

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

CORINNE R. HENSLEY, et al.,)	
)	Case No. 95-3-0043
Petitioners,)	
)	
v.)	FINDING OF
)	NONCOMPLIANCE
SNOHOMISH COUNTY,)	
)	[Recommendation of
Respondent.)	Sanctions]
_____)	

PROCEDURAL HISTORY

On May 9, 1995, the Board received a Dispositive Motion from Corinne R. Hensley, Concerned Citizens for Sky Valley, and 1000 Friends of Snohomish County (hereafter collectively referred to as **Hensley**). Hensley’s Dispositive Motion asked the Board to find that Snohomish County (the **County**) was required and had failed to adopt by specified dates a comprehensive plan, final urban growth areas (**Final UGAs**), and development regulations to implement the plan, as required by the Growth Management Act (**GMA** or the **Act**).

On June 9, 1995, the Board issued an Order Granting Hensley’s Dispositive Motion, finding that the County was required to adopt and had not adopted a comprehensive plan, Final UGA boundaries and implementing development regulations, pursuant to the requirements of the Act. The Order established July 1, 1995 as the deadline for adopting a comprehensive plan and Final UGAs, and September 6, 1995 as the deadline for adopting development regulations to implement the comprehensive plan.

On August 9, 1995, the Board held a compliance hearing on the subject of adoption of the Plan and Final UGAs. On August 21, 1995, it issued a Finding of Compliance with that portion of the Order directing adoption of a Plan and Final UGAs.

On September 11, 1995, the Board received “Snohomish County’s Statement of Compliance Regarding Adoption of Development Regulations,” with attached copies of eleven ordinances. Those ordinances were characterized by the County as development regulations implementing the County’s Plan, adopted pursuant to the Board’s Order.

On September 19, 1995, the Board issued a Notice of Compliance Hearing for September 29, 1995; it issued a subsequent Order Continuing Compliance Hearing to October 24, 1995, in response to a request by the County.

On October 18, 1995, the Board received “Snohomish County’s Supplemental Statement of Compliance Regarding Adoption of Development Regulations,” with an attached Copy of Ordinance 95-081, Rural Cluster Subdivisions, adopted September 27, 1995.

On October 23, 1995, the Board received “Snohomish County’s Memorandum Concerning Compliance.”

On October 24, 1995, the Board received Hensley’s “Reply Brief to Snohomish County’s Statements of Compliance Regarding Adoption of Development Regulations.”

On October 24, 1995, the Board held the second compliance hearing in this case; Chris Smith Towne, presiding officer, appeared for the Board. For Petitioners Sky Valley, et al., Corinne R. Hensley represented herself; Jane Cooper represented 1000 Friends of Snohomish County, and Steve Erdman, participating telephonically, represented Concerned Citizens for Sky Valley. Gordon Sivley represented the County. Court reporting services were provided by Duane Lodell of Robert H. Lewis & Associates.

II. STATEMENT OF FACTS

1. The following portions of the Board’s Order are the subject of this compliance determination:

...

2. Pursuant to RCW 36.70A.300(1)(b), the County is given until ... **Wednesday, September 6, 1995** to adopt by ordinance development regulations that are consistent with and implement the comprehensive plan.

3. ... The County shall prepare a statement of the status of its compliance with the Board’s Order regarding adoption of development regulations, and file one original and two copies with the Board, and serve a copy on Hensley, not later than **5:00 p.m. on Monday, September 11, 1995**. ...*Order Granting Hensley’s Dispositive Motion*, at 5-6. (Emphasis in original)

2. On June 28, 1995, the Snohomish County Council (the **County Council**) adopted Amended Ordinance 94-125, adopting the Snohomish County Growth Management Act Comprehensive Plan.

3. Also on June 28, 1995, the County Council adopted Ordinances 94-113 through 94-124, adopting all of the County's Final Urban Growth Areas.

Ordinances

4. On March 7, 1995, the County Council adopted Ordinance 94-108, amending Title 32 SCC [Snohomish County Code] to designate and regulate critical areas pursuant to the requirements of the Act.

5. On June 28, 1995, the County Council adopted Ordinance 95-039, amending Ordinance 93-145 and Titles 13 and 26B SCC, to address mitigation of transportation impacts of development, consistent with and implementing the Plan.

6. On July 10, 1995, the County Council adopted Ordinance 95-048, amending Ordinance 92-101 and Titles 17, 18, 19, 20 and 21 SCC to make the provisions consistent with the final resource lands policies and designations in the Plan.

7. On July 10, 1995, the County Council adopted Ordinance 95-049, amending Ordinance 93-038 and Title 32 SCC, to make the provisions of Ordinance 93-038 applicable to agricultural lands receiving final designation in the Plan.

