

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 ADVOCATES FOR RESPONSIBLE
4 DEVELOPMENT AND JOHN E. DIEHL,

5
6 Petitioner,

7 v.

8 MASON COUNTY

9
10 Respondent.

Case No. 07-2-0006

FINAL DECISION AND ORDER

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13 **I. SYNOPSIS**

14 This case involves the appeal of three ordinances adopted by Mason County in late 2006
15 and published in January 2007. One ordinance adopts development regulations for master
16 planned developments (MDPs); one updates and amends the County's critical areas
17 ordinance; and one adopts a Future Land Use Map amendment changing the designation of
18 a parcel of property from Long Term Commercial Forest (LCTF) to In Holding.

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21 As to the MDP development regulations, the Board finds that the Petitioner has failed to
22 establish noncompliance and therefore the development regulations are deemed compliant
23 ,with two exceptions. First, the MDP regulations allow an MDP to straddle both an urban
24 and a rural designation. Under the regulations, this would allow a developer to place urban
25 densities and urban uses on rural lands in violation of RCW 36.70A.110(1). It would also
26 allow the densities and intensities in an established LAMIRD to be extended outside the
27 LAMIRD boundaries without meeting the criteria of RCW 36.70A.070(5)(d). For that reason,
28 the Board finds §17.10.015(3)(B)(iii) noncompliant with those provisions of the Growth
29 Management Act (GMA)(Ch. 36.70A RCW).

1 Second, the new MDP development regulations create a density bonus that could cause the
2 density allowed in a rural MDP to exceed the County's established rural densities. For this
3 reason, §17.60.015(B)(iii)(c) fails to comply with RCW 36.70A.070's requirements with
4 respect to reducing the conversion of undeveloped property into sprawling low-density
5 development in the rural areas and RCW 36.70A.110's requirement to prohibit urban growth
6 outside designated UGAs.
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9 As to the update and revision of the County's critical areas ordinance, the Board finds that
10 the Petitioner failed to meet its burden with respect to any of its challenges. It is the
11 Petitioner's burden to show that the science in the record is inadequate – to show where
12 and how the best available science is missing, by analyzing what is in the record and
13 presenting the science Petitioner alleges has not been included. Petitioner did not
14 overcome the presumption of validity regarding wetlands regulations because it only
15 provided assertions unsupported by science.
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18 Petitioner also failed to meet its burden on challenges to the compliance of regulations to
19 protect fish and wildlife habitat conservation areas (FWHCAs). The Board finds that
20 Petitioner relied upon an initial set of comments from the Washington Department of Fish
21 and Wildlife (WDFW) without addressing the County's response to those comments.
22

23 With respect to the Shaw Family LLC property designation and map change, the Board
24 finds this is a comprehensive plan amendment and thus subject to Board jurisdiction. To be
25 consistent with the Mason County comprehensive plan, the amendment changing the
26 designation of the Shaw Family property from Long Term Commercial Forest (LTCF) to In
27 Holding Land must conform to the comprehensive plan policies for such a change. Those
28 plan provisions require the applicant to demonstrate that no reasonable use of the property
29 is possible under the LCTF designation (RE-205(C)); and to demonstrate that the property
30 can no longer be feasibly used for Long Term Commercial Forest Designation to justify a
31 change from LCTF designation to In Holding (RE- 206). The Board finds that the County
32

1 failed to address those comprehensive plan policies (RE-205(C) and RE-206) as required
2 by the terms of those plan policies and therefore is not consistent with them.

3 4 **II. PROCEDURAL HISTORY**

5 The Petition for Review in this case challenges three ordinances: Mason County Ordinance
6 112-06, adopted on November 7, 2006, that amended development regulations applicable
7 to master development plans (MDPs); Mason County Ordinance 138-06, adopted
8 December 7, 2006, that amended the County's Resource Ordinance; and Mason County
9 Ordinance 139-06, adopted December 27, 2006, that amended the Future Land Use Map of
10 the comprehensive plan by a designation change requested by the Shaw Family. The
11 Shaw Family are Intervenors in this case.

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14 Notice of the adoption of all three ordinances was published on January 11, 2007. The
15 Petition for Review was filed February 20, 2007. The petition was filed by Advocates for
16 Responsible Development (ARD) and John E. Diehl.

17
18 A Prehearing Conference was held telephonically on April 3, 2007. John E. Diehl
19 represented the Petitioners. Deputy Prosecuting Attorney T.J. Martin represented Mason
20 County.

21
22 Subsequently, the Shaw Family LLC moved to intervene in the case and requested to
23 conduct discovery on the issue of whether Advocates for Responsible Development is "a
24 bona fide association."¹ The Board granted the motion for intervention.² However, the
25 Board denied the motion for discovery because there was no showing that the discovery
26 sought would be necessary to deciding the issue of standing to bring the petition since
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30 _____
31 ¹ Motion to Intervene and For Discovery, April 6, 2007.

32 ² Order Granting Intervention to the Shaw Family LLC, April 16, 2007. The Intervenor objected to the condition in the Order Granting Intervention that by Intervenor status the Intervenor was not granted the right to participate in any settlement discussions between the parties. Objection to Condition of Order Granting Intervention, April 20, 2007. This objection was noted.

1 standing for an “entity of any character” is granted to one who has participated orally or in
2 writing before the County in adopting the challenged ordinances by RCW 36.70A.280(3).³

3
4 Both Mason County⁴ and the Intervenor⁵ moved to dismiss certain issues based on lack of
5 standing of John E. Diehl, individually, and ARD. Petitioners opposed those motions.⁶ The
6 County challenged the Petitioners’ standing as to Issues 9-14 and 15. Intervenor
7 challenged the Petitioners’ standing as to Issue 15 only (which is the issue pertaining to
8 Intervenor’s property). The Board granted the motions as to Petitioner John E. Diehl, finding
9 that he did not participate in the County’s proceedings in his individual capacity.⁷ The Board
10 denied the motions as to ARD, finding that ARD participated in writing in accordance with
11 RCW 36.70A.280(2)(b). The Board also found that the County did not establish that the
12 written comments submitted by ARD were untimely.⁸

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14
15 Mason County moved for reconsideration of the Order on Standing.⁹ Reconsideration was
16 denied because the Board’s order on standing was not final (thus not a proper subject for a
17 motion for reconsideration under WAC 242-02-832) and the standing issue could be raised
18 further at the hearing on the merits.¹⁰ The Board deems the evidence and argument
19 submitted with and in response to the motion for reconsideration of its decision on standing
20 to be part of the hearing on the merits. The issue of standing is therefore discussed below
21 under Board Discussion.
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27 ³ Order Denying Discovery Request, April 23, 2007.

28 ⁴ Respondent Mason County’s Motion to Dismiss Petitioners’ Petition for Review & Memorandum in Support of
29 Motion to Dismiss, April 25, 2007.

30 ⁵ Motion to Dismiss, April 25, 2007.

31 ⁶ Motion for Order Requiring County to Index the Record in Compliance with Order of March 2 and Response
32 Opposing Motions to Dismiss, May 7, 2007.

⁷ Order on Standing, May 21, 2007.

⁸ *Ibid.*

⁹ Mason County’s Motion for Reconsideration Re: Issue No. 15 and Standing, June 1, 2007.

¹⁰ Order Denying County’s Motion for Reconsideration Re: Issue No. 15 and Standing, June 11, 2007.

1 Mason County also moved to dismiss Issue No. 13 based on newly adopted State
2 legislation, SSB 5248, imposing a legislative “moratorium” on changing critical areas
3 regulations as they pertain to agricultural activities.¹¹ The Board granted the motion without
4 prejudice to the Petitioner’s ability to re-file its Petition for Review after the expiration of the
5 legislative delay.¹²
6

7 Finally, Mason County and Intervenor moved to dismiss Issue No. 15 (pertaining to the
8 designation change of the Shaw property) for lack of Board jurisdiction over it.¹³ The Board
9 denied the motion but expressly allowed the County to re-raise the issue with additional
10 evidence.¹⁴ The County submitted a motion to reconsider on this issue and the Board will
11 discuss it below.
12

13
14 The Intervenor objected to materials submitted in Petitioner’s brief that were not part of the
15 County’s Index.¹⁵ However, Intervenor did not specify what documents submitted by
16 Petitioner were outside the record.¹⁶
17

18 Shortly before the hearing on the merits, Intervenor submitted an additional memorandum
19 pertaining to an administrative segregation recorded of the Shaw property.¹⁷ In this
20 memorandum, Intervenor submitted evidence of a property segregation recorded with the
21 Mason County Auditor, arguing that this mooted Issue No. 15.
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23
24 The hearing on the merits was held on July 19, 2007 at Memorial Hall in Shelton,
25 Washington. John Diehl represented ARD. Deputy Prosecuting Attorney T. J. Martin
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27 ¹¹ Respondent Mason County’s Motion to Dismiss Petitioners’ Petition for Review & Memorandum in Support
28 of Motion to Dismiss at 6-7.

29 ¹² Order on Motions to Dismiss Issues 13 and 15, May 22, 2007.

30 ¹³ Respondent Mason County’s Motion to Dismiss Petitioners’ Petition for Review & Memorandum in Support
31 of Motion to Dismiss at 6.

32 ¹⁴ Order on Motions to Dismiss Issues 13 and 15, May 22, 2007.

¹⁵ Notification of Objection to Additional Materials, June 21, 2007.

¹⁶ *Ibid.*

¹⁷ Supplemental Memorandum of Intervenor, July 16, 2007.

1 represented Mason County, assisted by Robert Fink, Steve Goins, and Allen Borden of the
2 County's planning staff. All three board members attended, Margery Hite presiding.
3 At the hearing on the merits, Petitioner objected to the last submission from Intervenor and
4 the document attached to it as being late and not within the briefing schedule. The Board
5 allowed Intervenor's memorandum because Intervenor had notified the Board of scheduling
6 problems due to counsel's planned vacation. Petitioner also objected to proposed Exhibit I-
7 1 as irrelevant and representing an action that took place months after the adoption of the
8 challenged ordinance. The Board agrees that the administrative segregation occurred after
9 the ordinance was adopted but will admit it and give it the appropriate weight as to the
10 questions in Issue No. 15.
11

12
13 In response to the objection from Intervenor to exhibits submitted by the Petitioner that were
14 not in the Index to the Record, Petitioner stated that the exhibits were from the record in
15 WWGMHB Case No. 95-2-0073. ARD pointed to the Index to the Record where the County
16 had a heading entitled "The record of Growth Management Hearings Board Case Number
17 95-2-0073". The County disagreed that it had put the entire record of WWGMHB Case No.
18 95-2-0073 into the record in this case, but had no objection to the consideration of those
19 documents. The Board finds that the entire record in WWGMHB Case No. 95-2-0073 was
20 not part of the Index to the Record in this case but that Petitioner reasonably misunderstood
21 the Index to include the old case record. Therefore, Exhibit 801 could have been submitted
22 as an exhibit. However, Petitioner must do more than just list an exhibit to put it before the
23 Board as evidence. To be considered by the Board, an exhibit must be cited with
24 reasonable particularity in the brief, giving the Board the parts of the exhibit (if too lengthy to
25 produce in its entirety) that are relevant and the reasons for that in the argument. Petitioner
26 foot-notes Index 801 as "this publication" by the Department of Ecology, without providing
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1 the name or date of the publication, let alone the applicable pages.¹⁸ This is not a sufficient
2 means to put evidence before the Board.

3
4 Exhibit 180 was listed in the present Index and is therefore admissible.

5
6 Petitioner also submitted only 2 pages of Exhibit 43 – a letter that is unidentified in those 2
7 pages and, being only 5 pages in length, should have been submitted in its entirety as an
8 exhibit to Petitioner’s brief. Petitioner agreed to supply the Board with a complete copy of
9 Exhibit 43, which was provided on July 24, 2007. In response to Board questions, the
10 County submitted the documents showing the County’s process in adopting the challenged
11 ordinance from June through December 2006, after the hearing on the merits.
12

13 **III. BURDEN OF PROOF**

14 For purposes of board review of the comprehensive plans and development regulations
15 adopted by local government, the GMA establishes three major precepts: a presumption of
16 validity; a “clearly erroneous” standard of review; and a requirement of deference to the
17 decisions of local government.
18

19
20 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
21 amendments to them are presumed valid upon adoption:

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

25 RCW 36.70A.320(1).

26
27 The statute further provides that the standard of review shall be whether the challenged
28 enactments are clearly erroneous:

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

¹⁸ Petitioners’ Opening Brief at 8.
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1 RCW 36.70A.320(3)

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

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

17 RCW 36.70A.3201 (in part).

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

25 IV. ISSUES PRESENTED

26 Ordinance No. 112-06

27 1. By allowing waiver of minimal landscaping and open space requirements without any
28 clear criteria by which to maintain compliance with GMA goals and requirements, do
29 §§17.60.012(1) and (2) fail to comply with the GMA goal to retain open space (RCW
30 36.70A.020(9)), as well as, indirectly, the goals to reduce the inappropriate conversion of
31 undeveloped land into sprawling, low density development (RCW 36.70A.020(2)), to
32 conserve productive agricultural and forest lands (RCW 36.700A.020(8)), to conserve fish
and wildlife habitat (RCW 36.70A.020(9)), and to protect the environment (RCW
36.70A.020(10)), and the requirement of RCW 36.70A.040 to adopt DRs (development

1 regulations) to implement a comprehensive plan required by RCW 36.70A.070 to provide for
2 open space?

3 2. By allowing densities equal to the “sum of the maximum densities of the underlying
4 parcels” does §17.60.012(2)(B) fail to comply with RCW 36.70A.070’s requirement to
5 maintain rural character and RCW 36.70A.110’s requirement to confine urban growth to
6 designated UGAs (urban growth areas)?

7 3. By allowing sprawling commercial development along highways and other roads through
8 waiver of density restrictions otherwise applicable to parts of MDPs (master development
9 plans), does §17.60.015(B)(ii) fail to fulfill the GMA goal to avoid urban sprawl and RCW
10 36.70A.110’s requirement to confine urban growth to designated UGAs?

