

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 NANCY DORGAN,

4  
5 Petitioner,

6  
7 v.

8 CITY OF PORT TOWNSEND,

9  
10 Respondent.

**Case No. 05-2-0018**

**FINAL DECISION AND ORDER**

11  
12 **I. SYNOPSIS OF DECISION**

13 This decision arises after a series of settlement extensions, including one granted after the  
14 hearing on the merits. At the hearing on the merits, the City indicated a willingness to  
15 expressly incorporate the 2005 Stormwater Management Manual for Western Washington  
16 (Department of Ecology) into its critical areas ordinance to address the chief complaints of  
17 the Petitioner regarding the City's critical areas ordinance. The City eventually did amend  
18 the ordinance challenged in this case to incorporate the stormwater management manual.  
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21 In this decision, we find that the adoption of a new ordinance addressing the best available  
22 science and critical areas protections in the City's critical areas ordinance moots all of the  
23 issues in this case based on stormwater management regulation. While the Petitioner may  
24 challenge the new ordinance (Ordinance 2929), she must do that by way of a new petition  
25 for review.  
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28 As to the remaining issues, in particular the challenges to the City's regulations to protect  
29 critical aquifer recharge areas (CARAs), the Board finds that the Petitioner has not met her  
30 burden of proof. Her specific challenge to a waiver of some requirements in the City's code  
31 fails to show how the remaining requirements for protection of CARAs are clearly erroneous.  
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Her general challenges lack focus and rely upon a mistaken premise that the burden is on

1 the City to prove that its critical areas regulations are compliant. The Growth Management  
2 Act clearly places the burden on a petitioner to show noncompliance. RCW 36.70A.330.

## 3 4 **II. PROCEDURAL HISTORY**

5 On July 5, 2005, the City of Port Townsend adopted Ordinance No. 2899 (the Ordinance).  
6 Notice of Adoption of the Ordinance was published on July 13, 2005. Nancy Dorgan filed  
7 the petition for review of the Ordinance on August 8, 2005. An amended petition for review  
8 was filed on September 6, 2005.

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11 The prehearing conference was held telephonically on September 6, 2005. At that time, the  
12 parties indicated an interest in settlement. Two extensions of the decision for a final  
13 decision and order were granted upon the joint request of the parties, but settlement  
14 discussions were not successful.<sup>1</sup>

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17 Due to the relocation of offices, the City's Index to the Record was not filed according to the  
18 applicable schedule, so the schedule was revised to account for the delay.<sup>2</sup> The City then  
19 filed the Index on April 12, 2006. Upon motions by the City and Petitioner, the record was  
20 supplemented with additional documents.<sup>3</sup> Additionally, Petitioner brought a motion to  
21 supplement the record further at the hearing on the merits and the City had no objection.  
22 As a result, Exhibit 168 (minutes of the June 5, 2006 Port Townsend City Council meeting)  
23 was admitted as evidence in this case.  
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26 The hearing on the merits was held on June 29, 2006 in Port Townsend, Washington.  
27 Nancy Dorgan appeared *pro se*. John Watts, City Attorney, represented the City of Port  
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30 <sup>1</sup> Order Extending Deadline for Final Decision and Amended Prehearing Order Establishing New Schedule,  
31 October 3, 2005; Second Order Extending Deadline for Final Decision and Amended Prehearing Order  
32 Establishing New Schedule, January 13, 2006

<sup>2</sup> Order Extending Record Deadline and Establishing New Record Schedule, April 6, 2006.

<sup>3</sup> Order on City's Motion to Exclude Proposed additions to the Record, May 25, 2006; Second Order on City's  
Motion to Exclude Proposed Additions to the Record, June 8, 2006.

