

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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3 Advocates for Responsible Development
4 and John E. Diehl,

5
6 Petitioner,

7 v.

8 Mason County,

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10 Respondent,

11 Shaw Family LLC,

12
13 Intervenor
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Case No. 07-2-0006

**ORDER ON MOTIONS TO DISMISS
ISSUE NOS. 13 AND 15**

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16 THIS Matter comes before the Board upon the motion of Mason County to dismiss the
17 Petition for Review based on, among other things, failure to state a claim for which relief
18 may be granted regarding Ordinance 138-06 (Issue 13); and lack of subject matter
19 jurisdiction regarding Ordinance 139006 (Issue 15).¹ The Board has addressed the
20 motions to dismiss for lack of standing in a separate order.² Petitioners oppose the
21 motions to dismiss these issues, asserting that the Board has jurisdiction to hear both Issue
22 No. 13 and Issue No. 15.³
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25 **MOTION TO DISMISS ISSUE NO. 13**

26 Issue 13: By exempting new agricultural activities within Fish and Wildlife Habitat
27 Conservation Areas or their buffers providing they comply with a conservation plan, does
28 §17.01.110.F.3 fail to protect such critical areas as required by RCW 36.70A.060(2) and
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30 ¹ Respondent Mason County's Motion to Dismiss Petitioners' Petition for Review and Memorandum in Support
31 of Motion to Dismiss, April 25, 2007.

² Order on Standing, May 21, 2007.

32 ³ Motion for Order Requiring County to Index the Record in Compliance with Order of March 2 and Response
Opposing Motions to Dismiss, May 7, 2007.

1 36.70A.172(1) and/or WAC 365-195-920 and interfere substantially with goals of conserving
2 fish and wildlife habitat and protecting the environment (RCW 36.70A.020(9) and (10))?

3 **Positions of the Parties**

4 The County argues that the legislative moratorium imposed by Substitute Senate Bill 5248
5 prevents the Board from ordering the relief sought in this case.⁴ Because this legislation
6 prohibits any county from amending its critical areas ordinance relating to agricultural
7 activities, the County argues, no relief may be granted as to Issue 13.⁵

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10 Petitioner⁶ responds that the County is raising an argument under Civil Rule 12(b) and that
11 rule is not applicable to growth board proceedings.⁷ Further, Petitioner argues that the
12 Board may still enter a finding of noncompliance and a determination of invalidity,
13 notwithstanding SSB 5248 because there is no statutory restriction preventing the Board
14 from concluding there is noncompliance and ordering the County to plan to remedy its
15 noncompliance at some time in the future.⁸

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17 **Board Discussion**

18 Substitute Senate Bill 5248 amends chapter 36.70A RCW (the GMA) to add a new section:

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20 For the period beginning May 1, 2007, and concluding July 1, 2010, counties and
21 cities may not amend or adopt critical area ordinances under RCW 36.70A.060(2) as
they specifically apply to agricultural activities. Nothing in this section:

- 22 (a) Nullifies critical area ordinances adopted by a county or city prior to May 1,
23 2007, to comply with RCW 36.70A.060(2);
24 (b) Limits or otherwise modifies the obligations of a county or city to comply
25 with the requirements of this chapter pertaining to critical areas not
26 associated with agricultural activities; or

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28 ⁴ Respondent Mason County's Motion to Dismiss Petitioners' Petition for Review and Memorandum in Support
29 of Motion to Dismiss at 5-6.

⁵ *Ibid* at 1.

⁶ The Board has determined that Mr. Diehl lacks individual standing in this case. The sole petitioner, therefore,
30 is Advocates for Responsible Development (ARD).

⁷ Motion for Order Requiring County to Index the Record in Compliance with Order of March 2 and Response
31 Opposing Motions to Dismiss at 6.

⁸ *Ibid* at 6-7

1 (c) Limits the ability of a county or city to adopt or employ voluntary measures
2 or programs to protect or enhance critical areas associated with agricultural
3 activities.

4 SSB 5248 Section 1 (2).

5 The purpose of the temporary delay established in SSB 5248 is to utilize the William D.
6 Ruckelshaus Center to conduct an examination of the “conflicts between agricultural
7 activities and critical area ordinances adopted under chapter 36.70A RCW” with the aim
8 towards “resolving, harmonizing, and advancing commonly held environmental protection
9 and agricultural viability goals.” SSB 5248 Section 3 (1) and Section 1 (2). If the
10 Ruckelshaus Center is not successful in reaching agreement on how best to address the
11 conflicts between agricultural activities and certain regulatory requirements as they apply to
12 agricultural activities:

13 ... the legislature intends, upon the expiration of the delay, to require jurisdictions that
14 have delayed amending or adopting certain regulatory measures to promptly
15 complete all regulatory amendments or adoptions necessary to comply with the
16 growth management act.

