

STATE OF WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON

CITY OF MOSES LAKE

Petitioner,

vs.

GRANT COUNTY,

Respondent.

Case No.: 99-1-0016

FINAL DECISION AND ORDER

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**I. Procedural History**

On November 30, 1999, the City of Moses Lake, by and through its counsel, Katherine Kenison, of LeMargie and Whitaker, filed a Petition for Review of Grant County's action adopting its Comprehensive Land Use Plan (Ordinance 99-158-CC).

On January 19, 1999, the Board issued a Prehearing Order establishing legal issues and setting a motion and briefing schedule. The Petitioner raised 52 issues in the matter before the Board.

This matter was scheduled for a hearing on the merits on April 27, 2000. Before hearing the arguments of counsel, the Board resolved several pretrial motions brought by the parties. First, the Board denied the Respondent's motion to supplement the record with errata sheets, interim zoning ordinances, building permit activity statistics and a January 19, 2000, letter from the Department of Commerce, Trade and Economic development. Second, the Board denied the Respondent's motion to strike portions of Petitioner's brief for hearing on merits. Third, the Board granted Petitioner's motion to take judicial notice of articles concerning the Florida and Oregon laws, as quoted in other Board decisions.

After hearing arguments on the merits from both parties, and after thoroughly reviewing the briefs and exhibits submitted by both sides, the Board concludes that the Petitioner has proved

that the County's adoption of its Comprehensive Plan was clearly erroneous as to certain issues raised. The Board's conclusion is supported by the findings of fact and discussion that follows.

## **II. Findings of Fact**

1. On September 30 1999 Grant County adopted its Comprehensive Plan (Plan), Technical Appendices and FEIS.
2. The plan includes twenty-two designations of Rural Areas of More Intensive Development (RAIDs). Each RAID was allocated a portion of the forecasted population. The area determined to be needed for each RAID was increased by the same 60% reduction factor that was used in determining the needed acreage for UGAs.
3. The plan includes 8,717 acres zoned at 1 du- 2.5-acre parcels in the rural portions of the County.
4. The plan includes Urban Reserve Areas zoned at 1 du-5-acre parcel.
5. At this time, the County has not yet issued final development regulations to implement the policies set out in the newly adopted Comprehensive Plan. Pending adoption of these regulations, the County suspended all further processing of long plat applications in rural areas. Ordinance No. 99-177-66. In the event of any conflict between interim development regulations and the Plan criteria, the Comprehensive Plan controls.

## **III. Standard of Review**

The County's action is presumed valid RCW 36.70A.320(1). The burden is on Petitioner to demonstrate that the County's action was not in compliance with the requirements of the GMA. RCW 36.70A.320(2). The Board "shall find compliance unless it determines that the action by [the County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). For the Board to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

## **IV. Legal Issues and Discussion**

The Prehearing Order in this matter listed the 52 issues raised by the Petitioner City. The Petitioner, at our request, encompassed these issues into five subject areas. The following five subjects were briefed and argued at the final hearing with the understanding that all the issues raised in the petition were specifically included and not deemed abandoned:

1. Internal Inconsistencies;
2. RAIDs issues;
3. CPPs inconsistencies;
4. Commercial/Industrial growth outside UGAs; and,

## 5. Miscellaneous.

We will not detail each and every argument of the parties but will briefly summarize them and determine if the Petitioner has carried their burden required under the law.

### **Issue 1. Internal Inconsistencies**

Petitioner's Position: The Petitioner contends the County's Plan failed to maintain internal consistency. This inconsistency is believed to be either an example of a flawed Plan or an attempt to create an unidentifiable, and therefore unenforceable, restriction on future growth. Without clear rules, the County has no standard to contain growth.

The first inconsistency listed is the irreconcilable numbers within the plan. These numbers were admitted by the County to be incorrect and an errata sheet was offered to be included in the record by the Respondent. There were over 80 incorrect computations found in the final Plan.

