

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 City of Anacortes,

3 Petitioner,

Case No. 07-2-0008

4 v.

5 Skagit County and The Skagit County Board
6 of Health,

**ORDER DENYING COUNTY MOTION
TO DISMISS WITHOUT PREJUDICE,
DENYING ECOLOGY'S MOTION TO
DISMISS AND DENYING CITY'S
MOTION FOR SUMMARY JUDGMENT**

7 Respondent

8 And

9 Department of Ecology,

10 Intervenor.

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16 THIS Matter comes before the Board upon three motions: the motion of Skagit County (the
17 County) to dismiss the petition for review for lack of subject matter jurisdiction¹; the motion
18 of the Department of Ecology (Ecology) to dismiss certain issues for lack of subject matter
19 jurisdiction²; and the motion of the City of Anacortes (the City) for summary judgment on
20 public participation grounds.³
21

22 **SYNOPSIS**

23 In this order, the Board decides to deny the County's motion at this time and to proceed to a
24 hearing on the merits. The Board does not find that it has jurisdiction over the challenged
25 regulations but instead requests the parties to further brief the issue for the hearing on the
26 merits. In this regard, the Board requests that the parties address the applicability of RCW
27 36.70A.070(1) and WAC 365-195-825(5) to the determination of whether the amendments
28 to Ch. 12.48 SCC constitute development regulations, in addition to any other arguments
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32 ¹ Skagit County's Motion to Dismiss for Lack of Subject Matter Jurisdiction

² Department of Ecology's Motion to Dismiss for Lack of Jurisdiction

³ Anacortes' Summary Judgment Motion

1 they feel are pertinent. The County is also requested to provide references to the
2 development regulations (in its code) that meet the requirements of RCW 36.70A.070(1)
3 and WAC 365-195-825(5).

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5 As to Ecology's motion to dismiss, the Board finds that the fact that Ecology has adopted an
6 Instream Flow Rule and that the County has adopted the challenged amendments at least
7 in part to implement that Rule does not deprive the Board of jurisdiction. Ecology's rule and
8 the basis for it may provide a defense to the challenges but they do not pre-empt the
9 Board's jurisdiction over development regulations adopted by the County.

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11 As to the City's motion for summary judgment on public participation grounds, the Board
12 finds that the question of jurisdiction is still outstanding and therefore summary judgment is
13 not appropriate. The Board will consider the public participation challenges at the hearing
14 on the merits.

15 16 17 **BURDEN OF PROOF**

18 For purposes of board review of the comprehensive plans and development regulations
19 adopted by local government, the GMA establishes three major precepts: a presumption of
20 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
21 decisions of local government.

22
23 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
24 amendments to them are presumed valid upon adoption:

25
26 Except as provided in subsection (5) of this section, comprehensive plans and
27 development regulations, and amendments thereto, adopted under this chapter are
presumed valid upon adoption.

28 RCW 36.70A.320(1).

29
30 The statute further provides that the standard of review shall be whether the challenged
31 enactments are clearly erroneous:

1 The board shall find compliance unless it determines that the action by the state
2 agency, county, or city is clearly erroneous in view of the entire record before the
3 board and in light of the goals and requirements of this chapter.

4 RCW 36.70A.320(3)

5 In order to find the County's action clearly erroneous, the Board must be "left with the firm
6 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
7 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

8
9 Within the framework of state goals and requirements, the boards must grant deference to
10 local government in how they plan for growth:

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

21 RCW 36.70A.3201 (in part).

22 In sum, the burden is on the Petitioner to overcome the presumption of validity and
23 demonstrate that any action taken by the County is clearly erroneous in light of the goals
24 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
25 Where not clearly erroneous and thus within the framework of state goals and requirements,
26 the planning choices of local government must be granted deference.