8. On July 10, 1995, the County Council adopted Ordinance 95-050, amending Title 32 SCC by adding a new chapter to meet the Act's notice requirement for lands receiving final mineral lands designation in the Plan, pursuant to RCW 36.70A.060.

9. Also on July 10, 1995, the County Council adopted Ordinance 95-051, amending Ordinance 93-040 and Title 32 SCC, to make the provisions of Ordinance 93-040 applicable to agricultural lands receiving final designation in the Plan, pursuant to RCW 36.70A.060.

10. On July 10, 1995, the County Council adopted Ordinance 95-052, amending Ordinance 93-083 and Title 32 SCC, Right to Practice Forestry, to make the provisions of Ordinance 93-083 applicable to forest lands receiving final designation in the Plan, pursuant to RCW 36.70A.060.

11. On July 24, 1995, the County Council adopted Ordinance 95-065, amending Ordinance 95-039 and Title 26B SCC, to address references in Ordinance 95-039 to the Plan, which was the subject of a petition for referendum filed on July 5, 1995.

12. On August 9, 1995, the County Council adopted Ordinance 95-062, adding a new Title 19A SCC to binding site plans, and providing a "voluntary, alternative method for the division of land." The Ordinance contains no reference to the Growth Management Act (the **Act**) or to the

Plan adopted pursuant to the requirements of the Act.

13. On August 16, 1995, the County Council adopted Ordinance 95-061, amending Ordinance 94-003 and Title 18 SCC, which provides for planned residential developments and directs that densities shall be consistent with the Plan.

14. On August 23, 1995, the Council adopted Ordinance 95-070, amending Ordinance 95-039 and Title 26B SCC, which provides for the imposition of impact fees for roads pursuant to Chapter 82.02 RCW

15. On September 27, 1995, the Council adopted Ordinance 95-081 amending Title 32 SCC to modify the Rural Cluster Subdivision code to reflect final forest land designations in the Plan.

16. The record does not indicate if or when notice of adoption of any of these regulations was published.

DISCUSSION

In its Memorandum, the County urges the Board to find that the County did adopt regulations implementing the Plan, citing to the twelve Ordinances cited above. The County directs the Board's attention to its previous rulings in failure-to-act (at all or procedurally, as specified in the Act) cases: *KCRP, et al., v. Kitsap County*, CPSGMHB No. 94-3-0005, (1994), and *Friends of the Law v. King County*, CPSGMHB No. 94-3-0009 (1994), where the Board held that a compliance hearing will be limited to the question of whether a local government took the specified compliance action, not whether the action taken complied substantively with the Act's requirements.

The County calls the Board's attention to the specific requirements of the Act to adopt development regulations to protect critical areas and protect resource lands (RCW 36.70A.060), and to the absence of a mandatory list of development regulations required to implement comprehensive plans. It concludes that, without such a list, the Board cannot determine whether the development regulations adopted by the County are sufficient to comprise Plan implementation.

Finally, the County asks the Board to answer affirmatively the narrow question: Did the County adopt regulations to implement its Plan by the deadline set by the Board in its Order Granting Hensley's Dispositive Motion?

Hensley, while agreeing that the County has "... adopted development regulations which may, in part, implement the Plan," argues that under the GMA, comprehensive plans must be fully

implemented with consistent development regulations by the deadline established in the Act.

Hensley asserts that the Plan (at Appendix H) specifies 199 implementation steps, with at least 28 of those requiring adoption or amendment of a development regulation. It characterizes the County's argument as asking the Board to find " ... that procedural compliance is attained by adopting one development regulation, regardless of how many are required to implement the Plan." To refute this position, Hensley observes that a GMA deadline for the adoption of development regulations must be interpreted to be not a "starting gun" but a "checkered flag."

Hensley distinguishes procedural and substantive challenges:

Procedural challenges ask whether the jurisdiction has adopted development regulations in sufficient quantity and classification to implement all portions of an adopted GMA comprehensive plan by the statutory deadline. **Substantive** challenges challenge the adequacy of the implementation by asking whether the substance of an adopted regulation sufficiently implements a portion of portions of an adopted GMA comprehensive plan. (emphasis in original) Hensley Brief, at 3.

Finally, Hensley points out that the county has not adopted a zoning ordinance to implement the Plan, and asks the Board to find the County still out of compliance.

While the County makes the observation that the Act, at RCW 36.70A.040(3)(d), provides little specific direction to local governments in complying with the requirement of the Act to adopt development regulations that are consistent with and implement their comprehensive plans, the Act does provide a definition of development regulations at RCW 36.70A.030:

(9) "Development regulations" means any controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances.

