undesignated LAMIRDS in a FSEIS, and delineate and map the LAMIRD boundaries (currently noncompliant).
4. Delineate and map rural densities in the comprehensive plan (currently noncompliant).
5. Adopt DRs for the Allyn non-municipal urban growth area (currently noncompliant).

DISCUSSION AND CONCLUSIONS

Issue #1 - Matrix of Permitted Uses

The County argued that it had complied with the spirit of the March 2001 order by abandoning the use of the invalidated matrix of permitted uses and substituting 194 parcels with "non-residential land uses in the rural area and outside of the other designated LAMIRDS." Exhibit #3206, pg. 2.

In its June 17, 2002 reply brief on rezone criteria clarifications, the County noted:

“Of the 177 (sic) parcels, many are designated rural commercial and rural industrial and are thus an area of more intensive rural development.”

(The County’s number of LAMIRDs (177) refers to pages 4 through 8 of Exhibit #3206. Page 9 contains 17 more, a total of 194, which we use throughout this order)

The County noted its acceptance of many of Petitioner Diehl’s suggestions regarding the comprehensive set of rezone criteria (Ex. #3202). The County pointed out that it limits commercial and industrial rezones of areas outside of RACs and hamlets to 5 parcels per year and declared that those new rezone commercial industrial properties will be limited to 20 employees or less.

The County stated that the rezone criteria required new commercial and industrial rezones to be a half-mile from any RAC or hamlet and any commercial or industrial property. The County observed that many of those suggestions were made by MCCDC and that the County had responded favorably. The County also noted that it had removed the phrase “none of which shall be determinative” as a notation regarding rezone criteria. The County observed that continuing rural businesses as now conforming makes those businesses more difficult to maintain.

Petitioners responded that, without mapped delineation of the new 194 LAMIRDs, it is impossible to determine where the half-mile zone starts. They contended that the permitted uses within these new LAMIRDs allowed expansion and change of use where the previous ordinance treated these as nonconforming uses which could neither expand nor create an enterprise with a different use.

Conclusion

We commend the County on its willingness to accept petitioner recommendations and its expressed intent to provide limitations on expansion of commercial/industrial enterprises not principally serving the rural population in the rural area as called for by Section .070 of the GMA. Several aspects of the plan and ordinance amendments need to be reviewed before we can find compliance.

Under this record, no map exists of the new 194 LAMIRDs in Exhibit #3206, pg. 4 through 9. The excellent development area maps, 1 through 5, are limited to 9 hamlets, the original 14 ICIAs, and 3 RACs. The sheer volume of 194 new LAMIRDs which apparently were created under the requirements of Section .070(5)(d)(iii) or (d)(i) requires precise delineation in order to meet the requirements of .070(5)(d)(iv).

We concur with MCCDC's contention that Section 1.05.080(I) of Ordinance #23-02, which appears to limit the number of possible rezones per year and precludes rezones within one-half mile of RACs, hamlets, and ICIAs, does not apply to the unmapped 194 isolated properties or new LAMIRDs.

At the hearing, the County acknowledged that the identified businesses in Exhibit #3206 meet the definition of isolated small-scale businesses designated under RCW 36.70A.070(5)(d)(iii). As such, the County is required to demonstrate that these isolated uses meet the provisions of RCW 36.70A.070(5)(a)-(c). See Panesko, WWGMHB Case #00-2-0031c (FDO, March 5, 2001).

Section .070(5)(d)(i) of the GMA addresses infill development or redevelopment of existing commercial and industrial areas. Subsection (iii) addresses intensification of development on lots containing isolated nonresidential usage or new development or

new development of isolated cottage industries and isolated small scale businesses not principally designed to serve the existing and projecting rural population.

The rural development districts in Ordinance #23-02 are characterized as commercial, industrial, natural resources, and tourist. Rural commercial is divided into three categories, RC1, 2, and 3. RC1 is defined as “very small areas of commercial development, often a single lot, or along a highway consisting of a convenience or general store.” But the category “includes” this description, so it is not limited to it. RC2, “includes” historical neighborhood centers serving primarily surrounding rural residential development. RC3, “includes” historical village centers serving rural residents and tourists.