1 Townsend. All three board members attended. Based on discussions at the hearing on the  
2 merits, the parties requested and were granted an additional extension of the deadline for  
3 final decision and order to pursue settlement.<sup>4</sup> However, the Board was advised that  
4 settlement discussions were again unsuccessful on July 27, 2006, and therefore Petitioner  
5 requested that the Board issue its decision in this case. On August 15, 2006, the Presiding  
6 Officer wrote to the parties asking whether the City had taken legislative action to amend the  
7 challenged ordinance, as the City's attorney had suggested would happen at the hearing on  
8 the merits.<sup>5</sup> On August 17, 2006, the City's attorney responded, providing a schedule for  
9 City legislative action to amend the Ordinance (Ordinance 2899).<sup>6</sup> On August 21, 2006, the  
10 Presiding Officer again wrote the parties, indicating that the City's proposed schedule for  
11 legislative action would provide the Board with very short notice and, further, that legislative  
12 action amending the challenged Ordinance may moot this appeal.<sup>7</sup>  
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15  
16 On September 6, 2006, the City advised the Board that it anticipated amending the  
17 challenged Ordinance (Ordinance 2899) and that the City Council had approved a first  
18 reading of the ordinance amending Ordinance 2899.<sup>8</sup> On September 19, the City wrote  
19 again, providing the Board a copy of Ordinance 2929, amending Ordinance 2899 "to include  
20 the best available science as required under RCW 36.70A.172, and making technical  
21 amendment regards numbering".<sup>9</sup> This letter indicates that the City Council approved the  
22 second reading and adoption of Ordinance 2929.<sup>10</sup> The Board takes official notice of Port  
23 Townsend Ordinance No. 2929 pursuant to WAC 242-02-660(4).  
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29 <sup>4</sup> Order Extending Deadline for Final Decision and Order After Hearing on the Merits, July 14, 2006.  
30 <sup>5</sup> Letter of August 15, 2006 from Presiding Officer to John P. Watts and Nancy Dorgan.  
31 <sup>6</sup> Letter of August 17, 2006 from John P. Watts to the Presiding Officer.  
32 <sup>7</sup> Letter of August 21, 2006 from Presiding Officer to John P. Watts and Nancy Dorgan.  
<sup>8</sup> Letter of September 6, 2006 from John P. Watts to the Presiding Officer.  
<sup>9</sup> Letter of September 19, 2006 from John P. Watts to the Presiding Officer.

<sup>10</sup> *Ibid.*

1 **III. ISSUES PRESENTED**

2 Issue No. 1: Does Ordinance 2899 fail to protect critical areas, contrary to the requirements  
3 of RCW 36.70A.020(10), .040(3), .060, .130, .170 and .172.  
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5 Issue No. 2: Do the storm water management provisions of Ordinance 2899 fail to include  
6 Best Available Science for the protection of the functions and values of critical areas and  
7 anadromous fisheries, contrary to RCW 36.70A.172.  
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9 **IV. BURDEN OF PROOF**

10 For purposes of board review of the comprehensive plans and development regulations  
11 adopted by local government, the GMA establishes three major precepts: a presumption of  
12 validity; a “clearly erroneous” standard of review; and a requirement of deference to the  
13 decisions of local government.  
14

15 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
16 amendments to them are presumed valid upon adoption:  
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18 Except as provided in subsection (5) of this section, comprehensive plans and  
19 development regulations, and amendments thereto, adopted under this chapter are  
20 presumed valid upon adoption.  
21 RCW 36.70A.320(1).  
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23 The statute further provides that the standard of review is ‘clearly erroneous’ for challenged  
24 governmental enactments:  
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26 The board shall find compliance unless it determines that the action by the state  
27 agency, county, or city is clearly erroneous in view of the entire record before the  
28 board and in light of the goals and requirements of this chapter.  
29 RCW 36.70A.320(3).

