

STATE OF WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

LOON LAKE PROPERTY
OWNERS ASSOCIATION, LOON
LAKE DEFENSE
FUND and WILLIAM & JANICE
SHAWL,
LARSON BEACH NEIGHBORS
and
JEANIE WAGENMAN

Case No. 01-1-0002c

AMENDED FINAL
DECISION AND ORDER

Petitioners,
v.

STEVENS COUNTY,

Respondent

I. Procedural History

On January 26, 2001, Loon Lake Property Owners Association, Loon Lake Defense Fund and William and Janice Shawl, (LLPOA) filed a Petition for Review and on January 29, 2001 Larson Beach Neighbors and Jeanie Wagenman (Larson Beach) filed a Petition for Review.

On February 28, 2001, Larson Beach filed an Amendment of Petition for Review.

The petitions were subsequently consolidated in the March 13, 2001 Prehearing Order.

On March 15, 2001, Respondent Stevens County filed a Motion to Dismiss Issues 1-10 of LLPOA and a Motion to Dismiss Issues 1-20 of Larson Beach.

On March 19, 2001, LLPOA filed a Motion for Partial Summary Judgment.

On April 23, 2001, the Board issued an Order on Motions finding that LLPOA Issue No. 5 was not properly before the Board. The Board also denied the County's motion to

dismiss the 20 issues raised by Larson Beach.

Petitioner LLPOA's motion for partial summary judgment requested a finding that the Minimum Lot Size Regulations of November 14, 2000, Stevens County Code Title 4 and Interim Code Title 4 Chapter 5.09/Design of the December 26, 2000 Stevens County Code Title 5 and the December 26, 2000 Stevens County Interim Code Title 5 are non-compliant. The Board determined the County had already been found in non-compliance on this issue and Summary Judgment need not be entered.

On July 27, 2001, Stevens County moved for Reconsideration, Clarification and Modification.

On October 4, 2001 a hearing was held in Stevens County on the County's Motion for Reconsideration, Clarification and Modification.

II. Findings of Fact

1. On November 14, 2000 the County adopted Interim Short and Long Subdivision Platting Regulations. (Titles 4 and 5). These were amended on December 26, 2000.
2. Titles 4 and 5 establish a minimum lot size of 2.5 acres or smaller outside Urban Growth Areas (UGAs) and Interim Urban Growth Areas (IUGAs) in Stevens County. These Regulations authorized minimum lot sizes of 2.5 acres under certain conditions within the rural areas of Stevens County. Residential Cluster Developments, Planned Unit Developments and other density variations were also allowed pursuant to these Regulations.
3. The Growth Management Hearings Board for Eastern Washington (the Board) found that Stevens County Short and Long Plat Subdivision Codes referenced above to be out of compliance because they failed to prohibit urban growth beyond the IUGAs boundaries in the matter of *Wilma v. Stevens County*, No. 99-1-0001c, Order on Second Compliance Hearing, March 14, 2001.
4. Stevens County has not designated or conserved Resource Lands or adopted a Comprehensive Plan pursuant to the GMA at this time.
5. Stevens County Planning Department conducted an environmental review of the proposed Subdivision Codes on the basis of separate Environmental Checklists. The County concluded that the Codes did not have a probable

significant adverse impact on the environment and issued a determination of non-significance (DNS) on October 6, 2000. This was appealed and the Hearing Examiner refused to overrule the County's position of no environmental review being needed.

6. On August 24, 1999, Stevens County adopted a Public Participation Program in response to a May 21, 1999 order in *Wilma v. Stevens County*, No. 99-1-0001c. This Public Participation Program was found to be out of compliance with the GMA in an order entered March 14, 2001 in the *Wilma* case, *supra*. The Order found this program did not provide for early public involvement nor did it provide for a broad dissemination of proposals and alternatives.

III. Legal Issues and Discussion

A. LOON LAKE PROPERTY OWNERS ASSOC., LOON LAKE DEFENSE FUND and WILLIAM and JANICE SHAWL (LLPOA) ISSUES

ISSUES 1, 3 AND 4 ARE TO BE TAKEN TOGETHER DUE TO THEIR SIMILARITY.

Issue 1: Are Chapter 4.16/Minimum Lot Size Regulations and Chapter 5.09/Design, allowing 2.5 acres outside interim urban growth areas (IUGAs) on an interim basis inconsistent and substantially interfering with RCW 36.70A.020 goals of urban growth, reduce sprawl, economic development, property rights, natural resource industries, open space and recreation, environment and citizen participation and coordination (hereafter Goals)?

Issue 3: Whether provisions other than the minimum lot size sections further reduce in size the rural 2.5-acre minimum lot size and therefore whether these provisions in combination with the 2.5 acres provision satisfy the requirements of RCW 36.70A.110?

Issue 4: Are the performance standards in Chapter 4.16/Minimum Lot Size Regulations and Chapter 5.09/Design inconsistent and substantially interfering with Goals, natural resource lands (NRL) and Critical Areas (CA) requirements, Comprehensive Plans (CP) and Rural Element Requirements and Urban Growth Requirements?

Petitioner position: LLPOA contends that the rural 2.5-acre minimum lot size fails to prohibit urban growth outside IUGAs and fails to protect rural and natural resource lands, particularly on an interim basis. They contend the minimum lot size and the

exemptions and variances contained within the short and long plat regulations do not protect the rural nature of Steven County but do encourage sprawl and urban growth outside IUGAs and is therefore not compliant with the Growth Management Act (GMA).

The Petitioners believe the 2.5-acre minimum lot size, Boundary line Adjustments, Family Exemptions, Variances, Planned Unit Development and Residential Cluster Developments allow the lot size to be even smaller and encourage urban sprawl in the rural areas of the County. LLPOA contends the requirement of having access to a paved county road for lots of this size is not an adequate standard to limit growth such as this.

They contend that the biggest loopholes of the codes are the variances. They state the required grounds for variances are easily satisfied. LLPOA also contends that the "Interim" regulations should not allow exemptions and variances while serving a place-keeping function, pending the final regulations implementing the comprehensive plan.

