

**State of Washington**

**GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON**

**SAVE OUR BUTTE SAVE OUR BASIN )**

**SOCIETY, Petitioner )**

)

**ICICLE CANYON COALITION, ) CASE NO. 94-1-0015**

**Petitioner )**

**) ORDER ON MOTIONS FOR**

**N. CENTRAL WASHINGTON AUDUBON ) INVALIDITY, MOTION TO**

**SOCIETY, Petitioner ) STRIKE "MOTIONS FOR**

**) INVALIDITY, AND MOTION TO**

**SUZANNE SABERHAGEN, ) STRIKE/DISMISS RESPONDENT**

**Petitioner ) "MOTION TO STRIKE"**

)

**SAVE CHELAN ALLIANCE, )**

**Petitioner )**

)

**LEAF ADOPT-A-FOREST, )**

**Petitioner )**

)

**YAKAMA INDIAN NATION, )**

**Petitioner )**

)

**CHELAN-DOUGLAS LAND TRUST, )**

**Petitioner )**

)

**1000 FRIENDS OF WASHINGTON, )**

**Petitioner )**

)

**NORTH CASCADES CONSERVA- )**

**WASHINGTON ENVIRONMENTAL COUNCIL AND WASHINGTON ENVIRONMENTAL COUNCIL,** )  
Petitioner )  
)  
vs. )  
)  
**CHELAN COUNTY,** )  
Respondent )  
\_\_\_\_\_)

### **Procedural History**

On August 8, 1994, the Eastern Washington Growth Management Hearings Board (the Board) issued its Final Order and Decision in this case. The Board found that Chelan County Resolution No. 93-158 was not in compliance with the Growth Management Act (the Act), specifically RCW sections 36.70A.020, .060 and .170. Chelan County had failed to designate and conserve agricultural and forest resource lands. Chelan County had failed to designate and protect critical areas. The Board remanded the Resolution to Chelan County for revision to bring its into compliance with the Act by December 8, 1994.

On December 7, 1994, the Board of Chelan County Commissioners enacted Resolution 94-160, which revised forest and mineral resource lands designations and protections only. The resolution did not modify either designations or regulations for agricultural resource lands or critical areas as was originally ordered by the Board.

On January 30, 1995, the Board issued its decision on its January 10, 1995 compliance hearing. The Board found that Chelan County Resolution 94-160 brought the County into compliance with the Act with regard to forest and mineral resource lands. The Board, however, found that Chelan County remained noncompliant with regard to both the designation and regulation of agricultural resource lands and critical areas. The Board conveyed this finding to Governor Lowry by letter dated February 7, 1995.

On November 13, 1995, the Board received a Motion for Determination of Invalidity from Petitioners, Save Our Butte Save Our Basin Society, Icicle Canyon Coalition, North Central Washington Audubon Society, Suzanne Saberhagen, Save Chelan Alliance, Leaf Adopt-A-Forest, Chelan-Douglas Land Trust, 1000 Friends of Washington, and North Cascades Conservation Council and Washington Environmental Council. On November 15, 1995, the Board received another Motion for Determination of Invalidity from Petitioner, the Confederated Tribes and Bands of the Yakama Indian Nation. It is noted that neither the Chelan County Conservation District, nor the State of Washington, nor Citizens for Rural, Environment and Agricultural Land has joined in either of these motions. The State of Washington, as a Petitioner in the underlying proceeding, appeared on the limited issue of the Board's jurisdiction to consider and decide issues related to the constitutionality of the Growth Management Act.

The Board received briefings from the parties. The Board also received a Motion to Strike "Motion for

Determination of Invalidity" and an Amended Motion to Strike "Motions for Determination of Invalidity" from Respondent, as well as a Motion to Strike/Dismiss Respondent's "Motion to Strike" from Petitioner, Yakama Indian Nation.

On December 12, 1995, the Chelan County Board of Commissioners adopted Resolution No. 95-160, purporting to repeal Chelan County Resolutions No. 93-158 and No. 94-160.

The Board held its compliance hearing on these motions on December 18, 1995 in its office in Yakima, Washington.

### Discussion

Unlike hearings on the merits, a compliance hearing presents no established set of issues, however, the Board finds it useful to address the following issues for purposes of organization.

#### **Issue No. 1. Does the Board have Jurisdiction to Hear Constitutional Issues in this Case?**

The Act establishes and limits the Board's jurisdiction:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, Chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21 RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted. RCW 36.70A.280 as amended by ESHB 1724. (emphasis added.)

The general rule is that an administrative board does not have jurisdiction to hear constitutional issues.

Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication. Chaussee v. Snohomish County Council, 38 Wn.App. 630, 636, 689 P.2d 1084 (1984). State v. Munson, 23 Wn. App. 522, 524, 597 P.2d 440 (1979); see Human Rights Comm'n v. Cheney Sch. Dist. 30, 97 Wn. 2d 118, 125, 641 P. 2d 163 (1982).

Gutschmidt v. City of Mercer Island CPSGMHB No. 92-3-0006 (Order on Prehearing Motions 1992), at 21. See also Twin Falls v. Snohomish Cy., CPSGMHB No. 93-3-0003 (Order on Dispositive Motions

1993), at 159-61; *Nichols v. Snohomish County*, 47 Wn. App. 550, 736 P.2d. 670 (1987).

In Gutschmidt, the Central Board concluded nothing in GMA either expressly or impliedly authorizes the Growth Management Hearings Boards to decide constitutional issues. The Board agrees with the Central Board and finds that it is without jurisdiction to decide constitutional issues raised by the County.

## **Issue No. 2. After Issuing an Initial Compliance Hearing Order in a Case, Does the Board Retain Jurisdiction Where Noncompliance has been Found?**

The Act provides that after the Board finds a county is not in compliance with the Act and the remand time has expired, the Board shall hold a compliance hearing to determine if the county has come into compliance with the Act. See RCW 36.70A.330. This section does not preclude the Board from holding multiple compliance hearings. If a county, for instance, is found at a compliance hearing to be in noncompliance but takes subsequent action to come into compliance, it must have an avenue to be found in compliance.

There is nothing in the language of RCW 36.70A.330 which suggests that the Board does not have continuing jurisdiction to determine whether a county has come into compliance at some date after an initial compliance hearing. To construe this section to preclude the Board from having such authority would produce undesirable results. The County would be deprived of obtaining an order from the primary administrative review body that it had achieved compliance. If sanctions were under consideration by the Governor or had already been imposed, the County would need an order from the Board finding that compliance had been achieved.

When a compliance hearing results in a finding of continued noncompliance, the Board's jurisdiction is not at an end. It retains jurisdiction to determine at a later date whether compliance has been achieved and to make orders relating to the original compliance order.

RCW 36.70A.330 was amended in 1995 and now provides as follows:

- (1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300 (1)(b) has expired...the board shall set a hearing for the purpose of determining whether the... county...is in compliance with the requirements of this chapter.
- (2) The board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter...
- (3) If the board finds that the...county...is not in compliance, the board shall transmit its finding to the governor....
- (4) The board shall also reconsider its final order and decide:

(a) If a determination of invalidity has been made, whether such a determination should be rescinded or modified under the standards in RCW 36.70A.300(2); or

(b) If no determination of invalidity has been made, whether one now should be made under the standards in RCW 36.70A.300(2).

The board shall schedule additional hearings as appropriate pursuant to subsections (1) and (2) of this section. 1995 Laws of Washington, Chapter 347, section 112 (amending RCW 36.70A.330) (emphasis added.)

The Board's continuing jurisdiction where noncompliance has been found is expressly provided by the statute.

A second jurisdictional base is provided by RCW 36.70A.345 which provides that "the governor shall consult with and communicate his or her findings to the appropriate growth management hearings board prior to imposing the sanction or sanctions."

Finally, the Act indicates that compliance hearing findings should not be treated as final. While the final decision and order of a Board may be appealed under WAC 242-02-860(5) and WAC 242-02-892, no similar authorization exists to appeal a finding of noncompliance. This lack of any other type of judicial involvement indicates that the Board maintains control of the matter. Nor does the legislation ever use the word "final" in describing a finding of noncompliance as it does with a final decision and order. Therefore, the only body that can address a finding of noncompliance made under RCW 36.70A.330 until an ordinance complies is the Board.

### **Issue No. 3. Does ESHB 1724 Provide Jurisdiction to Hear Motions for Invalidity in this Case?**

Recent amendments to RCW 36.70A.300 and .330, enacted by ESHB 1724 sections 10 and 112, became effective after the first compliance hearing on this matter. An amendment to a legislative enactment is presumed to operate prospectively. Marine Power and Equipment Co. v. Washington State Human Rights Commissions Hearing Tribunal, 39 Wn. App. 609, 616, 694 P. 2d 697 (1995). However, this presumption is reversed to favor retroactive application if the enactment is "remedial and concerns procedure or forms of remedies..." Id. at 616-17. "When a statute is remedial and concerns procedure or forms of remedies, there is a presumption that the statute is intended to apply retroactively." Agency Budget v. Wash Ins. Guar. Assn., 93 Wan. 2d 416, 425 (1980). The presumption of retroactively to remedies applies even without an expressed retroactive provision made by the legislature. Tomlinson v. Clarke, 60 Wn. App. 344, 351 (1991); Johnson v. Continental West Inc., 99 Wn. 2d. 555, 559 (1983).