11 4. By allowing administrative discretion to waive criteria for density bonuses for
12 Performance Subdivisions, does §17.60.015(B)(iii)(c) fail to comply with RCW 36.70A.070’s
13 requirement to maintain rural character and RCW 36.70A.110’s requirement to prohibit
14 urban growth outside designated UGAs?

15 5. By not requiring that development within MDPs and Fully Contained Communities within
16 designated urban growth areas be contingent on concurrent development of municipal
17 services and facilities, including public sewer systems, does §17.60.015(3)(S)(i) fail to meet
18 the goals to reduce inappropriate conversion of undeveloped land into sprawling, low
19 density development (RCW 36.70A.020(2)), to conserve productive agricultural and forest
20 lands (RCW 36.70A.020(8)), to retain open space and conserve fish and wildlife habitat
21 (RCW 36.70A.020(9)), to protect the environment (RCW 36.70A.020(10)), and to ensure
22 that those facilities and services necessary to support the development shall be available at
23 the time of occupancy (RCW 36.70A.020(12)), and the requirements of RCW 36.70A.060,
24 36.70A.070, and 36.70A.110?

25 6. By allowing approval of a MDP if the applicant shows no more than that the existing
26 publicly owned treatment plant “can be expanded to treat wastewater generated from
27 Master Development Plan service area and proposed land uses,” does §17.60.015(3)(S)(ii)
28 fail to meet the goals to reduce inappropriate conversion of undeveloped land into
29 sprawling, low density development (RCW 36.70A.020(2)), to conserve productive
30 agricultural and forest lands (RCW 36.70A.020(8)), to retain open space and conserve fish
31 and wildlife habitat (RCW 36.70A.020(9)), to protect the environment (RCW
32 36.70A.020(10)), and to ensure that those facilities and services necessary to support the
development shall be available at the time of occupancy (RCW 36.70A.020(12)), and the
requirements of RCW 36.70A.060, 36.70A.070, and 36.70A.110?

7. By allowing approval of lengthy, even century-long development under a MDP, without
regard to intervening advancement of scientific understanding in protection of critical areas,

1 does §17.60.023(1) fail to protect critical areas as required by RCW 36.70A.060 and
2 36.07A.172?

3 8. By allowing a MDP to be modified with only administrative review and without clear
4 criteria for determining which modifications are minor or for determining whether approval
5 should be given, does §17.61.034 fail to protect against administrative discretion being
6 abused to the neglect of the GMA goals to retain open space and conserve fish and wildlife
7 habitat (RCW 36.70A.020(9)), to reduce inappropriate conversion of undeveloped land into
8 sprawling, low density development (RCW 36.70A.020(2)), to conserve productive
9 agricultural and forest lands (RCW 36.70A.020(8)), and to protect the environment (RCW
36.70A.020(10))?

10 **Ordinance 138-06**

11 9. Given that the best available science indicates the need for 300-foot buffers to protect
12 Category I and II wetlands with high habitat function, according to the Department of
13 Ecology, does §17.01.070.E fail to protect wetlands as required by RCW 36.70A.060(2) and
14 RCW 36.70A.172(1) and/or WAC 365-195-920 and interfere substantially with goals of
15 conserving fish and wildlife habitat and protecting the environment (RCW 36.70A.020(9)
and (10))?

16 10. By allowing harvest of 30% of the merchantable trees in a wetlands buffer, does
17 §17.01.070.E.7.d fail to protect wetlands as required by RCW 36.70A.060(2) and
18 36.70A.172(1) and/or WAC 365-195-920 and interfere substantially with goals of conserving
19 fish and wildlife habitat and protecting the environment (RCW 36.70A.020(9) and (10))?

20 11. By reducing buffers on lakes under 20 acres in size do §17.01.110.D.2 and.5 fail to
21 protect fish and wildlife habitat conservation areas as required by RCW 36.70A.060(2) and
22 36.70A.172(1) and/or WAC 365-195-920 and interfere substantially with goals of conserving
23 fish and wildlife habitat and protecting the environment (RCW 36.70A.020(9) and (10))?

24 12. By allowing new construction within buffers for Fish and Wildlife Habitat Conservation
25 Areas based on “common line” setbacks and subject only to planting some native
26 vegetation and a pledge to follow best management practices, does §17.01.110.D.2 fail to
27 protect such critical areas as required by RCW 36.70A.060(2) and 36.70A.172(1) and/or
28 WAC 365-195-920 and interfere substantially with goals of conserving fish and wildlife
habitat and protecting the environment (RCW 36.70A.020(9) and (10))?

29 13. By exempting new agricultural activities within Fish and Wildlife Habitat Conservation
30 Areas or their buffers providing they comply with a conservation plan, does §17.01.110.F.3
31 fail to protect such critical areas as required by RCW 36.70A.060(2) and 36.70A.172(1)
32 and/or WAC 365-195-920 and interfere substantially with goals of conserving fish and
wildlife habitat and protecting the environment (RCW 36.70A.020(9) and (10))?

1 14. By arbitrarily setting the less of a) 40% of the area of the lot, or b) 2,550 square feet as
2 the minimum reasonable use for a residence in a residentially zoned area, does §17.01.150
3 fail to protect critical areas as required by RCW 36.70A.060(2) and 36.70A.172(1) and/or
4 WAC 365-195-920 and interfere substantially with goals of conserving fish and wildlife
5 habitat and protecting the environment (RCW 36.70A.020(9) and (10))?

6 **Ordinance No. 139-06**

7 15. In rezoning land designated as LTCF [long term commercial forest] land without
8 showing that its continued use for the production of timber resources is not reasonable or
9 that it no longer satisfies the criteria for designation as LTCF land, has the County in
10 Ordinance 139-06 failed to maintain the internal consistency of its Comprehensive Plan and
11 Future Land Use Map required by RCW 36.70A.070 and does its action interfere
12 substantially with the goal of conserving productive forest lands and discouraging
13 incompatible uses (RCW 36.70A.020(8))?

14 **V. DISCUSSION**

15 **Standing.** While the Board denied the motions of the County and Intervenor to dismiss
16 Issue Nos. 9-14 for lack of standing by ARD prior to the hearing on the merits, standing is
17 an issue that must be established in every case – whether through the unchallenged
18 assertions in the Petition for Review or by a decision on argument based on facts in the
19 record. The Board will therefore consider the arguments of the County and Intervenor on
20 reconsideration. Petitioner ARD disputes the allegations and conclusions drawn by the
21 County and the Intervenor.¹⁹

22
23 The County claims that the date for adoption of amendments to the County's critical areas
24 ordinance (Ordinance 138-06) was advertised for two weeks prior to the public hearing to
25 adopt those amendments - November 28, 2006.²⁰ At the November 28, 2006 hearing, an
26 oral motion was made to hold open the written comment period to December 12 and to set
27 a new public hearing for December 19, 2006.²¹ ARD's comments were not submitted until
28 December 19, 2006 (all parties agree on this date). Therefore, the County argues, the
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30

31 ¹⁹ Response to County's Motion for Reconsideration, June 6, 2007.

32 ²⁰ Declaration of Robert Fink in Support of Mason County's Motion for Reconsideration, June 1, 2007 at ¶ 10.

²¹ *Ibid* at ¶ 12 and 13.

1 Petitioner's comments were submitted after the written comment period and cannot be a
2 basis for asserting standing in this case.

3
4 Petitioner responds, among other things, that the County's web-site has standing
5 instructions for testimony at public hearings that directs the speaker to bring copies of
6 written testimony.²² Therefore, Petitioner argues, it is "arbitrary and capricious" for the
7 County to accept oral comments but not written comments.²³ Petitioner argues that, under
8 the County's interpretation, it would have had standing if it had handed in its written
9 comments on December 19, 2006 at the public hearing but not if it had (as it did) faxed
10 them in on December 19th.

11
12
13 In our Order on Standing, the Board focused on the lack of evidence that the limitation on
14 the written comment period (December 12 rather than the public hearing date of December
15 19) was well-publicized. The County has responded by pointing out that the publicized
16 date for all comment was November 28 and that the extension of the written comment
17 period to December 12 was publicly announced at the time that the public hearing date was
18 extended to December 19. ARD replies that it should be able to submit written comments
19 when oral comments may be submitted (which was December 19), particularly since the
20 Mason County web-site "standing" instructions as to oral testimony include a direction to
21 bring a written copy.

22
23
24 The GMA puts a strong emphasis on public participation in the process of adopting
25 comprehensive plans and development regulations. RCW 36.70A.140 requires counties
26 and cities to adopt public participation programs to ensure "early and continuous"
27 opportunities for public participation. RCW 36.70A.035 provides for public notice to ensure
28 that the public is aware of up-coming legislative decision-making. Goal 11 of the GMA calls
29 for:
30

31
32 ²² Response to County's Motion for Reconsideration at 2.

²³ *Ibid*

1 Citizen participation and coordination. Encourage the involvement of citizens in the
2 planning process and ensure coordination between communities and jurisdictions to
3 reconcile conflicts.

4 RCW 36.70A.020(11).

5 In keeping with these goals and requirements, the GMA provides that any citizen can bring
6 a petition to the growth hearings boards if that citizen has participated orally or in writing in
7 the public process and provided comments “regarding the matter on which a review is being
8 requested.”²⁴ The point of this provision is to ensure that a person with concerns regarding
9 pending legislation raises them to the local jurisdiction first, before taking recourse to the
10 boards. This gives the local government the opportunity to correct an error in GMA
11 compliance, if there was one.

12
13 Last minute comments hardly give the local jurisdiction a chance to correct. An appropriate
14 public participation program would give time both for public comments and for a response to
15 them. Therefore, the Board does not find it unreasonable for a local jurisdiction to set a
16 deadline for comments prior to taking final action, provided that deadline is well-publicized,
17 reasonable in light of the legislation in view and the interests involved, and is designed to
18 encourage rather than limit public input (by, for instance, setting an additional public hearing
19 for that purpose). We do not agree with Petitioner that the GMA entitles it to bring its
20 comments at the last minute. The statute calls for “participation” which implies genuine
21 interaction rather than just submitting comments when the time to respond to them
22 effectively has passed.

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26 However, we continue to find that the question of when written comments could be
27 submitted in this case was confusing. There was an oral announcement at the November
28 28th public hearing of a new period for written comments and a different date of December
29 19 for the public hearing where apparently oral comments could still be offered. This was
30 not a sufficiently clear notice to apprise a reasonably attentive member of the public that he
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²⁴ RCW 36.70A.280(2)(b).
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1 or she could not submit written comments for the December 19 public hearing. Here, ARD
2 submitted written comments on December 19 and the County considered them. A
3 memorandum dated December 22, 2006 was prepared by the County's consultants
4 responding to the comments received by ARD and also those of the Olympia Master
5 Builders.²⁵ The County should be commended for acting in good faith with respect to all the
6 comments it received.
7

8 **Conclusion:** Petitioner ARD has standing to raise all the challenges in the Petition for
9 Review pursuant to RCW 36.70A.280(2)(b) because it submitted written comments within
10 the timeframe it reasonably understood to be open for comment. Petitioner John E. Diehl
11 lacks standing because he did not participate in his personal capacity but only as a
12 representative of ARD. The Order on Standing, May 21, 2007 is incorporated by reference
13 in the decision on this issue.
14

15 **Challenges to Ordinance 112-06 – Master Planned Developments (MDPs)**

16 **Issue No. 1:** By allowing waiver of minimal landscaping and open space requirements
17 without any clear criteria by which to maintain compliance with GMA goals and
18 requirements, do §§17.60.012(1) and (2) fail to comply with the GMA goal to retain open
19 space (RCW 36.70A.020(9)), as well as, indirectly, the goals to reduce the inappropriate
20 conversion of undeveloped land into sprawling, low density development (RCW
21 36.70A.020(2)), to conserve productive agricultural and forest lands (RCW 36.700A.020(8)),
22 to conserve fish and wildlife habitat (RCW 36.70A.020(9)), and to protect the environment
23 (RCW 36.70A.020(10)), and the requirement of RCW 36.70A.040 to adopt DRs
24 (development regulations) to implement a comprehensive plan required by RCW
25 36.70A.070 to provide for open space?

26 **Positions of the Parties**

27 Petitioner argues that by allowing the County to modify any of the standards associated with
28 lot size, setbacks, landscaping and similar requirements without criteria, MCC
29
30
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32 ²⁵ December 22, 2006 Memorandum from Lisa A Berntsen to Bob Fink submitted by County post-hearing as part of the December 27, 2006 Staff Report.

1 §17.60.010(1)(A) grants “unbridled discretion” to County officials.²⁶ They also argue that
2 MCC 17.60.010(1)(B) grants similar discretion to the planning officials without clear criteria.
3 This, they assert, allows “loopholes by which administrative discretion may vitiate the
4 purposes of the Act” because there is no assurance that the comprehensive plan provisions
5 for open space will be implemented.²⁷
6

7 The County responds by pointing out that an express purpose of Ordinance 112-06 is to
8 create and enhance additional open space.²⁸ The County urges that the lot size, width,
9 setback and landscaping standards referenced by Petitioner are not open space in the first
10 place, and that the MDP regulations enhance rather than reduce existing open space
11 requirements.²⁹
12

13 **Board Discussion**

14 §17.60.010 of the development regulations adopted for MDPs states that one of the
15 “primary purposes” of the MDP is:
16

17 To encourage the permanent preservation of open space, wildlife habitat, riparian
18 corridors, and other critical areas, including aquifer recharge areas, geologically
19 hazardous areas, wetlands, frequently flooded areas, watercourses, lakes and
20 cultural resources in a manner that is consistent with Mason County’s
21 Comprehensive Plan and Master Trail Plan.³⁰

22 The submittal and review requirements of §17.60.015(F) require common open space for a
23 MDP³¹ within an urban growth area (UGA) and require it to be predominately located in
24 large contiguous, undivided areas with no dimensions less than 30 feet³² and that the
25 amount of open space shall equal at least 200 square feet per single family residential
26

27
28 ²⁶ Petitioners’ Opening Brief at 1-2.

29 ²⁷ *Ibid* at 2.

30 ²⁸ Mason County’s Prehearing Brief at 5 citing Dev. Reg. 17.60.010.

31 ²⁹ *Ibid*.