LLPOA contends that the County's "Performance Standards" used for the siting of the minimum size lots substantially interfere with the GMA and its goals. These standards for minimum size lots are the requirements that the lot must have access to a paved county road, have potable water, and have the needed sewer and utility connections. LLPOA claims that these standards have very little, if anything to do with the seven rural characteristics set forth in RCW 36.70A.030(14). LLPOA contends that these standards controlling lot sizes are simply not related to the legislature's view of rural land use patterns, or the preservation of open spaces. They point out the developer may subdivide and eliminate open spaces by simply doing so near a paved road or by putting in the required roads.

Respondent position: Stevens County contends in its argument that the County uses performance standards to regulate development. The minimum lots can be allowed only if they have access to a paved County road, have power, septic tank and potable water. The County believes that a minimum lot size of 2.5 acres is appropriate.

The County claims variance procedures are needed for due process. They further contend that the Petitioners' brief is lacking in a detailed discussion or analysis of language being challenged or claimed to be clearly erroneous. The County believes that it is at a disadvantage because it must guess as to which paragraphs, sentences or words Petitioners challenge.

The County believes that the Petitioners have not met their burden of proof. The County lists several states that have used a performance-based system in their land use systems.

Discussion: The Petitioners did specifically identify the language being challenged and why they believe the actions of the County are clearly erroneous.

The Growth Management Act, RCW 36.70A.110(1) requires urban growth to be prohibited outside IUGAs or UGAs. Urban growth refers to the intensive use of land “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 36.70A170....” (RCW 36.70A.030(7)).

RCW 36.70A.030(14) provides as follows:

(14) “Rural Character” refers to the patterns of land use and development established by the County in the rural element of its Comprehensive Plan:

- (a) In which open space, the natural landscape, and vegetation predominate over the built environment;
- (b) That fosters traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;
- (c) That provides visual landscapes that are traditionally found in rural areas and communities;
- (d) That is compatible with the use of the land by wildlife and for fish and wildlife habitat;
- (e) That reduces the inappropriate conversion of undeveloped land into sprawling, low-density development;
- (f) That generally do not require the extension of urban governmental services; and
- (g) That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

Permitting minimum lot sizes of 2.5 acres and exemptions and variances allowing even smaller lots throughout the County would encourage sprawl and not protect resource lands, critical areas and the rural nature of the non-urban areas in Stevens County. The fact that certain restrictions apply to the siting of such small lots is not sufficient to achieve the goals of the GMA. During the interim period where there is no Comprehensive Plan, compliant Critical Area ordinance or Resource Lands designation, the protection offered by these short and long plat regulations is insufficient.

Urban growth refers to the intensive use of land “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 36.70A170...” To determine whether the County is in violation of this provision and the goals of the GMA this Board looks not only at the minimum lot size listed, but also any exemptions or variances that would allow different lot sizes in the rural areas of the County.

While exemptions and variances are common, they need to be strictly enforced and standards must be developed to insure that the exemptions and variances are allowed only where they do not interfere with the goals of the GMA. Because the County has not adopted a comprehensive plan and the required elements contained therein, the interim regulations prohibiting urban growth in rural areas are needed to preserve the rural character of that area until the comprehensive plan decisions have been made. The exemptions and variances listed in the Platting Ordinances can be applied throughout the rural areas and lack standards. Variances can easily be granted, further encouraging sprawl prior to the adoption of the County’s Comprehensive Plan.

The Board recognizes the need for variances and exemptions, but with guiding standards to protect the rural character of the County. Titles 4 and 5 lack these standards. LLPOA has shown that these actions of the County are clearly erroneous.

As the County stated in their brief, performance standards are defined as land use regulations based upon application of specific standards, relating to actual impacts of a proposed development. The Board does recognize that performance standards can be used in successful growth planning. However, in this case the standards must advance the goals of the GMA. The only “standard” that appears to be different from what would normally be required for a building lot is the required access to a paved road. This does not reduce urban growth in rural areas. It does allow extensive growth along the paved County roads. It encourages urban sprawl.

Conclusion: Stevens County is out of compliance with the GMA. The actions of the County are clearly erroneous and fail to comply with the GMA. The Board finds in favor of the Petitioners in Issues 1, 3 and 4. Titles 4 and 5 are found to be out of compliance.

Issue 2: LLPOA has withdrawn this issue.

Issue 5: This issue was dismissed by previous order.

Issue 6: LLPOA has withdrawn this issue.

Issue 7: LLPOA has withdrawn this issue.

Issue 8: Was the failure of Stevens County to transmit copies of the subdivision codes to the Department of Community, Trade and Economic Development, (CTED), now known as Office of Community Development (OCD), sixty days prior to enactment of the subdivision codes inconsistent and substantially interfering with Goals, NRL and CA Requirements, CP and Rural Element Requirements and Urban Growth Requirements and the specific provisions of RCW 36.70A.106?

Petitioners position: The Petitioners contend that the GMA requires the County to submit copies of the Subdivision Codes to the Office of Community Development (OCD) within 60 days prior to its enactment.

Respondent position: The County believes that OCD was aware of the proposed amendments to Title 4 and 5. The County contends also that the statute does not require copies of these regulations be sent to OCD but rather the notification of the County's intent to adopt development regulations.

Discussion: RCW_36.70A.106 requires the County to "notify the department of its intent to adopt such plan or regulations at least sixty days prior to final adoption." Surely this implies that the County "notify" the OCD rather than believe that the OCD was "aware of the proposed amendments." While this statute does not clearly state that the ordinances must be sent to the OCD, the meaning of the section is clear. The purpose of forwarding the ordinance to the OCD is to receive comments and help in its review for compliance with the GMA. However, the statute is not clear and the Board must presume that the County's actions were valid. The failure to notify OCD is not a significant omission in view of the other shortcomings in Titles 4 and 5.

Conclusion: The County is not found out of compliance on this issue.

Issue 9: Did the November 14, 2000 subdivision codes have a significant adverse impact on the environment requiring a consideration of reasonable alternatives at the threshold determination stage, a determination of significance (DS) and environmental impact statement (EIS) and if yes, was the failure to do so inconsistent and substantially interfering with the Goals, NRL and CA Requirements, CP and Rural Element Requirements and Urban Growth Requirements?