Other named inconsistencies include the following: the claim by the County the Planned Growth Committee was currently proceeding with a process of reviewing proposed amendments, yet they have not met since July of 1999; the large allocation of Industrial/Commercial lands in Rural areas; large RAIDs; Recreational development acres at 1 DU per acre without a limitation as to the residential development of the full 1530.5 acres; the failure of the County to encourage population location within the cities while allowing for great growth in rural areas; the actions of the County do not have the effect of encouraging and directing growth in urban areas; and the failure of the County to follow the goals of the GMA and the County-wide Planning Policies (CPPs).

The County has not prepared an accurate inventory of existing legal lots as part of the planning data. The Petitioner believes this must be done in order to provide accurate data to protect the resource lands. It is also believed that the County has failed to review these existing legal lots. There are a large number of these lots and when added to the new ones allowed by the Plan, excessive growth is being encouraged in the rural part of the County. The Petitioner lists various inconsistencies with the CPP. They believe the CPPs are mandatory, not optional as the County claims. The County's unilateral decision to treat the CPPs as non-binding and optional insures inconsistency and will cause the urbanization of the rural areas to continue unabated. The Petitioner further contends the County erred by not including a copy of the CPPs in the Plan.

The Petitioner then points out the urban reserve areas (UR) with 1-du/5 acres. This sized parcel is claimed to be inconsistent with the definition of an UR zone, which will actually preclude the orderly growth on UGA and transition. The experiences of Oregon and Florida were cited.

The county has failed to designate lands for parks and recreation and have used the word “should” instead of “shall” to comply with the mandates.

The County is claimed to have usurped the law and will alone decide when the UGA is expanded. The CPPs mandate a process for amending UGAs. There are over 5.4 times more rural area acres designated for future development than those found in the UGAs. This frustrates the goals of the GMA and directs growth away from urban areas.

There is no specific policy to guide the development of master planned resorts. These resorts are permitted under the GMA only if the County reserves a portion of the 20-year population projection and offsets the UGA accordingly.

The Petitioner contends the establishing of 8,717 acres zoned at 1 du-2.5 acres is inconsistent with all anti-sprawl goals and would allow for 3,487 new 2.5-acre rural lots. This is a pattern of new sprawl. In addition, Shoreline Areas are zoned to allow up to 3 du per acre. The Plan states that the County should protect the shorelines rather than the statutorily required “shall” recognize and protect. The Plan contains no Shoreline Master Program.

The County also has not mapped critical aquifer recharge areas. The goals and policies to protect this crucial supply of drinking water cannot be effectuated unless these critical areas have been identified or located.

Respondent’s response: The County contends the Plan is consistent with those few directive Countywide Planning Policies (CPPs) not otherwise superceded by the 1997 GMA amendments. They contend that the CPPs are advisory not mandatory. They believe CPPs specifically operate as flexible guidelines to be adaptable to the changing needs and conditions of Grant County and its constituent cities.

The County also contends the RAID designations fully complied with GMA mandates and not the outdated CPPs that conflict with those mandates. Further, the County asserts that nothing in the GMA requires the County to include the CPPs as part of the Comprehensive Plan document.

The County also believes the difference between the words “shall” and “should” is one of degree rather than kind, both terms impart a directive meaning.

The County contends they actively participated in joint planning efforts with Moses Lake. The County believed they developed an extensive public participation program, which guided the vision toward the County’s plan.

The County believes their Industrial and Commercial Lands Designation comply with the GMA.

The Plan contains strong policies to encourage economic development. The plan insures an adequate supply of commercial or industrial sites will be available to promote this economic development.

Grant County is not obligated to allocate all growth to urban areas and such an allocation would not balance competing GMA policies to provide a variety of rural densities and protect private property rights. The GMA does not require a straight density approach to match need to new dwelling units.

