

On October 10, 1995, the Board issued an order for a compliance hearing on November 8, 1995.

On October 10, 1995, Kittitas County adopted Ordinance No. 95-15 amending Ordinance No. 94-22. Kittitas County has codified these Critical Areas Ordinances under KCC 17A.

On November 3, 1995, Petitioner filed Withdrawal of Motion for Finding of Non-Compliance and Invalidity. Its motion was filed prior to the County's adoption of Ordinance No. 95-15.

On November 6, 1995, Petitioner filed a new Motion for Finding of Non-Compliance and Invalidity. Along with this motion the Board received a Statement of Issues for Compliance Review and a proposed briefing schedule developed by the parties.

On November 27, 1995, the Board held a compliance hearing at its office in Yakima, Washington.

On December 14, 1995, the Board received Kittitas County Resolution 95-151, Resolution Regarding Legislative Intent, concerning the County's Critical Areas Ordinance under KCC 17A. This document is not part of the original record, rather, it is a good faith effort by Respondent to address areas of ambiguity in the Critical Areas Ordinance discussed at the compliance hearing.

Discussion

The Growth Management Act requires the designation and protection of critical areas. Kittitas

County Ordinance No. 94-22 as amended by Ordinance No. 95-15 is not in compliance with the Growth Management Act for the following reasons: 1) category 4 wetlands are not protected, 2) the vegetative buffers applying to type 4 waters are arbitrarily limited to a distance between 40 to 500 feet from these waters confluence with type 1, 2 and 3 waters regardless of the length of the type 4 water in question and 3) there is no building or structural setback requirement for type 5 waters. . Additionally, there are several ambiguous sections of the Ordinance that should be clarified.

A category 4 wetland by definition cannot exceed two acres in size. Yet the Ordinance allows filling up to two acres without a permit, thus no protection for this category of wetland is provided

[\[1\]](#). Similarly, the record fails to support the limitation of type 4 water buffers to so many feet from the confluence of type 1, 2 and 3 waters. The record indicates that some type 4 waters, those that are quite short, would be protected, but all other type 4 waters are without protection. Some type 4 waters run through agricultural areas, and as such fall within the agricultural exemption. Those waters, however, that do not fall under this exemption, should be protected. Finally, building permits should not be issued without a setback from type 5 waters. This is important because it protects both newly constructed buildings from flood damage and water quality.

Critical areas ordinances are by nature complex enactments involving a large number of individual elements. In this case, Kittitas County's Ordinance, with the important, but limited exceptions noted, fulfills the requirements of the Growth Management Act. The County has done a commendable job on the vast majority of its Critical Areas Ordinance. The Board will not, as requested, make a finding of invalidity.

Instead, the Board pursuant to RCW 36.70A.330, as amended by Engrossed Substitute House Bill 1724, “ESHB 1724”, remands the Critical Areas Ordinance to Kittitas County for the specific and limited purpose of amending the Ordinance as defined below.

The Board’s remand order extends only to amendment of the Ordinance for the following enumerated items:

1) The protection of category 4 wetlands is required;

2) The Ordinance currently provides that vegetative buffers for type 4 waters only extend to a maximum of 500 feet from these waters confluence with a type 1, 2 or 3 waters, without regard to the length of the type 4 water. This limit needs to be removed. Type 4 waters must be protected for their full length. It should be noted that the width of the buffers are not in dispute and that in agricultural areas, the agricultural exemption applies;

3) The establishment of a structural setback for type 5 waters is required. Specifically, this is not a question of buffering, rather, that buildings not be sited on type 5 waters; and

4) That the clarifications of legislative intent embodied in Kittitas County Resolution 95-151 must be incorporated into the Critical Areas Ordinance.

This limited remand recognizes that, with the noted exceptions, the County’s Critical Areas Ordinance complies with the Growth Management Act. It provides a reasonable and efficient way to correct the limited defects of an otherwise good ordinance. The Board does not envision an extensive or complex amendment process. The County is moving to adopt its comprehensive plan. The completion of this remand action will further its adoption process.

ESHB 1724 added the following sentence to RCW 36.70A.330, “The Board shall schedule additional hearings as appropriate pursuant to subsections (1) and (2) of this section.”

Subsections (1) and (2) provide for determination of compliance or noncompliance. A hearing under this section shall be given the Board's highest priority and a finding shall be issued within forty-five days of the filing of a compliance hearing motion.

The time constraints of hearing briefing schedules allow for only one hearing within the forty-five day time limit. The Board finds that ESHB 1724 authorized additional compliance hearings outside the previous time constraint. The Board makes this finding for the following reasons:

(1), this construction is logical, it makes sense, ; (2), it promotes implementation of the Growth Management Act; (3), it provides a discrete tool, in cases such as this one, to make minor corrections; (4), it is proportional to the level of need; and, finally, it is fair to all parties.

The Board commends the parties for their cooperative spirit. The hearing was a constructive effort to address the requirements of the Critical Areas Ordinance.

Summary

The Board finds that Kittitas County's Critical Areas Ordinance, with the important, but limited enumerated exceptions noted above, complies with the Growth Management Act. The Board holds, however, that Kittitas County is in noncompliance in regard to these enumerated exceptions. The Board remands the Critical Areas Ordinance to Kittitas County for modification in compliance with the requirements of the Growth Management Act. The Board will hold a second compliance hearing concerning these limited items, and only these items, on March 6, 1996 at 9:00 a.m.

SO ORDERED this 21st day of December, 1995.

EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS

BOARD

Tom A. Williams, Presiding Officer

Judy Wall, Board Member

D. E. "Skip" Chilberg, Board Member

[\[1\]](#) Counsel for Respondent was unaware that the Ordinance allowed filling of all category 4 wetlands. This should be viewed as an inadvertent error, the County intended protection of this type of wetland.