

State of Washington
**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD**

CITY OF TACOMA, CITY OF MILTON,)	Case No. 94-3-0001
CITY OF PUYALLUP and CITY OF)	
SUMNER,)	
)	
Petitioners,)	FINDING OF COMPLIANCE
)	
v.)	
)	
PIERCE COUNTY,)	
)	
Respondent.)	
_____)	

On October 12, 1993, the Pierce County Council (the **County**) adopted Pierce County Ordinance No. 93-91S (**Ordinance 93-91S** or the **Ordinance**), establishing Interim Urban Growth Areas (**IUGAs**) and creating a process for adopting Final Urban Growth Areas (**FUGAs**). Notice of adoption was published November 12, 1993.

On January 6, 1994, the Cities of Tacoma, Milton, Puyallup and Sumner (the **Cities**) filed a Petition for Review with the Central Puget Sound Growth Planning Hearings Board (the **Board**) [\[FN1\]](#) challenging Ordinance 93-91S for not complying with the Growth Management Act

(GMA).

Following a February 23, 1994 hearing on motions, the Board issued an Order on Dispositive Motions on March 4, 1994. The Board denied the County's motion to dismiss Legal Issues 1, 2, and 3, ruling that it did not have jurisdiction to determine violations of equitable doctrines. The order also granted the Cities' dispositive motion on Legal Issue No. 6, and remanded Ordinance 93-91S to the County, with instructions to bring a portion of Section 5 into compliance with the GMA.

On April 12, 1994, the Board held a hearing on the merits of the remaining legal issues at the Metropolitan Park District offices in Tacoma.

On July 5, 1994, the Board entered a Final Decision and Order, ruling that Ordinance 93-91S is not in compliance with the requirements of the GMA.

On August 4, 1994, the Board received notification that the County had appealed the Board's Final Decision and Order to the Thurston County Superior Court, Cause No. 94-2-02198-0. That appeal is still pending.

On November 30, 1994, County Council Chair Dennis Flannigan and County Executive Doug Sutherland sent a letter to the Board's Presiding Officer in this case, indicating that on November 29, 1994, the County adopted its comprehensive plan and final urban growth areas. The letter further indicated that:

These final UGAs have regulatory effect and supersede the interim UGAs previously adopted in Ordinance 93-91S.

On December 7, 1994, the Board on its own initiative scheduled a compliance hearing to determine whether the County had complied with the directives in the Board's Final Decision and Order.

On December 28, 1994, the Cities filed "Petitioners' Compliance Hearing Memorandum" with the Board. The following exhibits were attached to the memorandum: Exhibit A--Pierce County Ordinance 94-82S; Exhibit B--Urban Growth Areas map; Exhibit C--excerpts from "the Comprehensive Plan for Pierce County" (the **Comprehensive Plan**); Exhibit D--Urban Service Areas/Urban Growth Area map; and Exhibit E--an excerpt from the Pierce County Countywide Planning Policies. The County did not submit any documents for the compliance hearing.

On December 29, 1994, the Board held a compliance hearing telephonically. The Board's three members, M. Peter Phillely, presiding, Joseph W. Tovar, and Chris Smith Towne, participated. Kyle J. Crews represented Tacoma; Mark H. Calkins represented Milton and Sumner; Robin

Jenkinson represented Puyallup; and T. Ryan Durkan represented the County. Court reporting services were provided by Duane W. Lodell, CSR, of Robert Lewis & Associates, Tacoma.

STATEMENT OF FACTS

1. The Board's Final Decision and Order contained the following order:

1) Pierce County Ordinance No. 93-91S is **remanded** to the County with instructions to bring it into compliance with the Growth Management Act, specifically RCW 36.70A.110, and with the Board's holdings and conclusions in this case:

A. Pierce County's IUGAs must be based exclusively upon OFM's growth management planning population projection for the year 2012;

B. Pierce County's IUGAs must include densities sufficient to permit the urban growth that is projected to occur in the county for the succeeding twenty-year period.

C. Pierce County's IUGAs must include greenbelt and open space areas, and these terms must be defined.

D. Either Pierce County's IUGAs ordinance must include a notice indicating where interested persons can ascertain whether specific parcels of property are located within or outside the IUGAs, and/or Pierce County's IUGAs ordinance must contain an IUGAs map that contains a

notice providing such information.

E. On remand, if the County adopts new IUGAs that are different from the IUGAs proposed by the various cities, the County must provide written justification why it elected to adopt different IUGAs and the written justification must be provided with sufficient time for a dissatisfied city to formally object to DCTED.

F. On remand, Pierce County must "show its work" justifying the IUGAs configuration it ultimately adopts. In order to "show its work" regarding its adopted IUGAs (as opposed to work on proposed IUGAs), the County must document how it applied OFM's population projections; define terms; calculate densities; deduct for any critical areas and natural resource lands, greenbelts and open spaces; define development intensity in clear numeric terms; and specify its methods and assumptions.

2) On remand, if the County adopts IUGAs that are not identical to those proposed by the cities, it must correct Section 2 of Pierce County Ordinance No. 93-91S so that it correctly reflects the actual circumstances.

