

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 REBECCA A. SPRAITZAR,

4 Petitioner,

5
6 v.

7 ISLAND COUNTY,

8
9 Respondent.

Case No. 08-2-0023

FINAL DECISION AND ORDER

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12 **I. SYNOPSIS OF DECISION**

13 In this order the Board concludes that Petitioner has not carried her burden to demonstrate
14 that Island County failed to comply with RCW 36.70A.140 during the adoption of Ordinance
15 C-87-07, PLG-017-07, regarding Accident Protection Zones (APZs) in the vicinity of
16 Whidbey Island Naval Air Station. Instead, Petitioner challenged the content of the notices
17 themselves, a matter that would more properly be the subject of a challenge founded on
18 RCW 36.70A.035. Because the Board is precluded from addressing issues not presented
19 to the Board in the statement of the issues in the Petition for Review, the appeal is denied.
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22 **II. PROCEDURAL HISTORY**

23 Island County adopted Ordinance C-87-07, PLG-017-07 on March 10, 2008, amending
24 Chapters 17.02 and 17.03 of the Island County Code and the Comprehensive Plan.
25

26 On May 14, 2008, Petitioner Rebecca Spraitzar filed a timely appeal. At the time the appeal
27 was filed, Ms. Spraitzar was representing herself. However, on June 14, 2008, Peter Eglick
28 appeared on her behalf.
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31 On June 13, 2008, Petitioner filed a motion for an extension of the 30 day amendment
32 period allowed under WAC 242-02-260 to submit amendments to the Petition for Review,

1 and a Motion to Clarify the Issue Statement. Petitioner sought to expand the scope of the
2 challenge to include a challenge to the County's compliance with RCW 36.70A.140 "as
3 interpreted and applied in light of RCW 36.70A.035 and RCW 36.70A.020(11)." On July 3,
4 2008, the Board denied the motions.

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6 On July 7, 2008, the County filed a motion to dismiss, which the Board denied.

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8 On August 12, 2008, Mr. Eglick filed a Notice of Withdrawal and Petitioner again
9 represented herself *pro se*.

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11 The Hearing on the Merits (HOM) was held on September 25, 2008 in Coupeville,
12 Washington. Petitioner represented herself. Respondent was represented by Daniel
13 Mitchell and Keith Dearborn. Board members Holly Gadbow, William Roehl, and James
14 McNamara attended with Mr. McNamara presiding.

15 16 17 **III. 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 Except as provided in subsection (5) of this section, comprehensive plans and
26 development regulations, and amendments thereto, adopted under this chapter are
27 presumed valid upon adoption.

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

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

1 RCW 36.70A.320(3)

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

6
7 Within the framework of state goals and requirements, the boards must grant deference to
8 local government in how they plan for growth:

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

20 RCW 36.70A.3201 (in part).

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

26 IV. DISCUSSION

27 **Issue No. 1:** Did the County's adoption of Ordinance C-87-07, PLG-017-0 fail to comply
28 with the requirements of RCW 36.70A.140 because it did not provide effective notice for
29 early and continuous public participation?
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1 **Position of the Parties**

2 Petitioner claims that the County failed to meet the requirements of the GMA because the
3 notice it provided of the amendments contained in Ordinance C-87-07, PLG-017-07 was
4 “incomprehensively cryptic” to the average citizen¹.

5
6 Petitioner argues that while the County may have met the notice requirements contained in
7 the County code,² it failed to meet the GMA’s public participation requirements which
8 require “notice procedures that are reasonably calculated to give notice to property owners”
9 of proposed amendments.³ The notice provided by the County was too vague to fairly
10 apprise the public of the scope of the matters that would be undertaken at the advertised
11 Planning Commission and Board of Island County Commissioners (BICC) hearings,
12 Petitioner claims.⁴ In particular, Petitioner argues that the County never provided a complete
13 notice that certain currently permitted uses would be banned and subdivision barred.⁵
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16 Petitioner also argues that the County’s failure to publish notice of BICC meetings involving
17 the proposal precluded informed public participation.⁶ She points out that no public notice
18 was provided for the August 6, 2007 meeting where Planning Department staff presented a
19 modified version of Ordinance C-87-07 for review, thus precluding continuous public
20 participation.
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22
23 Petitioner further argues that the County violated GMA public participation and notice
24 requirements by failing to provide adequate notice of continued hearings. She notes that
25 the BICC scheduled a public hearing to consider the adoption of Ordinance C-87-07 on
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30 ¹ Petitioner’s Prehearing Brief at 1.

31 ² Id. at 9.

32 ³ Id. at 8, quoting from RCW 36.70A.035.

⁴ Id. at 9-10.

⁵ Id. at 10.