A review of the language of sections 110 and 112 leads to the conclusion that they are clearly remedial in nature. The entire scheme is designed to provide a supplemental remedy for non-compliance. The Act has not changed; the standards for compliance have not changed, only a new remedy has been added.

The Western Washington Growth Management Hearings Board has ruled that sections 110 and 112 of ESHB 1724 should apply retroactively. Olympic Environmental Council v. Jefferson County, WWGMHB No. 94-2-0017, Compliance Hearing Order, 8/17/95. Similarly, the Central Puget Sound Growth Management Hearings Board has stated that it "concur[s] with the Western Board's analysis of RCW 36.70A.300." Bremerton et al. v. Kitsap County, 95-3-0039 at 1225, Code Publishing.

This Board concurs and finds that sections 110 and 112 of ESBH 1724 apply in this case.

**Issue No. 4. Is Chelan County in compliance with the Act with regard to agricultural resource lands and critical areas?**

The Board's Final Order and Decision held that Resolution No. 93-158 failed to comply with the Act with regard to agricultural lands and critical areas. On remand the County adopted Resolution No. 94-160, however, as the County admits, this resolution did not modify either designations or regulations for Critical Areas or Agricultural Lands as was originally ordered by the Board.

At the Board's first compliance hearing, the County moved for an extension until April, 1995 to complete this work. While this motion was denied because it was outside the statutory time-frame, the Board recommended to Governor Lowry that the County be given reasonable additional time to complete this work. Even though the County was three years behind the Act's time-frame for completion of this work, the Board attempted to work with the County. Almost a year has elapsed since this hearing and the County has not yet taken action to designate and conserve agricultural resource lands or to designate and protect critical areas.

To the contrary, the County has just adopted Resolution No. 95-160, purporting to repeal its previous GMA resolutions. The validity of this resolution, owing to its adoption process, is unclear. There is no question, however, that the County by its failure to designate and conserve agricultural resource lands and to designate and protect critical areas, remains in noncompliance with the Act.

Respondent contests the Petitioners standing. This is a misplaced argument. Because the County has refused to enact legislation to comply with the Board's final order, the original Petitioners retain standing. Respondent, also, questions the record. This too is a misplaced argument. The extensive record from the original action continues in this case.

**Issue No. 5. Do the County's Actions support a Finding of Invalidity?**

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RCW 36.70A.300, as amended by ESHB 1724 requires that the Board: (a) conclude that the continued validity of the development regulations would substantially interfere with the fulfillment of the goals of this chapter, and; (b) specify the parts of the regulations that are invalid and the reasons for their invalidity.

There are two issues regarding agricultural resource lands. First, is the extent of the designation. In its Final Order, the Board found that the County had failed to make an adequate agricultural lands designation under RCW 36.70A.170. The continuing lack of adequate designation, substantially interferes with the fulfillment of planning goal no. 8, the enhancement of natural resource industries. Without the required designation, conservation of these lands cannot be assured. The County has taken no action to change the designation in Resolution No. 93-158 that the Board found to be inadequate.

Second, the County has taken no further action to conserve the agricultural resource lands it designated in Resolution No. 93-158. This, also, substantially interferes with the fulfillment of planning goal no. 8. Rapid development in the County, as well as the lack of a sufficient minimum lot size provision interferes with this planning goal. The Board is basing its decision on the extensive record below. See Final Order at 553. Because of this record, a de novo review is not necessary. Additional support may be found in Appendix A, Findings of Fact.

The County has taken no further action to designate or protect critical areas. The Board finds the County's failure to act substantially interferes with the fulfillment of planning goals numbers 8, 9 and 10. Again the Board is able to base its finding on the record below. For instance, the Board noted in its Final Order at 561, that a 25 foot riparian buffer was inadequate for riparian areas. Exhibits 117, 119-3, 144-4, 161, 190, 277, CACI 40, and CACI 49. Similarly, "Minimum wetland buffers of 25 feet will not be effective for any but the simplest Category IV wetlands." Letter of 10/22/93 critiquing the Critical Areas portion of the Resolution by Ted A. Clausung, Washington Department of Wildlife. See also, Exhibits 115, 119 and Exhibit 492. Final Order at 562. There is also no dispute that Chelan County has and is experiencing rapid growth. [Testimony of Commissioner Myers, Board of County Commissioners hearing 11/30/93] Final Order and Decision at 551(Code Publishing).

