

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 WHIDBEY ENVIRONMENTAL ACTION
4 NETWORK,

5 Petitioner,

Case No. 98-2-0023c

6 v.

7 ISLAND COUNTY,

8 Respondent

9
10 **ORDER FINDING COMPLIANCE AS TO**
11 **TYPE 5 STREAM BUFFERS AND**
12 **DENYING DETERMINATION OF**
13 **INVALIDITY AS TO AGRICULTURAL**
14 **ACTIVITIES IN RURAL AREAS**

15 THIS Matter comes before the Board upon the motion of Island County for a finding of
16 compliance as to its development regulations pertaining to Type 5 stream buffers
17 (Respondent Island County's Compliance Progress Report and Request for a Compliance
18 Determination Re: Type 5 Stream Buffers) and Petitioner Whidbey Environmental Action
19 Network (WEAN)'s motion for an order of invalidity and sanctions as to ICC 17.02.030 and
20 ICC 17.02.040E. WEAN's Motion of September 26, 2005, for Invalidity and Sanctions. This
21 matter was set for hearing on October 25, 2005, by order dated September 12, 2005. Order
22 Setting Compliance Hearing and Briefing Schedule.

23 **SUMMARY OF DECISION**

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25 Petitioner has no objection to a finding of compliance as to the County's stream buffers for
26 Type 5 streams adopted in Ordinance C-42-05, July 25, 2005. Ordinance C-42-05
27 increased the buffers on Type 5 streams to 50 feet in accordance with the Board's final
28 decision and order in this case. Final Decision and Order (June 2, 1999). Therefore, the
29 Board finds that the County has achieved compliance on FDO Remand Issue 15 (Type 5
30 stream buffers).
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1 However, the County actively opposes the Petitioner's motion for a finding of invalidity and
2 the imposition of sanctions. We find that the County is actively undertaking efforts to
3 achieve compliance with the requirements for protection of critical areas in rural areas and
4 that such efforts should be allowed to continue. Petitioner has failed to show that the
5 continuing validity of ICC 17.02.030 and ICC 17.02.040E (exemption from buffer
6 requirements for agricultural uses in rural outside of designated agricultural lands) pending
7 the completion of the County's compliance efforts substantially interferes with the goals of
8 the Growth Management Act (Ch. 36.70A RCW) and we therefore decline to impose
9 invalidity at this time.
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11 12 **PROCEDURAL BACKGROUND**

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15 This case has had a long history, beginning when the Petition for Review was filed in 1998.
16 Multiple issues were raised in the original petition and various decisions of the Board have
17 been issued, some of them regarding all the issues and some tracking specific issues. The
18 two issues addressed in this order are the exemption from the critical areas buffers
19 requirements for agricultural activities occurring outside of designated natural resource
20 lands (FDO Remand Issue 10) and the buffer requirement for Type 5 streams (FDO
21 Remand Issue 15).
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24 The Board first found noncompliance on both these issues in its Final Decision and Order,
25 dated June 2, 1999. Thereafter, the Board referred to the issues as FDO Remand Issue 10
26 (the agricultural exemption) and FDO Remand Issue 15 (Type 5 stream buffers). The Board
27 found invalidity as to FDO Remand Issue 15 but rescinded invalidity upon the County's
28 enactment of an interim ordinance. Compliance Order (April 2, 2001). The Board did not
29 enter an invalidity finding as to FDO Remand Issue 10 (the agricultural exemption issue) but
30 stated, "We find no reason to make an invalidity determination, as requested by WEAN, as
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1 long as interim Ordinance C-29-99 remains in effect and precludes the application of the
2 exemption to land in the RR zone.” Compliance Order (April 2, 2001).

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4 The Board’s decision on these issues was appealed by the County to the Island County
5 Superior Court. The Superior Court, among other things, reversed the Board’s finding of
6 noncompliance on FDO Remand Issues 10 and 15. Decision, *Island County and WEAN v.*
7 *Western Washington Growth Management Hearings Board*, Island County Superior Court
8 Cause No. 99-2-00334-3, June 12, 2002. WEAN and the County appealed this decision to
9 the Court of Appeals, Division I, which reversed the Superior Court on FDO Remand Issues
10 10 and 15 and affirmed the Board on those issues. *WEAN v. Island County*, 122 Wn. App.
11 156, 93 P.2d 885 (2004).