⁶ Id. at 13-14.

1 August 27, 2007 but continued the hearing five times.⁷ Except in one case, where the
2 continuance was advertised by newspaper, notice was provided via a bulletin board posting.
3 Finally, Petitioner asserts that the County's arbitrary decision to provide special notice by
4 mail to six individuals merely highlights the deficiencies in the notice that was presented to
5 others.⁸

6
7 In response, the County argues that it properly followed the procedures of the Island County
8 Code for the review and amendment of the Comprehensive Plan and development
9 regulations, as set forth in ICC 16.26.050 – 060.⁹ It notes that ICC 16.26.080 establishes
10 the local requirements to ensure that members of the public are notified of all public
11 hearings before the Planning Commission and the BICC, and that in accordance with that
12 section, notice was published in advance of the hearings, as required, as well as in advance
13 of public workshops and deliberation meetings as well.¹⁰ The County asserts that these
14 published notices provided effective notice that complied with the public participation
15 requirements of the GMA.
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18 In response to Petitioner's assertions that the notices published in the newspaper were
19 vague, the County asserts that the notices were clear and reasonably calculated to notify
20 landowners that live near NAS Whidbey Ault Field and Outlying Field Coupeville of the
21 pending APZs. In addition to the newspaper notice of meetings, the County points to the
22 individualized letters sent to the most affected property owners, newspaper articles featuring
23 the APZ proposal, the availability of the proposed amendments on the Planning
24 Department's website, and the fact that the published notice of the BICC public hearing
25 stated that copies of the ordinance were available on request.
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31 ⁷ Id. at 14.

32 ⁸ Id. at 15.

⁹ Island County's Response Brief at 8.

¹⁰ Id.

1 The County also argues that the fact that members of the public testified at the BICC public
2 hearing demonstrates that there was effective public notice prior to the hearing.¹¹ The
3 County asserts that it was not required to republish notice of continued hearings where, as
4 here, the time and place of the continued hearing was established on the record at the
5 hearing.
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7 **Board Discussion**

8 Petitioner has brought a very narrow challenge. As noted in the issue statement,
9 Petitioner's challenge alleged noncompliance with RCW 36.70A.140. No other GMA
10 violations were alleged.
11

12 RCW 36.70A.140 provides, in pertinent part:
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14 Each county and city that is required or chooses to plan under RCW 36.70A.040 shall
15 **establish and broadly disseminate to the public a public participation program**
16 identifying procedures providing for early and continuous public participation in the
17 development and amendment of comprehensive land use plans and development
18 regulations implementing such plans. The procedures shall provide for broad
19 dissemination of proposals and alternatives, opportunity for written comments, public
20 meetings after effective notice, provision for open discussion, communication programs,
21 information services, and consideration of and response to public comments. (emphasis
22 added).

23 As can be seen from the text of this provision of the GMA, RCW 36.70A.140 establishes the
24 requirement that local jurisdictions adopt public participation programs that provide for early
25 and continuous public participation. The GMA has other public participation requirements.
26 RCW 36.70A.020(11) establishes a goal to encourage the involvement of citizens in the
27 planning process. RCW 36.70A.035 requires the county to establish notice procedures that
28 are reasonably calculated to provide notice to property owners and other affected
29 individuals and entities. RCW 36.70A.070 requires that the county adopt its comprehensive
30 plan in accordance with its public participation procedures. In this case, Petitioner has not
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32 ¹¹ Id. at 20.

1 raised any challenges to the County's failure to establish a public participation program, the
2 features of the County's public participation program, or the County's failure to follow its own
3 program. Instead, she has focused on the content of the notices issued pursuant to that
4 program. However, the question of whether the notices provided by the County were drafted
5 in such a manner so as to provide adequate notice to the public is a matter addressed
6 within the context of the requirements of RCW 36.70A.035 and the public participation goal
7 set forth in RCW 36.70A.020(11).

8
9 RCW 36.70A.035(1) provides:

10 (1) The public participation requirements of this chapter shall include notice
11 procedures that are reasonably calculated to provide notice to property owners and
12 other affected and interested individuals, tribes, government agencies, businesses,
13 school districts, and organizations of proposed amendments to comprehensive
14 plans and development regulation. Examples of reasonable notice provisions include:

15 (a) Posting the property for site-specific proposals;

16 (b) Publishing notice in a newspaper of general circulation in the county, city, or
17 general area where the proposal is located or that will be affected by the proposal;

18 (c) Notifying public or private groups with known interest in a certain proposal or in
19 the type of proposal being considered;

20 (d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals;
21 and

22 (e) Publishing notice in agency newsletters or sending notice to agency mailing lists,
23 including general lists or lists for specific proposals or subject areas.
24