Issue 10: Did the December 26, 2000 codes have a significant adverse impact on the environment in requiring environmental review, a threshold determination, a DS and an EIS and if yes, were these failures to do so inconsistent and substantially interfering with the Goals, NRL and CA Requirements, CP and Rural Element Requirements and Urban Growth Requirements?

Petitioners position: On Issues 9 and 10, LLPOA contends that the County failed to address reasonable minimal lot size alternatives to the minimum lot sizes in the 11/24/00 Title 4 and 5 Ordinances (these titles were again amended 12/26/00). The minimum lot sizes are 2.5 acres for residential lots and 1.0 acre for commercial and recreation lots. The Petitioners contend the county is required to consider alternatives to the proposal. RCW 43.21C.030(2). The alternative analysis is considered one of the three “prominent” provisions of SEPA. The proposal in the Environmental Checklist does not describe reasonable alternatives.

The Petitioners pointed out the contention by the Stevens County Planning Department that the environment is improved by the ordinances and therefore an EIS is not required. However, LLPOA cites a Court of Appeals case to the contrary:

“Even proposals intended to protect or improve the environment may require an EIS. SEPA regulations do not allow threshold determinations to be made by balancing the potential “good/bad” effect of a proposal.” *Alpine Lake’s Protection Society v. Washington State Dept. of Natural Resources*, 102 Wn. App. 1 (1999).

LLPOA contends that even given an overall improved environment, Washington case law provides that an EIS is still required to consider the environmental impacts.

The Petitioners further contend that now is the time to examine the impact of the 2.5 acre minimum lots. It is the cumulative effect of these ordinances rather than the individual impact of a development that needs to be examined. They believe it is vital to review and fully disclose the environmental effects in order that the legislative body makes a fully informed decision.

Respondent position: The County contends that for the Petitioners to prevail they must establish that the implementation of the adopted changes to the short platting and long platting requirements will have a probable significant adverse environmental impact. RCW 43.21C.031. “Significant” is defined under WAC 197-11-792 as meaning a reasonable likelihood of more than a moderate adverse impact on environmental quality. RCW 43.21C.031.

Discussion: The Washington State Legislature expanded the Board’s jurisdiction to include SEPA actions taken to comply with the GMA. (RCW 36.70A.280). The Board has jurisdiction to review the nonproject specific County actions. The Board must determine if the EIS performed for these actions was adequate. Less detail is required

for an EIS on a nonproject action. WAC 197-11-704(2)(b)(ii). A specific project shall undergo a much more rigorous SEPA review.

The Board agrees the cumulative effect of the small lot size should be examined prior to passage of the subject ordinances. These titles have a major impact on growth planning. The cumulative effect clearly governs the direction of growth. Had the Comprehensive Plan been adopted and received the SEPA review required, regulations implementing the Plan's policies would require less or no additional detailed review. It would have already been done. This Board has found that Titles 4 and 5 are out of compliance due to this failure to prohibit urban growth in the rural areas of the County. It is hoped that the County will adopt a comprehensive plan and then adopt regulations to implement the policies contained therein. Whatever corrective actions the County takes should include a total review of alternatives and their cumulative environmental effects.

Conclusion: The Board has already found Titles 4 and 5 out of compliance. The changes adopted by the County to bring these titles into compliance must again go through the SEPA review process. The Board need not reach this issue at this time. The Board will review the County's efforts to bring itself into compliance including its compliance with SEPA.

Issue 11: Did the County fail to develop and disseminate an adequate public participation program and fail to adequately include the public in the planning process for the subdivision codes and, if so, whether these failures violate the requirements of RCW 36.70A.035?

Discussion: Refer to Larson Beach Issue 12 below for discussion of this issue.

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B. LARSON BEACH NEIGHBORS/WAGENMAN ISSUES

Issue 1: Whether Stevens County conducted proper/complete environmental review when it adopted Title 4 Platting of Short Subdivisions, Resolution 114-2000 and amending resolution 114-2000 with Resolution 140-2000?

Whether Stevens County conducted proper/complete environmental review when it adopted Title 5 Platting of Long Subdivisions, Resolution 115-2000 and amending resolution 115-2000 with Resolution 141-2000?

Whether Stevens County's Long Subdivision Platting Code and Short Subdivision platting Code complies with the State Environmental Policy Act (RCW 43.21C) including,

but not limited to RCW 43.21.030, .031, .240; WAC 197-11-060, -21, -235, -792 (segmentation and cumulative impacts analyses); WAC 197.11-080 (incomplete or unavailable information); WAC 197-11-330, .310 (threshold determination process); WAC 197-11-335, .340(3)(a) (additional information): and WAC 197-11-442, .440 (4) non-project EIS.

Conclusion: See LLPOA Issues 9 and 10 above.

Issue 2: Has Stevens County failed to adopt, under the Growth Management Act, a Comprehensive Plan and Development regulations, as required by RCW 36.70A.020, .030, .040, .070, .110, and WAC 365-195?

Discussion: The County conceded this issue and admits that they have failed to adopt a Comprehensive Plan and Development regulations as required by the above chapters of the GMA.

Conclusion: The County is out of compliance due to their failure to adopt a Comprehensive Plan and Development regulations as required by the GMA. RCW 36.70A.020, .030, .040, .070, and .110.

Issue 3: Has Stevens County failed to have designated and adopt Development Regulations to Conserve Natural Resource lands, including but not limited to: RCW 36.70A.020, .060, .170, .177 and WAC 365-195-400, and WAC 365-190?

Respondent position: The County conceded this issue and admits that they have failed to designate and adopt Development regulations to conserve Natural Resource Lands as required by the above chapters of the GMA.

Conclusion: The County is out of compliance due to their failure to adopt Development regulations to Conserve Natural Resource Lands as required by the GMA. RCW 36.70A.020, .060, .070, and .177.