27
28 Where a motion to dismiss challenges the Board's subject-matter jurisdiction, the burden is
29 on the Petitioner to show that the Board has jurisdiction. A finding of board jurisdiction is a
30 necessary predicate to a determination of compliance or noncompliance under the GMA

1 (Ch. 36.70A RCW).⁴ Since the GMA places the burden of proof on the Petitioner, that
2 burden must include a showing of jurisdiction:

3 Except as otherwise provided in subsection (4) of this section, the burden is on the
4 petitioner to demonstrate that any action taken by a state agency, county, or city
5 under this chapter is not in compliance with the requirements of this chapter.⁵

6 **ISSUES PRESENTED**

- 7
- 8 1) Does the Board have subject-matter jurisdiction over the County's amendments to
9 Chapter 12.48 of the Skagit County Code adopted in Ordinance No. 020070004?
 - 10 2) Did the adoption of Ordinance No. 020070004 fail to comply with the public
11 participation and inter-governmental coordination requirements of the GMA (RCW
12 36.70A.035, 36.70A.106, 36.70A.140 and Goal 11)?
- 13

14 **DISCUSSION**

15 **Positions of the Parties**

16 The County argues that the amendments to Chapter 12.48 of the Skagit County Code
17 (SCC) were adopted pursuant to RCW 70.05 rather than pursuant to the GMA.⁶ Ch. 12.48
18 SCC, the County argues, is the County's Drinking Water Code and was adopted to establish
19 the County's Public Health Departments' standards for the protection of public health, rather
20 than for evaluating compliance with zoning or density requirements.⁷ The County asserts
21 that the amendments to the Drinking Water Code were not adopted pursuant to the GMA
22 but pursuant to the Board of Health's authority under Chapter 70.05 RCW.⁸ Since the
23 Board's jurisdiction is limited to adoptions pursuant to the GMA, the County concludes, the
24 Board lacks jurisdiction over these amendments.⁹

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30 ⁴ RCW 36.70A.280(1) and 36.70A.290(2)

31 ⁵ RCW 36.70A.320(2)

32 ⁶ Skagit County's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 1.

⁷ *Ibid* at 2-3.

⁸ *Ibid* at 8-9.

⁹ *Ibid*.

1 The County also argues that Ch. 12.48 SCC is not a development regulation because it
2 does not control land use.¹⁰ Instead, the County argues, the Drinking Water Code has
3 some effect on the rate of development but it does not place a “control” on development and
4 land use.¹¹

5
6 Ecology argues that the City is essentially attacking Ecology’s analysis of the reservations
7 needed to protect instream flows and habitat adopted by Ecology in the Skagit River
8 Instream Flow Rule (WAC 173-503-073).¹² According to Ecology, the City’s allegations
9 regarding potential negative impacts to instream resources “essentially amount to a
10 challenge to the portion of Ecology’s 2006 rule establishing reservations.”¹³ Ecology argues
11 that the portions of the City’s position that attack Ecology’s analysis for its rule are an
12 improper collateral attack on that rule.¹⁴

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15 The City responds that the County itself explicitly adopted the challenged amendments to
16 meet the intent of the Growth Management Act.¹⁵ The City argues that Chapter 12.48 SCC
17 and Chapter 14.24 SCC are interrelated Growth Management Act provisions that both
18 regulate development which impacts critical areas. Chapter 12.48 SCC provides that its
19 purpose includes meeting the intent of the Growth Management Act as well as implementing
20 the requirements of its critical areas ordinance (Chapter 14.24 SCC), the City points out.¹⁶

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23 The City also argues that Chapter 12.48 SCC is a development regulation because it
24 controls land use and has a sufficient nexus to the GMA.¹⁷ As examples, the City claims
25 that the changes in the amount of water required for development and the siting distances
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29 ¹⁰ *Ibid* at 9.

30 ¹¹ *Ibid*.

31 ¹² Department of Ecology’s Motion to Dismiss for Lack of Jurisdiction at 4-5.

32 ¹³ *Ibid* at 4.

¹⁴ *Ibid* at 5.

¹⁵ Anacortes’ Response to County’s Motion to Dismiss at 1.

¹⁶ SCC 12.48.010; *Ibid*.