25 It is RCW 36.70A.035 that contains the requirement that notice procedures be "reasonably
26 calculated to provide notice to property owners and other affected and interested
27 individuals" of proposed amendments. Petitioner has not asserted a violation of this section
28 of the GMA. Nevertheless, Petitioner has framed her argument as if the challenge was
29 brought under RCW 36.70A.035. In her brief, she argues that the County failed to meet
30 GMA's public participation requirements which require "notice procedures that are
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1 reasonably calculated to give notice to property owners” of proposed amendments¹² – a
2 mandate imposed not by RCW 36.70A.140 but by RCW 36.70A.035. This argument is not
3 properly before the Board, and in fact the Board denied Petitioner’s untimely attempt to
4 clarify her issue statement to include a claim under RCW 36.70A.035. ¹³
5

6 Petitioner points out that this Board has previously applied RCW 36.70A.035 in resolving an
7 issue under section .140.¹⁴ However, such an approach is not appropriate in light of WAC
8 242-02-210(2)(c). WAC 242-02-210(2)(c) states:
9

10 (c) A detailed statement of the issues presented for resolution by the board that
11 **specifies the provision of the act or other statute allegedly being violated**
12 and, if applicable, the provision of the document that is being appealed;
(emphasis added).

13 This rule would be rendered meaningless were Petitioner permitted to pursue an appeal
14 based upon an alleged violation of a section of the GMA not specified in the Petition for
15 Review. Further, considering a claim founded on the requirements of RCW 36.70A.035
16 when such a violation was not alleged in the Petition for Review or contained in the
17 Prehearing Order would be inconsistent with RCW 36.70A.290(1) which provides, in
18 pertinent part: “The board shall not issue advisory opinions on issues not presented to the
19 board in the statement of issues, as modified by any prehearing order.”¹⁵
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22 Because Petitioner’s claims do not address the establishment of the County’s public
23 participation program, but rather the sufficiency of the notice provided to the public, an issue
24 of compliance with RCW 36.70A.035, the Board finds that Petitioner has not established a
25 violation of RCW 36.70A.140.
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30 ¹² Id. at 8, quoting from RCW 36.70A.035.

31 ¹³ Order Denying Motion for Extension in time to Amend Petition for Review and Denying Motion to Clarify
Issue Statement(July 3,2008).

32 ¹⁴ Id. citing *Dunlap v. Nooksack (Dunlap)*, WWGMHB Case No. 06-2-0001, FDO at 9-12 (7/7/06).

¹⁵ Also see *Overton Associates v. Mason County*, WWGMHB Case No. 05-2-009c (Final Decision and Order,
August 25, 2005) at 2 and 12.

1 **Conclusion:** Based on the foregoing, the Board concludes that Petitioner has not proven
2 that the County violated the provisions of RCW 36.70A.140 as alleged in the Petition for
3 Review.

4 **V. FINDINGS OF FACT**

- 5 1. Island County is a county located west of the crest of the Cascade Mountains that is
6 required to plan pursuant to RCW 36.76A.040.
7
8 2. On March 10, 2008 the County adopted Ordinance C-87-07, PLG-017-07, amending
9 Chapters 17.02 and 17.03 of the Island County Code and the Comprehensive Plan.
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11 3. On May 14, 2008 Petitioner filed a timely appeal.
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13 4. Petitioner's sole issue in this appeal contained in the Petition for Review and the
14 Prehearing Order alleged that the County violated the provisions of RCW
15 36.70A.140.
16
17 5. The Board denied a motion to clarify the Petition for Review to include a challenge
18 under RCW 36.70A.035.
19
20 6. Island County's public notice requirements for comprehensive plan and development
21 regulation amendments are located at ICC 16.26.080(A).
22
23 7. Petitioner has not alleged that the County failed to adhere to the provisions of ICC
24 16.26.080(A).
25
26 8. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.

27 **VI. CONCLUSIONS OF LAW**

- 28 A. The Board has jurisdiction over the parties to this action.
29 B. The Board has jurisdiction over the subject matter of this action.
30 C. Petitioner has standing to raise the issue in this case.
31 D. Petitioner has not demonstrated that the County violated the provision of RCW
32 36.70A.140 as alleged in the Petition for Review.
E. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.

1 **VII. ORDER**

2 Petitioner has not carried her burden to demonstrate that Island County violated RCW
3 36.70A.140. Therefore, this case is closed.

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5 DATED this 10th day of November, 2008.