Issue 4: Sections RCW 36.70A.040, .110 and .170 set forth a sequence for planning activities. The county has adopted development regulations Title 4 and 5 that “backwards” -proper sequencing and make compliance with the relevant sections of the GMA impossible. Does Stevens County’s improper sequencing in this instance, interfere with compliance with the Act and substantially interfere with the fulfillment of the goals (1-13) of the Act?

Petitioners position: Larson Beach contends the county has failed to sequence the

adoption of a Comprehensive Plan, designation and conservation of Resource lands, Critical Area Ordinances and other regulations as required by the GMA. They point out that development regulation under RCW 36.70A.040 must implement the comprehensive plan but does not do so here because there is no Plan. The fact that “Interim” qualifies the Ordinances does not change this. This word was added later and Larson Beach contends the County has acted in error.

Respondent position: The County admits that it is true the county has complied with various provisions of the GMA “out of sequence”, but there is no adequate remedy other than to nullify everything and start over in the correct sequence. The Attorney for the County asks, “Is that what the Petitioner is requesting?”

Discussion: The Petitioners are asking that the Board find that the County is not properly sequencing the planning under the GMA. The examples given by Larson Beach are accurate and demonstrate why the GMA establishes a sequence for the adoption of Public Participation, Interim Urban Growth Areas, Resource Lands designation, Critical area Ordinances, etc. When these steps are not followed it becomes difficult if not impossible to protect what is required to be protected, plan for what is required to be planned for, or prohibit what is required to be prohibited.

The failure of the County to properly sequence planning under the GMA requires the Board to look at Titles 4 and 5 more critically. While much of these titles might not otherwise be out of compliance, their passage without the designation and conservation of Resource Lands and the planning found in a Comprehensive plan, forces us to again find these titles out of compliance. These titles interfere with the Goals of the GMA more than is first realized. The State Legislature specifically directs the County to designate and conserve Resource Lands and Critical Areas prior to the other required actions. (RCW 36.70A.060 and .170). The Short and Long Plat Ordinances of the County allow subdivisions, large and small, throughout the rural areas, including areas that one would expect to find Resource lands and Critical areas. The out of sequence adoption of these regulations cause a real frustration of the goals of the GMA.

RCW 36.70A.060 requires Stevens County to first “adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.” That section of the GMA goes on to require the County to place a notice in all plats or permits that allow activity within 500 feet of resource lands that such resource lands are there and that certain activities may occur which may not be compatible with residential development. This notice makes sense only if the resource lands are designated.

The County needs to review the GMA and proceed accordingly. The Board has found the County's actions are clearly erroneous on a number of issues and the County has conceded they are out of compliance in other aspects.

Conclusion: The County has not properly sequenced the adoption of Comprehensive Plan elements as required under the GMA. The County is not in compliance. Any further action taken by the County to respond to this order or to otherwise come into compliance with the GMA must be properly sequenced as required by the GMA.

Issue 5: Do the County's Long-Short Plat Subdivision codes fail to comply with the Act by failing to preserve and protect the rural character of the land, open space (RCW 36.70A.030 (14)(15) (16); RCW 36.70A.070(5) including but not limited to protection of natural surface water flows, ground water, including .070(1) (5) and surface water recharge and discharge areas and failing to be "compatible with the use of the land by wildlife, fish and wildlife habitat." Does this fail to comply with the goals of the Act #2, #9, and #10 and substantially interfere with the fulfillment of the goals of the Act?

Petitioners position: Larson Beach contends the County has failed to comply with the Act by failing to preserve and protect the rural character of the land and open space. They believe the Long-Short Plat Subdivision Codes are part of the rural element and the cornerstone of the County's Comprehensive Plan. If this is true, the Petitioners believe that what the county has done is out of compliance.

Respondent position: The County believes that this issue is *res judicata*. Titles 4 and 5 have been found to be non-compliant. They believe this issue need not be again addressed.

Discussion: The Board has found Titles 4 and 5 out of compliance with the GMA in this case and in *Wilma v. Stevens County*, No. 99-1-0001c. The reason given for such noncompliance was the failure of the County to prohibit or discourage urban growth in rural areas of the county. These titles do not adequately protect fish and wildlife areas nor do they preserve the rural character of Stevens County's rural areas. The County has also been found out of compliance for their failure to designate and conserve Resource Lands or adopt a Comprehensive plan. Titles 4 and 5 are not the comprehensive plan, but they dramatically impact what that plan may contain. The County remains out of compliance.

Conclusion: The issue raised herein has already been decided earlier in this case and in the *Wilma* case *supra*. Titles 4 and 5 continue to be out of compliance for the reasons stated above.

Issue 6: Whether Stevens County's Long-Short Plat Subdivision codes, fail to comply with the Act by failing to preserve the rural character, by failing to contain and define boundaries of limited areas of more intensive development, master planned resorts, rural areas of intense development and recreational areas. Does it also fail to provide and designate the extent of uses of the land, for agriculture, industry, commercial, shoreline, mixed-use areas, timber, commerce recreation, open space, public utilities and facilities, historic preservation and other land uses? (RCW 36.70A.070 (1)(2)(3)(4)(5). Does this substantially interfere with the fulfillment of the goals of the Act and comply with the 13 goals of the Act?

Discussion: Because of the other decisions herein, it is not necessary to address this issue. The County has been found out of compliance for failure to adopt a comprehensive plan or designate and conserve Natural Resource lands.

Conclusion: This issue need not be addressed because it has been resolved already herein.

Issue 7: Do the County's Long-Short Plat Subdivision codes fail to allow identification of open space corridors within and between urban growth areas, land useful for recreation, wildlife habitat trail, and connection of critical areas? (RCW 36.707a.160). Does this fail to comply with the Act and interfere substantially with the goals of the Act complying with #9 and #10?

Discussion: Because of the other decisions herein, it is not necessary to address this issue. The County has been found out of compliance for failure to adopt a comprehensive plan or designate Natural Resource lands.

Conclusion: This issue need not be addressed because it has already been resolved herein.

