

STATE OF WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON

Case No.: 97-0015C

**ORDER ON REMAND**

KENNETH AND SANDRA KNAPP;  
BERNARD DAINES AND OUTLOOK  
DEVELOPMENT LLC; EDWARD A. AND  
PATRICIA E. PAYNE; DALE L. AND  
DEANNA L. BRIGHT; CARL B. AND ANN  
T. BERNSON; GLENROSE ASSOCIATE-91;  
MERIDIAN LAND, LLC; HARLEY C.  
DOUGLASS, INC.; REX HARDER AND  
MACKENZIE BAY PROPERTIES;  
THEODORE GUNNING AND  
NORTHWOOD PROPERTIES;

Petitioners

v.

SPOKANE COUNTY,

Respondent

GLENROSE COMMUNITY ASSOC.

Intervenor

CITY OF SPOKANE,

Intervenor.

I. PROCEDURAL HISTORY

On December 24, 1997, the Eastern Washington Growth Management Hearings Board issued its Final Decision and Order in this matter.

On August 23, 1999, the Board issued its Order on 4<sup>th</sup> Compliance Hearing.

On September 30, 1999, the Board issued its Order on Motion for Reconsideration.

On October 26, 1999, the parties appealed the Board Order to Thurston County Superior Court, Case No. 99-2-02001-1.

On July 27, 2001, the Court issued its Order as follows:

“(1) The Board was clearly erroneous in ruling that Petitioners did not carry their burden in showing that the City of Spokane did not comply with the requirement to designate critical areas. (2) The issue of whether the Board erred in allowing in excess of 180 days to comply with the first remand order is moot; and (3) The Board was not clearly erroneous in ruling that the County complied with applicable SEPA requirements. This matter is remanded to the Board for further proceedings consistent with this Order.”

On September 5, 2001, the Board scheduled a hearing on remand.

On November 8, 2001, the Board held a hearing on remand in Spokane. Cary F. Driskell appeared on behalf of Petitioners Daines, Outlook Development, LLC, and Kenneth and Sandra Knapp, Michael J. Piccolo appeared on behalf of the Intervenors and the Respondent was represented by Robert Binger.

## II. FINDINGS OF FACT

1. The City of Spokane has identified the five critical areas required to be designated by RCW 36.70A.040(3) by designating these areas on maps.
2. The City adopted the following maps as part of their Comprehensive Plan;
  - a. Wetlands – Map NE 3, which designates wetlands;
  - b. Spokane – Rathdrum Aquifer – Map NE 1, which designates areas with a Critical Recharging Effect on Aquifers used for Potable Water;
  - c. Priority Habitat and Species – Map NE 8, which designates Fish and Wildlife Habitat Conservation Areas;
  - d. Flood Hazard Areas – Map NE 5, which designates Frequently Flooded Areas;
  - e. Hazardous Geology – Map NE 10, which designates Geologically Hazardous Areas;
  - f. Slope Classifications – Map NE 6, which designates geologically hazardous areas as to slope, and
  - g. Erodible Soils – Map NE 9, which designates geologically hazardous areas as to soil erosion.

3. On May 14, 2001, the City of Spokane adopted two new ordinances to protect certain critical areas:

a. Spokane Interim Fish and Wildlife Habitat Conservation Areas Ordinance; and

b. Spokane Interim Geologically Hazardous Areas Ordinance.

4. On May 21, 2001, the City Council for the City of Spokane adopted the City's Comprehensive Plan. This Plan included the designation of critical areas through the adoption of the maps listed above.

### III. STANDARD OF REVIEW/BURDEN OF PROOF

RCW 36.70A.320(1) provides that development regulations adopted under the Growth Management Act (the Act) are presumed valid. RCW 36.70A.320(2) states that the burden is on the petitioners to "demonstrate that any action taken by a...county, or city under this chapter is not in compliance..." with the Act. RCW 36.70A.320(3) states that the Board shall find compliance "unless it determines that the action by the ... County, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of..." the Act.

### IV. ISSUE, DISCUSSION AND CONCLUSION

ISSUE: The Board is asked to determine if the City of Spokane has properly designated Critical Areas as required by the Growth Management Act.

Petitioners' Position: The Petitioners contend that the City has not properly designated the Critical areas within the city. They believe the only change made by the City was the removal of the word "Potential" on the maps. The maps now show the same areas as before, but are designated as "critical areas" rather than "potential critical areas." The Superior court found the Eastern Washington Growth Management Hearings Board wrong when it found the Petitioners had not carried their burden of proof of showing the City failed to properly designate Critical Areas. At that time the City had identified the critical areas on the map as "Potential Critical Areas".