30 In order to find Port Townsend’s action clearly erroneous, the Board must be “left with the  
31 firm and definite conviction that a mistake has been made.” *Department of Ecology v.*  
32 *PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

1 Within the framework of state goals and requirements, the boards must grant deference to  
2 local government in how they plan for growth:

3 In recognition of the broad range of discretion that may be exercised by counties and  
4 cities in how they plan for growth, consistent with the requirements and goals of this  
5 chapter, the legislature intends for the boards to grant deference to the counties and  
6 cities in how they plan for growth, consistent with the requirements and goals of this  
7 chapter. Local comprehensive plans and development regulations require counties  
8 and cities to balance priorities and options for action in full consideration of local  
9 circumstances. The legislature finds that while this chapter requires local planning to  
10 take place within a framework of state goals and requirements, the ultimate burden  
11 and responsibility for planning, harmonizing the planning goals of this chapter, and  
12 implementing a county's or city's future rests with that community.

13 RCW 36.70A.320(1) (in part).

14 In sum, the burden is on the Petitioner to overcome the presumption of validity and  
15 demonstrate that any action taken by the City is clearly erroneous in light of the goals and  
16 requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).

17 Where not clearly erroneous and thus within the framework of state goals and requirements,  
18 the planning choices of local government must be granted deference.

## 19 V. DISCUSSION

20 **Issue No. 2: Do the storm water management provisions of Ordinance 2899 fail to**  
21 **include Best Available Science for the protection of the functions and values of**  
22 **critical areas and anadromous fisheries, contrary to RCW 36.70A.172.**  
23

24 In the newly adopted ordinance (Ordinance No. 2929), the City has amended the  
25 Environmentally Sensitive Areas section of the Port Townsend Municipal Code (PTMC),  
26 Chapter 19.05 PTMC. The amendments change the definition of "Stormwater Management  
27 Manual" from "the current stormwater requirements adopted within the Port Townsend  
28 engineering design standards (EDS) manual, which are derived from the Stormwater  
29 Management manual for Western Washington" to "the 2005 Department of Ecology  
30 Management manual for Western Washington" to "the 2005 Department of Ecology  
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1 Stormwater Management Manual for Western Washington (SWMM-WW) (2005)".<sup>11</sup> The  
2 amendments further provide that all development subject to the provisions of the Chapter  
3 must comply with the 2005 Department of Ecology Stormwater Management Manual for  
4 Western Washington, as well as city engineering design standards manual, city stormwater  
5 master plan and adopted drainage basin plans.<sup>12</sup>  
6

7  
8 While the Board cannot review the new enactment without a new petition for review,  
9 Ordinance 2899 must be presumed valid. RCW 36.70A.320(1). The Board finds that the  
10 amendments in Ordinance No. 2929 address the stormwater management provisions of  
11 Ordinance No. 2899. Therefore, the Board determines that Issue No.2 is now moot  
12 because it challenges an ordinance that has been substantially amended with respect to the  
13 issues raised in Issue No. 2. If the Petitioner wishes to challenge the storm water  
14 management provisions of Ordinance 2929 for failing to include best available science for  
15 the protection of the functions and values of critical areas and anadromous fisheries, she  
16 must bring a petition for review of the new ordinance.  
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19 **Conclusion:** The stormwater management provisions of Ordinance No. 2899 have been  
20 substantially amended to address the best available science requirements of RCW  
21 36.70A.172. The issue of whether the stormwater management provisions of Ordinance  
22 No. 2899 comply with RCW 36.70A.172 is therefore moot.  
23

24  
25 **Issue No. 1: Does Ordinance 2899 fail to protect critical areas, contrary to the**  
26 **requirements of RCW 36.70A.020(10), .040(3), .060, .130, .170 and .172.**

27 The Board also finds that the aspects of this Issue which challenge the City's stormwater  
28 management regulations have been rendered moot by the adoption of Ordinance No. 2929.  
29 The stormwater management regulations applicable in the City of Port Townsend have  
30 been substantially amended with the adoption of Ordinance No. 2929. Again, if the  
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<sup>11</sup> Ordinance No. 2929, Exhibit A.