Issue 8: Do Stevens County's Long-Short Plat Subdivision codes fail to comply with the intent and mandate of the Act because the natural resource areas, which have not been designated or conserved by the county, are therefore included and impacted by the platting which these codes would permit, both with urban and rural densities. Does this substantially interfere with goals of the Act and fails to comply with such goals as #2, #8, and #10? (RCW 36.70A.030 (15); .040, .060, .050; 170; .070(5)(c)(v); .030(2)(8)(11) and WAC 365-195-825(a); .210; 826 (1) (e)(I) (ii) and WAC 365-190)

Has Stevens County failed to have designated and adopt Development Regulations to

Conserve Natural Resource lands, including but not limited to: RCW 36.70A.020, .060, .170, .177 and WAC 365-195-400, and WAC 365-190?

Respondent position: The County conceded this issue and admits that they have failed to adopt development regulations to designate and conserve Natural Resource Lands as required by the above chapters of the GMA.

Conclusion: The County is out of compliance due to their failure to adopt development regulations to conserve natural resource lands as required by the GMA. RCW 36.70A.020, .060, .070, and .177.

Issue 9: Do Stevens County's Long-Short Plat Subdivision codes fail to comply with the Act by failing to require all plats, short plats development permits, issued for development activities on or within five hundred feet of lands designated as agricultural, forest, or mineral resource, contain a notice that the property is within or near these lands? Does this also fail to "buffer" or insure that lands adjacent to NRL shall not interfere with their use..."protecting against conflicts with the use of NRL?" RCW 36.70A.070 (5)(c)(v). Do these fail to comply with #8 (RCW 36.70A.060(1), WAC 365-195-825 (f)(ii)(iii), WAC 365-190 and substantially interfere with the goals of the Act?

Respondent position: The County conceded this issue and admits that they have failed to adopt Development regulations to conserve Natural Resource Lands as required by the above chapters of the GMA.

Discussion: The County conceded this issue and admits that they have failed to adopt Development regulations as required by the above chapters of the GMA.

Conclusion: The County is out of compliance due to their failure to adopt Development regulations to Conserve Natural Resource Lands as required by the GMA. RCW 36.70A.020, .060, .070, and .177.

Issue 10: Does essentially allowing a 2.5 "rural" density (only dependent upon paved roads and roads with snow removal) across the rural portions of the county, fail to keep with the rural definition, failing to keep with the traditional and visual landscapes of the rural area and protect the rural character? (RCW 36.70A.030 (14); .070 (5)(b)(c)? Does this fail to reduce sprawl of inappropriate conversion of undeveloped land into sprawling low-density development. Does this substantially interfere with the goals of the Act and fails to comply with the Act and #2, #9 and #10?

Discussion: Titles 4 and 5 and the 2.5-acre minimum lot sizes have already been

found non-compliant. This issue need not be decided again here.

Conclusion: This issue has already been decided herein. (LLPOA Issues 1,3 and 4)

Issue 11: Do Stevens County's long-short plat codes fail to prevent "urban densities outside of IUGAs? Do the codes properly use and define urban and rural densities? Do these codes reduce urban and rural sprawl, including but not limited to RCW 36.70A.030 (14)(15). 110? Does this comply with the Act and substantially interfere with the goals of the Act, contrary to GMA goals 1 and 2?

Respondent position: The County concedes it has not yet adopted a Comprehensive Plan. With regard to Residential Cluster Developments, the County admits that an error was made in that section. They expect a change in lot size within the IUGAs.

The County does contend that with respect to variances, the County has established the requirement for both need and written criteria, which must be met.

Conclusion: These issues have been already decided herein. (Issues 1,3 and 4)

Issue 12: Did Stevens County fail to implement their own Public Participation Program in writing the Long-Short Platting Subdivision codes? Did they fail to adequately include and disseminate this Public Participation Program? Does this comply with the Act and substantially interfere with Goal 11 of the Act?

Petitioner position: Petitioners contend Stevens County in adopting Titles 4 and 5 has violated their own public participation program policies, as well as RCW 36.70A.140 and 035. The alleged violations include:

- 1) Failure to provide adequate notification and dissemination of information to the public, per RCW 36.70A.035;
- 2) Utilization of an ad-hoc self-appointed advisory committee not representative of a variety of interest, contrary to Stevens County's public participation program policy;
- 3) Failure by Stevens County to follow Stevens County Countywide Planning Policy #8, which provides for "open discussion, broad dissemination of alternatives and consideration of a response to public comments".

Petitioners contend further that the County utilized a self-appointed group as a citizens advisory committee in preparing Titles 4 and 5. Petitioners point to many instances in

the record where this ad-hoc committee is given official status, although no formal action was taken by the County in creating this group. The group was not representative of a variety of interests, as specified in the PPP policies and apparently represented only developer interests.

Petitioners list several instances where this group is referred to in the record as a citizens advisory committee” or similar term. Petitioner brief, p. 48. Respondent does not rebut this claim, nor do they explain why the PPP policy was not followed in forming this advisory committee. The Board can only conclude that the County was seeking advice from a limited perspective. Their failure to follow their own policy is clearly erroneous.

Petitioners further contend that the County failed to follow County-wide Planning Policy #8 in the adoption of Title 4 and 5. This policy provides for “open discussion, broad dissemination of alternatives, and consideration of a response to public comments”.

Respondent position: The Respondent’s response is presented here in its entirety:

“Issue 12: *Res judicata*. The board in *Wilma* has found Resolution 91-1999 to be non-compliant. The record reflects more than adequate public participation in the development of Titles 4 and 5. In excess of twenty public meetings/hearings and workshops were advertised and held. Petitioner here is simply venting her frustration at not getting her way. Public participation does not require the county to comply with the demands of each participant. By her own admissions, Petitioner has had many, many opportunities for public participation in the policy making process. Rather than launching this type of rambling tirade against the County, perhaps Petitioner should reflect upon and analyze why her own strategies and methods have proven to be so unsuccessful for so many years and at so many levels.”

Discussion: The Board, in the *Wilma* case, found Stevens County’s Public Participation Program (PPP) non-compliant. The Board again finds that the County’s PPP is out of compliance. This issue, however, alleges further that Stevens County has failed to follow the adopted countywide planning Policy #8, the County’s PPP, and both RCW 36.70a.035 and 36.70A.140. Clearly, the *Wilma* case addressed the adequacy of the PPP, not whether or not it was adhered to as in this case. Thus, the County’s *res judicata* argument is rejected.

