



On January 25, 1996, the Board entered an “Order Partially Granting Motions for Reconsideration and Clarification.”

On May 13, 1996, the Board received “Respondent Snohomish County’s Statement of Actions Taken to Comply with Final Decision and Order” (the **County’s Compliance Statement**). Attached to the County’s Compliance Statement as Exhibit A was Snohomish County Council Amended Ordinance No. 96-011.

On May 29, 1996, the Board issued a “Notice of Compliance Hearing and Briefing Schedule” (the **Notice**). The Notice set a date for a compliance hearing in this matter, established a schedule for the submittal of briefs and alerted the parties that the Board might elect to consider both procedural and substantive compliance in its compliance finding. The Notice stated that if, after a review of the briefing and argument presented, the Board concludes that it is not possible to make a determination of substantive compliance, it will so indicate in its compliance finding.

On June 12, 1996, the Board received the “Brief of Tulalip Tribes of Washington and Pilchuck Audubon Society in Response to County’s Compliance Statement” (the **Tulalip/Pilchuck Response**). Attached to the Tulalip/Pilchuck Response were a February 12, 1996 memorandum from Dave Somers to Randy Sleight; a March 12, 1996 letter from David W. Brock to the Snohomish County Planning Commission; and a March 12, 1996 memorandum from David Somers to the Snohomish County Planning Commission which also transmitted a copy of the February 12, 1996 Somers letter (collectively referred to here as the **Tulalip correspondence**). Also transmitted with the Tulalip/Pilchuck Response were a series of unnumbered and unlabeled exhibits including articles from various periodicals and draft reports by state and federal agencies (collectively referred to here as the **Tulalip Response Exhibits**).

On June 14, 1996, the Board received the “State’s Response to Respondent Snohomish County’s Statement of Actions Taken to Comply with Final Decision and Order” (the **State’s Response**).

On June 19, 1996, the Board received “Snohomish County’s Reply Brief in Support of Actions Taken to Comply with Final Decision and Order” (the **County Reply**) together with a “Declaration of Barbara Dykes in Support of Snohomish County’s Reply Brief (the **Dykes Declaration**) and a “Declaration of Randolph R. Sleight in Support of Snohomish County’s Reply Brief” (the **Sleight Declaration**). There were twelve attachments to the Dykes Declaration and two attachments to the Sleight Declaration.

The Board held a compliance hearing on Monday, June 24, 1996, in its conference room at 2329 One Union Square, 600 University Street, Seattle. Board Members Chris Smith Towne and Joseph W. Tovar, presiding officer in this case, were present for the Board. Appearing for the County was Barbara Dykes. Also present on behalf of the County was Randolph R. Sleight. Appearing for Tulalip was James H. Jones, Jr.; for Pilchuck was Ellen Gray; for the Master Builders was Alison Moss; and for the State was Tommy Prud’homme. Court reporting services were provided telephonically by Robert H. Lewis, Tacoma. No witnesses testified.

During the hearing, the County made a motion to strike (the **Motion to Strike**) the submission of studies that were attached to or transmitted with the Pilchuck/Tulalip Response, identified above as the Tulalip Correspondence and the Tulalip Brief Exhibits. The County argued that the

petitioner did not cite to where these items were in the record presently before the Board and that, even if some of it was arguably in the record, it was unfair to require the County to reply to such a volume of information on short notice. The rationale for the County's Motion to Strike is set forth in the County Reply, at 19.

On July 12, 1996, the Board received a Petition for Review from the Tulalip Tribes alleging that Snohomish County Ordinance 96-011 does not comply with the goals and requirements of the GMA. The matter was assigned Case No. 96-3-0029, and labeled *Tulalip v. Snohomish County*.

## **II. findings OF FACT**

1. On March 7, 1995, the Snohomish County Council (the **Council**) enacted Ordinance 94-108, an ordinance designating and adopting regulations to protect critical areas (the **Critical Areas Ordinance** or **CAO**). On this same date, the Council adopted Ordinance 94-109, adding the CAO to the list of regulations the County uses as substantive authority under the State Environmental Policy Act (**SEPA**).

2. On December 6, 1995, the Board entered its Final Decision and Order in this case.

3. On January 25, 1996, the Board entered its Order Partially Granting Motions for Reconsideration and Clarification.

4. On April 30, 1996, the Council adopted Ordinance 96-011. By its terms, Ordinance 96-011 adopted amendments to Snohomish County Code Chapter 32.10, Critical Areas Regulations under the Growth Management Act and in response to the December 6, 1995 and January 25, 1996 Orders of the Central Puget Sound Growth Management Hearings Board. Ordinance 96-

[\[1\]](#)

011 contains a savings clause.