32 ³⁰ 17.60.010(5)

³¹ The Board here uses the acronyms for MDPs as if they were written out as “master development plans” and the article “a” instead of “an”, accordingly.

³² 17.60.015(F)(i)(a)

1 unit.³³ Outside of UGAs³⁴, the requirements for common open space are that it constitute at
2 least 65% of the gross land area of the MDP and be located in large contiguous, undivided
3 areas with no dimensions less than 50 feet.³⁵ The standards for common open space (and
4 private open space in MDPs within a UGA) are spelled out in detail in the MDP ordinance.³⁶
5

6 Clearly the standards for open space in the MDP development regulations are specific and
7 provide guidance to the reviewing County officials on how open space requirements should
8 be met. The County has chosen to offer flexibility to the designers of a MDP in terms of lot
9 size, landscaping and similar features in part, at least, to offset the open space requirement
10 of a MDP. The regulations on open space applicable to MDPs (17.60.015(F)(i), (ii) and (iii);
11 17.60.015(G)) are clear and promote open space.³⁷ There is no showing that the MDP as a
12 whole fails to implement any comprehensive plan provision on open space – indeed, no
13 such plan provision has even been cited.
14
15

16 **Conclusion:** The provisions of §17.60.010(1)(A) and 17.60.010(1)(B) taken in light of the
17 entire ordinance do not fail to comply with Goals 2, 8, 9 or 10 of the GMA. Petitioner has
18 further failed in its burden to show that these code provisions violate the requirements of
19 RCW 36.70A.070 to implement any open space provisions in the Mason County
20 comprehensive plan.
21

22
23 **Issue No. 2** By allowing densities equal to the “sum of the maximum densities of the
24 underlying parcels” does §17.60.012(2)(B) fail to comply with RCW 36.70A.070’s
25 requirement to maintain rural character and RCW 36.70A.110’s requirement to confine
26 urban growth to designated UGAs (urban growth areas)?
27

28 ³³ 17.60.015(F)(i)(d)

29 ³⁴ Again, the Board uses the acronym “UGA” as if it were written out - “urban growth area” - and the article
30 “an”, accordingly.

31 ³⁵ 17.60.015(F)(ii)

32 ³⁶ 17.60.015(F)(i), (ii) and (iii); 17.60.015(G)

³⁷ Petitioner failed to cite to any comprehensive plan policy on open space, in spite of claiming that the MDP ordinance fails to implement such plan provisions. It is Petitioner’s burden to properly cite to the basis of its claim.

1 **Positions of the Parties**

2 Petitioner argues that §17.60.012(2)(B) allows a developer to double the densities otherwise
3 allowed on his land by making it part of a MDP.³⁸ Because the regulation allows densities
4 equal to the “sum of the maximum densities of the underlying parcels”, Petitioner argues,
5 the result could be to allow higher densities in the rural part of the MDP than are allowed
6 anywhere in the UGA itself.³⁹ This would fail to maintain rural character as required by
7 RCW 36.70A.070 or to prohibit urban growth outside designated UGAs as required by RCW
8 36.70A.110, Petitioner claims.⁴⁰

10
11 The County responds that the maximum density allowance does not change with property
12 developed under a MDP.⁴¹ The MDP regulations prohibit maximum density outside of an
13 UGA, the County asserts, so that the hypothetical developer who developed a MDP across
14 both the rural areas and an UGA “would be restricted to the sum of the maximum density
15 allowed of that rural area.”⁴²

16
17 **Board Discussion**

18 §17.60.012(2)(B) comes under the heading of “Codes and Regulations that may not be
19 modified” and provides as follows:

20
21 Development Density. The maximum density of a project is the sum of the maximum
22 densities of the underlying parcels at the time of the MDP application, except for the
23 provisions of Section 17.60.015(30)(B)(iii) Bonus Density. For parcels within the MU
24 Zoning District of the Belfair Urban Growth Area and the VC Zoning District of the
25 Allyn Urban Growth Area, the MDP shall include a residential density ranging from
26 three to fifteen (3-15) units per acre for those portions of the proposed development.

27 At argument, the County explained that the sum of the maximum densities would be
28 calculated by adding together the maximum densities allowed on each parcel, e.g. a 100-

29
30 _____
31 ³⁸ Petitioners’ Opening Brief at 2.

32 ³⁹ *Ibid* at 2-3.

⁴⁰ *Ibid* at 3.

⁴¹ Mason County’s Prehearing Brief at 6.

⁴² *Ibid* at 7.

1 acre parcel zoned at one dwelling unit per twenty acres would have a maximum density of 5
2 units. Petitioner appeared to understand this regulation as allowing the ratio of densities to
3 be added together.

4
5 Petitioner's interpretation of this section is possible but raises many additional questions of
6 how the math might be done – how are ratios added together and when? The County's
7 interpretation is readily applied and yields the total number of dwelling units that may be
8 constructed in a given MDP by adding the maximum number of units that may be developed
9 on each parcel together to get the maximum number of units that may be developed on the
10 parcel as a whole MDP. The Board will defer to the County's interpretation of its own code
11 when such interpretation is reasonable. However, the County may wish to consider some
12 clarifying language to respond to Petitioner's confusion.

13
14
15 **Conclusion:** §17.60.012(2)(B) does not alter the densities of the underlying parcels but
16 simply allows the developer to utilize each unit derived from computing the maximum
17 underlying density over the area of the MDP as a whole. §17.60.012(2)(B) complies with
18 RCW 36.70A.070 on rural character⁴³ and RCW 36.70A.110 on confining urban growth to
19 urban areas.

20
21
22 **Issue No. 3:** By allowing sprawling commercial development along highways and other
23 roads through waiver of density restrictions otherwise applicable to parts of MDPs (master
24 development plans), does §17.60.015(B)(ii) fail to fulfill the GMA goal to avoid urban sprawl
25 and RCW 36.70A.110's requirement to confine urban growth to designated UGAs?

26 **Positions of the Parties**

27 Petitioner asserts that §17.60.015(B)(ii)⁴⁴ allows sprawling commercial development along
28 roads by allowing a developer to extend the density allowed in a LAMIRD or UGA to an
29 _____

30
31 ⁴³ Compliance with rural character is dependent upon the description of rural character established by each
32 county. RCW 36.70A.070(5)(c). Again, Petitioner has failed to cite to any comprehensive plan provisions, this
time relating to Mason County's rural character.

⁴⁴ The quoted provision appears to be 17.60.015(3)(B)(ii) under "Review Criteria".

1 adjoining rural area.⁴⁵ Petitioner argues that densities might be shifted to concentrate
2 relatively dense development along a highway where it would be more profitable to a
3 developer but would allow rural highways to become lined with development.⁴⁶
4

5 The County responds that the density of development in a MDP is based on the underlying
6 zone. "No section within the GMA prohibits commercial development along highways and
7 other roadways."⁴⁷ The County stresses the development in a UGA will be more intense
8 than that in a rural area, but concedes that there is nothing preventing an MDP from
9 "straddling" the boundaries between rural areas and UGAs.⁴⁸ However, the County also
10 states that urban uses cannot be shifted into the rural areas where an urban uses requires
11 urban levels of service.⁴⁹
12

13 **Board Discussion**

14 §17.10.015(3)(B)(iii) establishes the ability of uses and densities to shift within the
15 boundaries of a MDP:
16

17 When an MDP is located in more than one zoning district, uses and density may shift
18 between zoning districts within the boundaries of the MDP if that transfer does not
19 exceed the maximum density of the zone and results in a project that better meets
20 the goals and policies of the Comprehensive Plan.
21

22 The County concedes that there is no regulation to prevent a MDP from encompassing both
23 rural and urban lands. When asked by the Board if the developer of a MDP could move
24 uses and densities from the portion of the MDP in the UGA to areas outside the UGA, the
25 County agreed that would be possible.
26

27 New urban uses and densities are not allowable outside of UGAs. RCW 36.70A.110(1)
28 provides that growth may only occur outside of UGAs "if it is not urban in nature." Allowing
29

30 ⁴⁵ Petitioners' Opening Brief at 3.

31 ⁴⁶ *Ibid.*

32 ⁴⁷ Mason County's Prehearing Brief at 7.

⁴⁸ *Ibid.*

⁴⁹ Argument at the Hearing on the Merits.

1 a MDP to extend urban uses and densities from the UGA portion of the MDP into the rural
2 lands of the MDP would extend urban growth outside of the UGA without a determination
3 that a shift in the UGA boundary was appropriate due to an overall need to expand the
4 amount of urban lands (as required by RCW 36.70A.110). This would be a particular
5 concern where there are lands within an UGA which are non-developable (critical areas, for
6 instance) which could be included in a MDP so that the densities and uses that are allowed
7 in the UGA could be transferred to rural lands. Such an outcome would violate RCW
8 36.70A.110.
9

10
11 Petitioner argues that the same thing is true with respect to limited areas of more intensive
12 rural development (LAMIRDs).⁵⁰ That is, §17.10.015(3)(B)(iii) allows a developer to move
13 the more intensive rural densities and uses from a LAMIRD to a rural area, thus failing to
14 minimize and contain LAMIRDs as required by RCW 36.70A.070(5)(d)(iv).
15

16 The majority of LAMIRDs in Mason County are very small in size.⁵¹ AMDP in a rural area
17 must be at least 250 acres in size.⁵² Therefore, the likelihood of a transfer of many uses
18 and densities within a rural MDP is very slight. Nevertheless, the requirements of RCW
19 36.70A.070(5)(iv) for LAMIRDs are very express. Without meeting those criteria, the
20 establishment of uses and densities that are more than rural in intensity fails to “minimize
21 and contain” LAMIRDs, as required by RCW 36.70A.070(5)(d)(iv).
22
23

24 **Conclusion:** To the extent that 17.10.015(3)(B)(iii) allows a developer to place urban
25 densities and urban uses on rural lands, it fails to comply with RCW 36.70A.110(1). To the
26 extent that §17.10.015(3)(B)(iii) allows the densities and intensities in an established
27 LAMIRD to be extended outside the LAMIRD boundaries without meeting the criteria of
28 RCW 36.70A.070(5)(d), it fails to comply with RCW 36.70A.070(5)(d)(iv).
29
30

31 ⁵⁰ Petitioners' Opening Brief at 3.

32 ⁵¹ Dawes v. Mason County, WWGMHB Case No.96-2-0023 (Compliance Order, November 12, 2003)

⁵² 17.60.011(2)(B).

1 **Issue No. 4:** By allowing administrative discretion to waive criteria for density bonuses for
2 Performance Subdivisions, does §17.60.015(B)(iii)(c)⁵³ fail to comply with RCW
3 36.70A.070's requirement to maintain rural character and RCW 36.70A.110's requirement to
4 prohibit urban growth outside designated UGAs?

5 **Positions of the Parties**

6 Petitioner argues that the criteria for granting the density bonuses "are phrased so vaguely
7 that neither the applicant nor anyone else can determine in advance whether and how much
8 of a density will be allowed."⁵⁴ This, ARD alleges, fails to comply with the requirement to
9 maintain rural character in RCW 36.70A.070 or the requirement to prohibit urban growth
10 outside designated UGAs in RCW 36.70A.110.

11 The County responds that this allowable increase is allowed only for urban areas, must be
12 accompanied by an increase in the required open space, and is limited by the maximum
13 residential density allowed in the Mason County Development Regulations.⁵⁵

14 **Board Discussion**

15 §17.60.015(3)(B)(iii)(c) allows the County Commissioners to approve a residential density
16 bonus in a MDP if:

- 17 • The design of the development offsets the impact of the increase in density
18 due to provision of privacy, open space, landscaping, and other amenities; and
- 19 • The increase in density is compatible with existing uses in the immediate
20 vicinity of the subject property.

21 §17.60.015(3)(A)(iii)(a) provides that a developer can request a bonus in the number of
22 dwelling units, allowing up to the Maximum Density allowed in the Mason County
23 Development regulations.

24
25
26
27
28
29
30
31 ⁵³ It appears that this is a citation to 17.60.015(3)(B)(iii)

32 ⁵⁴ Petitioners' Opening Brief at 4.

⁵⁵ Mason County's Prehearing Brief at 8.

1 The Board finds that §17.60.015(3)(A)(iii)(a) read with the criteria in §17.60.015(3)(B)(iii)(c)
2 are sufficiently vague as to appear to create a density bonus that would cause the density
3 allowed in a rural MDP to exceed the County's established rural densities. Allowing urban
4 densities or suburban densities in a MDP fails to comply with the GMA requirements for
5 urban growth to be located in urban growth areas (RCW 36.70A.110); and for rural areas to
6 reduce the inappropriate conversion of undeveloped land into sprawling low-density
7 development in the rural area (RCW 36.70A.070(5)(c)(iii)). Clarification that the density
8 bonus would not allow the residential density in a rural MDP to exceed the County's
9 maximum rural density would address this issue.
10
11

12 **Conclusion:** §17.60.015(B)(iii)(c) fails to comply with RCW 36.70A.070's requirements with
13 respect to sprawling low-density development in the rural areas and RCW 36.70A.110's
14 requirement to prohibit urban growth outside designated UGAs.
15

16 **Issue No. 5:** By not requiring that development within MDPs and Fully Contained
17 Communities within designated urban growth areas be contingent on concurrent
18 development of municipal services and facilities, including public sewer systems, does
19 §17.60.015(3)(S)(i) fail to meet the goals to reduce inappropriate conversion of undeveloped
20 land into sprawling, low density development (RCW 36.70A.020(2)), to conserve productive
21 agricultural and forest lands (RCW 36.70A.020(8)), to retain open space and conserve fish
22 and wildlife habitat (RCW 36.70A.020(9)), to protect the environment (RCW
23 36.70A.020(10)), and to ensure that those facilities and services necessary to support the
24 development shall be available at the time of occupancy (RCW 36.70A.020(12)), and the
25 requirements of RCW 36.70A.060, 36.70A.070, and 36.70A.110?