The Board finds that the public participation requirements of RCW 36.70A apply to the adoption of Title 4 and 5. Titles 4 and 5 are subdivision ordinances. RCW 36.70A.030

includes subdivision ordinances as a development regulation. RCW 36.70A.140 provides for “early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans.” The County has acknowledged that the subject titles are “the cornerstone of their comprehensive plan”. (Dennis Sweeney, p. 2005 of County Record)

The County clearly intended that its own PPP apply. Paragraph 1 states (in part) “It applies to the adoption of ...development regulations, ...

While Titles 4 and 5 do not implement the comprehensive plan, they are in fact the “cornerstone” of that plan, and significantly impact the comprehensive plan and sub-area plans. To find that public participation was not required simply because the comprehensive plan had not been completed would defy the spirit and intent of the entire GMA. The Western GMHB states: “The goals and requirements of the GMA concerning public participation apply to all development regulations. Review of challenges to public participation involves a review of the entire record to determine if compliance with both the spirit of and strict adherence to RCW 36.70A.140 have been achieved” *CCNRC v. Clark County*, 92-2-0001 (FDO 9/23/98).

The Respondent argues only “in excess of twenty public meetings/hearings and workshops were advertised and held.” The Respondent then characterizes petitioner’s participation as a “rambling tirade against the County”. County Prehearing Brief, p. 10. This is an inappropriate comment and not accurate. Further this type of comment does not reflect a willingness of the County to receive comments from those supporting or opposing their actions.

RCW 36.70A.035 provides as follows:

“Public participation-Notice provisions. (1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include:

- (a) Posting the property for site-specified proposals;
- (b) Publishing notice in a newspaper of general circulation in the county, city or general area where the proposal is located or that will be affected by the proposal;
- (c) Notifying public or private groups with known interest in a certain proposal

or in the type of proposal being considered;

(d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and

(e) Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

The Board finds that the provisions of RCW 36.70A.035 are applicable to the actions taken by Stevens County. Stevens County maintains, “public meetings/hearings, and workshops were held.” None of the other provisions for public notification or dissemination of information contained in the statute are claimed to have been followed. Those omissions by Stevens County are non-compliant with both the spirit and intent of the GMA as well as the strict adherence to RCW 36.70A.035, and are clearly erroneous.

Petitioners point to many instances in the record where an ad-hoc committee is given official status, although no formal action was taken by the County in creating this group. The group was not representative of a variety of interests, as specified in the PPP policies and apparently represented only developer interests.

The Board finds that the provisions of RCW 36.70A.035 are applicable to the subject action taken by Stevens County. Stevens County maintains, “public meetings/hearings, and workshops were held.” None of the other provisions for public notification or dissemination of information contained in the statute are claimed to have been followed. Those omissions result in the failure of Stevens County to comply with both the spirit and the intent of the GMA and their actions are clearly erroneous.

Petitioners contend none of the above provisions were followed. The Respondent provided no response to the claim. A search of the record finds no mention of alternatives considered to Title 4 and 5, nor any response to Petitioners’ concerns.

RCW 36.70A.140 states, to ensure public participation, “procedures shall provide for ... consideration of and response to public comments.” (Emphasis added) The Board finds Stevens County’s actions clearly erroneous in its failure to consider alternatives, and to respond to public comments, contrary to both County-wide Planning Policy #8 and RCW 36.70A. 140. While errors in exact compliance with the established program will not render the development regulations invalid, the County must provide for public participation that is appropriate and effective under the circumstances presented by the board’s order. The County has taken almost two years in the effort to bring them into compliance. The County had adequate time for the public participation required in a

situation such as this, but failed to do so.

Conclusion: The Board finds that Stevens County, in adopting Titles 4 and 5, failed to comply with RCW 36.70A035, .140, Stevens County Public Participation Program Policies, and Stevens County Countywide Planning Policy #8. The Petitioners have demonstrated that these actions are clearly erroneous in view of the entire record before us and the requirements of the GMA.

Issue 13: Do Stevens County's Long-Short Subdivision codes fail to comply with the Act and the County Wide Planning Policies? (RCW 36.70A.210). Does this comply with the Act and substantially interfere with the goals of the Act?

Petitioners position: The Petitioners appear to be withdrawing this issue or referring the Board to the other issues where the same subjects are covered. The Petitioner believes however that the county has failed to comply with their CWPPs.

Respondent position: The County did not respond, believing that the Petitioner had withdrawn this issue.

Discussion: The Board has found Titles 4 and 5 out of compliance with the GMA. The Board has found that the County has failed to act in a number of issues. The County will have to reexamine where it has been found out of compliance and also adopt a comprehensive plan and its elements as required by the GMA. When the County works to bring itself into compliance, of course it must follow the County Wide Planning Policies as is required by law.

Conclusion: The Board need not enter a finding on this issue.

Issue 14: Do Stevens County's Long-Short Subdivision codes; fail to comply with the Act by encouraging and allowing urban services such as (but not limited to) public sanitary sewers in all rural areas for both the long and short plat codes? Is this contrary to the definition of Rural? (RCW 36.70A.030(12)(16) RCW 36.70A.110(3)(4). Does this comply with the Act and substantially interfere with Goals #1, #2 and #12 of the Act?

Discussion: Extending city services into rural areas of the county encourage urban growth. This is a reason why the legislature prohibited the provision of those services in rural areas except for where it can be shown to be necessary to protect the basic health and safety. That is not the case here. The Board has found Titles 4 and 5 out of compliance. Those titles encourage urban densities in rural areas. The county must bring them into compliance. Part of the solution is to not allow the provision of urban

services in the rural areas. RCW 36.70A.030.

Conclusion: The Board finds that the County's Titles 4 and 5 are out of compliance additionally for allowing the provision of urban services in rural areas beyond what is allowed under the GMA.

Issue 15: Do Stevens County's Long-Short Plat Subdivision codes fail to meet the goal of concurrency (WAC 365-195-060(3) RCW 36.70A.020(12) to ensure that those public facilities (such as the commitment of sewer) and services are there to service the development? Does this comply with the Act and substantially interfere with Goal #12 of the Act?