1 Petitioner wishes to challenge those amendments, she will need to file a new petition for  
2 review.

3 **Positions of the Parties**  
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5 When the City offered to make the amendments to Ordinance 2899 at the hearing on the  
6 merits, Petitioner asserted that some issues would still remain. Petitioner agreed that the  
7 incorporation of the 2005 Stormwater Management Manual (SWMM-WW) would cure any  
8 problems with the City's protections of wetlands. However, Petitioner challenges the  
9 adequacy of the City's regulations to protect critical aquifer recharge areas (CARAs). In her  
10 brief, she alleges this on the grounds that PTMC 19.050(D)(1)(j) creates a waiver that is  
11 "excessive, noncompliant, and reflects the City's failure to accept its consider [sic] inter-  
12 jurisdictional critical areas responsibilities."<sup>13</sup>  
13

14 The City responds that any waiver still requires that the performance standards for  
15 development are met, including the SWMM-WW.<sup>14</sup> With the adoption of the SWMM-WW,  
16 the City argues that CARAs are protected by it "because new development and  
17 redevelopment here is mitigated and interference with groundwater is mitigated, according  
18 to the standards in SWMM-WW and the CAO [critical areas ordinance]".<sup>15</sup> The City also  
19 points to the extent of low-density residential development in Port Townsend; regulations  
20 on lot coverage limitations; tree conservation regulations; and significant open space in  
21 public ownership; as well as the requirements for sewer hookup to the City wastewater  
22 treatment system as additional ways the City has addressed contamination of  
23 groundwater.<sup>16</sup>  
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30 <sup>12</sup> *Ibid.*

31 <sup>13</sup> Petitioner's Opening Brief at 17.

32 <sup>14</sup> Respondent City's Brief at 12.

<sup>15</sup> *Ibid*

1 **Discussion**

2 Petitioner makes a general allegation that the City’s critical areas ordinance fails to protect  
3 the functions and values of CARAs. In specific, she challenges the language of PTMC  
4 19.050(D)(1)(j). The cited section of the Port Townsend Municipal Code falls under the  
5 heading of “Critical area permit requirements – Exemptions, nonconforming structures,  
6 application requirements, special reports, and advance determinations” (PTMC 19.05.040).  
7 Sub-heading D (PTMC 19.05.040(D)) establishes the “Application Requirements and  
8 Delineations” which include staff site visits, preapplication consultation, a site inventory and  
9 survey, a site construction plan, and special reports. The challenged provision states:  
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12 For critical areas, development proposals which contain only aquifer recharge areas,  
13 frequently flooded areas or seismic hazard areas, the director may waive compliance  
14 with the application requirements and delineations requirements of this section and  
15 compliance with the performance standards for development contained in PTMC  
16 19.05.060. The director must be satisfied that the performance standards provided in  
17 the individual critical area regulations for a specific environmental category are met  
18 and no purpose established under this chapter would be furthered by requiring  
19 compliance with application requirements or the performance standards for  
20 development.

21 PTMC 19.05.040(D)(1)(j)

22 Petitioner makes broad statements about the impact of unmitigated development on  
23 CARAs but she fails to demonstrate that the other applicable provisions, including the  
24 SWMM-WW, are insufficient to mitigate development impacts. Petitioner appears to try to  
25 shift the burden of proof to the City to establish that its critical areas regulations protect the  
26 functions and values of CARAs. However, the burden of proof is always on the Petitioner,  
27 unless a finding of invalidity has been entered. RCW 36.70A.330. Here, now that the City  
28 has adopted and integrated the SWMM-WW into its critical areas ordinance, Petitioner has  
29 not met her burden of proof regarding the City’s regulations to protect CARAs.  
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<sup>16</sup> *Ibid* at 14-17.