26 **Issue No. 6:** By allowing approval of an MDP if the applicant shows no more than that the
27 existing publicly owned treatment plant "can be expanded to treat wastewater generated
28 from Master Development Plan service area and proposed land uses," does
29 §17.60.015(3)(S)(ii) fail to meet the goals to reduce inappropriate conversion of
30 undeveloped land into sprawling, low density development (RCW 36.70A.020(2)), to
31 conserve productive agricultural and forest lands (RCW 36.70A.020(8)), to retain open
32 space and conserve fish and wildlife habitat (RCW 36.70A.020(9)), to protect the
environment (RCW 36.70A.020(10)), and to ensure that those facilities and services
necessary to support the development shall be available at the time of occupancy (RCW
36.70A.020(12)), and the requirements of RCW 36.70A.060, 36.70A.070, and 36.70A.110?

1 **Positions of the Parties**

2 Petitioner urges that §17.60.015(3)(S)(i) fails to require that connection to public sewer be
3 made at the time of occupancy.⁵⁶ Petitioner argues that the applicant for a MDP in an UGA
4 is required to show that the treatment plant has adequate capacity to handle the MDP; that
5 the collection system has adequate capacity to convey the wastewater generated by the
6 MDP; and “a sewer availability certificate” from the recognized public utility purveyor.⁵⁷
7 However, Petitioner points out, none of these requirements actually requires sewer to be
8 connected at the time of occupancy.⁵⁸ It is not enough, Petitioner argues, to determine that
9 the existing publicly owned treatment plan could be expanded – that is no guarantee that
10 the treatment plant will be expanded to provide adequate capacity at the time the
11 development is occupied.⁵⁹

12
13
14 The County responds by referring the Board to §17.60.015(3)(S)(i) and (ii).⁶⁰ This concept,
15 the County argues, confirms the premise that “growth pays for growth” and achieves
16 concurrency.⁶¹

17
18 **Board Discussion**

19 RCW 36.70A.110 and Goal 12 (RCW 36.70A.020(12)) require urban levels of service at the
20 time of urban levels of development. 17.60.015(3)(S)(i) does not require urban levels of
21 service at the time of occupancy but, the County urged at the hearing on the merits, this
22 development regulation only pertains to one part of the MDP approval process.⁶²
23
24
25
26

27 ⁵⁶ Petitioners’ Opening Brief at 4.

28 ⁵⁷ *Ibid* at 5.

29 ⁵⁸ *Ibid*.

30 ⁵⁹ *Ibid* at 6.

31 ⁶⁰ Mason County’s Prehearing Brief at 9.

32 ⁶¹ *Ibid*.

⁶² After the hearing on the merits, the County provided the Board with a form certificate of sewer availability. However, this form does not require public sewer availability within a UGA but is also submitted when on-site sewer will be utilized.

1 The County states that it anticipates that MDPs will be built out over time. The MDP
2 regulations regarding connection to public sewer depend upon the Implementing Site
3 Development Plan (ISD Plan), which is described in Chapter 17.61 of the MDP development
4 regulations. An ISD Plan is required to implement all or any phase of an approved MDP.⁶³

5 The MDP Development Regulations provide:
6

7 Approval of an ISD Plan is required prior to filing a final plat, or issuance of any
8 building permit on land that is subject to an approved Master Development Plan. The
9 ISD Plan must be consistent with the MDP.⁶⁴

10 The ISD Plan must include a preliminary plan indicating the size and general location of
11 sewer collection piping and connection or extensions of existing facilities, lift station plan,
12 manhole locations, and onsite treatment plan, if applicable.⁶⁵ The Review Guidelines further
13 provide as a criteria that “Adequate public services and facilities necessary to accommodate
14 the proposed use and density are or can be made available.”⁶⁶ Approval of the ISD Plan
15 requires a finding that, among others, “[A]dequate utilities, roadway improvements,
16 sanitation, water supply, and drainage are available.”⁶⁷ Further, the County may not issue a
17 Certificate of Occupancy until all improvements included in the approved ISD Plan have
18 been installed and approved unless a performance guarantee has been posted for
19 improvements not yet completed or the “phasing of improvements has been accounted for
20 in an infrastructure phasing agreement, a condition of approval or a development
21 agreement.”⁶⁸
22
23

24 Taken together, the Board cannot conclude that the County’s approach to public sewer for a
25 MDP in an UGA is clearly erroneous. The MDP requirements do not allow urban
26 development without urban services since the ISD Plan requires that the public sewer
27

28
29 _____
30 ⁶³ 17.61.026

31 ⁶⁴ 17.61.026 at p. 17.61-2.

32 ⁶⁵ 17.61.028(G)

⁶⁶ 17.61.029(C)

⁶⁷ 17.61.031(4).

⁶⁸ 17.61.033

1 agreements for the MDP be implemented before a building permit can be issued. While it
2 would improve the development regulations to expressly provide that no urban development
3 in an UGA will be permitted unless connected to public sewer at the time of occupancy, we
4 cannot say that this is not covered by the ISD provisions in Ordinance 112-06.
5

6 **Conclusion:** Petitioner has failed to demonstrate that the development regulations
7 applicable to MDPs inside a UGA will not ensure urban levels of service at the time of
8 occupancy. §17.60.015(3)(S)(i) and (ii) are not stand-alone regulations but must be read
9 together with the rest of the development regulations for MDPs, especially the ISD Plan
10 requirements. Petitioner has failed to show that §17.60.015(3)(S)(i) and (ii) do not comply
11 with RCW 36.70A.060, 36.70A.070, and 36.70A.110 or Goals 2, 8, 9, 10 and/or 12 of the
12 GMA.
13

14
15 **Issue No. 7:** By allowing approval of lengthy, even century-long development under an
16 MDP, without regard to intervening advancement of scientific understanding in protection of
17 critical areas, does §17.60.023(1) fail to protect critical areas as required by RCW
18 36.70A.060 and 36.07A.172?

19 **Positions of the Parties**

20 Petitioner argues that §17.60.023(1) fails to protect critical areas because it allows a MDP to
21 be built over an unlimited period of time without taking into account progress in science that
22 may be needed to illuminate protections needed for critical areas.⁶⁹
23

24 The County responds that the master development planning process was initiated to
25 support long-term, comprehensive planning of large parcels of land.⁷⁰ Because large sites
26 typically take a long time to develop, the approval of a MDP is effective for up to 15 years
27
28
29
30

31 ⁶⁹ Petitioners' Opening Brief at 6. Petitioner also argues in this issue that this provision does not ensure
32 concurrency. However, that allegation is outside the scope of this issue and will not be considered here.

⁷⁰ Mason County's Prehearing Brief at 9.

1 pursuant to 17.60.023.⁷¹ Avoidance of a “moving target” of best available science is part of
2 the vesting doctrine, the County urges.⁷²

3
4 **Board Discussion**

5 §17.60.023(1) provides:

6 Duration of the Master Development Plan. Approval of a MDP shall be effective for
7 up to 15 years; however, the Board may extend the approved MDP time limit at the
8 time of approving the MDP if an agreement is entered into with the applicant
9 approving the MDP for a period longer than 15 years.

10 The provision does not allow for repeated extensions of the 15 year development period but
11 does allow the County to make a case-by-case determination at the time of approval that a
12 particularly large or complicated MDP might be effective for a specified period greater than
13 15 years. As the County points out, approved applications vest to the regulations in effect
14 at the time of approval so that the developer knows what the requirements will be and can
15 plan accordingly. The Board does not find that the reservation to the County of the ability
16 to grant an effective period longer than 15 years at the time of approval of the application is
17 clearly erroneous and non-compliant with RCW 36.70A.060 and 36.07A.172 for failing to
18 protect critical areas.

19
20
21 **Conclusion:** The County has discretion to balance the possibility of new scientific
22 understandings of critical areas against the need for predictability in developing large
23 parcels under a MDP. Petitioner has failed to demonstrate that §17.60.023(1) is clearly
24 erroneous and fails to comply with RCW 36.70A.060 and 36.07A.172.

25
26
27 **Issue No. 8:** By allowing a MDP to be modified with only administrative review and without
28 clear criteria for determining which modifications are minor or for determining whether
29 approval should be given, does §17.61.034 fail to protect against administrative discretion
30 being abused to the neglect of the GMA goals to retain open space and conserve fish and
31 wildlife habitat (RCW 36.70A.020(9)), to reduce inappropriate conversion of undeveloped

32 ⁷¹ *Ibid* at 10.

⁷² *Ibid*.

1 land into sprawling, low density development (RCW 36.70A.020(2)), to conserve productive
2 agricultural and forest lands (RCW 36.70A.020(8)), and to protect the environment (RCW
3 36.70A.020(10))?

4 **Positions of the Parties**

5 Petitioner argues that §17.61.034 fails to provide clear criteria to determine which
6 modifications to a MDP are minor, which are major and which are only minor “departures.”⁷³
7 Petitioner is particularly concerned that §17.61.034 allows serial amendments without public
8 participation.⁷⁴
9

10
11 The County responds that §17.61.034 only describes which types of amendments are major
12 and which are minor. Major amendments, the County states, are a Type II process and
13 require public hearing and notice. Minor amendments, on the other hand, are governed by
14 an administrative process with specific criteria.⁷⁵
15

16 **Board Discussion**

17
18 §17.61.034 describes two ways to amend or modify an approved ISD Plan. Major
19 amendments, requiring a Type II process “with notice”, are described as “a substantial
20 change or modification to the elements of the approved ISD Plan, including changes that
21 require additional environmental review.”⁷⁶ A minor amendment, Type II “No Notice”, is
22 described by 9 criteria.⁷⁷
23

24 Petitioner argued at the hearing on the merits that there is no provision for considering the
25 cumulative effect of minor amendments. At argument, the County stated that all nine criteria
26 needed to be met before an amendment could be considered “minor”. If all nine criteria
27 must be met for an amendment to be treated as “minor”, then the criteria themselves do
28

29
30 ⁷³ Petitioners’ Opening Brief at 6.

31 ⁷⁴ *Ibid* at 7.

32 ⁷⁵ Mason County’s Prehearing Brief at 12.

⁷⁶ §17.61.034(1).

⁷⁷ §17.61.034(2)

1 address cumulative impacts. Provided change is measured from the original approval
2 rather than from the last “minor” amendment, the requirements that the change not have the
3 “effect” of changing certain key aspects of the MDP will necessarily address the cumulative
4 effect of those changes. Having the effect of increasing density or intensity
5 (§17.61.034(2)(F)), for instance, will make the amendment “major”, requiring Type II process
6 and notice.
7

8 Clarification that the nine criteria of §17.61.034(2) must be met in order for the proposed
9 amendment to be considered “minor”, and that the “effect” of any minor amendment will be
10 measured from the original approval rather than from the last minor amendment, would
11 assist the public in understanding this regulation.
12

13
14 **Conclusion:** The Board does not find noncompliance on this issue but requests that the
15 County clarify of §17.61.034(2) to make it clear that all nine criteria must be met to have an
16 amendment to a MDP considered “minor” and that change is measured from the original
17 approval rather than from the last “minor” amendment, when it addresses compliance on
18 other issues in this case.
19

20 **Ordinance 138-06 – Amendments to the County’s Resource Ordinance**

21
22 **Issue No. 9:** Given that the best available science indicates the need for 300-foot buffers to
23 protect Category I and II wetlands with high habitat function, according to the Department of
24 Ecology, does §17.01.070.E fail to protect wetlands as required by RCW 36.70A.060(2) and
25 RCW 36.70A.172(1) and/or WAC 365-195-920 and interfere substantially with goals of
26 conserving fish and wildlife habitat and protecting the environment (RCW 36.70A.020(9)
27 and (10))?
28

29 **Positions of the Parties**

30 Petitioner argues that the table associated with §17.01.070.E allows buffers for Category I
31 and II wetlands with high habitat function to be reduced to ¾ of the standard width without
32 any science showing that such a reduction will still protect the functions and values of the

1 wetlands.⁷⁸ Petitioner points to Exhibit 43, a September 22, 2006 letter from the
2 Department of Ecology (Ecology) stating that such a reduction would result in a high risk of
3 degradation of these wetlands' habitat functions.
4

5 The County counters that Ecology later supported the County's position.⁷⁹ The County
6 refers to Exhibit 13, an e-mail from Richard Mraz of the Department of Ecology, for support
7 of this assertion. The County urges that it has discretion to vary from Ecology's guidance
8 and that it followed the scientifically based advice of its consultant.⁸⁰ The County also
9 states that it followed an approach used by Kitsap County and approved by the Central
10 Puget Sound Growth Management Hearings Board in *Hood Canal Environmental Council,*
11 *et al. v. Kitsap County*, WWGMHB Case No. 06-2-0012c (2007).⁸¹ Further, the County
12 argues, protection of wetlands is largely based on habitat concerns; because the County
13 has designated critical species and their habitats and provided protections "[t]hese habitats
14 do not need to be protected by larger standard wetland buffers."⁸²
15
16

17 **Board Discussion**

18 Ordinance 138-06 recites that it is Mason County's update of its critical areas ordinance,
19 required by RCW 36.70A.130. One of the amendments to the County's Resource
20 Ordinance (Mason County Code Ch. 8.52) altered the buffer widths necessary for various
21 types of wetlands. The one challenged by Petitioner is §17.01.070.E and the associated
22 tables showing buffers for Category I and II wetlands.
23
24

25 Petitioner argues that best available science requires 300 feet buffers for Category I and II
26 wetlands but relies almost exclusively for this argument on Exhibit 43, a letter dated
27 September 22, 2006 from Rick Mraz of Department of Ecology, to Bob Fink, Planning
28

29 _____
30 ⁷⁸ Petitioners' Opening Brief at 7-8.

31 ⁷⁹ Mason County's Prehearing Brief at 12.

32 ⁸⁰ *Ibid* at 13.

⁸¹ *Ibid* at 13-14.

⁸² *Ibid* at 14.

1 Manager. In that letter, Mr. Mraz gave comments and suggestions on the June 28, 2006
2 draft of the County's proposed amendments. In response to Section 17.10.070(E) and
3 Tables C, D, E & F of the County's Resource Ordinance, Mr. Mraz stated:

4 The best available science indicates that these wetlands (Category I and II wetlands
5 with high habitat function) should be protected by a 300-foot buffer if the adjacent
6 land use is of high-intensity. The County's approach would result in a high risk of
7 degradation of these wetlands' habitat functions.