The Act contains specific provisions directing the adoption of development regulations that: are consistent with and implement the comprehensive plan (RCW 36.70A.040(3)(d)); assure conservation of agricultural, forest, and mineral resource lands (RCW 36.70A.060(1)); protect designated critical areas (RCW 36.70A.060(2)); and designate urban growth areas (RCW 36.70A.110(4)).

The State Department of Community, Trade and Economic Development (**CTED**) prepared Procedural Criteria for Adopting Comprehensive Plans and Development Regulations (365-195 WAC,) to meet its responsibility under RCW 36.70A.190 to adopt " ... procedural criteria to

assist counties and cities in adopting comprehensive plans and development regulations that meet the goals and requirements ...” of the Act. RCW 36.70A.190(4)(b).

The Procedural Criteria, at WAC 365-195-210, define “Consistency” as:

“Consistency” means that no feature of a plan or regulation is inconsistent with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.

Part Eight of the Criteria, at WAC 365-195-800(1), Relationship to comprehensive plans, discusses implementing development regulations:

Development regulations under the Growth Management Act are specific controls placed on development or land use activities by a county or city. Such regulations must be consistent with comprehensive plans developed pursuant to the Act and they must implement those comprehensive plans.

“Implement” in this context has a more affirmative meaning than merely “consistent” (See WAC 365-195-210(5)). “Implement” connotes not only a lack of conflict but sufficient scope to carry out fully the goals, policies, standards and directions contained in the comprehensive plan. Emphasis added.

The Board has previously agreed that DCTED has correctly explained a part of what the Act intends by the requirement for “consistency.” However, in *West Seattle Defense Fund v. Seattle (WSDF I)*, CPSGMHB Case No. 94-3-0016 (1995), the Board determined that, in certain situations, the Act requires more:

As a general proposition, the board agrees with the Procedural Criteria: internal consistency means that provisions are compatible with each other - that they fit together properly. In other words, one provision may not thwart another. However, the Board finds that consistency can also mean more than one policy not being a roadblock for another; it can also mean that policies of a comprehensive plan, for instance, must work together in a coordinated fashion to achieve a common goal. *WSDF I*, at 26. Emphasis added.

WAC 365-195-805(1) recommends that each local government planning under the Act develop a detailed strategy for implementation of its comprehensive plan. An essential feature is the selection of the specific regulations needed, with consideration of the following:

(a) The choice of substantive requirements, such as the delineation of use zones; general development limitations concerning lot size, setbacks, bulk, height, density;

provisions for environmental protection; urban design guidelines and design review criteria; specific requirements for affordable housing, landscaping, parking; levels of service, concurrency regulations and other measures relating to public facilities.

(b) The means of applying the substantive requirements, such as methods of prior approval through permits, licenses franchises, or contracts.

(c) The processes to be used in applying the substantive requirements, such as permit application procedures, hearing procedures, approval deadlines, and appeals.

(d) The methods of enforcement, such as inspections, reporting requirements, bonds, permit revocation, civil penalties, and abatement.

In the present instance, the question is not whether the twelve cited ordinances are consistent with one another, in the sense that they do “not thwart [one] another,” as the Procedural Criteria explain. Rather, the question is whether the development regulations adopted by the County “work together in a coordinated fashion to achieve a common goal,” which in this case is nothing less than the full implementation of the County’s comprehensive plan.

While it is not the Board’s responsibility to identify each and every development regulation which would be necessary to achieve full implementation of the Plan, the Board can and will conclude that, lacking a comprehensive zoning code^[1] or its functional equivalent, the County has not adopted development regulations that “work together in a coordinated fashion to achieve a common goal,” and has not complied with the Board’s Order. While each of the twelve cited ordinances, on its face, addresses a section of the Act (e.g. regulation of critical areas,) or meets one of the suggested regulations in WAC 365-195-805(1), none of the twelve constitutes a zoning code that applies throughout the County’s jurisdiction.

Absent such a core document,^[2] the County’s regulatory scheme lacks a clear statement of the basics of land use regulation - - what land use categories are permitted in different portions of its jurisdictional area? What permit process is required and what are the development standards with which a project must comply? This is more than a matter of good policy or good form -- without that fundamental baseline information that a zoning code and map provide, it is not possible for a local government to meet Planning Goals (6) regarding property rights, and (7) regarding permits.

^[3] Lacking a zoning code, it is difficult to imagine how the development permit process can be “timely,” “fair” and “predictable” pursuant to RCW 36.70A.020(7), and not “arbitrary and discriminatory” pursuant to RCW 36.70A.020(6). How is either a development permit applicant, or a neighbor to a potential development site, going to know what to expect from the County’s land use decision-making process without a zoning code, or its functional equivalent, to clearly establish rights and expectations? Indeed, absent a core land use regulation, how is the County going to comply with the mandate of RCW 36.70A.065 that it:

... shall establish time periods for local government actions on specific development permit applications and provide timely and predictable procedures to determine whether a completed development permit application meets the requirements of those development regulations ...