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8 _____
James McNamara, Board Member

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William Roehl, Board Member

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13 I respectfully dissent from my colleagues for several reasons. First, this case can be
14 distinguished from *Dunlap*. In *Dunlap*, Petitioner challenged that the City of Nooksack's
15 failure to advertise an extended public hearing where provisions of the County's critical
16 areas ordinance had been changed violated both RCW 36.70A.140 and RCW
17 36.70A.020(11).¹⁶ These cases are similar because Petitioners in both cases challenged
18 that lack of appropriate notice violated RCW 36.70A.140 instead of the relevant citation of
19 RCW 36.70A.035. However, in *Dunlap*, Petitioner also asserted a violation of RCW
20 36.70A.020(11), the goal for encouraging citizen participation. I believe this goal
21 encompasses adequate notice, which is a key component of encouraging the involvement
22 of citizens in the public process for developing comprehensive plans and development
23 regulations. Here, Petitioner only claims a violation of RCW 36.70A.140.

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27 Nevertheless, even though Petitioner in this case did not allege a violation of RCW
28 36.70A.020(11), I would have considered the Petitioner's challenge as an alleged violation
29 of RCW 36.70A.140. I agree with my colleagues that adherence to the Board's Rules of
30 Procedure is important to ensure fairness to all parties in Board proceedings and
31

32 ¹⁶ *Dunlap* at 9.

1 understand how a close reading of RCW 36.70A.140 leads to my colleagues' decision.
2 However, I believe that public participation is a keystone of the GMA, therefore, such a
3 close reading detracts from this fundamental goal of the GMA. Since notice is a necessary
4 precondition to public participation and public participation is such a keystone to the GMA, it
5 is important to take it seriously and give it meaning.
6

7 It is also important to consider Petitioner's challenge in light of the legislative history of the
8 GMA's public participation requirements and past Western Board decisions. RCW
9 36.70A.035 was added to the GMA in 1997. RCW 36.70A.020 (11) and RCW 36.70A.140
10 were included when the GMA was originally passed. RCW 36.70A.140 was amended in
11 1995. Prior to 1997, when the GMA was amended to include the notice provisions of RCW
12 36.70A.035, this Board considered RCW 36.70A.140 and RCW 36.70A.020(11), sometimes
13 alone, sometimes together, to decide GMA public participation challenges. See *Achen v.*
14 *Clark County*, WWGMHB Case No. 95-2-0067 (Final Decision and Order, September 20,
15 1995), *WEAN v. Island County*, WWGMHB Case No. 95-2-0063 (Order on Dispositive
16 Motions, June 6, 1995), *Moore-Clark v. City of La Conner*, WWGMHB Case No. 94-2-0021
17 (Final Decision and Order, May 11, 1995), and *WEC v. Whatcom County*, WWGMHB Case
18 No. 95-2-0071 (Final Decision and Order, December 20, 1995).
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21
22 Additionally, Island County did not argue either in its Motion to Dismiss or in its brief for the
23 Hearings on the Merits that the Board should not consider Petitioner's argument because
24 she did not allege a violation of RCW 36.70A.035 nor did the Prehearing Order include that
25 alleged violation. Instead, the County's defense was that it followed its notice procedures
26 and that it had given adequate notice.
27

28 Therefore, based on past Board interpretation of the parts of the GMA relating to public
29 participation, I would have considered whether petitioner's challenge to the County's failure
30 to give adequate notice was a violation of RCW 36.70A.140. I am also reminded of one of
31 the "truisms" about the GMA, set forth in a very early decision issued by this Board:
32

1 Our ultimate reason for existence is to make decisions that further the "planning"
2 concepts, directions, goals and requirements of the GMA and, to a lesser extent,
3 make determinations as to legal interpretations of the Act. We should not allow the
4 flash of legal interpretation to blind us to the impact and realities of good planning
5 decisions.¹⁷

6 _____
7 Holly Gadbaw, Board Member

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

10 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
11 mailing of this Order to file a petition for reconsideration. Petitions for
12 reconsideration shall follow the format set out in WAC 242-02-832. The original and
13 three copies of the petition for reconsideration, together with any argument in
14 support thereof, should be filed by mailing, faxing or delivering the document directly
15 to the Board, with a copy to all other parties of record and their representatives.
16 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
17 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
18 filing a petition for judicial review. **A response to a Motion for Reconsideration must
19 be filed within 5 days of the filing of the motion.**

20 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
21 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
22 judicial review may be instituted by filing a petition in superior court according to the
23 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
24 Enforcement. The petition for judicial review of this Order shall be filed with the
25 appropriate court and served on the Board, the Office of the Attorney General, and all
26 parties within thirty days after service of the final order, as provided in RCW
27 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
28 but service on the Board means actual receipt of the document at the Board office
29 within thirty days after service of the final order.

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

¹⁷ Port Townsend v. Jefferson County, WWGMHB Case No. 94-2-006(Final Decision and Order, August 8, 1994).

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