8 In response to comments received from ARD on this point in December, 2006, the County's
9 consultants noted that many "positive protective changes were made between the June
10 2006 and the November 2006 drafts".⁸³ After the amended draft (of November) was sent to
11 Ecology, Ecology responded with concerns about "Change #14" only.⁸⁴ "Change #14" was
12 a proposal effecting mitigation for wetlands impacts, at §17.01.070(F), not the buffers
13 required for Category I and II wetlands.
14

15
16 In addition to Mr. Mraz's comment letter of September (Exhibit 13), Petitioner also refers
17 loosely to Exhibit 801 which is neither provided nor described but appears to be the buffer
18 width needs for various functions and values tabulated by the County's consultants in
19 1997.⁸⁵
20

21 The County, on the other hand, amended the wetland rating system of §17.01.070E
22 according to the advice of its consultants. GeoEngineers advised that the 1993 rating
23 system of Ecology no longer is best available science and recommended classifying
24 wetlands using the 2004 DOE rating system.⁸⁶ The science in the County's record includes
25 two recent documents prepared by Ecology – *Freshwater Wetlands in Washington State,*
26 *Volume I: A Synthesis of the Science* (2005); and *Wetlands in Washington State, Volume 2:*
27
28

29
30
31 ⁸³ December 22, 2006 Memorandum from Lisa Berntsen to Bob Fink at p. 4.

32 ⁸⁴ Exhibit 13.

⁸⁵ Petitioners' Opening Brief at 8 and footnote 1.

⁸⁶ Exhibit 47 at 2-3.

1 *Guidance for Protecting and Managing Wetlands* (2005).⁸⁷ The County stated that it
2 followed an option proposed by Department of Ecology which “take[s] into consideration the
3 habitat value and the degree of impact of the proposed use.”⁸⁸ The County refers the Board
4 to §1.8 of Volume 2 of *Wetlands in Washington State* regarding the role of local government
5 in determining wetland protections.
6

7 WAC 365-195-900 allows counties and cities to use information that local, state or federal
8 natural resource agencies have determined represents the best available science consistent
9 with criteria set out in WAC 365-195-900 through 365-195-925. Those provisions require
10 that scientific information be produced through a valid scientific process subject to peer
11 review and setting out methods, logical conclusions, quantitative analysis, context and
12 references.⁸⁹
13

14
15 Here, Petitioner makes an assertion that best available science requires 300 feet buffers on
16 all Category I and II wetlands but fails to offer scientific information that meets the criteria in
17 WAC 365-195-900 to support this assertion. The 1997 tabulation of the County’s experts
18 may not be current since Petitioner has not demonstrated that it was unaffected by the 2005
19 guidance documents prepared by Ecology (see above). Even if Petitioner had supplied the
20 Board with the actual science from 1997, it would not be sufficient to rebut the 2005-6
21 Department of Ecology documents relied upon by the County, without scientific analysis of
22 how the documents should be interpreted. Relying solely upon a few sentences from Mr.
23 Mraz without including the source of the scientific opinion is not enough to overcome the
24 County’s assertions regarding the science it utilized. Indeed, there is nothing in the record
25 on this issue to indicate that Mr. Mraz intended his comments to be used in lieu of best
26 available science.
27
28
29
30

31 ⁸⁷ Exhibit 45 at 2.

32 ⁸⁸ *Ibid.*

⁸⁹ WAC 365-195-900(5)
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1 Petitioner has simply failed to make a case that the County's regulations regarding buffers
2 for Category I and II wetlands do not include best available science as required by RCW
3 36.70A.172. The Petitioner's conclusory remarks about the need for a 300 feet buffer on all
4 Category I and II wetlands are not sufficient to overcome the presumption of validity that
5 attaches to all legislative enactments under the GMA.⁹⁰ While there may be a case to be
6 made that the County's regulations for protection of Category I and II wetlands do not
7 protect the functions and values of those wetlands, Petitioner has not made it. That is
8 Petitioner's burden and if the Petitioner fails in that burden (as here), the regulations must
9 be deemed compliant.
10
11

12 **Conclusion:** Petitioner has failed to show that §17.01.070.E fails to protect wetlands as
13 required by RCW 36.70A.060(2) and RCW 36.70A.172(1) and/or WAC 365-195-920.
14 Therefore, §17.01.070.E is deemed compliant.
15

16 **Issue No. 10:** By allowing harvest of 30% of the merchantable trees in a wetlands buffer,
17 does §17.01.070.E.7.d fail to protect wetlands as required by RCW 36.70A.060(2) and
18 36.70A.172(1) and/or WAC 365-195-920 and interfere substantially with goals of conserving
19 fish and wildlife habitat and protecting the environment (RCW 36.70A.020(9) and (10))?
20

21 **Positions of the Parties**

22 Petitioner argues that allowing timber harvesting within buffers fails to provide adequate
23 protection for wetlands and is not supported by best available science (BAS).⁹¹ Petitioner
24 states that the functions and values of a wetland are jeopardized if "the buffer is disturbed to
25 the extent of removing nearly a third of the merchantable timber and without strict,
26 scientifically-based guidelines to mitigate the effects of logging."⁹² Petitioner claims the
27 County "offers no science to the contrary."⁹³
28
29

30 ⁹⁰ RCW 36.70A.320

31 ⁹¹ Petitioners' Opening Brief at 8.

32 ⁹² *Ibid.*

⁹³ *Ibid* at 9.

1 The County responds that this provision was approved by the Board in *Diehl v. Mason*
2 *County*, WWGMHB Case No. 95-2-0073 (1995).⁹⁴ Further, the County states that it
3 responded to the comment from Department of Ecology and considered whether to delete
4 §17.01.070.E.7.d in its entirety.⁹⁵ This proposal to delete §17.01.070.E.7.d was rejected by
5 the Planning Advisory Committee.⁹⁶ The County points out that when this provision was
6 referred to the Ecology again, no opposition was expressed.⁹⁷
7

8 **Board Discussion**

9
10 In this issue, Petitioner relies solely upon itself in asserting that allowing timber harvesting
11 within buffers is not supported by best available science. Although Petitioner cites to the
12 September 2006 letter of Ecology again, there is nothing in that letter that refers to best
13 available science or to any scientific resource. Concerning the timber cutting provision, Mr.
14 Mraz stated:

15 This is contrary to the concept that forestry is a low intensity use and should receive
16 a buffer. This provision allows for logging in the buffer. Since this activity can be
17 defined as new forestry, it should be subjected to the buffer requirements listed in
18 Section 17.01.070E. Commercial forestry that is not subject to Forest Practices
19 review should not be allowed in wetland buffers.⁹⁸

20 Mr. Mraz did not mention best available science nor does he cite to any scientific document
21 to support this assertion. Presumably, had Mr. Mraz intended to offer best available science
22 for purposes of overcoming the presumption of validity, he would have provided the
23 scientific basis for his opinion. However, this statement is offered by Petitioner as if that is
24 all that were necessary to establish that the County's choice lacks scientific validity. The
25 mere fact that a representative of Ecology makes a statement does not make that statement
26 best available science. The record must show a scientific basis for the conclusion or
27

28
29
30 _____
31 ⁹⁴ Mason County's Prehearing Brief at 15.

32 ⁹⁵ *Ibid.*

⁹⁶ Exhibit 3 at 11.

⁹⁷ Mason County's Prehearing Brief at 15, citing Exhibit 13.

⁹⁸ Exhibit 13 at 4 (responding to an earlier draft).

1 opinion. In this case, the Petitioner goes so far as to assert that it is the County's burden to
2 offer science to contradict its unsupported claim.⁹⁹

3
4 It is true that the County must include best available science (BAS) in developing its
5 regulations to protect critical areas.¹⁰⁰ Here, as to its wetlands regulations, the County
6 stated that the BAS on which it relied was primarily "the Washington Department of
7 Ecology's (DOE) publications 'Wetlands in Washington State, Volume 1: A Synthesis of the
8 Science' (2005) and 'Wetlands in Washington State, Volume 2: Guidance for Protecting and
9 Managing Wetlands' (2005)." ¹⁰¹

10
11
12 The requirement to include BAS in developing critical areas regulations means that such
13 BAS must be in the County's record. Here, the County has noted the science it used to
14 develop its wetlands regulations. The requirement to include BAS does not shift the burden
15 of proof in a case before the growth management hearings boards; the burden is not on the
16 County to prove it used BAS. The County must show its work in its record but it is the
17 Petitioner's burden to show that the science in the record is inadequate – to show where
18 and how the best available science is missing, by analyzing what is in the record and
19 presenting the science Petitioner alleges has not been included. This is a burden Petitioner
20 has not even begun to shoulder on this issue. The Board cannot say that there is no basis
21 for a challenge to the compliance of §17.01.070.E.7.d with RCW 36.70A.060(2) and
22 36.70A.172(1); we can only say that the Petitioner has failed to make the case.

23
24
25 **Conclusion:** Petitioner has failed to show that §17.01.070.E.7.d fails to protect wetlands
26 as required by RCW 36.70A.060(2) and 36.70A.172(1) and/or WAC 365-195-920.

27 Therefore, §17.01.070.E.7.d is deemed to comply with RCW 36.70A.060(2) and
28 36.70A.172(1) and/or WAC 365-195-920.
29

30
31 _____
32 ⁹⁹ Petitioners' Opening Brief at 9.

¹⁰⁰ RCW 36.70A.172(1)

¹⁰¹ Ordinance No. 138-06, Attachment B (8)

1 **Issue No. 11:** Petitioner abandoned this issue.

2
3 **Issue No. 12:** By allowing new construction within buffers for Fish and Wildlife Habitat
4 Conservation Areas based on “common line” setbacks and subject only to planting some
5 native vegetation and a pledge to follow best management practices, does §17.01.110.D.2
6 fail to protect such critical areas as required by RCW 36.70A.060(2) and 36.70A.172(1)
7 and/or WAC 365-195-920 and interfere substantially with goals of conserving fish and
8 wildlife habitat and protecting the environment (RCW 36.70A.020(9) and (10))?

9 **Positions of the Parties**

10 Petitioner argues that shoreline buffers should not be reduced as allowed by
11 §17.01.110.D.2 because the “minimal protection offered by 100-foot buffers would be
12 substantially reduced by allowing additional nonconforming uses where existing neighboring
13 development intrudes into the buffer.”¹⁰² This provision would allow new construction within
14 buffers for fish and wildlife habitat conservation areas (FWHCAs) based on “common line”
15 setbacks subject only to planting some native vegetation and pledging to follow best
16 management practices, Petitioner claims.¹⁰³ Petitioner cites to a comment letter from the
17 Washington Department of Fish and Wildlife (WDFW) recommending a minimum 100 foot
18 buffer for all saltwater shoreline areas”.¹⁰⁴

19
20
21 The County argues that this provision was approved by the Board in *Diehl v. Mason County*,
22 WWGMHB Case No. 95-2-0073 and is therefore *res judicata* here.¹⁰⁵ The County argues
23 that WDFW’s comment was based on 1997 research which was not new science introduced
24 as part of the update but part of the science used in developing the County’s original critical
25 areas regulations.¹⁰⁶ Nevertheless, the County claims that it responded to WDFW’s
26 comments by increasing the mitigation required for the common line provision.¹⁰⁷
27

28
29 _____
30 ¹⁰² Petitioners’ Opening Brief at 9.

31 ¹⁰³ *Ibid.*

32 ¹⁰⁴ *Ibid* at 10.

¹⁰⁵ Mason County’s Prehearing Brief at 16.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* at 14-15.

1 **Board Discussion**

2 §17.01.110.D.2 provides that the standard buffers and setbacks for a single family home
3 proposed on a lot created prior to December 5, 1996 (located on saltwater or a freshwater
4 lake 20 acres or more in size) may be reduced under certain circumstances. If there are
5 houses on both sides (and within 150 feet of the lot line and no more than 200 feet from the
6 ordinary high water mark (OHWM)) then an imaginary common line drawn across the lot
7 from the two most adjacent houses may be used to establish setbacks and buffers that are
8 less than 100 feet from the OHWM.¹⁰⁸ If there is a residence on just one side of the lot
9 under development, the buffer and setback is determined by an imaginary common line
10 from the neighboring house to a point 100 feet from the OHWM at the far end of the lot
11 where the new house will be built.¹⁰⁹ Under both those circumstances, the reduced buffer (if
12 less than 100 feet) will be “enhanced for wildlife function which will include at a minimum
13 planting with native vegetation” and use of best management practices to limit impacts to
14 the resource.¹¹⁰

15
16
17
18 Petitioner relies upon the letter of WDFW of October 3, 2006 to support its argument that
19 100 foot buffers are required to prevent a net loss of fish and wildlife habitat structure and
20 function in the shorelines.¹¹¹ This letter is a thorough and scientifically-based assessment of
21 the impact of amendments to the County’s Resource Ordinance (Ordinance 138-06) and it
22 is the only science in the record regarding §17.01.110.D.2.
23

24 The County does not contest that the WDFW letter represents the best available science on
25 this provision of the Mason County Resource Ordinance; instead, the County urges the
26 Board to find that this is not a new provision and is therefore not subject to challenge.¹¹²
27
28

29
30 _____
¹⁰⁸ §17.10.110(D)2.(a)

31 ¹⁰⁹ *Ibid.*

32 ¹¹⁰ §17.10.110(D)2.(a)(1)(c) and (d)

¹¹¹ Exhibit 37

¹¹² Mason County’s Prehearing Brief at 16

1 RCW 36.70A.130 requires counties and cities to update their comprehensive plan policies
2 and development regulations on a schedule set in RCW 36.70A.130(4). Updates are
3 required so that the local jurisdictions may undertake any revisions needed for compliance
4 with the GMA.¹¹³ To accomplish an update, the local jurisdiction must take legislative action
5 by adopting a resolution or ordinance following notice and a public hearing indicating, at a
6 minimum, “a finding that a review and evaluation has occurred and identifying the revisions
7 made, or that a revision was not needed and the reasons therefor.”¹¹⁴
8

9
10 The County argues that §17.01.110.D.2 is not subject to review since there is no new
11 science in the record and the Board found this provision compliant in an earlier case.¹¹⁵
12 Petitioner contests that this provision was at issue in the earlier case. In the final
13 compliance order in *Dawes et al. v. Mason County*, WWGMHB Case No. 95-2-0073c, this
14 Board found compliance on Issue 5 – the requirement to raise buffers in marine shorelines
15 (and for lakes of 20 acres or more) to at least 100 feet. There is no discussion in that
16 decision of any exemption from the 100 feet buffer requirement.¹¹⁶ Therefore, we find that
17 the Board did not render a decision on the exemption challenged here. Even if the County
18 were correct in arguing that the update requirement does not extend to code provisions that
19 were approved in prior board decisions (a position the Board has not adopted), there was
20 no such approval in the prior case.
21

22
23 The County asserts that the common line situation is typically one applying to existing small
24 lots that would be eligible for variances, if required, and “there would be little environmental
25 benefit nor difference in outcome from requiring that process.”¹¹⁷
26
27
28
29

30 ¹¹³RCW 36.70A.130(2)(a)

31 ¹¹⁴RCW 36.70A.130(1)(b).