The Board is aware that even the most detailed and well-organized zoning code will not be able to answer *every* question that a property owner or permit applicant might have about what is permitted by a local government's regulatory scheme. The GMA does not impose such a burden. However, it does demand that a local government's regulatory scheme be more clear and complete than that which the County has provided in its twelve ordinances. Further, a zoning code provides a primary means of alerting the reader to requirements in other free-standing development regulation, such as those offered here.

Therefore, the Board concludes that its prior Order, Planning Goals (6) and (7), the Act's requirements for internal consistency among development regulations, and the requirement that such regulations affirmatively implement the County's comprehensive plan, means that the County must adopt a zoning ordinance and map, or a functional equivalent. Until it does so, Snohomish County is in violation of the Board's Order and the GMA.

ORDER

Having considered the documents filed by the County in support of a finding of compliance, and Sky Valley's brief in opposition to such a finding, as well as the parties' arguments at the compliance hearing, the Board concludes that the County **has not complied** with that portion of the Board's Order concerning adoption by ordinance of development regulations that are consistent with and implement the comprehensive plan.. Therefore, the Board issues a **finding of noncompliance** to the County.

As to the twelve Ordinances offered by the County to demonstrate compliance with the Board's Order, in the event a potential petitioner concludes that any fails to substantively comply with the Act, that person will be able to file a new petition for review challenging the county's action within sixty days of publication. *Friends of the Law I*, CPSBGMHB Case No. 94-3-0003 (1994), Order Denying Motions for Reconsideration, at 9-11.

FINDING

Snohomish County, having failed to carry out those actions required by the Board's Final Decision and Order to be completed by September 6, 1995, **is not in compliance** with the requirements of the Growth Management Act.

RCW 36.70A.330(3) requires that the Board transmit its finding of noncompliance to the Governor, and authorizes it to recommend to the Governor that sanctions be imposed. The Governor, upon receiving such a recommendation, is authorized by RCW 36.70A.340 to impose appropriate sanctions. The Board will forward this finding of noncompliance to the Governor, with a recommendation that sanctions be imposed only if the County does not promptly correct the oversight by adopting a zoning ordinance.

So ORDERED this 3rd day of November, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Chris Smith Towne
Board Member

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

^[1] The Board takes official notice of *The Practice of Local Government Planning*, International City Management Association and American Planning Association, Frank S. So and Judith Geztels, Editors, Washington., D.C. (1988). This classic planning text describes the historical rationale, statutory and case law basis and use of zoning as the most fundamental land use control in this country.

Zoning is the basic means of land use control employed by local governments in the United States today. Zoning divides the community into districts (zones) and imposes different land use controls on each district, specifying the allowed uses of land and buildings, the intensity or density of such uses, and the bulk of buildings on the land. *The Practice of Local Government Planning*, at 251.

The national scope of zoning as the most fundamental of American land use controls is traced to the actions by all fifty state legislatures, beginning in the 1920's.

The Standard State Zoning Enabling Act ... was published and distributed as an informational piece by the U. S. Department of Commerce in 1922 and, again, in slightly revised form, in 1926. All fifty states ultimately adopted the model zoning act in basically its original form, which is a remarkable record for any model law...

Also in 1926, the U.S. Supreme Court issued the landmark land use decision which provided the constitutional bedrock for zoning:

Village of Euclid v. Ambler Realty Co., upheld the constitutionality of a comprehensive zoning system in Euclid, a suburb of Cleveland, Ohio... What is important about the Court's decision is that it exemplified an attitude that was -- and is -- characteristic of traditional zoning (often called Euclidean Zoning, after the village in the case). Like most early zoning, the plan in effect in Euclid was designed to protect neighborhoods of single-family houses. *The Practice of Local Government Planning*, at 252.

...

As the assumptions that once guided zoning have changed, a number of approaches to land use control have evolved that reflect -- and encourage -- shifts in development patterns. These include planned unit developments, the use of performance (rather than design) standards, phased development controls, and growth management systems... *The Practice of Local Government Planning*, at 276.

[2] The primacy of zoning as the most fundamental of development regulations is recognized by the fact that the definition at RCW 36.70A.030(9) begins with "zoning ordinances."

[3] The Act's Planning Goals are set forth at RCW 36.70A.020. It includes:

- (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions. (Emphasis added.)
- (7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability. (emphasis added.)