The County contends its Interim Development Regulations adequately protect natural resource lands and critical areas pending adoption of final development regulations. The County states that they are currently holding Planning Commission hearings on proposed final development regulations which are expected to be adopted this summer. While critical areas are not identified, the Critical Areas Ordinance, No. 93-49-CC, establishes standards for a site-specific analysis of resource or critical area lands, as part of the land application approval process. The plan also adopts a specific policy designed to enhance and protect shoreline areas.

The County asserts that natural resource lands are protected by the Plan. Grant County's plan designates nearly 79 % of Grant County as agricultural or open space lands. The Plan also establishes mandatory goals, which state that mineral resource land of long-term commercial significance "shall be preserved" in order to encourage an adequate resource base for long-term use by the public.

Discussion: The County contends the countywide planning policies are optional and not mandatory. The cases cited by the County were earlier than the following recent Supreme Court Decision. That Supreme Court case, King County v. Cent. Puget Sound Board, et al, 138 Wn.2d 162 (1999) at p. 175, gives us specific direction on this issue:

The GMA requires county and city comprehensive plans to be consistent with each other in order to ensure harmonious land use planning. RCW 36.70A.100. RCW 36.70A.210(1) provides that "a 'county-wide planning policy [CPP]' is a written policy statement or statements used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework *shall ensure that city and county comprehensive plans are consistent* as required in RCW 36.70A.100." (Emphasis added by the court). Local governments are required to adopt regionally developed CPPs, from which local comprehensive plans, and then development regulations, are enacted.

**The CPPs are thus the major tool provided in the GMA to ensure that the comprehensive plans of each city within a county agree with each other.** If the CPPs served merely as a nonbinding guide, municipalities would be at liberty to reject CPP provisions and the CPPs could not ensure consistency between visions and

the CPPs could not ensure consistency between local comprehensive plans. The Board was therefore correct to conclude that CPPs are binding on the County. (Emphasis provided).

Consistency is a vital part of the mandates of the GMA. The Supreme Court, above, emphasizes the importance of the CPPs to aid in insuring consistency. This is the “major tool provided in the GMA” to ensure consistency of a plan. The County’s belief that these policies are optional is a fundamental flaw in their planning. Much of the County’s planning is suspect and a review of the Plan and the CPPs directives are necessary to come into compliance with the GMA.

The Board takes specific notice of the parcels zoned at a density of 1 DU-2.5 acres. The area under scrutiny is 8,717 acres in rural areas. This approximately 15 square miles is spread throughout the unincorporated area of Grant County. The County designated these areas in addition to the 22 RAIDS, some of which allow residential development at similar or greater density. This creates an impermissible pattern of urban growth in the rural area. The Board cannot conclude that such a large area that would permit, as a matter of right, over 3,486 land-consumptive 2.5-acre lots, is anything other than classic low-density sprawl. While RCW 36.70A.070(5)(d) allows higher density in the rural area, the County did not establish these lot sizes under that exception or any other.

The use of “should” instead of “shall” is of concern. Where there is a requirement or mandate, not a choice, “shall” must be used. It is then clear to all reading the Plan that it is a mandate not an option.

Conclusion: The Petitioner has carried its burden and the Board finds that the action by the County is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. Specifically, the County’s treatment of the CPPs as optional requires their review of the Plan for consistency with the CPPs as directed by the above Supreme Court decision. Further, the Board finds that parcels at a density of 1 DU-2.5 acres is improper in Rural areas in the manner provided for by the County. This is a pattern of urban growth. Also, in cases where the GMA provides mandatory action, “shall” must be used instead of “should”.

## **Issue 2. RAIDS**

This has been decided in a companion case, James A. Whitaker, NO. 99-1-0019. This issue is resolved in the same manner except that the Board finds all the RAIDS out of compliance, including those not listed in the Whitaker Petition.

## **Issue 3. CPPs inconsistencies**

Petitioner's Position: The Petitioner asserts that the County is bound by the Countywide Planning Policies (CPPS). If the desired action of the County was in conflict with the CPPs, the County's choice was to reconvene the Planned Growth Committee and renegotiate the CPPs, not to unilaterally renege on its contractual agreement. The GMA does not require RAIDs be created, but merely permits them. The statute relied upon by the County to disregard the CPPs states that RAIDs "may" be designated, not that they "shall".