Respondent position: The County concedes they have not adopted a Comprehensive Plan. They made no further comment in their brief on this issue.

Discussion: The County must meet the GMA goal of concurrency. They must ensure at the time of new development, public facilities and services are in place or are adequately planned. The word "ensure" found in this statute imposes a requirement on local governments to state what it plans to do and how that is to be accomplished in order to achieve concurrency compliance. The requirements found in the platting ordinances for adequate facilities are not what are required by the GMA. RCW 36.70A.020(12). Because the Comprehensive plan has not been adopted, the Board sees only a portion of the County's management of growth. When the Comprehensive plan is adopted, concurrency is to be measured by the adequacy of public facilities, including parks. Something more than a generalized policy statement is necessary to comply with the GMA.

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A local government has both the duty and the right to determine the adequacy of public facilities and services. Such a determination requires the examination of current adequacy level and then a local government's future ability to add to those facilities and services. The County must establish an objective baseline to determine minimum level of services standards for public facilities and services.

RCW 36.70A.020(12) requires local governments to adopt either policies or regulations or a combination thereof that provide reasonable assurances, but not absolute guarantees, that the locally defined public facilities and services necessary for future growth are adequate to serve that new growth, either at the time of occupancy and use or within an appropriately timed phasing of growth, connected to a clear and specific funding strategy.

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Conclusion: The Board need not address this issue at this time. When the Comprehensive plan is adopted, this is where concurrency is normally addressed. Here again is an example of the critical need to properly sequence the elements of the adoption of a comprehensive plan.

Issue 16: Do Stevens County's Long-Short Plat Subdivision codes fail to specify that "approvals of short subdivisions shall require written findings that "appropriate provisions" have been made for the public health, safety and general welfare, including... sanitary wastes" WAC 365-195-825 (4)(a)? Does this comply with the Act (goals #1, #12) and substantially interfere with the goals of the Act?

Petitioners position: The Petitioners contend the County has failed to require written findings that appropriate provisions have been made for the public health, safety and general welfare, including sanitary waste.

Respondent position: The County's only comment on this issue is to direct the Board to see Section 4.22.030(6) of Title 4 as amended and RCW 58.17.060 and .110.

Discussion: RCW 58.17.060 requires the County to adopt regulations for the summary approval of short plats and short subdivisions or alteration or vacation thereof. "Such regulations shall be adopted by ordinance and shall provide that a short plat and short subdivision may be approved only if written findings that are appropriate, as provided in RCW 58.17.110, are made by the administrative personnel...." (RCW 58.17.060(1)). This clearly requires that the ordinance contain a requirement of written findings. The ordinances' reference to RCW 58.17.110(6) is not enough. That ordinance section only requires that "appropriate provisions are made within the proposed subdivision for the public health, safety and general welfare, as per Chapter 58.17.110 RCW."

Conclusion: The County has failed to comply with RCW 58.17.060 by failing to include within Title 4 the requirement of written findings. However, this board does not have the jurisdiction to find non-compliance if the County has not followed these RCW provisions. The Board can only determine if the actions of the County comply with the GMA. Furthermore, the Board has already found these Titles 4 and 5 out of compliance.

Issue 17: Do Stevens County's Long-Short Plat Subdivision codes fail to protect the rural element which includes Critical Areas (RCW 36.70A.070(5)) by platting into critical areas that have insufficient or no protection for both rural and urban growth areas. Does this comply with the Act and Goals #9, and #10? Does this substantially interfere with the goals of the Act?

Petitioners position: The Petitioners contend that Titles 4 and 5 have an adverse impact on Critical Areas and do not mitigate the expected damage.

Respondent position: The County states that Titles 4 and 5 are not intended as the County's Critical Areas Ordinance. They also contend the Petitioners have not met her burden of proof and they fail to specify any words which are clearly erroneous and do not comply with the GMA.

Discussion: Critical Areas must be identified and protected. The key place for that protection is the Critical Areas Ordinance and the Comprehensive Plan. If the Plats titles conflict with the Critical Areas Ordinance, the Critical Areas Ordinance prevails. Titles 4 and 5 have already been found out of compliance partially due to the impact these Titles have on Critical Areas.

Conclusion: The Petitioners have not carried their burden of proof. Discussion of the Critical Areas will take place when the Board reviews the County's ordinance that designates and protects Critical Areas.

Issue 18: Whether the Zoning Ordinance No. 3-1994 text and map and/or Amended Zoning Resolution 109-1997 are consistent and comply with the Growth Management Act? Does its continual application, validity, or portion of its application substantially interfere with the goals of the Act? Does the permitting and changing of rezones of "urban" density and allowing inappropriate "rural" densities as well as inappropriate intensive urban uses around the lake/watershed and within the zoning district, comply with the Growth Management Act and substantially interfere with the goals of the Act?

Petitioners position: The Petitioners are asking this Board to determine if the urban densities of 3.5 dwelling per acre and 1 dwelling per acre are proper under Growth Management. The Board is asked to determine if parts of the Sub-area Loon Lake Zoning Code was compliant with the Growth Management Act. The question specifically is whether the Loon Lake Code takes precedence over Title 4 and 5. The Petitioners evidently have received assurances from the Planning Director that the Loon Lake Code took precedence, but that was never put in writing.

Respondent position: Lloyd Nickel, attorney for the County, simply stated that the Petitioners were asking the Board to be an advocate for the Petitioners. He then contended that the Petitioners failed to meet their burden of proof.

Discussion: The Petitioners have not stated an issue upon which the Board can rule.

The Board cannot make a declarative ruling and are unable to do what the Petitioners ask.

Conclusion: The Board cannot rule on this issue at this time.

Issue 19: Are Title 4 and Title 5, internally consistent and consistent with each other, as well as being consistent with Stevens County's other resolutions/ordinances and consistent with State Law. Is this inconsistency contrary to the Act and contrary to WAC 365-195-500?

Petitioners position: The Petitioners wanted to use this issue to be able to address the issue of consistency with other development regulations.