5. On July 12, 1996, the Tulalip Tribes of Washington filed a petition for review with the Board alleging that Ordinance 96-011 does not comply with the goals and requirements of the GMA. The matter was assigned Case No. 96-3-0029 and is entitled *Tulalip v. Snohomish County*. Among the allegations in this case are that the County was obliged to include best available science pursuant to RCW 36.70A.172(1) and did not do so, and that the County's critical areas regulations treat critical areas differently in urban areas than in rural areas, a differentiation which petitioners argue does not comply with the GMA.

## **III. discussion**

In the Notice of Compliance Hearing, the Board noted that it had recently addressed the matter of when, and under what circumstances, the Board would determine substantive as well as procedural compliance of the action(s) taken on remand, citing its compliance decision in *Vashon-*

*Maury, et al., v. King County*, CPSGMHB Case No. 95-3-0008, Finding of Compliance (May 24, 1996):

Generally, the Board will continue to determine only procedural compliance in the compliance findings it issues pursuant to RCW 36.70A.330(2). Substantive compliance will be determined only if a new petition for review is timely filed. On occasion, the Board may determine both procedural and substantive compliance in a compliance finding if it determines that the circumstances are appropriate. The Board will consider the following factors in deciding whether it will consider substantive compliance at a compliance hearing: the Board's own schedule, the number of parties in the case, the scope and nature of the legal issues before the Board, and (if possible to determine at the time) whether new petitions for review challenging the substance of the remand amendment have been timely filed. *Vashon-Maury*, Finding of Compliance, at 9.

In the Notice of Compliance Hearing, the Board served notice that it appeared to be possible to determine substantive as well as procedural compliance in this matter, but that if the Board concluded that it was not possible to make a determination of substantive compliance, it would so indicate in its order on compliance.

The three issues raised by Pilchuck/Tulalip are: (1) whether the savings clause of Ordinance 96-011 complies with the GMA and the FDO; (2) whether the County was required by the FDO and order to eliminate the distinction between urban and rural critical area regulations; and (3)

whether the County employed the "best available science" pursuant to RCW 36.70A.172(1) <sup>[2]</sup> in the preparation of Ordinance 96-011.

## **Positions of the Parties**

### **County**

The County argues that the Act does not prohibit the use of a savings clause and pointed out that, if the Board's FDO is overturned by superior court, the County would be free to revert to the regulations set forth in Ordinance 94-108. It argues that the FDO did not explicitly direct the County to eliminate the distinction between urban and rural area critical area regulations. It points out that the Board ordered the County's amended CAO to be consistent with the County comprehensive plan, and the latter did make an urban/rural distinction.

The County argues that it was not obligated to include "best available science" in the preparation and adoption of Ordinance 96-011 because neither the FDO nor the Notice of Compliance Hearing directed the County to do so. The County also pointed out that RCW 36.70A.172 was not effective on the date that the original CAO, Ordinance 94-108, was adopted. Even so, the County argues that, while the language of RCW 36.70A.172(1) requires that local governments "include" in its process a review or consideration of best available science, that direction does not state that a local government has to adopt the most stringent, environmentally protective standards

available. County Reply, at 22. It argues that the term “best available science” is ambiguous and suggests that local governments have broad discretion in interpreting it.

The County further argues that at least some of the scientific and technical information submitted by the Tulalip Tribes was reviewed by the County, specifically Exhibit 39 submitted to the Planning Commission and Exhibit 49 submitted to the County Council. County Reply, at 23.

### **Master Builders**

Master Builders argues that the petitioners have made no showing that the GMA prohibits a savings clause in this circumstance and concurs with the County that the FDO did not provide explicit direction to eliminate any distinction between urban and rural critical areas regulations. With regard to “best available science” Master Builders argues that the verb “include” is very broad and non-directive, more analogous to “consider.”

### **State**

The State did not challenge the County’s compliance with the GMA or the FDO in its adoption of Ordinance 96-011. However, at the hearing, the State cautioned the Board about the potential implication of the County’s argument that its comprehensive plan obliged it to make an urban/rural distinction in its critical areas regulations. A broad holding to that effect might be construed to permit a local jurisdiction to insulate itself from meeting a specific requirement of the Act by citing a contrary but unchallenged comprehensive plan policy.

### **Pilchuck/Tulalip**

Pilchuck/Tulalip pointed out that the savings clause in Section 18 of Ordinance 96-011 would reinstate Ordinance 94-108 upon a superior court ruling favorable to the County, but that if the Board’s decision were upheld by an appellate court, Ordinance 96-011 would not be similarly reinstated. It argued that such an outcome would result in a loss by the petitioners of the benefits of their prior appeal. Tulalip/Pilchuck Response, at 3.

As to the rural/urban distinction, Pilchuck/Tulalip argued that the Board had specifically rejected the Master Builders’ argument that the Act allows less protection to urban critical areas. It cites two sections of the FDO in support of this proposition. The first is:

Turning to the Master Builders’ argument that it is appropriate and necessary to treat urban critical areas differently than rural ones, the Board sees no such direction or authority in the Act. The GMA requires designation and protection of critical areas and makes no qualifying statement that, for example, urban critical areas are to receive less protection than rural ones. FDO, at 22.