The County adopted inconsistent development standards for unincorporated portions of UGAs. The County in Appendix C acknowledges that the Plan is inconsistent with the CPPs regarding urban growth outside of UGAs and industrial and commercial growth outside of UGAs. The County acknowledges need for "joint planning within unincorporated UGAs, but fails to adopt city land use and development standards pursuant to CPP 6. The Plan is inconsistent with CPP 2 in that its policies do not emphasize rural residential densities, encourage development in UGAs or permit only very low intensive land uses outside of the UGAs.

Respondent's Position: The County contends the CPPS are not mandatory but only a flexible guideline to be adaptable to the changing needs and conditions of Grant County. The County further states that they have been consistent with those few directives of CPPs not otherwise superceded by the 1997 GMA amendments. The decision of how directive any part of the CPPs is intended to be relative to local comprehensive plans can vary from county to county and from CPP to CPP. CPPs are policy documents, intended as general principles designed to guide local governments.

The preamble of the CPPs, Original Policy 14, states that "it is understood that these policies are meant as general framework guidelines for the county and each municipality, however flexibility must be maintained in order to adapt to different needs and conditions."

Discussion: The Supreme Court in King County v. Cent. Puget Sound Board, et al, *supra* at p. 175 declared the CPPs are "binding on the County" and the framework provided by the CPPs "shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100."

The fact that the GMA was amended, thus allowing the designation of RAIDs by the County does not change the mandatory nature of the CPPs. The County was not required to create the RAIDs. They were allowed to do so. If they wished to create RAIDs, the County had the obligation to request a change in the CPPs. This would give the local jurisdictions input and allow the changes if desirable. This was not done. The County admits the Raids are contrary to directives of the CPP. The Petitioner contends there are many other examples of the failure to follow the directives of the CPPs.

**Conclusion:** The County is out of compliance. As stated in the conclusion found in Issue 1, the mandatory nature of the CPPs is critical to consistency and coordination of city and county plans. The County must review the Plan and follow the direction of the Supreme Court. Directives found in the CPPs are mandatory, not optional.

#### **Issue 4. Commercial/Industrial growth outside UGAs**

**Petitioner's Position:** The Petitioner contends the County designated 2068 acres commercial and 9292 acres industrial in rural unincorporated lands. They point out that there are no policies specific to commercial/industrial lands, and further that no actual sites are designated. It is anticipated that all existing commercially and industrially zoned areas will retain their designation and thereby maintain the status quo. The designation of these areas is contrary to the CPPs and the GMA. The zoning maps must indicate where the districts will be located throughout the County.

The Petitioner asserts this allocation of unnamed industry in the rural area violates the GMA and previous Board decisions. The County is by law required to list location of different land uses. The Plan must limit the industrial development to resource based industry and limit commercial development to rural neighborhood needs. Friends of Skagit Co. v. Skagit Co. WWGMHB 95-2-0065, 8/28/96. Floating commercial zones that allows such uses everywhere outside the UGA will not meet the provisions of ESB 6094, amending the GMA and allowing certain exemptions to the prohibition of industrial and commercial zoning in the rural area of a County.

**Respondent's response:** The County points out the County is an agriculture-based economy with little if any commercial/industrial development other than farms. Recognizing this unique landscape through its inventory of industrial lands, the County designated industrial and commercial lands. They claim most of these lands are already developed to accommodate the County's "resource-based industries" and have been zoned industrial or commercial for some time.

The County contends that the County's final development regulations will accomplish exactly what the GMA requires. Until they are adopted, its interim zoning precludes rezoning any rural lands for commercial or industrial use. The County decided not to change the existing zoning due to the likely effect of increased population in its rural areas.

