

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 Robert Wiesen,

4 Petitioner,

Case No. 07-2-0009

5
6 v.

ORDER ON PETITIONER'S MOTION

7
8 Whatcom County

9 Respondent.

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11 **I. SYNOPSIS**

12 This matter comes to the Board on Petitioner's Motion for Summary Judgment submitted on
13 July 30, 2007.¹ Petitioner Robert Wiesen moves that the Board find that Whatcom County
14 has failed to timely review its urban growth areas (UGAs) and revise them to accommodate
15 the succeeding growth for the twenty-year period pursuant to RCW 36.70A.130(3).

16 Petitioner urges the Board to set an expedited schedule.² Whatcom County's Response to
17 Petitioner's Motions was filed on August 8, 2007. The County concedes that it has not met
18 the May 23, 2007 deadline for reviewing its UGAs and says that it intends to complete the
19 UGA review by February 2008.

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22 This order finds that the County has failed to review and evaluate its UGAs within ten years
23 of the adoption of the comprehensive plan that established the UGAs, and this lack of action
24 fails to comply with RCW 36.70A.130 (3).

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26 **II. PROCEDURAL HISTORY**

27 Robert Wiesen filed a Petition for Review in this case on June 11, 2007. A prehearing
28 conference was held on June 29, 2007. Petitioner Robert Wiesen appeared through his
29 attorney Tadas Kisielius of GordonDerr. Whatcom County appeared through its attorney
30 Karen Frakes. Holly Gadbow presided. At the prehearing conference, the Presiding Officer
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¹ Petitioner's Motion for Summary Judgment, July 30, 2007.

² *Ibid* at 1.

1 asked the parties if they would be willing to attempt settlement of the issues. The parties
2 agreed to try. The presiding officer also ruled that the County did not need to submit an
3 Index to the Record because the claim here is failure to act. A prehearing order was issued
4 on July 3, 2007.

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6 On July 16, 2007, in a letter to the Board, Petitioner's attorney reported that settlement
7 negotiations had failed. On July 30, 2007, Petitioner's Motion for Summary Judgment and
8 Petitioner's Motion to Add to the Record were filed. Whatcom County's Response to
9 Petitioner's Motions was filed on August 8, 2007.

10
11 On August 24, 2007, an Order on Petitioner's Motion to Add to the Record was issued.
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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.
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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
24 chapter are presumed valid upon adoption.
25 RCW 36.70A.320(1).

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

28 The board shall find compliance unless it determines that the action by the
29 state agency, county, or city is clearly erroneous in view of the entire record
30 before the board and in light of the goals and requirements of this chapter.
31 RCW 36.70A.320(3)
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1 In order to find the County's action clearly erroneous, the Board must be "left with the firm
2 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
3 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

4
5 Within the framework of state goals and requirements, the boards must grant deference to
6 local governments in how they plan for growth:

7 In recognition of the broad range of discretion that may be exercised by counties and
8 cities in how they plan for growth, consistent with the requirements and goals of this
9 chapter, the legislature intends for the boards to grant deference to the counties and
10 cities in how they plan for growth, consistent with the requirements and goals of this
11 chapter. Local comprehensive plans and development regulations require counties
12 and cities to balance priorities and options for action in full consideration of local
13 circumstances. The legislature finds that while this chapter requires local planning to
14 take place within a framework of state goals and requirements, the ultimate burden
15 and responsibility for planning, harmonizing the planning goals of this chapter, and
16 implementing a county's or city's future rests with that community.
17 RCW 36.70A.3201 (in part).

18 In challenging the sufficiency of compliance efforts as well as in an initial petition for review,
19 the burden is on Petitioners to overcome the presumption of validity and demonstrate that
20 any action taken by the County is clearly erroneous in light of the goals and requirements of
21 Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2). Where not clearly
22 erroneous, and thus within the framework of state goals and requirements, the planning
23 choices of local government must be granted deference.