32 ¹¹⁵Mason County’s Prehearing Brief at 16.

¹¹⁶Compliance Order for Compliance Hearing No. 17, June 6, 2003.

¹¹⁷Mason County’s Prehearing Brief at 16-17.

1 WDFW found that the common line provision was not supported by best available science
2 and recommended removing it.¹¹⁸ However, WDFW also stated that it could accept
3 flexibility for these kinds of lots so long as the reduction in buffers was offset by mitigation
4 tied to the habitat needs on site:

5 WDFW does not have a problem with building in some flexibility for lots that are
6 bounded by older, closer-to-shoreline development, however that flexibility should be
7 tied to the habitat needs on site and some kind of net improvement such as
8 replanting or other mitigation.¹¹⁹

9 Mason County therefore added new conditions to the common line exemption:
10

11 (c) If the resulting buffer is less than 100 feet, it will be enhanced for wildlife function
12 which will include at a minimum planting with native vegetation;

13 (d) If the resulting buffer is less than 100 feet, the development of site outside the
14 buffer shall also use best management practices such as those in Table X to limit
15 impacts to the resource.¹²⁰

16 WDFW did not respond to these changes:

17 Since the addition of the BMP section, WDFW has not provided an additional
18 response to the new (November) proposed revisions. While a lack of agency
19 response cannot be interpreted as an approval, it is being interpreted as a neutral
20 position and not a negative one. Thus, no additional changes are proposed to this
21 section.¹²¹

22 In addition to the mitigation and best management requirements of the common line buffer
23 provisions, the County has a provision in its development regulations pertaining to fish and
24 wildlife habitat conservation areas (FWHCAs) to increase a buffer on a case-by-case basis
25 where necessary to protect the structure, function and value of a FWPCA.¹²²
26
27
28
29

30 ¹¹⁸ Exhibit 57 at 1 and 2.

31 ¹¹⁹ *Ibid* at 2.

32 ¹²⁰ §17.01.110(D)(2)(a)(1)(c) and (d); §17.01.110(D)(2)(a)(2)(c) and (d), Draft November 20, 2006.

¹²¹ December 22, 2006 Memorandum from Lisa Berntsen (GeoEngineers) to Bob Fink

¹²² §17.01.110(D)(4).

1 Petitioner asserts that the County has no BAS to support this exemption from the 100 feet
2 buffer requirement.¹²³ However, Petitioner did not respond to the County's efforts to
3 incorporate the recommendation of WDFW for "flexibility" where the adjoining lots have
4 houses already located in the buffer; but rests wholly on the insistence on a mandatory 100
5 feet buffer in the shorelines. The requirement for BAS to be included in developing the
6 County's critical areas regulations is met here by the incorporation of the 100 feet buffer
7 requirement into the County's ordinance for FWHCAs in the marine and (certain) lake
8 shorelines. The limited exemption for pre-existing lots has not been shown to interrupt the
9 FWHCA, given that the exemption from the 100 feet buffer requirement only applies when
10 one or more adjacent lots already has residences within the 100 feet buffer. The exemption
11 makes a gradual connection between lots with existing residences located in what would
12 otherwise be the 100 feet buffer, across the developing lot, such that the next lot will pick up
13 the buffer at 100 feet from the shoreline. It is Petitioner's burden to show that connecting
14 the existing buffer to the 100 feet buffer across the adjacent lot using an imaginary common
15 line, together with required mitigation and best management practices in the buffer on this
16 lot, will not protect the functions and values of these FWHCAs.

17
18
19
20 **Conclusion:** Petitioner has not met its burden of showing that the common line exemption
21 with the addition of requirements for mitigation and best management practices
22 (§17.01.110.D.2) fails to incorporate best available science to protect the functions and
23 values of FWHCAs as required by RCW 36.70A.172(1).
24

25
26 **Issue No. 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
29 36.70A.172(1) and/or WAC 365-195-920 and interfere substantially with goals of conserving
30 fish and wildlife habitat and protecting the environment (RCW 36.70A.020(9) and (10))?
31
32

¹²³ Petitioners' Reply Brief at 9.
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1 **Positions of the Parties**

2 The County also moved to dismiss Issue 13 for failure to state a claim for which relief may
3 be granted.¹²⁴ The County argued that SSB 5248 imposes a legislative moratorium on
4 changes to critical areas ordinances relating to agricultural activities. Since Issue 13 relates
5 to agricultural activities in critical areas, the County argued that it could not undertake
6 changes to its ordinance even if the Board ordered it to do so.¹²⁵ Petitioners argued that the
7 Board should enter its decision but stay the effectiveness until the end of the legislative
8 delay imposed by SSB 5248.¹²⁶

10
11 **Board Discussion**

12 The Board found that both positions had merit but that:

13 On balance, therefore, the Board believes that the Legislature intended that petitions
14 for review challenging critical areas protections from agricultural activities be deemed
15 not ripe until the delay established in SSB 5248 has expired. We therefore dismiss
16 Issue No. 13 without prejudice to the Petitioner's ability to re-file it after the delay
17 established in SSB 5248 has expired.¹²⁷

18 Therefore, the Board dismissed Issue No. 13 without prejudice to the Petitioner's ability to
19 re-file it after the legislative delay has expired. It will be up to the Petitioner to monitor the
20 legislation and re-file its petition with respect to this issue within 60 days of the expiration of
21 the legislative delay.

22
23 **Conclusion:** The Board's decision with respect to Issue 13 (Order on Motions to Dismiss
24 Issues 13 and 15, May 22, 2007) is incorporated in this decision and made part of the final
25 order. Issue 13 is dismissed without prejudice to the Petitioner's ability to re-file it in a new
26 petition within 60 days after the delay established in SSB 5248 has expired.
27

28
29 _____
30 ¹²⁴ Respondent Mason County's Motion to Dismiss Petitioners' Petition for Review & Memorandum in Support
of Motion to Dismiss.

31 ¹²⁵ *Ibid* at 6-7.

32 ¹²⁶ Motion for Order Requiring County to Index the Record in Compliance with Order of March 2 and
Response Opposing Motions to Dismiss at 6-7.

¹²⁷ Order on Motions to Dismiss Issues 13 and 15, May 22, 2007.

1 **Issue No. 14:** By arbitrarily setting the less of a) 40% of the area of the lot, or b) 2,550
2 square feet as the minimum reasonable use for a residence in a residentially zoned area,
3 does §17.01.150 fail to protect critical areas as required by RCW 36.70A.060(2) and
4 36.70A.172(1) and/or WAC 365-195-920 and interfere substantially with goals of conserving
5 fish and wildlife habitat and protecting the environment (RCW 36.70A.020(9) and (10))?

6 **Positions of the Parties**

7 Petitioner argues that §17.01.150 is an arbitrary provision on minimum reasonable use of a
8 lot. "It is self-evident that an owner would still have a reasonable use of his lot if he were
9 somewhat more restricted in the size of house he may build."¹²⁸

10
11 The County responds that the Petitioner has merely asserted the "blanket notion of the
12 regulation as being 'arbitrary'".¹²⁹ The County points to Exhibit 35 to show the justification,
13 rationale and implications of this change, arguing that it is not arbitrary but promotes timely
14 and fair processing of permits.¹³⁰

15
16 **Board Discussion**

17 In its reply brief, Petitioner makes it clear that its objection to §17.01.150 is that it does not
18 limit nonconforming uses so that they may be phased out over the long run.¹³¹ However,
19 the Petitioner offers no argument concerning the provisions of the GMA that it alleges are
20 violated – RCW 36.70A.060(2) and 36.70A.172(1). There is simply no basis put before the
21 Board by Petitioner on this issue for finding a violation of either RCW 36.70A.060(2) or
22 36.70A.172(1).
23
24

25 **Conclusion:** Petitioner has failed to show that §17.01.150 is clearly erroneous and fails to
26 comply with RCW 36.70A.060(2) and 36.70A.172(1).
27
28
29

30
31 ¹²⁸ Petitioners' Opening Brief at 11.

32 ¹²⁹ Mason County's Prehearing Brief at 18.

¹³⁰ *Ibid.*

¹³¹ Petitioners' Reply Brief at 10.

1 **Ordinance 139-06 – Shaw Family Property Designation Change**

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

9 **Positions of the Parties**

10 Petitioner challenges the designation change of the Shaw Family LLC property from Long
11 Term Commercial Forest (LTCF) to “Inholding Lands”. “Inholding Lands”, Petitioner
12 asserts, allow for lot sizes as small as 5 acres instead of the 80 acre minimum applicable to
13 LTCF lands.¹³² Petitioner argues that the amendment to the Future Land Use Map
14 accomplishing the designation change is inconsistent with the County’s own criteria for
15 reclassification requests.¹³³ Further, Petitioner alleges that the Shaw Family property
16 satisfies the County’s criteria for designation of LTCF land and may not be reclassified
17 “without any showing that it is not properly classified as LTCF land”.¹³⁴ Petitioner also
18 alleges that the designation change allows substantial residential development that is
19 incompatible with the adjoining LCTF lands.¹³⁵ Finally, Petitioner alleges that the Shaw
20 Family property does not meet the County criteria for “Inholding Lands” and should not have
21 been rezoned.¹³⁶

22
23
24 Intervenor argues that the Board lacks jurisdiction over this issue for several reasons. First,
25 Intervenor argues that the Board’s rules deny the Shaw Family due process on an issue that
26 will substantially and directly impact it.¹³⁷ Therefore, Intervenor urges, the Board should
27
28

29 _____
30 ¹³² Petitioners’ Opening Brief at 11.

31 ¹³³ *Ibid.*

32 ¹³⁴ *Ibid* at 14.

¹³⁵ *Ibid* at 15.

¹³⁶ *Ibid* at 16.

¹³⁷ Intervenor’s Responsive Brief at 2.

1 determine that it lacks jurisdiction or its rules would be unconstitutional.¹³⁸ Intervenor also
2 argues that this is a site specific issue which does not change any provision of the
3 comprehensive plan so that the Board lacks jurisdiction to consider it.¹³⁹ Further, Intervenor
4 asserts, Mason County has authority to “amend whatever proper legislation it sees fit. RCW
5 36.01.010.”¹⁴⁰ It is clear, the Intervenor claims that any appeal of that determination had to
6 be under LUPA (the Land Use Petition Act).¹⁴¹
7

8
9 On the substantive challenges to Issue 15, Intervenor argues that changes to the map are
10 made by staff and adopted as a whole without review as to the individual effected
11 parcels.¹⁴² Intervenor alleges that each of the eight criteria of MCDR 1.05.080 are met.¹⁴³
12 According to Intervenor, the current impact to it of the LTCF designation is over \$2,000,000
13 and that the proposal submitted by Intervenor was a compromise that still costs it “in the
14 neighborhood of \$1,300,000 to \$1,400,000”.¹⁴⁴
15

16 The County also argues that the Board lacks subject-matter jurisdiction over Issue 15.¹⁴⁵
17 The County urges that the designation change of the Shaw Family property was a project
18 permit that is not subject to board jurisdiction.¹⁴⁶
19

20 Substantively, the County notes that planning staff had concluded that three important
21 rezone criteria were not met by the Intervenor’s request for a designation change.¹⁴⁷
22 However, following testimony and questions to the staff and applicant at the public hearing,
23 the County Commissioners concluded “that the requested rezone be approved since the
24
25

26
27 ¹³⁸ *Ibid.*

28 ¹³⁹ *Ibid* at 2-3.

29 ¹⁴⁰ *Ibid* at 4.

30 ¹⁴¹ *Ibid* at 5.

31 ¹⁴² *Ibid* at 7.

32 ¹⁴³ *Ibid* at 8

¹⁴⁴ *Ibid* at 12.

¹⁴⁵ Mason County’s Prehearing Brief at 18-19.

¹⁴⁶ Mason County’s Motion for Reconsideration Re: Issue No. 15 and Standing at 5.

¹⁴⁷ Mason County’s Prehearing Brief at 20.

1 subject property was located along a county road and adjacent to smaller-sized parcels
2 already designated In-Holding Lands.”¹⁴⁸

3
4 **Board Discussion**

5 **Jurisdiction.** The County argues that the designation change of the Shaw Family property
6 from LTCF to In-Holding Commercial Forest Lands (In-Holding Lands) was authorized by
7 policy RE-205 of Chapter III of the Mason County comprehensive plan.
8

9 The County argues that this means that the change in designation of the Shaw Family
10 property is a site-specific rezone.¹⁴⁹
11

12 The Board does not agree that a designation change pursuant to comprehensive plan
13 policies for such changes is a site-specific rezone within the meaning of RCW 36.70B.020.
14

15 The growth boards have jurisdiction to hear, among other things, challenges to legislation
16 adopting amendments to comprehensive plans.¹⁵⁰ A comprehensive plan consists of “a
17 map or maps, and descriptive text covering objectives, principles, and standards used to
18 develop the comprehensive plan.”¹⁵¹ Ordinance No. 139-06 adopted, among other things, a
19 change in the Future Land Use Map as shown on Chapter IV Land Use for the Shaw Family
20 LLC.¹⁵² This adoption is an amendment to the Mason County Comprehensive Plan.
21

22 The exclusion of site-specific rezones from Board jurisdiction applies to the definition of
23 “development regulations” rather than to the definition of comprehensive plan
24 amendments.¹⁵³ In defining “development regulations”, the GMA states that these do not
25 include project permits as defined in RCW 36.70B.020.¹⁵⁴ RCW 36.70B.020, in turn,
26

27
28 ¹⁴⁸ *Ibid.*

29 ¹⁴⁹ Respondent Mason County’s Motion to Dismiss Petitioners’ Petition for Review & Memorandum in Support
of Motion to Dismiss at 6.