**Discussion:** Urban growth is generally prohibited in rural areas. Since its initial passage in 1990, the GMA has required that all counties planning under the Act develop a rural element in their comprehensive plan that includes "... lands that are not designated for urban growth, agriculture, forest or mineral resources." RCW 36.70A.070(5). It has long been the rule that rural elements not contain development, urban in nature. Urban growth is defined in the Act as:

(17) “Urban growth” refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. “Characterized by urban growth” refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.

More recently, certain exceptions to the requirement that no urban growth be placed in the Rural Element of the Plan were adopted by the State Legislature, RCW 36.70A.070(5)(d) and RCW 36.70A.376. Both of these amendments are narrow exceptions to the fundamental goal of the Growth Management Act, to reduce sprawl, (RCW 36.70A.020(2)).

Grant County has not complied with the requirements of the statutory exemptions to the prohibition of urban development in Rural Areas. The County contends the designation of the Commercial/Industrial areas in the unincorporated areas of the County is recognition of existing zoning and uses. What was once the norm in Grant County is now an anomaly under the GMA. Although past practices cannot be ignored, they also cannot be the pattern for the future. As a consequence, the future land use map must show land use as anticipated because of GMA goals and requirements rather than an illustration and continuation of pre-existing development.

The GMA, as amended, still prohibits urban growth in the rural area. See RCW 36.70A.070(5)(d)(ii), (d)(iii), (d)(iv), and .110(1). The Act states that even the “innovative techniques” for rural development must not allow urban growth. RCW 36.70A.070(5)(b). However, a pattern of more intensive rural development, as limited by the provisions of RCW 36.70A.070(5)(d), does not constitute urban growth in the rural area. RCW 36.70A.030(17). Therefore, unless the designation of Industrial or Commercial development in the Rural areas of the County, satisfies the provisions of RCW 36.70A.070(5)(d), or RCW 36.70A.367, it does not comply with the requirements of the Act. RCW 36.70A.070(5)(d)(i) applies to infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas. An “existing area or existing use is one that was in existence . . . [o]n July 1, 1990.” RCW 36.70A.070(5)(d)(v)(A).

The Act requires the County to “explain how the rural element harmonizes the planning goals . . . and meets the requirements of [the Act].” RCW 36.70A.070(5)(a). The County made no attempt to harmonize the planning goals. There was no attempt by the County to comply with the requirements under RCW 36.70A.367, major industrial developments – Master planned locations.

This does not mean the County can or must ignore what has occurred in the Past. The past patterns will certainly affect its future for many years to come. Those past development patterns cannot be easily undone. The landowners affected by those pre-GMA development activities are protected, for better or worse, by the fact that their uses, although nonconforming with future planning and zoning, are legal. They are also protected by the fact that their fully completed development permit applications are vested. Nonetheless, the County cannot base its future planning for new growth on its past development practices if those past practices, as here, do not comply with the GMA or the CPPs. What was once permissible is no longer so. The GMA was passed to stop repeating past mistakes in the future. The GMA contemplates quite a different future. The past practices cannot be the pattern for the future. As a consequence, the future land use map must show land use as anticipated because of GMA goals and requirements.

**Conclusion:** Industrial and Commercial development is urban in nature and is prohibited in Rural areas unless there is compliance with the exceptions under the GMA. The County has not complied with the statutory exceptions and the designation of Industrial and Commercial lands in the rural areas are found out of compliance. The Petitioners have proved that the County's Plan is not in compliance with the requirements of the GMA and is clearly erroneous as to these issues.