24 In this case, where Petitioner alleges failure to act to complete a requirement of the Act
25 within the timeframe set up by the Act, the burden of proof remains with the Petitioner that
26 the County has failed to act to complete the requirement within the timeframe established by
27 the Act.

28 29 **IV. ISSUES TO BE DISCUSSED**

- 30 1. Did the County violate RCW 36.70A.130(3), RCW 36.70A.110, and RCW 36.70A.020
31 (1),(2) and (4) by failing to perform the review of its urban growth areas and the
32 densities permitted within both the incorporated and unincorporated portions of each
UGA, as required under RCW 36.70A.130(3), within the timeframe established by the
statute?

1 2. Did the County violate RCW 36.70A.130(3), RCW 36.70A.110, and RCW 36.70A.
2 020(1), (2) and (4) by failing to take action to adopt any revisions to its
3 comprehensive plan resulting from its review of its urban growth areas and the
4 densities permitted within both the incorporated and unincorporated portions of each
5 UGA within the timeframe established in the statute?

6 V. DISCUSSION OF THE ISSUES

7 Positions of the Parties

8 Petitioner declares that it is an undisputed fact that the County concedes that it has not
9 updated its UGAs and revised them to accommodate the urban growth projected to occur in
10 the succeeding twenty-year period as required by RCW 36.70A.130(3). Petitioner points out
11 that there is no question that the ten-year deadline for reviewing UGAs (of May 23, 1997)
12 established in the July 6, 2006 Order Granting Motion to Dismiss in *Wiesen v. Whatcom*
13 *County*, WWGMHB Case 06-2-0008, has not been met.

14
15 Petitioner urges the Board to set an expedited schedule because the consequences of the
16 County's inaction are a failure of the urban areas to accommodate growth and thus pushing
17 urban growth to rural areas.³ Petitioner argues that another reason for the Board to find
18 noncompliance and to set an expedited schedule is so that the County will take the deadline
19 established by RCW 36.70A.130(3) seriously. Petitioner says that several important
20 preliminary decisions that need to be made for the review to take place have yet to be
21 made.⁴

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24 Whatcom County admits that the May 23, 1997 deadline for review and evaluating their
25 UGAs has not been met. The County states that it is scheduled to adopt the Bellingham
26 UGA in September 2007 and the other UGAs in February 2008.⁵

27 28 Board Discussion

29 RCW 36.70A.130(3) requires:
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31 _____

32 ³ Ibid at 10.

⁴ Ibid at 10.

⁵ Whatcom County's Response to Petitioner's Motions at 1 and 2.

1 (3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall
2 review, at least every ten years, its designated urban growth area or areas, and the
3 densities permitted within both the incorporated and unincorporated portions of each
4 urban growth area. In conjunction with this review by the county, each city located
5 within an urban growth area shall review the densities permitted within its boundaries,
6 and the extent to which the urban growth occurring within the county has located
7 within each city and the unincorporated portions of the urban growth areas.

8 (b) The county comprehensive plan designating urban growth areas, and the
9 densities permitted in the urban growth areas by the comprehensive plans of the
10 county and each city located within the urban growth areas, shall be revised to
11 accommodate the urban growth projected to occur in the county for the succeeding
12 twenty-year period. The review required by this subsection may be combined with
13 the review and evaluation required by RCW 36.70A.215.

14 In its July 6, 2006 Order Granting Motion to Dismiss in *Wiesen v. Whatcom County*,
15 WWGMHB Case 06-2-0008, the Board decided that Whatcom County had up to ten years
16 from the date of designation of its UGAs to complete the review of its UGA boundaries and
17 densities within its UGAs.⁶ The parties do not dispute that this date is May 23, 2007, which
18 is ten years from the date on which the Whatcom County Comprehensive Plan was adopted
19 (on May 23, 1997)⁷ and the UGAs were designated.