30 ¹⁵⁰ RCW 36.70A.280(1)(a)

31 ¹⁵¹ RCW 36.70A.070 (preamble)

32 ¹⁵² Ordinance No. 139-06, Amendments to the Mason County Comprehensive Plan and Mason County Parks
and Recreation Comprehensive Plan, ¶1

¹⁵³ RCW 36.70A.030(7).

¹⁵⁴ *Ibid.*

1 defines project permits to include “site-specific rezones authorized by a comprehensive plan
2 or subarea plan but excluding the adoption or amendment of a comprehensive plan,
3 subarea plan, or development regulations except as otherwise specifically included in this
4 subsection.”¹⁵⁵ Therefore, there is no conflict between RCW 36.70B.020(4) and RCW
5 36.70A.280(1); an amendment to a comprehensive plan is not a site-specific rezone.
6

7 Both the County and the Intervenor argue that fairness and due process require the Board
8 to find that it lacks jurisdiction over this comprehensive plan amendment because there was
9 no service and automatic party status conferred upon the Intervenor in the GMA appeal.
10 However, all comprehensive plans and development regulations affect property owners.
11 Some changes to plans affect more and some fewer property owners. In this case, the
12 comprehensive plan amendment was requested by Intervenor to affect only its property.
13 However, the County’s action is still a legislative action affecting the overall plan for the
14 County. If it were possible to evade GMA compliance by making comprehensive plan map
15 changes on an individual basis, then there would be a patchwork of decisions, some of
16 which must comply with the GMA and some of which need not. This would not make for “an
17 internally consistent document [in which] all elements shall be consistent with the future land
18 use map,” as required by RCW 36.70A.070.
19
20
21

22 Intervenor was able to request the ability to participate in this appeal and did so. However,
23 ultimately the question under the GMA is whether the County’s action complies as to plans
24 and development regulations. The Board has jurisdiction to consider the challenge to the
25 change to the Future Land Use Map requested by Intervenor.
26

27 The County also argues that the rezone of the property occurred first and then the map was
28 changed to reflect that a designation change had been made, so that the map change is not
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¹⁵⁵ RCW 36.70B.020(4)
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1 subject to GMA review. Again the Board finds that the comprehensive plan amendment
2 confers jurisdiction over the designation change.

3
4 **Compliance of the Future Land Use Map Change with RCW 36.70A.070**

5 RCW 36.70A.070 requires that all the parts of the comprehensive plan, including its maps,
6 be consistent with one another. Petitioner here challenges whether the designation change
7 from LTCF to In Holding Lands is consistent with the County's comprehensive plan.

8 RE-205 provides:

9
10 Long Term Commercial Forests may be reclassified to In Holding Lands provided
11 that all the following conditions are met:

- 12 A. The property meets the classification for In Holding Lands.
13 B. The property owner removes the property from open space or forest land tax
14 classification pursuant to RCW Chapters 84.33 or 84.34 within three years of the
15 effective date of redesignation, and any taxes, interest and penalties are in full
16 upon removal [sic].
17 C. The applicant has demonstrated that reasonable use of the property as
18 Designated Long-Term Commercial Forest Land is not possible and the inability
19 to make a reasonable use of the property is not due to action or inaction of the
20 applicant.¹⁵⁶

21 RE-206 requires:

22 Prior to designation out of the Long Term Commercial Forest classification, the
23 property owner shall demonstrate that the property can no longer be feasibly used for
24 Long Term Commercial Forest Purposes for reasons not caused by the property
25 owner.

26 RE-208 further requires:

27 Designation of In-Holding lands shall not interfere with the ability to manage the
28 remainder of the block for long term commercial forestry.

29 County staff reviewed the change in designation as a rezoning request pursuant to Mason
30 County Development Code Section 1.05.080 and found the criteria, including compliance
31 with the comprehensive plan policies, were not met.¹⁵⁷ The Board turns first to the Mason

32 ¹⁵⁶ Mason County Comprehensive Plan RE-205, III-4.4

¹⁵⁷ Exhibit 184 at 1.

1 County comprehensive plan policies requiring a showing of no reasonable use and an
2 inability to feasibly use the property under its current designation (LTCF).

3
4 While listing the applicable comprehensive plan policies in the staff analysis, the staff did
5 not address either the requirement that the applicant demonstrate reasonable use of the
6 property is not possible under the present designation (RE-205(C)); or that the property
7 shall demonstrate that the property can no longer be feasibly used for Long Term
8 Commercial Forest Designation (RE-206).¹⁵⁸ The Board of County Commissioners adopted
9 the designation map change from LTCF to In Holding without making any findings with
10 respect to either of these plan policies (RE- 205(C) and RE- 206).¹⁵⁹

11
12
13 The property owner (Shaw Family LLC) submitted a property valuation report from
14 Windermere Real Estate in support of its application for a designation change. The report
15 valued the property (approximately 93 acres) at \$480,000.00 to \$500,000.00 under the
16 LTCF designation; \$1,245,000.00 to \$1,435,000.00 if designated In Holding to be developed
17 at a density of one unit per five acres; and \$2,530,000.00 to \$2,810,000.00 if there were no
18 limitations on subdivision.¹⁶⁰

19
20 While it is not at all clear that this difference in property valuation shows either a lack of
21 reasonable use or an inability to feasibly use the property under the present designation, the
22 Board does not render an opinion on those points here. Critically in terms of consistency of
23 the Future Land Use Map change with the comprehensive plan policies, there is a lack of
24 findings required under the County's plan policies RE- 205(C) and RE- 206 that no
25 reasonable use of the property is possible under LCTF or that the property can no longer be
26 feasibly used for Long Term Commercial Forest Designation. Since the County's
27 comprehensive plan explicitly requires the property owner to demonstrate these
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29

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31 ¹⁵⁸ Exhibit 184 at 6.

32 ¹⁵⁹ Attachment A to Ordinance No. 139-06, December 27, 2006.

¹⁶⁰ December 1, 2006 letter from Jef Conklin to Stephen T. Whitehouse, Exhibit 184.

1 circumstances to the County, the change in the land use map and designation of the lands
2 from LCTF to In Holding without findings to that effect is not consistent with the County's
3 own comprehensive plan policies and therefore fails to comply with RCW 36.70A.070.
4 Having found noncompliance based on inconsistency with the comprehensive plan, the
5 Board will not address whether the map and designation change is also inconsistent with
6 other comprehensive plan policies
7

8 **Conclusion:** The change in the Future Land Use Map of the comprehensive plan is a
9 comprehensive plan amendment subject to the jurisdiction of the Board pursuant to RCW
10 36.70A.280(1). The comprehensive plan requires the applicant to demonstrate that no
11 reasonable use of the property is possible under the LCTF designation in order to justify a
12 change from LCTF to In Holding. The County did not address this requirement (RE-
13 205(C)) in its decision to grant the designation and map change. The comprehensive plan
14 further requires the applicant to demonstrate that the property can no longer be feasibly
15 used for Long Term Commercial Forest Designation to justify a change from LCTF
16 designation to In Holding (RE- 206). The County did not address this requirement (RE- 206)
17 in its decision to grant the designation and map change. Therefore, the amendment to the
18 comprehensive plan adopted in Ordinance 139-06 which changes the LCTF designation of
19 the Shaw Family LLC property to In Holding fails to comply with the consistency requirement
20 of RCW 36.70A.070.
21
22
23

24 VI. FINDINGS OF FACT

- 25 1. Mason County is located west of the crest of the Cascade Mountains and is required
26 to plan pursuant to RCW 36.70A.040.
- 27 2. Ordinance No. 112-06 adopts development regulations for Master Development
28 Plans (MDPs). It was adopted on November 7, 2006 and published on January 11,
29 2007.
- 30 3. Ordinance No. 138-06 is Mason County's update of its critical area regulations
31 required by RCW 36.70A.130. It was adopted on December 27, 2006 and published
32 on January 11, 2006.

- 1 4. Ordinance No. 139-06 adopts an amendment to the Future Land Use Map as shown
2 in Chapter IV Land Use of the Comprehensive Plan. It was adopted on December
3 27, 2006 and published on January 11, 2006.
- 4 5. John E. Diehl is a person who did not submit any written or oral comments in his
5 individual capacity but only on behalf of Advocates for Responsible Development
6 (ARD).
- 7 6. ARD is a group of citizens that submitted written comments during the County's
8 adoption process regarding Ordinance No.112-06, Ordinance No.138-06 and
9 Ordinance No. 139-06. The written comments submitted regarding Ordinance
10 No.138-06 and No. 139-06 were submitted on December 19, 2006 by fax.
- 11 7. The question of when written comments could be submitted on Ordinance Nos. 138-
12 06 and 139-06 was confusing.
- 13 8. There was an oral announcement at the November 28th public hearing of a new
14 period for written comments and a different date of December 19 for the public
15 hearing where apparently oral comments could still be offered.
- 16 9. A memorandum was prepared by the County's consultants for the County
17 Commissioners, responding to the comments received by ARD on December 19,
18 2006 and also to the comments of the Olympia Master Builders prior to the adoption
19 of Ordinance 138-06 and Ordinance 139-06.
- 20 10. 17.60.010 of the development regulations adopted for MDPs states that one of the
21 "primary purposes" of the MDP is:
22
23 To encourage the permanent preservation of open space, wildlife habitat,
24 riparian corridors, and other critical areas, including aquifer recharge
25 areas, geologically hazardous areas, wetlands, frequently flooded areas,
26 watercourses, lakes and cultural resources in a manner that is consistent
27 with Mason County's Comprehensive Plan and Master Trail Plan.
- 28 11. The submittal and review requirements of 17.60.015(F) require common open space
29 for a MDP within an urban growth area (UGA) and require it to be predominately
30 located in large contiguous, undivided areas with no dimensions less than 30 feet
31 and that the amount of open space shall equal at least 200 square feet per single
32 family residential unit. Outside of UGAs, the requirements for common open space
are that it constitute at least 65% of the gross land area of the MDP and be located in
large contiguous, undivided areas with no dimensions less than 50 feet. The

1 standards for common open space (and private open space in MDPs within a UGA)
2 are spelled out in detail in the MDP ordinance.

3 12. There is no showing that the MDP regulations as a whole fails to implement any
4 comprehensive plan provision on open space –no such plan provision was cited by
5 Petitioner.

6 13. §17.60.012(2)(B) does not alter the densities of the underlying parcels. Instead, it
7 allows the developer to combine the maximum density allowed on each parcel on a
8 parcel-by-parcel basis and utilize it over the area of the MDP as a whole.

9 14. §17.10.015(3)(B)(iii) establishes the ability of uses and densities to shift within the
10 boundaries of a MDP:

11 When an MDP is located in more than one zoning district, uses and density
12 may shift between zoning districts within the boundaries of the MDP if that
13 transfer does not exceed the maximum density of the zone and results in a
14 project that better meets the goals and policies of the Comprehensive Plan.

15 15. The County concedes that there is no regulation to prevent a MDP from
16 encompassing both rural and urban lands.

17 16. When asked by the Board if the developer of a MDP could move uses and densities
18 from the portion of the MDP in the UGA to areas outside the UGA, the County agreed
19 that would be possible.

20 17. Allowing a MDP to extend urban uses and densities from the UGA portion of the
21 MDP into the rural lands of the MDP would extend urban growth outside of the UGA
22 without a determination that a shift in the UGA boundary was appropriate due to an
23 overall need to expand the amount of urban lands.

24 18. The majority of limited areas of more intensive rural development (LAMIRDs) in
25 Mason County are very small in size.

26 19. A MDP in a rural area must be at least 250 acres in size.

27 20. §17.10.015(3)(B)(iii) allows LAMIRD uses and intensities to be transferred within a
28 rural MDP without compliance with the criteria for LAMIRDs in RCW
29 36.70A.070(5)(iv).

30 21. §17.60.015(3)(B)(iii)(c) allows the County Commissioners to approve a residential
31 density bonus in a MDP if:
32

- The design of the development offsets the impact of the increase in density due to provision of privacy, open space, landscaping, and other amenities; and
- The increase in density is compatible with existing uses in the immediate vicinity of the subject property.

22. §17.60.015(3) provides that a developer can request a bonus in the number of dwelling units allowing up to the Maximum Density allowed in the Mason County Development regulations.

23. §17.60.015(3) is sufficiently vague as to appear to create a density bonus that would cause the density allowed in a rural MDP to exceed the County's established rural densities.

24. The MDP regulations regarding connection to public sewer depend upon the Implementing Site Development Plan (ISD Plan), which is described in Chapter 17.61 of the MDP development regulations. An Implementing Site Development Plan (ISD Plan) is required to implement all or any phase of an approved MDP. The MDP Development Regulations provide:

Approval of an ISD Plan is required prior to filing a final plat, or issuance of any building permit on land that is subject to an approved Master Development Plan. The ISD Plan must be consistent with the MDP.

25. The ISD Plan must include a preliminary plan indicating the size and general location of sewer collection piping and connection or extensions of existing facilities, lift station plan, manhole locations, and onsite treatment plan, if applicable. The Review Guidelines further provide as a criteria that "Adequate public services and facilities necessary to accommodate the proposed use and density are or can be made available."

26. Approval of the ISD Plan requires a finding that, among others, "[A]dequate utilities, roadway improvements, sanitation, water supply, and drainage are available." Further, the County may not issue a Certificate of Occupancy until all improvements included in the approved ISD Plan have been installed and approved unless a performance guarantee has been posted for improvements not yet completed or the "phasing of improvements has been accounted for in an infrastructure phasing agreement, a condition of approval or a development agreement."

27. §17.60.015(3)(S)(i) and (ii) are not stand-alone regulations but must be read together with the rest of the development regulations for MDPs, especially the ISD Plan requirements.