17 SSB 5248 Section 1 (3)

18 Further, the legislature expressly states that it “does not intend this act to reduce or
19 otherwise diminish existing critical area ordinances that apply to agricultural activities during
20 the deferral period ...” SSB 5248, Section 1(4).

21 The County notes that this legislation prohibits it from changing its critical areas ordinance
22 related to agricultural activities to respond to a Board finding of noncompliance.⁹ It could
23 not, the County maintains, even rescind the challenged legislation since that, too, would
24 violate the law.¹⁰
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31 ⁹ Respondent Mason County's Motion to Dismiss Petitioners' Petition for Review and Memorandum in Support
32 of Motion to Dismiss at 5-6.

¹⁰ *Ibid* at 5.

1 SSB 5248 did not amend any of the GMA provisions relating to the authority or obligations
2 of the growth boards. It also did not specifically address situations such as this one where
3 the County has recently taken action to amend its critical areas ordinance relating to
4 agricultural activities and a petition for review is pending before a growth board.
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6 We must, therefore, attempt to accord our actions with the legislative intent in the adoption
7 of SSB 5248 without specific legislative direction. A board is required to enter a decision on
8 whether the challenged local jurisdiction is in compliance with the GMA, and/or the State
9 Environmental Policy Act (SEPA) and/or the Shoreline Management Act (SMA) as they
10 relate to plans, development regulations and amendments to them within one hundred and
11 eighty days of filing a petition for review. RCW 36.70A.300. In its final order, if
12 noncompliance is found, the growth board is required to specify a reasonable time within
13 which compliance must be achieved. RCW 36.70A.300(3)(b).
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16 The County's argument is that SSB 5248 precludes it from achieving compliance, if
17 noncompliance is found. Therefore, the Board cannot order relief. Petitioner's argument is
18 that the Board can enter a finding of noncompliance (and a determination of invalidity) which
19 will, effectively, be stayed until the temporary delay is expired. Both of these arguments
20 have merit.
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23 Petitioner's argument finds support in Section 1 (4) of SSB 5248 which requires
24 "jurisdictions that have delayed amending or adopting certain regulatory measures to
25 promptly complete all regulatory amendments or adoptions necessary to comply with the
26 growth management act." Having a decision on whether challenged critical areas ordinance
27 provisions comply with the GMA will assist local jurisdictions in acting promptly should an
28 agreement not be reached through the Ruckelshaus Center.
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30 On the other hand, if the Board finds noncompliance on Issue No. 13, it cannot issue an
31 order as required by RCW 36.70A.300(3)(b) because the County is prohibited from
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1 amending its critical areas ordinance relating to agricultural activities. SSB 5248 Section 1
2 (2). The only way that appears available for the Board to address this contradiction would
3 be for the Board to issue its decision but stay its effectiveness pending the outcome of the
4 Ruckelshaus Center process. However, such a procedure raises more questions than
5 answers: Would this constitute a noncompliance finding for purposes of RCW 43.155.050
6 and 70.146.030? The Legislature specifically addressed this issue in extending update
7 requirements under RCW 36.70A.130 but did not address it here. Would the County be
8 required to undertake further planning and submit progress reports during the delay period
9 to demonstrate “substantial progress towards compliance”? Again, the Legislature
10 addressed this in extending the update requirements (see RCW 36.70A.130(10)) but did not
11 do so here.
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14 On balance, therefore, the Board believes that the Legislature intended that petitions for
15 review challenging critical areas protections from agricultural activities be deemed not ripe
16 until the delay established in SSB 5248 has expired. We therefore dismiss Issue No. 13
17 without prejudice to the Petitioner’s ability to re-file it after the delay established in SSB
18 5248 has expired.
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21 **MOTION TO DISMISS ISSUE NO. 15**

22 Issue No. 15: In rezoning land designated as LTCF [long term commercial forest]
23 land without showing that its continued use for the production of timber resources is
24 not reasonable or that it no longer satisfies the criteria for designation as LTCF land,
25 has the County in Ordinance 139-06 failed to maintain the internal consistency of its
26 Comprehensive Plan and Future Land Use Map required by RCW 36.70A.070 and
27 does its action interfere substantially with the goal of conserving productive forest
28 lands and discouraging incompatible uses (RCW 36.70A.020(8))?
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1 **Positions of the Parties**