## **Issue 5. Miscellaneous**

**Petitioner's Position:** In the issues encompassed under this section, the Petitioner City has enumerated numerous failures of the County's Comprehensive Plan. The following are examples of those claimed failures: 1) The County failed to adequately provide for an annual review of the Plan to ensure that resources are available to provide needed facilities. The County indicated only that it might revise the land use element if it encounters funding shortfalls. 2) There is no evidence that critical areas ordinance was reviewed concurrent with the adoption of the Plan; therefore the Plan is in noncompliance. 3) The Plan permits densities that will have significant impact on fish and wildlife habitat yet nothing is done to address the protection or mitigation of such habitats. 4) The Plan fails to analyze or discuss how it will provide for the protection of groundwater for public drinking and aquifer recharge areas. 5) The Plan has no specific corrective actions or mitigation measures to address the effects of drainage, flooding or storm-water runoff. 6) The County admits that its environmental review fails to include environmental review of land use and other provisions in sufficient detail and rigor that questions relating to the specific adequacy of, and impacts to the natural and built environment, are resolved upon adoption. 7) The Shoreline Master Program is inadequate and does not comply with SEPA or the GMA. 8) The best available science was not used in developing policies to protect the functions and values of critical areas. No scientific data, information or reports were cited upon which to base its goals and policies. 9) The County did not conduct an inventory and needs assessments of all domestic water supply systems in the County pursuant to RCW 36.70A.070(3). The utility element contains only a list of the various domestic water systems, without any discussion of

levels of service, current or future, as required by the GMA.

Respondent's Response: The County emphasizes the Plan's presumption of validity and contends the City's mere conclusory statements are insufficient to demonstrate "clearly erroneous" action under the GMA.

The County contends they are not obligated to allocate all growth to urban areas and such an allocation would not balance competing GMA policies to provide a variety of rural densities and protect private property rights. They further contend the County has in place sufficient interim development regulations to protect its natural resource lands and critical areas pending adoption of final development regulations.

Discussion: Many of the issues raised in this section are addressed in our conclusions of the previous four issues. The Board's found the County out of compliance for its failure to follow the CPPs; its improper establishment of RAIDs; its improper designation of the Industrial and Commercial lands in the unincorporated area; its designation of numerous 2.5 acre parcels in unincorporated areas; and, the use of "should" rather than "shall" in certain portions of the Plan. These findings of non-compliance resolve some of the issues raised in this section. Those issues not so resolved are decided in favor of the County. In these disparate issues, the City has not carried its burden of proof. In these areas the presumption of validity has not been rebutted and the County is found in compliance.

Conclusion: With the exception of the areas addressed by our findings of non-compliance in Issues 1-4, the City is found to have not born their burden of proof and the County is found in compliance.

## **V. DETERMINATION ON INVALIDITY**

The Petitioner requested a finding of invalidity be issued. RCW 36.70A.302(1) provides in part, "a Board may determine that all or part of a comprehensive plan or development regulations are invalid if the Board determines: (b) ...that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." Because the Board has now found portions of the County's Comprehensive Plan out of compliance, we may now hear arguments from the parties concerning invalidity. A date for hearing such arguments will be set and notice of such date will be provided to the parties.

## **VI. ORDER**

The Board, having considered the arguments of the parties in this proceeding, and based upon the Findings and Conclusions entered above, finds that Grant County has failed to comply with the requirements of the GMA, as set forth in this decision. Therefore, the Board issues a Finding of

Noncompliance and orders the County's Plan be remanded with instructions to come into compliance with the GMA and the CPPs.

1. The entire Plan is remanded with instructions to the County to review and revise all Plan elements, as is necessary to achieve compliance with the CPPs
2. The Board finds the RAID element of the Plan does not comply with the requirements of RCW 36.70A.070 and this element is remanded with instructions to bring this element into compliance.
3. The establishment of 2.5-acre parcels in the unincorporated area of the County is an impermissible pattern of urban growth in the rural area and this element is remanded with direction to eliminate this density.
4. The use of "shall" must be used where the activity is not optional.

**This is a final order for purposes of appeal pursuant to RCW 36.70A.300(5).**

**Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this final decision and order.**

SO ORDERED this 23rd day of May, 2000.

EASTERNWASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD

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Dennis A. Dellwo, Presiding Officer

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Judy Wall, Board Member

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D.E. "Skip" Chilberg, Board Member