20 Petitioner urges the Board to adopt an expedited schedule, but does not suggest what this
21 schedule should be. The County says that the review of the Bellingham UGA will be
22 completed in September 2007 and review of the rest of the UGAs will be completed by
23 February 2008.⁸

24
25 Conclusion: Based on the showing by Petitioner and the County's concession, the Board
26 finds that Whatcom County has failed to review the boundaries of its UGAs, the densities
27 permitted within the UGA boundaries, and the extent to which urban growth occurring within
28 the county has located within each city and the unincorporated portions of the urban growth
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32 ⁶ *Wiesen v. Whatcom County*, WWGMHB Case No. 06-2-0008 Order Granting Motion to Dismiss, July 6, 2006) at 9.

⁷ Index No. 101.

⁸ Whatcom County's Response to Petitioner's Motions at 2.

1 areas, within the timeframe established by RCW 36.70A.130(3). The GMA contemplates
2 that compliance as a result of a Board decision should ordinarily be completed within 180
3 days.⁹ Although Petitioner requests an “expedited schedule”, Petitioner has not provided
4 the Board with a work plan which would reflect such a schedule. The County’s proposal
5 (based on the County’s statement that the review of its UGAs will be completed by February
6 2008) would accomplish compliance within 180 days and therefore the Board grants the
7 County 180 days to take this action. Compliance shall be due no later than **February 25,**
8 **2008.**
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10 VI. FINDINGS OF FACT

- 11 1. Whatcom County is a county located west of the Cascade Mountains that is
12 required to plan pursuant to RCW 36.70A.040.
- 13 2. Robert Wiesen filed a petition for review on June 11, 2007 that claims that
14 Whatcom County has failed to review and revise its UGA boundaries and the
15 densities within them as required by RCW 36.70A.130(3) and this lack of action
16 fails to comply with RCW 36.70A.130(3), RCW 36.70A.110, and RCW 36.70A.020
17 (1), (2), and (4).
- 18 3. In its July 6, 2006 Order Granting Motion to Dismiss in *Wiesen v. Whatcom*
19 *County*, WWGMHB Case 06-2-0008, the Board determined that Whatcom County
20 had up to ten years from the date of designation of its UGAs to complete the
21 review of its UGA boundaries and densities within them.
- 22 4. The County adopted its comprehensive plan that established urban growth
23 boundaries on May 23, 1997.
- 24 5. The County admits that it has not reviewed and evaluated its UGA boundaries by
25 May 23, 2007 as required by RCW 36.70A.130(3).
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29 VII. CONCLUSION OF LAW

- 30 A. The Board has jurisdiction over subject matter of this petition for review.
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⁹ RCW 36.70A.300(3)(b)
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B. The Petition for review was timely filed since the County has failed to act according to the timelines of RCW 36.70A.130(3).

C. Whatcom County has failed to review its UGA boundaries, the densities permitted within the UGA boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas within the timeframe established by RCW 36.70A.130(3).

VIII. ORDER

The County is ordered to achieve compliance with the Growth Management Act in accordance with this final decision and order no later than February 25, 2008. The County must complete its review of its UGA boundaries and densities within them, and any revisions, if necessary, to accommodate the succeeding twenty years of growth by **February 25, 2008** according to the following schedule:

Compliance Due	February 25, 2008
Compliance Report (County to file and serve on all parties)	March 10, 2008
Any Objections to a Finding of Compliance Due	March 24, 2008
County's Response Due	April 14, 2008
Compliance Hearing (location to be determined)	April 21, 2008

Dated this 27th day of August, 2007.

Holly Gadbow, Board Member

Margery Hite, Board Member

James McNamara, Board Member

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

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

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

14 **Enforcement.** The petition for judicial review of this Order shall be filed with the
15 appropriate court and served on the Board, the Office of the Attorney General, and all
16 parties within thirty days after service of the final order, as provided in RCW
17 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
18 but service on the Board means **actual receipt of the document at the Board office**
within thirty days after service of the final order.

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

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Western Washington
Growth Management Hearings Board
905 24th Way SW, Suite B-2
Olympia, WA 98502
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-8966
Fax: 360-664-8975