3) Section 3 of Pierce County Ordinance No. 93-91S is **remanded** to the County with instructions to bring it into compliance with the Growth Management Act and with the Board's holdings and conclusions in this case because, as written, it eliminates County discretion in determining if IUGAs should extend beyond existing city limits.

4) Pursuant to RCW 36.70A.300(1)(b), the Board directs Pierce County to comply with this Final Decision and Order no later than **5:00 p.m. on Thursday, December 1, 1994**. The Board will hold a hearing after this date to determine whether the County has complied with this order.

5) In the event that Pierce County adopts its comprehensive plan and FUGAs prior to December 1, 1994, the County shall promptly notify the Board that such action has been taken. (emphasis in original).

2. On November 29, 1994, the Pierce County Council adopted and the Pierce County Executive approved Ordinance 94-82S, entitled:

An Ordinance of the Pierce County Council repealing Pierce County Code Title 19, the 1962 Comprehensive Plan, and adopting two new titles of the Pierce County

Code, Title 19A "The Pierce County Comprehensive Plan" pursuant to the Growth Management Act, Chapter 36.70A RCW; and new Title 19B, "General Planning Documents"; adopting an urban growth area; and adopting findings of fact. Exhibit A to Petitioners' Compliance Hearing Memorandum.

3. The effective date of Ordinance 94-82S is January 1, 1995. Exhibit A, § 9, to Petitioners' Compliance Hearing Memorandum.

4. Section 5(b) of Ordinance 94-82S adopts FUGAs and repeals Ordinance No. 93-91S and Ordinance 93-34 (which amended Ordinance 93-91S). Exhibit A to Petitioners' Compliance Hearing Memorandum, at 8.

POSITIONS OF THE PARTIES

The County contends that by adopting Ordinance No. 94-82S before the Board's December 1, 1994 deadline, it should be found in compliance. The County acknowledges that because Ordinance 94-82S did not take effect until January 1, 1995, it technically may be viewed in noncompliance for the month of December, 1994. However, the County points out that by the time the Board issues its finding regarding compliance in January, 1995, the issue will be moot since the question of compliance is relevant on the date of the Board's compliance finding rather than on the date of the compliance hearing. Accordingly, the County contends that it has complied with the requirements of both the Act and the Board's Final Decision and Order. However, the County maintains that it is obliged to comply only with the requirements of the GMA, and not with the specific provisions of the Board's Final Decision and Order. The County's position is based upon the Western Washington Growth Management Hearings Board's Compliance Hearing Order in *City of Port Townsend, Olympic Environmental Council and 1000 Friends of Washington v. Jefferson County*, WWGMHB Case No. 94-2-0006 (1994).

In response, the Cities argue that:

Pierce County technically has not complied with the Board's "Final Decision and Order" because, at the time of the instant compliance hearing, the County's IUGA Ordinance (No. 93-91S) will remain in effect. Only on January 1, 1995 will Ordinance No. 94-81S [*sic*: 94-82S] (repealing 93-91S and adopting FUGAs) become effective. The County has allowed the non-complying IUGA ordinance to remain in effect for one month beyond the date set for compliance by the Board. Petitioner's Compliance Hearing Memorandum, at 2.

As a result, the Cities ask the Board to issue a finding of noncompliance even though "the County's failure to comply will arguably become moot as of January 1, 1995 when the FUGA provision of the Comprehensive Plan Ordinance takes effect." Petitioner's Compliance Hearing Memorandum, at 2-3.

During oral argument, the Cities contended that a respondent must comply with the Board's Final Decision and Order, however specific that document might be, rather than with the generic requirements of the Act.

During oral argument, the Cities pointed out that, although Ordinance 94-82S itself was available on December 1, 1994, the appendices to that document, including the Comprehensive Plan itself, were not available until sometime later in the month. The County indicated that until the County Council formally adopted Ordinance 94-82S, its appendices could not be finalized. Therefore, because all the relevant documents would not have been finalized and available by December 1, 1994, the County made January 1, 1995 the effective date of Ordinance 94-82S, rather than December 1, 1994.

DISCUSSION

The Board agrees with that the County that it is in compliance with the Board's Final Decision and Order. However, the Board rejects the County's contention that the test of compliance is solely whether it complied with the statutory language of the GMA, rather than with the Board's final decision and order. To support that contention, the County cited *Port Townsend v. Jefferson County*, a case decided by the Western Washington Growth Management Hearings Board. In that case, the Western Board indicated:

... a Board has no authority to specifically order any particular action be taken after finding non-compliance, RCW 36.70A.300(1)(b). While we may make suggestions or recommendations it is entirely up to the local government to determine how it wishes to come into compliance with the Act. RCW 36.70A.330(1) states that a compliance hearing is for the purpose of determining whether the local government "is in compliance with the requirements of this chapter" (the Act).

Therefore, we hold that the issue to be decided at a compliance hearing is whether the local government has complied with the Act, and not necessarily whether there has been strict adherence to the recommendations issued in the final order.

