

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 JACK PETREE, FUTUREWISE, DEAN
3 HAVERSTRAW, CAITAC USA CORP and
4 ROBERT WIESEN,

Case No. 08-2-0021c

5 Petitioner,

COMPLIANCE ORDER

6 v.

7
8 WHATCOM COUNTY,

9 Respondent.

10 and

11
12 ERIC AND ROBIN HITZ, FUTUREWISE and
13 DAN MCSHANE,

14 Intervenor.

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18 THIS Matter came before the Board following the submittal of a Compliance Report¹ by
19 Whatcom County. An objection to a finding of compliance was filed by Petitioners Jack
20 Petree, Caitac USA Corporation, and Robert Wiesen (collectively, Petitioners).² A
21 Compliance Hearing was held on July 9, 2009, to consider the areas of non-compliance
22 found by the Board in its October 13, 2008 Final Decision and Order.
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25 **I. RECENT PROCEDURAL HISTORY**

26 On October 13, 2008, the Board issued its Final Decision and Order. With that FDO, the
27 Board found Whatcom County's actions did not comply with the Growth Management Act
28 (GMA) in two regards. The Board concluded:³
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32 ¹ Whatcom County's Statement of Actions, filed (May 26, 2009).

² Petitioners' Objections to a Finding of Compliance, filed June 9, 2009. The Board did not receive briefing, for or against, from Petitioners Futurewise or Haverstraw. The Board also did not receive briefing, for or against, from Intervenor.

³ October 13, 2008 FDO at 73.

1 Conclusion of Law O: The lack of text to describe the adopted comprehensive
2 land use map designation and the inconsistency between the comprehensive
3 land use map and the Subarea Plan does not comply with RCW 36.70A.070.

4 Conclusion of Law P: The lack of development regulations to implement the
5 adopted densities in the URMX zone does not comply with RCW 36.70A.115.

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7 On May 26, 2008, Whatcom County submitted its Compliance Report with two ordinances
8 attached. The County contends these ordinances achieved compliance with the GMA.
9 Ordinance 2009-024 (Exhibit A) adopted development regulations establishing densities in
10 the Urban Residential Mixed Use (URMX) zone. Ordinance 2009-028 (Exhibit B) adopted
11 changes intended to cure the inconsistencies between the comprehensive plan map and the
12 text of the Urban Fringe Subarea Plan (UFSP).⁴
13

14 On June 9, 2009, Petitioners filed Objections to a Finding of Compliance stating that the
15 County's newly adopted ordinances do not meet the requirements of the GMA due to the
16 County's: (1) failure to provide effective notice and public participation; (2) failure to publish
17 notices of the ordinances' adoption; (3) failure to consider input from the City of Bellingham
18 during drafting, review and adoption of the ordinances; (4) failure to ensure consistency
19 between Bellingham's and Whatcom County's comprehensive plans; (5) failure to make the
20 comprehensive plans consistent, resulting in the associated ordinances failing to comply
21 with the GMA; and (6) the failure of the County's actions to comply with RCW 36.70A.070
22 warrants a determination of invalidity.⁵
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25 On June 9, 2009 and June 15, 2009, Petitioners filed motions to supplement the record.⁶
26 The Board granted the motions allowing Exhibits 104 – 128, finding these exhibits would be
27 of substantial assistance to the Board.⁷
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31 ⁴ Whatcom County's Statement of Actions (May 26, 2009) Exhibits A and B.

32 ⁵ Petitioner's Objections to a Finding of Compliance at 4-30.

⁶ June 9, 2009 Petitioners' Motion to Supplement the Record; June 15, 2009 Petitioners' Amended Motion to Supplement the Record.

⁷ June 29, 2009 Order on Petitioners' Motions to Supplement the Record.

1 On July 7, 2009, Petitioners filed another motion to supplement the record⁸ with two
2 declarations.⁹ Due to the timing of this filing, the Board addressed it at the July 9
3 Compliance Hearing. The County had no objection; however, the County requested that
4 any editorial comments be struck from these exhibits. At the hearing, the Board accepted
5 the supplemental exhibits to the Record and stated that it would consider only those
6 portions that are not editorial in nature.
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8 On July 9, 2009, the Board held a telephonic compliance hearing. Board members Nina
9 Carter, serving as the Presiding Officer, James McNamara, and Will Roehl were present.
10 Petitioners were represented by Robert Tull and Richard Settle. Whatcom County was
11 represented by David Bricklin.
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13 II. BURDEN OF PROOF