Since the County has taken no action to remedy Resolution No. 93-158 with regard to agricultural lands and critical areas, the findings previously made by the Board in its Final Order and Decision continue to apply.

The County argues that a finding of invalidity is unfair because it will disrupt planning under the Act. The Board does not agree. The designation and conservation of resource lands and the designation and protection of critical areas are baseline actions that provide the sideboards for further planning under the Act. It is difficult to imagine how effective planning can proceed without first the completion of these fundamental building blocks. Completion of these tasks will advance comprehensive plan development.

### **Conclusion and Statement of Board Order**

Chelan County continues to be in noncompliance with the Growth Management Act with regard to agricultural resource lands designation and conservation as well as critical areas designation and protection. The Board finds that the following sections of Resolution 93-158 are invalid: 1) sections 531 and 832 of the Critical Areas chapter, dealing with riparian and wetland buffers, and 2) sections 2(F), 4.2, 4.4, and 5.0, of Interim Commercial Agricultural District I-C-A chapter, dealing with permitted

uses, set-back for dwelling units, sub-divisions, and lot size reductions. The Board, further, finds the agricultural resource lands designation under Resolution 93-158 is invalid.

Petitioners' Motions for Determination of Invalidity are granted, as limited. Respondent's Motion to Strike "Motions for Determination Of Invalidity" is denied. Finally, the " Motion to Strike/Dismiss Respondent's "Motion to Strike" of Petitioner Yakama Indian Nation is denied.

SO ORDERED this \_\_\_\_\_ day of January, 1996.

EASTERN WASHINGTON

GROWTH MANAGEMENT HEARINGS BOARD

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Tom A. Williams, Presiding Officer

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Judy Wall, Board Member

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D. E. "Skip" Chilberg, Board Member

## **Appendix A**

### Findings of Fact

0. The Growth Management Act required local governments, including Chelan County, to designate and protect resource lands and critical areas.
1. 2. On August 8, 1994, the Board entered its Final Decision and Order in this case. The Order determined that Chelan County's designation and conservation of agricultural resource lands did not comply with the Act. It, also, determined that the County's designation and protection of critical areas did not comply with the Act.
2. The Final Decision and Order directed Chelan County to reconsider its resolution and adopt one that would be in compliance with the Act by December 8, 1994.

3. On January 30, 1995, the Board issued a compliance hearing order which found that the County remained in noncompliance because it had failed to adopt provisions dealing with either agricultural resource lands or critical areas.
4. On December 12, 1995, the County adopted Resolution No. 95-160, which purported to repeal its previous Growth Management Act enactments. At the hearing the County stated that it did this as part of its challenge of the Act in the court system. From the time of the Board's issuance of its Final Decision and Order in August of 1994, the County has failed to adopt any resolution or ordinance to comply with the Act with regard to agricultural resource lands or critical areas.
5. Since the County has taken no action to bring Resolution No. 93-158 into compliance with the Act in regard to agricultural lands and critical areas, the findings previously made by the Board in its Final Decision and Order continue to apply and are made a part of these findings by reference.
6. Properly sized riparian and wetland buffers are critical to water quality and thus fish and wildlife habitat. Final Order at 24 and 26. Inadequate buffers preclude the attainment of planning goals 9 and 10.
7. The current agricultural lands regulation permits residential development in resource lands on parcels as small as one acre in size. The Board found this type of development substantially interferes with planning goal no. 8. Final Order at 555 and 564.
8. The Board found in its Final Decision and Order that the County failed to make an adequate agricultural lands designation under RCW 36.70A.170, and, therefore, was not in compliance with the Act. Final Order at 554. The County has taken no action to comply with either the Board's Final Order or the Act. Designation and conservation are two sides of the same coin. If the designation is inadequate, conservation regulations will not apply to lands that should be conserved, substantially interfering with planning goal no. 8.

### Conclusions of Law

0. Sections 531 and 832 of the Critical Areas chapter of Resolution 93-158 substantially interfere with the fulfillment of RCW 36.70A.020(9) and (10).
1. Sections 2(F), 4.2, 4.4, and 5.0 of the Interim Commercial Agriculture District chapter of Resolution 93-158 substantially interfere with the fulfillment of RCW 36.70A.020(8).
2. These sections, 531, 832, 2(F), 4.2, 4.4, and 5.0, of Resolution 93-158 should be and are hereby declared invalid under the provisions of ESHB 1724 section 110.
3. The agricultural resource land designation under Resolution 93-158 substantially interferes with the fulfillment of RCW 36.70A.020(8). It should be and is hereby declared invalid under the

provisions of ESHB 1724 section 110.

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