In the Order portion of the FDO, the Board directed the County to:

... bring it [Ord. 94-011, which includes SCC 32.10.520] into compliance with the GMA as

interpreted by the Board's decision. FDO, at 45.

Pilchuck/Tulalip argues that the CAO continues to:

... provide for lesser protection of critical areas in urban areas than in rural areas by providing for lower stream buffers ... and for lower wetlands buffers.... The record does not show any scientific justification for this failure to designate and protect these urban critical areas.

Pilchuck/Tulalip Response, at 4.

Pilchuck/Tulalip concedes that the requirements of RCW 36.70A.172(1) did not exist at the time of adoption of Ordinance 94-108 and thus an allegation of noncompliance with that section was not a part of the petition for review in the present case. However, it points out that this requirement did exist at the time the County undertook its efforts to comply with the Board's remand order to adopt final critical areas regulations now contained in the revised ordinance 96-011. Pilchuck/Tulalip then argues that it attempted to place information regarding "best available science" before the County and that the County had a duty under RCW 36.70A.140 to consider that information.

It argues that the record in the present case:

... reflects no analysis by the county as to which science is the "best available science" .., or employment of that science by the county to special consideration of the protection measures necessary to preserve or enhance anadromous fisheries.... Pilchuck/Tulalip Response, at 6.

Finally, Pilchuck/Tulalip argues that questions of compliance by the County with RCW 36.70A.172(1) should be addressed in a separate petition for review so that such issues can be addressed with the benefit of a full record and a normal briefing schedule. Such a petition has now been filed. *See* Finding of Fact 5.

## Conclusions

After a review of the argument presented in the briefs and at the hearing on the merits, the Board concludes that the County has procedurally complied with the FDO by the adoption of Ordinance 96-011. The Board is unable to determine the question of the County's substantive compliance relative to issues (2) and (3) identified above (i.e., the questions of whether the County was required to eliminate the CAO distinction between urban and rural areas and the compliance of Ordinance 96-011 with RCW 36.70A.172(1)). These two issues are specifically raised in *Tulalip v. Snohomish*, and are more appropriately addressed in that case. Furthermore, the materials that Pilchuck/Tulalip submitted with its joint Response brief are not properly before the Board at this time. Therefore, the Motion to Strike is **granted**.

With respect to issue (1) identified above, the Board concludes that the matter of the potential effect of the savings clause is outside the scope of Board jurisdiction. While the Act does make mention of the use of a "savings clause"<sup>[3]</sup> in an adopting local ordinance, it does so only in the

context of a Board determination of invalidity in a final decision and order, a fact absent in the present case. The Board concludes that neither the Act nor the FDO in this case required the County to include a savings clause in its adopting ordinance. Likewise, **the Board holds that neither the Act nor the FDO prohibit inclusion of a savings clause, nor do they direct or constrain its content. The inclusion of such a clause, and its terms, are within the sole discretion of a local government.**

#### **iv. FINDING of compliance**

The Board, having reviewed its Final Decision and Order and the file in this case, having reviewed the above referenced documents, and having considered the arguments of the parties, concludes that the County **has complied** with the Board's Final Decision and Order.

Therefore, the Board issues a Finding of Compliance to the County in this case.

So ORDERED this 18<sup>th</sup> day of July, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Joseph W. Tovar, AICP  
Board Member

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Chris Smith Towne  
Board Member

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[1] Section 18 of Ordinance 96-011 provides in part:

The amendment to provisions of Chapter 32.10 SCC by this ordinance are adopted in part to comply with the Final Decision and Order of the Central Puget Sound Growth Management Hearings Board in the Case of Pilchuck Audubon Society, at al v. Snohomish County, CPSGMHB No. 95-3-0047. An appeal of that final decision and order is currently pending in the case of Master Builders Association of King and Snohomish Counties v. Central Puget Sound Growth Management Hearings Board, King County Superior Court No. 96-2-056626SEA. It is the intent of the County Council that any provision of Chapter 32.10. SCC originally adopted by Ordinance 94-108 which was found by the Growth Management Hearings Board not to comply with the Growth Management Act, which is amended or repealed by this ordinance and which is subsequently found by the Superior Court to comply with the Growth Management act, be reenacted and that any provision of this ordinance amending or repealing that provision be null and void as of the date of the Superior Court's written order....

[2] RCW 36.70A.172(1) provides:

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries. [1995 c 347 § 105.] Emphasis added.

[3]

RCW 36.70A.300(4) provides:

If the ordinance that adopts a plan or development regulation under this chapter includes a *savings clause* intended to revive prior policies or regulations in the event the new plan or regulations are determined to be invalid, the board shall determine under subsection (2) of this section whether the prior policies or regulations are valid during the period of remand.Emphasis added.