14 After a Board has entered a finding of non-compliance, the local jurisdiction is given a
15 period of time to adopt legislation to achieve compliance.¹⁰ After the period for compliance
16 has expired, the Board is required to hold a hearing to determine whether the local
17 jurisdiction has achieved compliance.¹¹ For purposes of Board review of the
18 comprehensive plans and development regulations adopted by local governments in
19 response to a non-compliance finding, the presumption of validity applies and the burden is
20 on the challenger to establish that the new adoption is clearly erroneous.¹²
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22

23 In order to find the County's action clearly erroneous, the Board must be "left with the firm
24 and definite conviction that a mistake has been made."¹³
25
26

27 Within the framework of state goals and requirements, the Board must grant deference to
28 local governments in how they plan for growth:¹⁴
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30 ⁸ July 7, 2009, Petitioners' Second Amended Motion to Supplement the Record.

31 ⁹ Declaration of Antonia Oliver; Declaration of Jack Petree.

32 ¹⁰ RCW 36.70A.300(3)(b).

¹¹ RCW 36.70A.330(1) and (2).

¹² RCW 36.70A.320(1), (2) and (3).

¹³ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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

9 In sum, during these compliance proceedings the burden remains on the Petitioners to
10 overcome the presumption of validity and demonstrate that any action taken by the County
11 is clearly erroneous in light of the goals and requirements of the GMA.¹⁵ Where not clearly
12 erroneous and thus within the framework of state goals and requirements, the planning
13 choices of the local government must be granted deference.
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15 III. ISSUES TO BE DISCUSSED

16 Did the County, with the adoption of Ordinance 2009-024 and Ordinance 2009-028, bring
17 itself into compliance with the GMA as ordered by the Board in its October 2008 FDO in
18 regards to:
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- 20 1. Lack of text to describe adopted land use designation, a violation of RCW
21 36.70A.070.
- 22 2. Inconsistency between the CP Land Use Map and the Subarea Plan, a violation of
23 RCW 36.70A.070.
- 24 3. Development regulations to implement adopted densities for the URMX zone, a
25 violation of RCW 36.70A.115.
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27 In addition, the Petitioners allege Whatcom County violated the GMA's public participation
28 provisions, RCW 36.70A.020(11), .035, .130, and .140, raising a new issue of whether the
29 County violated these provisions when it adopted the two Ordinances.
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¹⁴ RCW 36.70A.3201 (in part).

¹⁵ RCW 36.70A.320(2).

1 **IV. DISCUSSION OF THE ISSUES**

2 As noted *supra*, the Board's October 2008 FDO found Whatcom County had failed to
3 comply with the GMA and set a compliance date of May 12, 2009. On April 14, 2009, the
4 County adopted Ordinance 2009-024 intending to cure the areas of non-compliance related
5 to the URMX zone by adopting Whatcom County Code (WCC) 20.24 which generally bases
6 minimum lot size and density on the provision of public sewer and water. On April 28, 2009,
7 the County adopted Ordinance 2009-028 seeking to cure the areas of non-compliance
8 related to the inconsistencies between the land use map and the Urban Fringe Subarea
9 Plan by amending policies and adding clarifying language.
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12 **Public Participation**

13 In adopting Ordinance No. 2009-028, the Petitioners claim that the full text of the ordinance
14 amendments were not published on the County's website and that notice on the website of
15 the Planning Commission agenda was not available until four working days before the
16 County Planning Commission meeting on March 12, 2009. Petitioners state that because
17 Whatcom County did not provide the public with essential materials on "the location
18 commonly used by the County" (i.e. the website) prior to the public hearing, they failed to
19 properly notify the public about the changes to the Bellingham Urban Fringe Subarea
20 Plan.¹⁶
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23 Next, the Petitioners state that the County published an erroneous notice in the *Bellingham*
24 *Herald* on April 18, 2009, regarding an upcoming public hearing before the County Council
25 on April 28, 2009. Petitioners complain that the County only published a notice of adoption
26 of amendments to Ordinance No. 2009-024 and not notice of consideration of the second
27 Ordinance, No. 2009-028.
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29 In reply, the County states that public information related to GMA proceedings is not
30 required to be posted on the County's website by either the GMA or County Code. The
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¹⁶ Petitioner's Objections to a Finding at 5
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1 County notes that it did post the Planning Commission's staff report and agenda on the
2 website four working days prior to the Planning Commission meeting; and, this posting listed
3 as an agenda item the amendments to Ordinance No. 2009-028. The County points out
4 that the proposed amendments were available at the County Planning Department prior to
5 the hearing and were also available to the Petitioners at the Planning Commission
6 hearing.¹⁷ Regarding the missing information in the April 18, 2009 *Bellingham Herald*, the
7 County replied that the Petitioner overlooked a separate notice, lower on the same page in
8 the *Bellingham Herald* which described the forthcoming County Council meeting when
9 Ordinance 2009-028 would be considered.¹⁸
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12 Board Discussion