Respondent position: The County points out that the Petitioners have not demonstrated any specific language from Titles 4 and 5, which is inconsistent with each other or other resolutions or ordinances.

Conclusion: The Petitioners have not carried their burden of proof. While consistency is required, the Petitioners must demonstrate that the actions of the County are clearly erroneous. They have not done so.

Issue 20: Does Title 4 and Title 5 allow for excessive administrative discretion in terms of granting variances and exemptions? Does this discretion then lack clear and specific guidelines by which these exemptions and variances are given, making it difficult for the public to understand and creating a situation that is rather arbitrary and vague as well as creating short and long plats that may not comply with the Act? Does this substantially interfere with the goals of the act?

Petitioners position: The Petitioners appear to have withdrawn this issue.

Conclusion: The issue is withdrawn.

IV. Invalidity

The Petitioners have asked the Board to find Stevens County's Titles 4 and 5 invalid under RCW 36.70A.302. The Board may determine all or part of a comprehensive plan or the development regulations are invalid if the board: (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300; (b) Finds that the continued validity of those parts of the regulations would substantially interfere with the fulfillment of the goals of the GMA; and (c) Specify the particular part of parts of the

regulation that are determined to be invalid, and the reasons for their invalidity. RCW 36.70A.302(1).

The Board has found Stevens County out of compliance, specifically Titles 4 and 5, their Short and Long Platting Regulations. The Board further finds certain provisions of Titles 4 and 5 substantially interfere with the fulfillment of the GMA goals.

V. Findings Of Fact

As revealed by the Board's discussion of specific legal issues in this Order, the County's Titles 4 and 5 do not comply with the requirements of the Growth Management Act and fail to be guided by its goals. The cumulative impact of the noncomplying provisions of these titles, the County's failure to properly sequence the adoption of elements of the Comprehensive Plan and the County's failure to adopt a comprehensive plan, designate Resource Lands and conserve such lands, substantially interferes with the fulfillment of these goals.

1. One of the key provisions that substantially interfere with the fulfillment of the goals of the GMA is the minimum lot size of 2.5-acres residential lots in the rural areas of the County. This flies in the face of a major goal of the GMA, reduction of sprawl. (RCW 36.70A.020(2)).
2. The failure of the County to follow its own Public Participation program and applicable statutes in the passage of Titles 4 and 5 is particularly disquieting. RCW 36.70A.020(11), RCW 36.70A.140 and RCW 36,70A.035 all require substantial public participation and a program for such participation be developed to insure the adequacy of that participation. The public participation program that was developed by the County was not used although the Titles were considered the "cornerstone" of the comprehensive plan. Also, Number 8 of the Countywide Planning Policies was not followed. These actions of the County substantially interfere with the fulfillment of goal 11 of the GMA.
3. The County admits that it has not adopted a comprehensive plan, regulations to designate and conserve Natural Resource Lands and that they are not proceeding in the sequence established by the GMA. By adopting Titles 4 and 5 out of sequence, the Comprehensive Plan policies and direction have not been developed. Establishing minimum lot size at a non-rural size can preclude the adoption of policies in conformity with the Goals of the GMA. These actions of the County substantially interfere with the fulfillment of Goals 8 and 9 of the GMA.

4. Portions of Stevens County are developing more rapidly than other parts, particularly in the south around the lakes and near the large metropolitan area of Spokane. To allow the minimum lot sizes contained in Titles 4 and 5 to stand would forever preclude establishing densities in those rural areas sought by the Goals of the GMA. These actions substantially interfere with the fulfillment of Goal 2 of the GMA.

Conclusion: The Board finds portions of Stevens County Titles 4 and 5 substantially interfere with the fulfillment of the GMA Goals and are invalid. Those sections are as follows and only to the extent they affect development outside UGAs or IUGAs: Chapter 4.16.50 Minimum Residential Lot Size Requirements outside Interim Urban Growth Areas; Chapter 4.16.060 Minimum Commercial Lot Size Requirements outside the Interim Urban Growth Areas; Chapter 5.02.10(4) Exemptions; Chapter 5.09.092 Residential Performance Standards; and Chapter 5.09.096 Residential Cluster Developments.

VI. ORDER

1. This Order amends and completely replaces the order entered in this matter on the 13th day of July 2001.
2. Stevens County Titles 4 and 5 are out of compliance with the GMA for its failure to prohibit urban growth outside IUGAs and UGAs in rural areas of the County; for encouraging and allowing urban services such as public sewer in rural areas; the failure of the County to designate and preserve Resource Lands; the failure of the County to follow its Public Participation Policies; failure to follow their Countywide Planning Policy # 8; and failure to comply with RCW 36.70A.020(11), RCW 36.70A.035, and RCW 36.70A.140. The actions of the County are clearly erroneous and fail to comply with the GMA. (LLPOA Issues 1, 3, 4 and 11 and Larson Beach Issues 4, 10, 12, and 14).
3. Stevens County is out of compliance with the GMA for their failure to adopt a Comprehensive Plan and development regulations as required by law. The County conceded this. (Larson Beach Issue 2).
4. Stevens County is out of compliance with the GMA for their failure to designate and conserve Natural Resource Lands as is required by law. The County conceded this issue. (Larson Beach Issues 3, 8 and 9).
5. The County is not found out of compliance on LLPOA Issue 8 and Larson Beach Issues 16, 17, 18 and 19.
6. Because Titles 4 and 5 were found out of compliance, the Board did not need to decide LLPOA Issues 9 and 10 and Larson Beach Issues 1, 5, 6, 7, 13 and 15.

7. LLPOA Issues 2, 5, 6 and 7 and Larson Beach Issue 20 have either been withdrawn by the Petitioners or dismissed by the Board.
8. The County shall, within 30 days, provide the Board with a schedule showing the timeline for bringing itself into compliance.

Pursuant to RCW 36.70A.300(5), this is a final order for purposes of appeal.

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 26th day of October, 2001.

EASTERN

WASHINGTON
BOARD

GROWTH MANAGEMENT HEARINGS

D. E. "Skip" Chilberg, Board Member

Judy Wall, Board Member

Dennis A. Dellwo, Board Member