We further hold that matters which were not part of the original finding of non-compliance cannot be used at the hearing as a basis for determining whether compliance has been achieved. We remain committed to the fundamental concept of the Growth Management Act that local decision-makers are the proper persons to implement GMA as long as the parameters established by the Act are adhered to. The specific mechanism for achieving compliance rests solely with local government.

... City of Port Townsend, Olympic Environmental Council and 1000 Friends of Washington v. Jefferson County, WWGMHB Case No. 94-2-0006 (1994), Compliance Hearing Order, at 6.

This Board agrees with the Western Washington Board that the ultimate discretion to implement the GMA rests with local governments. However, the Board offers a significantly different perspective on its own role in the process.

RCW 36.70A.330, entitled "Noncompliance," provides in part:

(1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300 (1)(b) has expired, the board, on its own motion or motion of the petitioner, shall set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of this chapter.

The County appears to contend that it can ignore the Board's Final Decision and Order and that it must comply only with what is found within the GMA as it alone interprets it. While it is true that the County must comply with the substantive and procedural requirements of the Act, the County fails to acknowledge that some of those requirements involve hearings boards, particularly the responsibility of this Board to interpret the GMA when it is unclear and/or in dispute and, based on the facts and arguments in a case, to issue findings and conclusions.^[FN2] Within the more than one hundred appeals filed to date with the three boards, there are obviously many different views on what the words of the Act mean. It is the duty of each of the growth management hearings boards to resolve these contested readings of the Act and provide clarity and guidance in a manner that harmonizes apparent internal conflicts while remaining true to legislative intent.

A final decision and order represents a board's conclusion of what contested GMA provisions require or allow. Unlike the Western Board, this Board holds that its Final Decision and Order is more than a mere suggestion or recommendation. If a final order were only that, there would be no need to hold a compliance hearing pursuant to RCW 36.70A.330, since a local government would have unrestricted license to do whatever it wanted. The County's theory ignores the fact that when the Board, after a hearing on the merits, determines by a preponderance of the evidence that the underlying action does not comply with the Act, the respondent local government's presumption of validity has been overcome.

This Board concludes that, at the time of the compliance hearing, for the purposes of determining whether the state agency, county or city is in compliance with the requirements of the Act, the respondent jurisdiction must comply not just with the statutory language but also with the Board's final decision and order, however specific it might be.

The Board nonetheless notes that the final decision and order itself must comply with the requirements of the Act. The Board cannot violate the Act. Furthermore, if a respondent found not to be in compliance with the requirements of the Act believes that the Board, in its final decision and order, has either reached the incorrect conclusion regarding compliance, or that the Board's conclusions about compliance, although legally correct, impose improper remedies, that jurisdiction is free to appeal the Board's decision to Thurston County Superior Court. *See* RCW 36.70A.300(2).

This Board has issued dispositive orders in sixteen cases to date. In some instances, the final decision of the Board was contained in a dispositive order; in others, as here, the final decision was contained in a Final Decision and Order. In every instance where the Board has determined that the respondent jurisdiction has not complied with the Act, the Board has imposed a

reasonable deadline for *when* the noncomplying jurisdiction must achieve compliance. Moreover, the Board has always attempted to explain *why* the respondent jurisdiction has not complied with the Act. In almost every case where noncompliance has been found, the Board has even ordered *how* the noncomplying jurisdiction can achieve compliance. Nonetheless, the local jurisdiction retains broad latitude.

For instance, in a recent case [\[FN3\]](#), the Board reviewed the Kitsap County Conservation Easement Ordinance (the CEO). Although the Board did not reject the concept of such an ordinance, the Board did find that the CEO was not in compliance with the Act's requirements. The Board then gave Kitsap County a reasonable period to *either* repeal the ordinance or to amend the ordinance so that it would comply with the Act. The Board did not specify how the County could do the latter, as this Board, like the Western Washington Board, concludes that the task of legislating is specifically reserved by the GMA to the elected local policy makers. It is up to the noncomplying jurisdiction to determine how best to achieve compliance.

The Board also points out that if the County's position, taken literally, were adopted, a petitioner could re-open the entire case at the compliance hearing level. Under the Board's ruling in this and prior cases, the compliance hearing is limited to reviewing only that portion of an enactment found not in compliance. This holding does not leave a petitioner unprotected. Since it takes a new legislative action to bring a jurisdiction into compliance, this new action, although taken to "correct" an existing enactment, triggers a new sixty day period for filing a new appeal.

Turning then to the issue at hand, whether the County complied with the Board's Final Decision and Order, the Board concludes that compliance has been achieved. Although the bulk of the Board's order related to how the County could bring its IUGAs Ordinance, No. 93-91S, into compliance, the Board was aware that the case involved *interim* regulations and urban growth areas that presumably would be replaced by final urban growth areas and a comprehensive plan. Accordingly, the Board realized that this case would become moot if the County proceeded to adopt its comprehensive plan and final urban growth areas within the period specified for compliance. Rather than expending scarce resources on bringing its IUGAs ordinance into compliance, the County decided to focus on adopting its FUGAs and Comprehensive Plan. The Board cannot fault the County for such a