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15 Petitioner WEAN requested that the Board promptly schedule a compliance hearing.
16 Memorandum from Steve Erickson to the Western Washington Growth Management
17 Hearings Board dated March 4, 2005. To determine the status of the case, the Board
18 ordered a progress report and the County filed its progress report on April 15, 2005. At that
19 time, the County asserted that there had not yet been a remand of the case from the courts.
20 Respondent Island County’s Compliance Progress Report. The case was remanded from
21 the Court of Appeals, Division I, to the Island County Superior Court on July 19, 2005.
22 Mandate Island County Superior Court No. 99-2-00334-3. The parties then agreed to move
23 the case from Island County Superior Court to this Board. The County filed its compliance
24 report and request for a finding of compliance on one subject on August 23, 2005.
25 Respondent Island County’s Compliance Progress Report and Request for a Compliance
26 Determination Re: Type 5 Stream Buffers. Petitioner filed its motion for invalidity and
27 sanctions on September 26, 2005. WEAN’s Motion of September 26, 2005 for Invalidity
28 and Sanctions.
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1 A hearing on the motions was held on October 25, 2005. Mr. Steve Erickson represented
2 WEAN. The County was represented by attorney Keith Dearborn and deputy prosecutor
3 Joshua Choate. Board members Holly Gadbow and Gayle Rothrock attended. The
4 presiding officer was Margery Hite.
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6 RECORD

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9 Because the County's compliance efforts in this case are ongoing, the record has been
10 subject to continuing augmentation. The following exhibits were added at the compliance
11 hearing:

12 Nine new exhibits identified in the October 10, 2005 County submission:

13 R8231, R8260, R8326, R8356, R8357, R8359, R8360, R8364, R8362
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15 Six new exhibits were offered by Petitioner at the hearing and are added to the record:

16 P-01 (2001 Shorelines Survey), P-02 (Sanitary Survey of Southwest Whidbey Island),
17 P-03 (Letter of May 27, 2005 from Meriwether to Parvin), P-04 (Letter of January 16,
18 2002 from Berbells to Higman), P-05 (Letter of May 27, 2005 from Meriwether to
19 Osterman), P-06 (Memo of May 27, 2005 from Meriwether to Southwest Whidbey
20 Growing Area File), P-07 (Cover letter of October 21, 2005 from Erickson to Hite)

21 Nine new exhibits offered by Island County at the hearing are added to the record:

22 R8390 (Beach survey), R8257 (Agricultural research methodology), R8387 (Bauer
23 letter), R8388 (Letter from Island County to CTED), R8384 (Current Packet for Public
24 Participation), R8385 (Former Packet for Public Participation), R-03 (Proposed
25 legislation on agricultural uses and pilot projects), R-01 (State/Governor proposed
26 legislation), R-02 (County Power Point presentation)

27 Subsequent to the hearing, WEAN submitted additional exhibits to respond to the County's
28 exhibits offered at the hearing:

29 P-19 (1st Declaration of Steve Erickson, November 1, 2005), P-20 (2nd Declaration
30 of Steve Erickson, November 5, 2005), P-21 (3rd Declaration of Steve Erickson,
31 November 4, 2005), P-22 (Guide for the Control of Molluscan Shellfish: Table of
32 Contents, July 2003), P-23 (Purpose of the National Shellfish Sanitation Program),
P-24 (Model Ordinance: p. 33-47)

1 Subsequent to the hearing, Island County submitted a response with additional exhibits to
2 WEAN's additional exhibits offered at the hearing:

3 R-04 (Record No. 8392 Declaration of Jeff Tate, October 28, 2005) and
4 R-05 (Record No. 8393 Declaration of Keith Higman, November 1, 2005)

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6 **BURDEN OF PROOF**
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8 Upon a finding of noncompliance, the Board may make a determination of invalidity,
9 supported by findings of fact and conclusions of law, "that the continued validity of part or
10 parts of the plan or regulation would substantially interfere with the fulfillment of the goals of
11 this chapter." RCW 36.70A302(1)(b). In a compliance hearing upon petition of a party, the
12 board shall also reconsider its final order and decide, if no determination of invalidity has
13 been made, whether one now should be made under RCW 36.70A.302. RCW
14 36.70A330(4).
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17 The burden is on the Petitioner to demonstrate that the continued validity of a plan or
18 regulation, or a portion of it, substantially interferes with the fulfillment of the goals of the
19 Growth Management Act (GMA).
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22 **COMPLIANCE ON TYPE 5 STREAM BUFFERS**
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24 Both parties agree that Island County Ordinance C-42-05 increased the buffers on Type 5
25 streams to 50 feet in accordance with the Board's final decision and order in this case. Final
26 Decision and Order, June 2, 1999. Therefore, the Board finds that the County has achieved
27 compliance on FDO Remand Issue 15 (Type 5 stream buffers).
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1 Compliance Hearing Order, November 17, 2000. Island County's Response to WEAN's
2 Motions for Invalidity and Sanctions at 4.