Exhibit #3206 states that there are residential land uses within each LAMIRD as a consequence of establishing each logical outer boundary. Exhibit #3206 next states “within each LAMIRD existing land uses are designated as certain development districts in order to locate similar development on adjoining properties and limit potential use conflicts.” Are these adjoining properties within the LAMIRD or beyond the logical outer boundary? And how does this relate to the CP policy allowing expansion of isolated commercial industrial areas of up to ten percent of the 1990 boundary, or 30 acres, whichever is less, without requiring a special use permit? Policy RU 214, CP at III-3.7, Ex. 2200 at 63. The County must answer these questions and clearly map the new LAMIRDs before we will be able to determine compliance. The requirements of .070(5)(d) and (e) must be met.

Issue #2 – Assessing the Effects of Undesignated LAMIRDs

The March 2001 order called for an assessment of the effects of the creation of 13 newly designated LAMIRDs under SEPA. In its opening brief, the County argued that “assessing the effects” did not refer to a FSEIS regarding these new LAMIRDs

and implied that it would not apply to the even newer 194 LAMIRDs created by the March 2002 amendments (Ex. #3206).

Petitioners responded that it was clear from our 2001 order that we intended an FSEIS to be provided by the County and even more ludicrous to assume that with 194 new LAMIRDs, a county would not be required to address the question of cumulative impact.

Conclusion

The most egregious failure of the County involves its treatment of the requirement to assess the effects of new LAMIRDs under SEPA. The County, in contending that this did not necessarily mean a FSEIS, has ignored the obvious cumulative effect of creating new LAMIRDs. The March 2001 order held that the failure to address SEPA effects of 13 LAMIRDs precluded compliance. We required the County to consider the “cumulative effects of LAMIRDs.” This failure to assess LAMIRD effects now substantially interferes with the fulfillment of the goals of the Act.

We clearly intended that an FSEIS be provided for the 13 newly created LAMIRDs which we addressed in our 2001 order. It is even more imperative that one be provided with the addition of 194 new LAMIRDs. We find that the failure to properly assess the addition of 12 times the number of LAMIRDs in the interim substantially interferes with the fulfillment of the Goal 10 of the Act regarding environmental protection. Sections 1.02.043, and 1.04.320, .330, .340 are found to substantially interfere with Goal 10 of the Act.

Issue #3 - Open Space and Recreation Area Mapping

Petitioner Diehl pointed out that the County had adopted another narrow interpretation, similar to the one regarding assessment of effects, when it neglected to identify corridors for open space because the order did not specifically mention “corridors”, even though the Act does. The Act states very plainly in Section .160 that a county “shall identify open space corridors within and between urban growth areas.” The corridors between the Allyn-Belfair area and Shelton are not mapped. They are identified as the following facilities which are mapped: a bypass bicycle route, a railroad, streams, a transmission line, and a pipeline. In contrast to the well-mapped proposed corridors of the three Allyn-Belfair area maps, there is no Allyn-Shelton corridor mapping.

Conclusion

We find that these do not constitute a corridor including lands useful for recreation, wildlife habitat, trails, and connection of critical areas. Identification of open space corridors remains noncompliant.

Issue #4 - Allyn UGA DRs

Section 1.03.031 of Ordinance #2302 amending the Mason County CP and DRs now includes the Allyn UGA. This section concerns binding site plans. Section 1.02.026, Allyn UGA, defines the Allyn development areas. None of the parties briefed this issue of our March 2001 Compliance Order. From our review of the ordinance we conclude that the DRs for the Allyn UGA are in compliance.

Issue #5 – Rural Density Mapping

In our March 2001 order, we required the County to delineate LAMIRDs and rural area densities on a final map. The County has complied in part with this

requirement. Maps for three RACs (Taylor Towne I and II counting as one), 9 hamlets, and 14 isolated commercial industrial areas (ICIAs) have been added to the record (Exhibits #3230, #3232, #3233, and #3234). Further, densities in the rural area are clearly mapped in Exhibit #3230.

The Mason County Report on Actions Taken, March 5, 2002, states:

“Mason County has just adopted the amendments to address rural lands, open space, and other issues in the Findings and Order, in Ordinance No. 23-02. Mason County prepared an approach to guide the land uses permitted in the rural areas of Mason County by establishing various development districts for the Rural Lands. New development districts for low density rural residential, rural commercial, industrial, natural resources, rural tourist, and master planned resorts were mapped and development standards for each of the districts were proposed.”