13 Petitioners' allegations are based solely on Ordinance No. 2009-028 and, therefore, the
14 Board reviewed the timeline and public involvement process Whatcom County provided for
15 the review and comment on available documents in regards to this compliance ordinance.
16 The County published notice of the March 12 Planning Commission public hearing in the
17 *Bellingham Herald* on March 1, 2009 (Ex 4.3; Ex. 104).¹⁹ This notice clearly invited the
18 public to submit comments and attend the hearing. Copies of the proposed amendments
19 were available from the County Planning Department by March 5 with details on how to
20 secure a copy provided on the County's website and the full text of the amendments and
21 maps were available March 12 at the Planning Commission meeting. Both Petitioners
22 Petree and Wiesen attended this meeting.²⁰
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25 On April 18, 2009, the County published notice of an April 28, 2009 Whatcom County
26 Council Planning and Development Committee meeting regarding the amendments to the
27 Sub-Area Plan (Ordinance 2008-029).²¹ Prior to the County Council meeting the proposed
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32 ¹⁷ Whatcom County's Reply to Petitioner's Objections at 2.

¹⁸ See *id.* at 7.

¹⁹ See *id.* at 5.

²⁰ Exhibit 103.

²¹ Exhibit 128.

1 amendments came before the County Council Planning and Development Committee.
2 Petitioner Petree and counsel for Caitac attended this meeting.²² The Committee
3 recommended approval to the County Council.²³ Later on that same day, April 28, the
4 matter came before the County Council at its regular meeting where the County voted to
5 approve the amendments.²⁴ Petitioners did not attend the County's regular meeting.
6

7 Given the extensive time, approximately six weeks, between the Planning Commission and
8 County Council meetings for public comment about the proposed amendments, the
9 availability of documents from the County's offices, and the public meetings/hearings held
10 by the County, the Board concludes that the County provided reasonable and adequate
11 notices of its actions related to Ordinance 2008-029 and Petitioner attended most of the
12 meetings/hearings, providing comments. Documents related to the proposed amendments
13 were available to Petitioners; they were, literally, just a phone call or visit away. The
14 Petitioners did not take affirmative steps to secure copies of the amendments, but rather
15 elected to passively wait for the County to post information on its website. The Board finds
16 that the Petitioners have not met their burden to establish the County's public process failed
17 to meet the public participation requirements of the Growth Management Act.
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21 **Conclusion:** As such, the Board concludes that Whatcom County's actions were not
22 clearly erroneous and did not violate RCW 36.70A.020(11); RCW 36.70A.035; RCW
23 36.70A.070; RCW 36.70A.130; or RCW 36.70A.140.
24

25 **City of Bellingham was not consulted when Ordinance 2009-028 was developed or**
26 **adopted.**

27 Petitioners claim that the County failed to involve the City of Bellingham as it developed
28 amendments to its ordinances to come into compliance with the GMA as required by the
29 Board's October 13, 2008 FDO. Petitioners quote a section of a letter from the City of
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32 ²² Exhibit 100.

²³ *Id.*

²⁴ Exhibit 107.

1 Bellingham stating that the City was “concerned that City staff were not involved in the
2 proposed policies”²⁵ which implies that the City was not consulted as the County went
3 forward to amend their ordinances. Next, the Petitioners state that the County and City
4 comprehensive plans, ten-year UGA review process and capital facilities planning process
5 should be coordinated between the County and City.
6

7 The County points out that the quote from the letter referenced by the Petitioners does not
8 refer to the actions the County was taking to comply with the GMA as required by the FDO.
9 Rather, Mr. Stewart from the City of Bellingham objected to other goal and policy text
10 changes that were NOT part of the compliance action. Whatcom County states that the
11 Petitioners misread the City of Bellingham’s letter by connecting two issues in the letter that
12 were, in fact, not referencing each other.²⁶
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15 Board Discussion

16 Upon reading the February 20, 2008, letter from the City of Bellingham to Whatcom County,
17 it is clear to the Board that the City agreed to the amended ordinances proposed by the
18 County to bring it into compliance with the GMA as directed by the Board’s FDO. The letter
19 states:
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21 “We strongly support incorporating these changes into the Land Use policies
22 section of the plan and in the zoning code *to assist the City and the County in*
23 *meeting the Hearings Board requirements.*” (emphasis added).

24 From an even closer reading of the letter, the Board sees that although the City still does
25 not agree with the County’s proposal to amend other sections of their plan, these issues
26 were not part of the County’s efforts to achieve compliance with the GMA as noted in the
27 Board’s October 2008 FDO.
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²⁵ Petitioner’s Objections at 19.