2 The County argues that Ordinance 139-06 adopted a site-specific rezone and is therefore
3 not subject to growth management hearings board jurisdiction.¹¹ As a site-specific rezone,
4 the County maintains, Petitioners were required to pursue their appeal under the Land Use
5 Petition Act (LUPA), including appeal to the Superior Court within 21 days of granting or
6 denying the rezone request.¹² The County further argues that if the Board retains subject-
7 matter jurisdiction, it would result in “unfairness and injury” to the Shaw Family LLC because
8 it was not notified or served with this challenge by Petitioners and because overturning the
9 rezone would leave “the party who acted properly (the Shaw Family) with the most injury.”¹³
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12 Petitioners respond that the question before the Board is one of interpretation of the Growth
13 Management Act, for which the Board has express jurisdiction:¹⁴ “[i]t is the question of the
14 consistency of the amended Future Land Use Map with the remainder of the County’s
15 Comprehensive Plan that is before this board.”¹⁵ Petitioners point out that they may not
16 even have standing under LUPA and that their complaint might be dismissed for failure to
17 exhaust administrative remedies before the Board if they had not filed this Petition for
18 Review.¹⁶
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21 **Board Discussion**

22 The Growth Management Hearings Boards have jurisdiction to hear petitions alleging:

- 23 (a) That a state agency, county, or city planning under this chapter is not in
24 compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to
25 the adoption of shoreline master programs or amendments thereto, or chapter
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29 ¹¹ Respondent Mason County’s Motion to Dismiss Petitioners’ Petition for Review and Memorandum in Support of Motion to Dismiss at 6.

30 ¹² *Ibid.*

31 ¹³ *Ibid* at 7.

32 ¹⁴ Motion for Order Requiring County to Index the Record in Compliance with Order of March 2 and Response Opposing Motions to Dismiss at 7.

¹⁵ *Ibid.*

¹⁶ *Ibid* at 7-8.

1 43.21C RCW as it relates to plans, development regulations, or amendments,
2 adopted under RCW 36.70A.040 or chapter 90.58 RCW; or
3 (b) That the twenty-year growth management planning population projections
4 adopted by the office of financial management pursuant to RCW 43.62.035 should be
5 adjusted.

6 RCW 36.70A.280(1)(a) and (b).

7 “Development regulation” is defined in RCW 36.70A.030(7) and “does not include a decision
8 to approve a project permit application, as defined in RCW 36.70B.020...” RCW

9 36.70B.020, in turn, defines a project permit:

10 “Project permit” or “project permit application” means any land use or environmental
11 permit or license required from a local government for a project action, including but
12 not limited to building permits, subdivisions, binding site plans, planned unit
13 developments, conditional uses, shoreline substantial development permits, site plan
14 review, permits or approvals required by critical area ordinances, **site-specific
15 rezones authorized by a comprehensive plan or subarea plan, but excluding
16 the adoption or amendment of a comprehensive plan, subarea plan, or
17 development regulations** except as otherwise specifically included in this
18 subsection.

19 RCW 36.70B.020(4). (emphasis added)

20 A site-specific rezone is one which is authorized by the Comprehensive Plan. *Wenatchee
21 Sportsmen v. Chelan County*, 141 Wash. 2d 169 at 179 (2000). In its motion, the County
22 does not direct the Board to the provisions of the comprehensive plan which authorize the
23 rezone at issue here. The Staff Reports attached to the County’s motion (Exhibit 5) refer to
24 rezone criteria outlined in Mason County Development Code Section 1.05.080 but do not
25 reference the comprehensive plan provisions that authorize the challenged rezones.

26 (Exhibit 5 includes the staff recommendation against the rezone and the Planning Advisory
27 Committee’s recommendation for approval.)

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29 On this record, the Board cannot grant the motion. However, we note that the staff referred
30 to the rezone request as a “site-specific rezone application” and will consider this issue
31 further if the County brings forward its comprehensive plan policy basis for the rezone
32 adopted in Ordinance 139-06.

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ORDER

Based on the foregoing, the motion to dismiss Issue No. 13 as premature is hereby GRANTED WITHOUT PREJUDICE as to the Petitioner bringing it as an issue upon expiration of the delay established in SSB 5248. The motion to dismiss Issue No. 15 for lack of subject-matter jurisdiction is DENIED but may be raised again with proper reference to the applicable comprehensive plan provisions.

This is not a final order but it shall become final upon issuance of the Final Decision and Order in this case.

ENTERED this 22nd day of May 2007.

Margery Hite, Board Member

Holly Gadbow, Board Member

James McNamara, Board Member