28. §17.60.023(1) provides:

1 Duration of the Master Development Plan. Approval of an MDP shall be effective for
2 up to 15 years; however, the Board may extend the approved MDP time limit at the
3 time of approving the MDP if an agreement is entered into with the applicant
4 approving the MDP for a period longer than 15 years

5 29. §17.61.034 describes two ways to amend or modify an approved ISD Plan. Major
6 amendments, requiring a Type II process “with notice”, are described as “a
7 substantial change or modification to the elements of the approved ISD Plan,
8 including changes that require additional environmental review.” A minor
9 amendment, Type II “No Notice”, is described by 9 criteria

10 30. Provided change is measured from the original approval rather than from the last
11 “minor” amendment and that the nine criteria all must be met for the amendment to
12 be considered “minor”, the requirements in §17.61.034 do not have the effect that
13 changing certain key aspects of the MDP will not necessarily address the significant
14 cumulative effect of those changes.

15 31. §17.01.070.E allows buffers of less than 300 feet for Category I and II wetlands and
16 varies the size of the required buffers on such wetlands depending upon factors such
17 as the degree of functioning of the habitat.

18 32. In a letter dated September 22, 2006 from Rick Mraz of the Department of Ecology,
19 to Bob Fink, Planning Manager, Mr. Mraz gave comments and suggestions on the
20 June 28, 2006 draft of the County’s proposed amendments. In response to Section
21 17.10.070(E) and Tables C, D, E & F of the County’s Resource Ordinance, Mr. Mraz
22 stated:

23 The best available science indicates that these wetlands (Category I and II
24 wetlands with high habitat function) should be protected by a 300-foot buffer if
25 the adjacent land use is of high-intensity. The County’s approach would result
26 in a high risk of degradation of these wetlands’ habitat functions.

27 33. The comment of Mr. Mraz was not supported by a citation to the science it utilized
28 and nothing suggests that Mr. Mraz intended his comments to be used in lieu of best
29 available science.

30 34. The science in the County’s record includes two recent documents prepared by
31 Ecology – *Freshwater Wetlands in Washington State, Volume 1: A Synthesis of the
32 Science* (2005); and *Wetlands in Washington State, Volume 2: Guidance for
Protecting and Managing Wetlands* (2005).

- 1 35. Petitioner failed to discuss the science in the County's record, to point out
2 deficiencies in the County's science, or to provide science meeting the requirements
3 of WAC 365-195-900 through 365-195-925 to support its challenge to §17.01.070.E.
- 4 36. §17.01.070.E.7.d allows the harvest of a percentage of the trees in wetlands buffers.
- 5
6 37. The sole science that Petitioner offers to challenge §17.01.070.E.7.d is a statement
7 in Mr. Mraz's letter of September 22, 2006 that advises that commercial forestry that
8 is not subject to Forest Practices review should not be allowed in wetland buffers.
9 The record fails to show a scientific basis for Mr. Mraz's conclusion or opinion.
- 10 38. Ordinance 138-06 states that the BAS on which it relied in updating the wetlands
11 regulations was primarily "the Washington Department of Ecology's (DOE)
12 publications 'Wetlands in Washington State, Volume 1: A Synthesis of the Science'
13 (2005) and 'Wetlands in Washington State, Volume 2: Guidance for Protecting and
14 Managing Wetlands' (2005).
- 15 39. Petitioner has failed to show where and how the best available science is missing on
16 wetlands regulations, by analyzing what is in the record and presenting the science
17 Petitioner alleges has not been included.
- 18 40. Petitioner abandoned Issue No.11.
- 19 41. §17.01.110.D.2 provides that the standard buffers and setbacks for a single family
20 home proposed on a lot created prior to December 5, 1996 located on saltwater or a
21 freshwater lake 20 acres or more in size, may be reduced under certain
22 circumstances.
- 23 42. If there are houses on both sides and within 150 feet of the lot line and no more than
24 200 feet from the ordinary high water mark (OHWM) then an imaginary common line
25 drawn across the lot from the two most adjacent houses may be used to establish
26 setbacks and buffers that are less than 100 feet from the OHWM. If there is a
27 residence on just one side of the lot under development, the buffer and setback is
28 determined by an imaginary common line from the neighboring house to a point 100
29 feet from the OHWM at the far end of the lot where the new house will be built. Under
30 both those circumstances, the reduced buffer (if less than 100 feet) will be "enhanced
31 for wildlife function which will include at a minimum planting with native vegetation"
32 and use of best management practices to limit impacts to the resource.
43. Petitioner relies upon the letter of WDFW of October 3, 2006 to support its argument
that 100 foot buffers are required to prevent a net loss of fish and wildlife habitat
structure and function in the shorelines. This letter is a thorough and scientifically-

1 based assessment of the impact of amendments to the County's Resource
2 Ordinance (Ordinance 138-06) and it is the only science in the record regarding
3 §17.01.110.D.2.

4 44. WDFW found that the common line provision was not supported by best available
5 science and recommended removing it. However, WDFW also stated that it could
6 accept flexibility for these kinds of lots so long as the reduction in buffers was offset
7 by mitigation tied to the habitat needs on site.

8 45. Mason County therefore added new conditions to the common line exemption,
9 requiring enhancement of the buffer for wildlife function at least by planting with
10 native vegetation and use of best management practices if the common line buffer is
11 less than 100 feet.

12 46. WDFW was sent the revised draft of the Resource Ordinance with the new conditions
13 and made no further comment.

14 47. The common line exemption makes a gradual connection between lots with existing
15 residences located in what would otherwise be the 100 feet buffer, across the
16 developing lot, such that the next lot will pick up the buffer at 100 feet from the
17 shoreline.

18 48. The requirement for BAS to be included in developing the County's critical areas
19 regulations is met here by the incorporation of the 100 feet buffer requirement into
20 the County's ordinance for FWHCAs in the marine and (certain) lake shorelines. The
21 limited exemption for pre-existing lots has not been shown to interrupt the FWHCA,
22 given that the exemption from the 100 feet buffer requirement only applies when one
23 or more adjacent lots already has residences within the 100 feet buffer.

24 49. Petitioner offers no evidence, just the argument that it is "self-evident" that an owner
25 would still have a reasonable use of his lot if he were somewhat more restricted in
26 the size of house he may build, in support of his challenge to §17.01.150.

27 50. Petitioner's brief offers no argument concerning the provisions of the GMA that
28 §7.01.150 violates – RCW 36.70A.060(2) and 36.70A.172(1).

29 51. Ordinance No. 139-06 adopted, among other things, a change in the Future Land
30 Use Map as shown on Chapter IV Land Use of the Mason County comprehensive
31 plan for the Shaw Family LLC.
32

1 52. RE-205 requires the following to reclassify Long Term Commercial Forest (LCTF)

2 Lands to an In Holding designation:

3 Long Term Commercial Forests may be reclassified to In Holding Lands provided
4 that all the following conditions are met:

5 A. The property meets the classification for In Holding Lands.

6 B. The property owner removes the property from open space or forest land tax
7 classification pursuant to RCW Chapters 84.33 or 84.34 within three years of the
8 effective date of redesignation, and any taxes, interest and penalties are in full upon
9 removal [sic].

10 C. The applicant has demonstrated that reasonable use of the property as
11 Designated Long-Term Commercial Forest Land is not possible and the inability to
12 make a reasonable use of the property is not due to action or inaction of the
13 applicant.

14 53. RE-206 requires:

15 Prior to designation out of the Long Term Commercial Forest classification, the
16 property owner shall demonstrate that the property can no longer be feasibly used for
17 Long Term Commercial Forest Purposes for reasons not caused by the property
18 owner.

19 54. The staff analysis of the Shaw Family LLC designation change request did not
20 address either the requirement that the applicant demonstrate reasonable use of the
21 property is not possible under the present designation (RE-205(C)); or that the
22 property shall demonstrate that the property can no longer be feasibly used for Long
23 Term Commercial Forest Designation (RE-206).

24 55. The Board of County Commissioners adopted the designation map change from
25 LTCF to In Holding without making any findings with respect to either plan policies
26 RE- 205(C) or RE- 206.

27 VII. CONCLUSIONS OF LAW

28 A. The Board has jurisdiction over the subject matter of the petition for review, except
29 with respect to Issue 13.

30 B. Issue 13 is not ripe, due to the legislative delay established for adopting any changes
31 to critical areas regulations related to agricultural activities in SSB 5248.
32

- 1 C. John E. Diehl, in his individual capacity, lacks standing to raise Issues 9-15 in the
2 petition for review.
- 3 D. Advocates for Responsible Development (ARD) has standing to raise the issues in
4 the petition for review.
- 5 E. The Petition for review was timely filed.
- 6 F. Petitioner (ARD) has failed in its burden with respect to Issue No. 1: that
7 §17.60.010(1)(A) and §17.60.010(1)(B) fail to comply with Goals 2, 8, 9 or 10 of the
8 GMA and violate the requirements of RCW 36.70A.070 to implement any open space
9 provisions in the Mason County comprehensive plan. Therefore, §17.60.010(1)(A)
10 and §17.60.010(1)(B) comply with RCW 36.70A.070 and Goals 2, 8, 9 and 10 of
11 RCW 36.70A.020.
- 12 G. §17.60.012(2)(B) complies with RCW 36.70A.070 on rural character and RCW
13 36.70A.110 on confining urban growth to urban areas. (Issue No. 2).
- 14 H. §17.10.015(3)(B)(iii) is clearly erroneous in allowing a developer to place urban
15 densities and urban uses on rural lands, and fails to comply with RCW
16 36.70A.110(1). §17.10.015(3)(B)(iii) is clearly erroneous in allowing the densities and
17 intensities in an established LAMIRD to be extended outside the LAMIRD boundaries
18 without meeting the criteria of RCW 36.70A.070(5)(d), and fails to comply with RCW
19 36.70A.070(5)(d)(iv). (Issue No. 3).
- 20 I. §17.60.015(B)(iii)(c) is clearly erroneous in that it fails to comply with RCW
21 36.70A.070's requirements with respect to sprawling low-density development in the
22 rural areas and RCW 36.70A.110's requirement to prohibit urban growth outside
23 designated UGAs. (Issue No. 4).
- 24 J. §17.60.015(3)(S)(i) and (ii) comply with RCW 36.70A.060, 36.70A.070, and
25 36.70A.110 and Goals 2, 8, 9, 10 and/or 12 of RCW 36.70A.020.(Issue Nos. 5 and
26 6).
- 27 K. §17.60.023(1) complies with RCW 36.70A.060 and 36.07A.172. (Issue No. 7).
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- 1 L. Provided change is measured from the original approval rather than from the last
2 “minor” amendment and that the nine criteria all must be met for the amendment to
3 be considered “minor” the requirements in §17.61.034 complies with Goals 2, 8,9 and
4 10 of RCW 36.70A.020 but needs clarification as set out in this decision. (Issue No.
5 8).
- 6 M. Petitioner has failed to show that §17.01.070.E fails to protect wetlands as required
7 by RCW 36.70A.060(2) and RCW 36.70A.172(1) and/or WAC 365-195-920.
8 Therefore, §17.01.070.E is deemed compliant (Issue No. 9).
- 9 N. Petitioner has failed to show that §17.01.070.E.7.d fails to protect wetlands as
10 required by RCW 36.70A.060(2) and 36.70A.172(1) and/or WAC 365-195-920.
11 Therefore, §17.01.070.E.7.d is deemed to comply with RCW 36.70A.060(2) and
12 36.70A.172(1) and/or WAC 365-195-920. (Issue No. 10).
- 13 O. Issue No. 11 was abandoned and is therefore dismissed.
- 14 P. Petitioner has not met its burden of showing that the common line exemption with the
15 addition of requirements for mitigation and best management practices
16 (§17.01.110.D.2) fails to incorporate best available science to protect the functions
17 and values of FWHCAs as required by RCW 36.70A.172(1). Therefore,
18 §17.01.110.D.2 is compliant with RCW 36.70A.172(1). (Issue No. 12).
- 19 Q. Issue No. 13 is dismissed without prejudice to the ARD’s ability to re-file it after the
20 delay established in SSB 5248 has expired.
- 21 R. Petitioner has failed to show that §17.01.150 is clearly erroneous and therefore
22 §17.01.150 complies with RCW 36.70A.060(2) and 36.70A.172(1). (Issue No.14).
- 23 S. The amendment to the comprehensive plan adopted in Ordinance 139-06 which
24 changes the LCTF designation of the Shaw Family LLC property to In Holding is
25 clearly erroneous in failing to address the requirements of Mason County
26 comprehensive plan policies RE-205(C) and RE-206 and therefore fails to comply
27 with the consistency requirement of RCW 36.70A.070.
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1 **VIII. ORDER**

2 Mason County is hereby ORDERED to achieve compliance with the Growth Management
3 Act as set forth in the above decision and Findings of Fact and Conclusions of Law within
4 180 days of the date of this Final Decision and Order. The following schedule shall apply:
5

6 Compliance Due	February 20 2008
7 Compliance Report and Index to 8 Compliance	February 27, 2008
9 Any Objections to a Finding of 10 Compliance and Record 11 Additions/Supplements Due	March 19, 2008
12 County's Response Due	April 10, 2008
13 Compliance Hearing (location 14 and time to be determined)	April 17, 2008

15 Entered this 20th day of August 2007.
16

17
18 _____
19 Margery Hite, Board Member

20
21 _____
22 Holly Gadbow, Board Member

23
24 _____
25 James McNamara, Board Member
26

27 Pursuant to RCW 36.70A.300 this is a final order of the Board.
28

29 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
30 mailing of this Order to file a petition for reconsideration. Petitions for
31 reconsideration shall follow the format set out in WAC 242-02-832. The original and
32 three copies of the petition for reconsideration, together with any argument in
support thereof, should be filed by mailing, faxing or delivering the document directly

1 to the Board, with a copy to all other parties of record and their representatives.
2 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
3 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
4 filing a petition for judicial review.

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

9 Enforcement. The petition for judicial review of this Order shall be filed with the
10 appropriate court and served on the Board, the Office of the Attorney General, and all
11 parties within thirty days after service of the final order, as provided in RCW
12 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
13 but service on the Board means actual receipt of the document at the Board office
14 within thirty days after service of the final order.

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