²⁶ Whatcom County’s Reply at 14.

1 **Conclusion:** Therefore, the Board concludes that the Petitioners have not met their burden
2 to establish that the County failed to include the City of Bellingham in its deliberations and
3 amendments to meet the Board's FDO requirement to come into compliance with the GMA.
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5 **Inconsistency between Whatcom County and the City of Bellingham Plans –**
6 **Conclusion of Law O**

7 Petitioners claim, with their Issues 4 and 5, the County's 2009 BUFS Plan is inconsistent
8 with the City of Bellingham's 1997 Urban Fringe Subarea Plan, in part, because the City
9 was not consulted when the County amended its ordinances to comply with the Board's
10 FDO.²⁷ The Petitioners state that even if procedural errors were not committed, the two
11 plans contain differences such as map references and lack of consistent analysis about
12 areas adjacent to City and County boundaries.
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15 Whatcom County replies that in adopting the ordinances, it corrected erroneous cross-
16 references between text and maps of the Subarea Plan. According to the County, it is the
17 City which has not yet made necessary corrections, but will in the course of updating its
18 plans.²⁸ The Growth Management Act does not require city and county plans to be the
19 exact mirror image of each other. They must simply not contradict each other. The County
20 points out that the Subarea Plan text was amended to reflect the same land use density as
21 in the land use map; i.e. 6 dwelling units per acre rather than 4 units. The County contends
22 that now both the text and the map require 6 units per acre and there is no longer a
23 contradiction between the maps and text.²⁹
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26 Petitioners claim further inconsistencies in the Subarea Plan, but the County explained that
27 these inconsistencies have been in place for many years and are not part of the Corrective
28 Amendments to the County's plan and ordinances. The County states that those
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32 ²⁷ Petitioner's Objections at 23.

²⁸ Whatcom County Reply at 19.

²⁹ Whatcom County's Reply at 18.

1 inconsistencies are being addressed by the City and County as they coordinate their work to
2 revise the upcoming Urban Growth Boundaries.³⁰

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4 Board Discussion

5 The County's amended ordinances and corrected maps address the crux of the compliance
6 requirements from the Board's October 13 FDO set forth in Conclusion of Law O. The
7 Board required the County to include text to describe adopted land use designations and
8 correct the inconsistency between the CP Land Use Map and the Subarea Plan.
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11 **Conclusion:** By adopting Ordinance 2009-028 the County has addressed the area of non-
12 compliance identified in Conclusion of Law O in the Board's Final Decision and Order of
13 October 13, 2008.

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15 **URMX Development Regulations – Conclusion of Law P**

16 Whatcom County adopted Ordinance 2009-024, which enacted WCC 20.24, to address
17 compliance in regards to the URMX zoning district regulations. This code provision bases
18 minimum lot size and density on the provision of public sewer and water and, in some
19 situations, stormwater facilities. In their briefing, however, Petitioners only address
20 Ordinance 2009-028, The Urban Fringe Subarea Plan,
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23 Generally, an issue that is not adequately briefed by the party who bears the burden of
24 proof is deemed abandoned. However, this is a compliance proceeding and the Board had
25 previously issued an order for the County to bring itself in compliance. Therefore, the Board
26 needs to ensure that the County's action in adopting Ordinance 2009-024 did just that.
27

28 Board Discussion

29 The Board noted in the October 2008 FDO that the County had failed to adopt development
30 regulations for the Comprehensive Plan land use designation of URMX.
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³⁰ Whatcom County's Reply at 20 Footnote 3.
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1 **Conclusion:** With the adoption of WCC 20.24, the County has adopted the requisite
2 regulations and achieved compliance with the GMA as ordered by the Board.

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4 **V. ORDER**

5 Based on the foregoing, the Board finds that Whatcom County has achieved compliance
6 with those areas determined to be non-compliant with the GMA in the Board's October 13,
7 2008 Final Decision and Order and Order on Compliance. Therefore, the Board enters a
8 finding of compliance in this regard.
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11 Entered this 14th day of August, 2009.

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14 _____
Nina Carter, Board Member

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17 _____
William Roehl, Board Member

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20 _____
James McNamara, Board Member

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

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

1 judicial review may be instituted by filing a petition in superior court according to the
2 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

3 **Enforcement.** The petition for judicial review of this Order shall be filed with the
4 appropriate court and served on the Board, the Office of the Attorney General, and all
5 parties within thirty days after service of the final order, as provided in RCW
6 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
7 but service on the Board means actual receipt of the document at the Board office
within thirty days after service of the final order.

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

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