¹⁷

1 for well protection zones directly control the use of land and critical areas protections by
2 limiting development based on water and land availability.¹⁸

3
4 In response to Ecology's motion, the City argues that the fact that Ecology promulgates a
5 State regulation regarding water resources does not preempt County authority, or relieve
6 the County from complying with GMA or SEPA.¹⁹ The City does not argue that the County
7 violated a non-GMA or non-SEPA statute or rule but whether the challenged local
8 regulations are consistent with GMA and SEPA.²⁰ "Ecology has no authority to plan for the
9 County under GMA."²¹

10
11 On its motion for summary judgment, the City argues that the County failed to comply with
12 the GMA's public participation requirements.²² The City asserts that the County's public
13 participation program requires Planning Commission review and it was skipped entirely.²³
14 The City also claims failures to properly notify CTED (the Washington Department of
15 Community, Trade and Economic Development) of the adoptions and a lack of sufficient
16 notice for public comments.²⁴ The City asks the Board to enter a finding of invalidity based
17 on substantial interference with GMA goal 11 (RCW 36.70A.020(11)).²⁵

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19
20 The County responds to the City's motion by arguing, first, that the Board lacks jurisdiction
21 to hear challenges to the drinking water code; second, that the County's notice and public
22 participation procedures substantially complied with GMA public participation requirements;
23 third, that the evidence on this issue is too expansive to be decided on summary judgment;
24 and fourth, that a finding of invalidity is inappropriate for summary judgment since a
25 thorough assessment of all the facts in the record is required.²⁶

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29 ¹⁸ Anacortes' Response to County's Motion to Dismiss at 10.

30 ¹⁹ Anacortes' Response to Ecology's Motion to Dismiss at 3.

31 ²⁰ *Ibid* at 5.

32 ²¹ *Ibid* at 3.

²² Anacortes' Summary Judgment Motion at 3.

²³ *Ibid* at 4.

²⁴ *Ibid* at 3-4.

²⁵ *Ibid* at 4-5.

²⁶ Skagit County's Response to Anacortes' Motion for Summary Judgment at 1-2.

1 **Board Discussion**

2 The Board's jurisdiction is established by statute:

- 3 A growth management hearings board shall hear and determine only those petitions
4 alleging either:
- 5 (a) That a state agency, county, or city planning under this chapter is not in
6 compliance with the requirements of this chapter, chapter 90.58 RCW as it relates
7 to the adoption of shoreline master programs or amendments thereto, or chapter
8 43.21C RCW as it relates to plans, development regulations, or amendments,
9 adopted under RCW 36.70A.040 or chapter 90.58 RCW; or
 - 10 (b) That the twenty-year growth management planning population projections
11 adopted by the office of financial management pursuant to RCW 43.62.035
12 should be adjusted.

13 RCW 36.70A.280(1).

14 All petitions relating to whether or not an adopted comprehensive plan, development
15 regulation, or permanent amendment thereto, is in compliance with the goals and
16 requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within
17 sixty days after publication by the legislative bodies of the county or city.

18 RCW 36.70A.290(2).

19 In this case, the City asserts that the Board has jurisdiction over the County's amendments
20 to Ch. 12.48 SCC because they are development regulations, rather than comprehensive
21 plan amendments. The definition of development regulations in the GMA is found in RCW
22 36.70A.030(7):

23 "Development regulations" or "regulation" means the controls placed on development
24 or land use activities by a county or city, including, but not limited to, zoning
25 ordinances, critical areas ordinances, shoreline master programs, official controls,
26 planned unit development ordinances, subdivision ordinances, and binding site plan
27 ordinances together with any amendments thereto. A development regulation does
28 not include a decision to approve a project permit application, as defined in RCW
29 36.70B.020, even though the decision may be expressed in a resolution or ordinance
30 of the legislative body of the county or city.