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4 The County urges that it has not unreasonably delayed or acted in bad faith in response to
5 the decision of the Court of Appeals. *Ibid* at 10. The County points out that it initiated its
6 compliance efforts in April 2005, even though the mandate from the Court of Appeals had
7 not yet been issued. *Ibid* at 11. The County also asserts that WEAN appealed the
8 Determination of NonSignificance (DNS) for an ordinance prepared to achieve compliance
9 with the Board's order and because of the SEPA appeal, the County cannot take action on
10 the ordinance until the Hearing Examiner renders his final decision. *Ibid*. The County offers
11 Resolution C-89-05, which establishes an update schedule for the agricultural best
12 management practices (Ag BMPs), as evidence of the efforts the County is undertaking to
13 complete any needed actions. The County asserts that it is undertaking environmental
14 review of the impacts of agriculture on critical areas, including water quality, and
15 determining what best management practices should be used by landowners conducting
16 agricultural activities located outside the agricultural zones. *Ibid* at 17. The County denies
17 that there is any evidence that the GMA's goals for open space and recreation (Goal 9) or
18 for the environment (Goal 10) are materially threatened by these exemptions. *Ibid* at 19.
19 Further, the County points out that these agricultural activities do not need permits so that
20 an invalidity finding would not prevent vesting of any permits – no permits are needed for
21 agricultural activities. *Ibid* at 21.
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26 **Discussion:**

27 A determination of invalidity requires a finding that the continued validity of a noncompliant
28 plan provision or development regulation will substantially interfere with the fulfillment of the
29 goals of the GMA. RCW 36.70A.302. In this case, it appears that the Petitioner (WEAN) is
30 fundamentally frustrated by the passage of time since this Board first found the County's
31 exemption for agricultural activities in lands zoned as rural (as opposed to agricultural lands)
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1 to be noncompliant in 1999. Rather than being a situation where permits might vest which
2 would substantially interfere with the County's ability to plan properly, this is a situation
3 where the Petitioner bases its request on the County's lack of compliance with the Board's
4 prior decisions.
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7 This Board has found that invalidity should be imposed where there is a reasonable risk that
8 development will occur during the compliance remand period that will interfere with the local
9 jurisdiction's ability to plan in accordance with the requirements and goals of the GMA. See,
10 e.g., *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013 (Final Decision and
11 Order, September 13, 2005) ("When there is a reasonable risk that the continued validity of
12 comprehensive plan provisions and/or development regulations that the Board has found
13 noncompliant will make it difficult for the county or city to engage in proper planning within
14 those goals, we have made a determination of invalidity. See *Vinatieri v. Lewis County*,
15 WWGMHB Case No. 03-2-0020c and *Irondale Community Action Neighbors v. Jefferson*
16 *County*, WWGMHB Case No. 04-2-0011, as examples.") Clearly, the concern that
17 inconsistent development might occur during the remand period is not present here. The
18 agricultural activities in rural areas subject to the exemption from the critical areas buffer
19 requirements at issue here are not "development" and, because they require no permits,
20 applications for permits for those activities are not likely to vest during the remand period.
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24 This is not the basis for WEAN's motion, however. Instead, WEAN relies upon Board
25 decisions where a determination of invalidity was considered on the basis of the
26 egregiousness of the violation; the length of time the violation has occurred; and the
27 likelihood that the violation will continue to occur absent invalidation. WEAN's
28 Memorandum of Sept. 26, 2005 in Support of Invalidity and Sanctions at 11. These criteria
29 may be seen as addressing a situation where a jurisdiction refuses to undertake reasonable
30 compliance efforts and thereby substantially interferes with the fulfillment of the goals of the
31 Act.
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1 We do not find this to be the situation here. The County has a thorough and extensive
2 public process in place to consider the use of best management practices to protect critical
3 areas from the impact of agricultural activities in rural areas. As WEAN agrees, buffers are
4 not the only method by which the functions and values of critical areas may be protected
5 pursuant to RCW 36.70A.172. The County has proposed a reasonable time table to
6 determine how best management practices may be used in rural lands and the Board will
7 review the County's compliance efforts.
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10 While we understand WEAN's position that the County's regulations have been out of
11 compliance since 1999, we also acknowledge that it is in the nature of legal challenges that
12 they can take years to resolve in the courts. At this point, we do not believe that the County
13 is unreasonably delaying undertaking its compliance efforts.
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16 Moreover, it is apparent that this issue is of substantial public interest. The County's
17 present public participation process has involved many that may not have been involved in
18 the earlier adoption process and active public participation is important to a sound decision.
19 Citizen involvement and "early and continuous" public participation are hallmark provisions
20 of the GMA. RCW 36.70A.020(11) and 36.70A.140.
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23 Because a concern has been raised about the openness of the public participation process
24 undertaken thus far, we take this opportunity to note that no segment of the public should be
25 denied access to the public participation process. To the extent that any efforts are made to
26 exclude any part of the community from participating in the public process, this could
27 jeopardize compliance with the public participation requirements of the GMA. The Board
28 takes no position with respect to whether that has occurred at this time and we
29 acknowledge the difficulty that longstanding adversarial differences can create in working
30 together productively.
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ORDER

Based on the foregoing, the County's motion for a finding of compliance on FDO Remand Issue 15 (Type 5 stream buffers) is hereby GRANTED and the Board finds that Ordinance C-42-05 complies with the GMA requirements for protection of the functions and values of Type 5 streams. Based on the County's program for updating its best management practices and critical areas protections in rural lands, WEAN's motion for a determination of invalidity is DENIED at this time.

Entered this 16th day of November 2005.

Margery Hite, Board Member

Holly Gadbow, Board Member

Gayle Rothrock, Board Member