No maps of the 194 development district parcel LAMIRDs are part of this record.

The new 194 LAMIRDs designated as a means of replacing the matrix of permitted uses remain unmapped and therefore, the requirement for final mapping remains noncompliant.

Post Hearing Briefing: Rezone Criteria (See Appendix II, p. 16)

In Exhibit #3206, the County pointed out that among the 194 parcels, the categories of rural natural resources (RNR) and rural tourist (RT) make up approximately 85% of the acreage designated as new LAMIRDs. Petitioners in their post hearing briefs on rezone criteria point out that criterion 1.05.080(I) (“criterion I”) allows RNR and RT development to escape the GMA restrictions for area or use limited by logical outer boundaries or small scale business or cottage industry limited by isolation. RNR and RT appear, according to Petitioner Diehl, to be unhampered either by the half-mile restriction or the limit of 5 rezones per year.

Conclusion

Because criterion I only governs industrial or commercial (RI or RC) and because rural tourists and rural natural resources comprise such a large percentage of the acreage encompassed by the 194 new LAMIRDs, we find that criterion I substantially interferes with the fulfillment of the Goal 2 (reduce sprawl) and Goal 10 (environment) and is declared invalid.

ORDER

Within 180 days of the date of this order, the County must:

1. Through an FSEIS, assess probable adverse environmental impacts and cumulative effects of the creation of 194 new LAMIRDs, 13 old and previously un-assessed LAMIRDs, including consideration of the effect of the policy allowing ICIA expansion of up to ten percent of the 1990 boundary.
2. The County must map the new LAMIRDs and determine which of the subsections of RCW 36.70A.070(5)(d) apply to each.
3. The County must identify an open space corridor between the UGAs of Allyn and Shelton under the requirements of Section .160.
4. The County must demonstrate that its restrictions on rezones in criterion I effectively reduce sprawl, extend to RT and RNR and extend to the 194 new LAMIRDs.

Ordinance Sections 1.02.320, .330, .340, and .043 substantially interfere with the fulfillment of Goal 10 of the Act and are invalid. Ordinance Section 1.05.080(I) substantially interferes with Goal 2 (reduce sprawl) and Goal 10 (environment) and is invalid.

As the matrix of permitted uses no longer applies to rural lands, we rescind our previous finding of invalidity regarding the rural lands portion of the matrix.

Findings of Fact and Conclusions of Law pursuant to RCW 36.70A.302(1)(b) are adopted and attached as Appendix I and incorporated herein by reference.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

SO ORDERED this 14th day of August, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member

Appendix I

Findings of Fact and Conclusions of Law Pursuant to RCW 36.70A.302(1)(b)

Findings of Fact

1. No corridors are identified which include land use both for recreation and wildlife habitat in connection of critical areas between Allyn and Shelton.
2. The 194 new LAMIRDs are not mapped.
3. No FSEIS has been prepared for assessment of the 194 LAMIRDs.
4. The regulations and policies governing expansion of the 194 new LAMIRDs require clarification.
5. The record does not contain evidence that the requirements of RCW 36.70A.070(5)(d) and (e) have been considered.

Conclusions of Law

1. Until mapping of the new LAMIRDs is complete and compliance with the provisions of RCW 36.70A.070(5)(a-c), (d), (3)(iii), and (iv) are met, Ordinance #23-02, sections .104.320, 330, .340, and .043 fail to comply with the Act and substantially interfere with Goals 1 and 2.
2. These sections of the ordinance are invalid until the FSEIS is completed and reviewed regarding cumulative effects of LAMIRDs unassessed under SEPA.
3. The ordinance fails to comply with RCW 36.70A.160.