1 **Conclusion:** Apart from those claims that rely on the need for incorporation of the SWMM-  
2 WW into the City's critical areas ordinance, Petitioner's claims that Ordinance 2899 fails to  
3 protect critical areas are not well founded. Petitioner has failed to meet her burden of proof.  
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## 5 VI. FINDINGS OF FACT

- 6 1. Port Townsend is a city located in Jefferson County. Jefferson County is a county  
7 that is required to plan pursuant to RCW 36.70A.040 and is located west of the crest  
8 of the Cascade Mountains.  
9
- 10 2. Ordinance 2899 was adopted by the Port Townsend City Council on July 5, 2005.  
11 Notice of adoption was filed on July 13, 2005.
- 12 3. Nancy Dorgan is the Petitioner in this case. She participated in the adoption of  
13 Ordinance 2899 and raised to the City the issues in this appeal during the adoption  
14 process.  
15
- 16 4. Petitioner filed her first petition for review in this case on August 8, 2005. She filed  
17 an amended petition for review on September 7, 2005.
- 18 5. The deadline for final decision and order in this case was extended three times in this  
19 case at the joint request of both parties.
- 20 6. The City of Port Townsend amended Ordinance 2899 on September 18, 2006 with  
21 the adoption of Ordinance 2929.
- 22 7. Ordinance 2929 amends the Environmentally Sensitive Areas section of the Port  
23 Townsend Municipal Code (PTMC), Chapter 19.05 PTMC. The amendments  
24 change the definition of "Stormwater Management Manual" from "the current  
25 stormwater requirements adopted within the Port Townsend engineering design  
26 standards (EDS) manual, which are derived from the Stormwater Management  
27 manual for Western Washington" to "the 2005 Department of Ecology Stormwater  
28 Management Manual for Western Washington (SWMM-WW) (2005)". The  
29 amendments further provide that all development subject to the provisions of the  
30 Chapter must comply with the 2005 Department of Ecology Stormwater Management  
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Manual for Western Washington, as well as city engineering design standards manual, city stormwater master plan and adopted drainage basin plans.

- 8. The amendments in Ordinance No. 2929 address the stormwater management provisions of Ordinance No. 2899.
- 9. PTMC 19.05.040(D)(1)(j) creates a waiver of application and delineation requirements for development on a site in which the only critical area(s) are critical aquifer recharge areas (CARA), frequently flooded areas or seismic hazard areas.
- 10. In order for the waiver to apply, the director must be satisfied that the performance standards provided in the individual critical area regulations for a specific environmental category are met and no purpose established under this chapter would be furthered by requiring compliance with application requirements or the performance standards for development.
- 11. Petitioner fails to demonstrate that the other applicable provisions of the Port Townsend Municipal Code, including the application of the SWMM-WW, are insufficient to mitigate development impacts on CARAs.

**VII. CONCLUSIONS OF LAW**

- A. The Board has jurisdiction over the parties and subject matter of this petition for review.
- B. Petitioner has standing to bring the issues she raises in her petition for review and amended petition for review.
- C. The adoption of Ordinance 2929 substantially amends Ordinance 2899 as to the stormwater management regulations that apply within the City of Port Townsend. Therefore the adoption of Ordinance 2929 has made the challenges based on stormwater management in this case moot.
- D. Petitioner has not met her burden of proof with respect to the remaining issues in this case.

1 **VIII. ORDER**

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3 Based on the foregoing, the Board finds that the appeal of Ordinance 2899 is now MOOT as  
4 to all issues related to stormwater management. As to the remaining issues, the Board  
5 finds that Petitioner has not met her burden of proof and Ordinance 2899 is COMPLIANT  
6 with RCW 36.70A.020(10), .040(3), .060, .130, .170 and .172.  
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8  
9 DONE this 29<sup>th</sup> day of September 2006.

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11 \_\_\_\_\_  
12 Margery Hite, Board Member

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15 Holly Gadbow, Board Member

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18 Gayle Rothrock, Board Member

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

22  
23 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date  
24 of mailing of this Order to file a petition for reconsideration. The original and three  
25 copies of a motion for reconsideration, together with any argument in support  
26 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the  
27 original and three copies of the motion for reconsideration directly to the Board, with  
28 a copy served on all other parties of record. **Filing means actual receipt of the**  
29 **document at the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-  
30 330. The filing of a motion for reconsideration is not a prerequisite for filing a petition  
31 for judicial review.

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

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**Enforcement.** The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties 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, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

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