31 The City argues that the amendments to Ch. 12.48 SCC are controls on development in that
32 they affect the development that may occur, including development in critical aquifer
recharge areas and low-flow salmon streams.²⁷ The County does not deny that the Drinking

²⁷ Anacortes' Response to County's Motion to Dismiss at 10.
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1 Water Code may affect development – however, it argues that it merely affects the rate of
2 development in much the same way as impact fees or on-site sewer regulations may so it is
3 not a development regulation.²⁸

4
5 Unlike impact fees or on-site sewer regulations, however, water quality and quantity
6 development regulations are expressly required by the GMA. The GMA requires the land
7 use element to “provide for protection of the quality and quantity of ground water used for
8 public water supplies.”²⁹ It also requires the County to adopt development regulations that
9 are consistent with and implement the comprehensive plan.³⁰ Revisions and amendments
10 to development regulations must be consistent with and implement the comprehensive
11 plan.³¹ WAC 365-195-825 provides that regulations on potable water are “specifically
12 required by the act”.³²

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15 The Board requests the parties to address these provisions of the GMA and the Procedural
16 Criteria for Adopting Comprehensive Plans and Development Regulations as they pertain to
17 the jurisdictional question at issue here. The Board also requests that the County provide
18 citations to the County’s development regulations that meet the GMA requirements
19 regarding water quality and quantity. Upon such further briefing, the Board will make its
20 ruling on the challenge to subject-matter jurisdiction raised by the County.
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23 As to Ecology’s challenge to the Board’s jurisdiction, the Board finds no basis for a lack of
24 subject matter jurisdiction. The City’s petition does not raise an issue under a statute that is
25 not within the Board’s jurisdiction – the challenges are to compliance with the GMA and
26 SEPA. No authority has been cited, nor does the Board know of any, that holds that the
27 County’s legislation to implement the Instream Flow Rule is immune from GMA review
28 because it relies upon an Ecology rule. Ecology’s rule may form the basis for a defense to a
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32 ²⁸ Skagit County’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 9-10.

²⁹ RCW 36.70A.070(1)

³⁰ RCW 36.70A.040

³¹ RCW 36.70A.130(1)(b)

³² WAC 365-195-825(5).

1 challenge but it does not deprive the Board of jurisdiction over a matter within the statutory
2 grant of authority.

3
4 Because the Board has not resolved the question of subject-matter jurisdiction, we will not
5 reach the summary judgment motion of the City. This issue will be carried over to the
6 Hearing on the Merits.

7
8 **Conclusion:** The Board requests further briefing on the question of whether the
9 amendments to Ch.12.48 SCC constitute development regulations. The Board finds no
10 authority for the argument that Ecology's adoption of a rule deprives the Board of jurisdiction
11 to consider the GMA or SEPA compliance of a County enactment based on that rule. The
12 County's compliance with the GMA requirements for public participation and inter-
13 governmental cooperation shall be considered at the Hearing on the Merits.

14 15 16 **ORDER**

17 Based on the foregoing, the County's motion to dismiss is DENIED at this time, without
18 prejudice to the County's ability to argue it further in its prehearing briefing and at the
19 Hearing on the Merits. Ecology's motion to dismiss for lack of subject matter jurisdiction is
20 hereby DENIED. The City's motion for summary judgment on public participation grounds
21 is CARRIED OVER to the Hearing on the Merits and may be briefed and argued for that
22 hearing.

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25 **This is not a final order pursuant to RCW 36.70A.300 for purposes of appeal or**
26 **motions for reconsideration.**

27
28 ***Because the question of Board resources in support of settlement discussions has***
29 ***been raised, the parties are advised that the Board has the ability to appoint a***
30 ***settlement officer or mediator where a case is pending. However, the parties are***
31 ***reminded that a request for a settlement/mediation officer must be made by all***
32 ***parties, in writing, and should be accompanied by a motion for extension of the***
deadline for final decision and order pursuant to RCW 36.70A.300(2)(b).

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DATED this 18th day of September 2007.

Margery Hite, Board Member

Holly Gadbaw, Board Member

James McNamara, Board Member

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