Appendix II

PROCEDURAL HISTORY

On August 24, 2001, we entered an order denying a motion for consolidation of this case and #95-2-0073, *Diehl, et al., v. Mason County (Diehl)* but granting a motion setting a common action date for compliance. That compliance due date was December 11, 2001. On November 29, 2001, we received a progress report on actions taken by Mason County for GMA compliance in these two cases regarding the general topics of rural areas, frequently flooded areas (FFA), geologically hazardous areas (GHA), and fish and wildlife habitat conservation areas (HCA). On the same day, we received a request for extension of the compliance date in these two cases. The County informed us that additional time was required for adequate public review for the rural land issues in *Dawes* and the frequently flooded area ordinance changes in *Diehl*. The HCA and GHA portions of *Diehl* were to be completed by the December 11, 2001 due date. On December 11, 2001, we granted the motion requesting a new due date of February 26, 2002. Compliance was to be achieved in *Diehl* for FFAs by that date. In *Dawes*, compliance was to be achieved by the same date regarding issues generally concerning rural lands and including mapping noncompliance. On January 24, 2002, we set a briefing and hearing schedule culminating in a compliance hearing May 16, 2002. On April 16, 2002, we granted a motion to supplement the index of documents from Mason County Community Development Council (MCCDC) by adding #3033, #3147, #3148, #3149, and #3150. On May 14, 2002, we denied a motion from Mason County to supplement the index with proposed #3035. We granted a motion to supplement the record from Mason County regarding proposed index #3236, #3237, #3238, and #3034 for the index of the record in both *Dawes* and *Diehl*. Because the indices for the two cases contain so many duplications, we long ago combined them into one index.

Compliance Hearing

A compliance hearing was held May 16, 2002 at the Shelton Memorial Hall, 2110 West Franklin Street, Shelton, Washington. Present for the Board were Les Eldridge and William H. Nielsen. Board Member Nan Henriksen was unavailable. Deputy Prosecutor Darren Nienaber represented Mason County. David Mann represented MCCDC. Petitioner John E. Diehl represented himself. We denied the May 13, 2002, motions from the County to supplement the index with proposed index #3036, #3037 for *Diehl*, and #3240 in this case. We ruled that a motion on index #3241, rezoning criteria amendments, was to be presented by the County May 28, 2002. Petitioners were to respond by June 7, 2002.

Post-Hearing Briefs

On May 22, 2002, we received the County's motion to supplement the index with Ordinance #47-02 and a County brief on six criteria changes for criteria E, B, and I. On June 3, 2002, Petitioner Diehl moved for an extension of seven days from the receipt of the minutes of the Planning Commission (PC) and Board of County Commissioners (BOCC) meetings pertaining to adoption of Ordinance #47-02 which he claimed were as yet unprepared and unreceived. On June 5, 2002, the County responded with no objection to adding the minutes of the PC and BOCC to the record and noted that copies of those minutes were mailed June 5, 2002, to parties.

We ruled that the June 7, 2002 deadline originally set for response of petitioners was extended by seven days to June 14, 2002, so as to give petitioners a fair opportunity to respond to the brief of the County including the PC and BOCC minutes. On June 7, 2002, Mason County Community Development County (MCCDC) responded to Diehl's motion with no objection to supplementing the record and provided an extensive briefing on why the amendment failed to protect rural areas from sprawl. On June 13, 2002, Mr. Diehl responded to the amendments with a brief that

addressed criteria A, C, D, F, G, and H, as well as criterion I. His remarks also referred to Exhibit #3242, Planning Commission meeting minutes of May 6, 2002, and their relationship to the adoption of the amendments to the zoning criteria.

On June 14, 2002, Mason County objected to the extension of time requested by Petitioner Diehl. The County moved to strike Mr. Diehl's brief as untimely. On June 17, 2002, the County submitted a reply brief (which we had not requested). It claimed Diehl's response went far beyond the subject matter of Ordinance #47-02. The County also replied to MCCDC's response, claiming that the County's amendments and DRs do limit sprawl. On June 21, 2002, Petitioner Diehl responded to the County's motion to strike. He claimed that he did not have time to elaborate on previously unaddressed aspects of Section 1.05.080 of the County Code because the County did not present the DR in its final form in time for the "original briefing".

We found Petitioner Diehl's response brief timely. We have disregarded aspects of his brief which did not relate to criteria E, B, and I or to the minutes of the May 6, 2002 PC meeting attached to his brief.

We grant the May 22, 2002 motion of the County to add Exhibit #3241, Ordinance #47-02, to the index of the record.