The Petitioners contend the purpose of critical area ordinances is to provide landowners and public service providers with the information necessary to make decisions. The Petitioners believe that if designation of critical areas is intended to provide some certainty in the planning process, then the City's claimed failure to designate critical areas does not comply. Instead, the Petitioners claim it leaves uncertainty.

The Petitioners also quoted a former Planning Director, Charles Dotson, from a letter dated April 16, 1999. In that letter, he stated that the map reflecting Potential Critical Areas represented the best data the City had available. Dotson went on to state that the designation of actual critical areas could only be made upon specific field investigations and expert review. The Petitioners believe this has not been done. They believe that "simply removing the word potential, but changing nothing else, does not comply with the Act."

The Petitioners further contend that the City has not used the best available science in such designation of the critical areas. They go on to state that it is difficult to argue the City used the best available science if the City could not even determine the nature or extent of the critical areas within the City.

The Petitioners further contend that Geologically Hazardous Areas are not properly designated. There appears to be a conflict between the definitions, one defining "Potential Geologically Hazardous Areas" and the other not. They also point out language indicating "the maps are intended to alert property owners, purchasers, developers, etc., to the possible existence of significant geological hazards, which may warrant further geotechnical study."

The Petitioners conclude by asserting that the City still does not have habitat conservation areas mapped and are thus not designated.

Intervenor's Response: The City points out that the requirement to designate may be met by designating or mapping known critical areas or by adopting a process to designate or map them as information becomes available. Pilchuck v. Snohomish County, CPSGMHB Case No. 95-3-0047, Final Decision and Order (Dec. 6, 1995). They believe that the City has done both. The GMA also does not require a specific method of gathering data for purposes of inventorying, designating or regulating critical areas. Moore v. Whitman County, EWGMHB No. 95-1-0002 (Final Decision and Order August 16, 1995). They contend they have done exactly what is required under the GMA and the hearings board's decisions regarding designation of critical areas. They state that the City does know where the critical areas are located and they are shown on the maps offered as an exhibit to the Board.

The City contends the Petitioners should fail when they claim the City has not designated all the critical areas, they fail to demonstrate what they mean and how it is

true. The City claims it does know where the critical areas are located. Exhibits 6 through 12 of the record submitted to the Board clearly designate the Critical Areas of Spokane. They claim this is also true regarding the best available science. They point out the record before the Hearings Board reflects the use of best available science and, further, the findings in the ordinances adopted by the City allege such use. The City points out that the Petitioners have shown the Board nothing to prove otherwise. Petitioners argue that field investigations had to have been performed to determine whether land designated as a critical area is actually a critical area. The City points out that the Petitioners provide no legal argument that this approach is required under the Act, quoting only a letter from a previous city planning director and contorting the issues before the Board on this appeal.

The City contends that their recognition other fish and wildlife habitat conservation areas and other critical areas might be identified upon further examination does not invalidate the designation that has already taken place. This additional effort is believed by the City to be beyond what is required for the identification of critical areas. Fish and wildlife habitat conservation areas are claimed to have been mapped. (Exhibit No. 8.)

With regard to the definitions of "geological hazardous areas" and "potentially geological hazardous areas" found in Ordinance No. C-32697, the City contends that nothing in the definitions detract from the designation of geological hazardous areas as identified in the critical areas maps for hazardous geology, erodible soils and slope classifications. They believe the designation of geological hazardous areas through mapping and the designation of geological hazardous areas through the classification characteristics in SMC 11.19.2528 remains intact and in compliance.

Respondents Response: The County of Spokane supported the arguments of the City and alleged that the County staff reviewed the actions of the City and supported their effort to come into compliance with the Act. The County believes that the City has properly identified the Critical areas and should be found in compliance.

Discussion: As stated earlier, RCW 36.70A.320(1) provides that development regulations adopted under the Act are presumed valid and the burden is on the petitioners to "demonstrate that any action taken by a...county, or city under this chapter is not in compliance..." with the Act. The Board shall find compliance "unless it determines that

the action by the ... County, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of..." the Act. This is a heavy burden for the Petitioners.

RCW 36.70A.040(3) and RCW 36.70A.170 require counties and cities to designate and protect critical areas where appropriate. Critical areas include: 1. Wetlands; 2. areas with a critical recharging effect on aquifers used for potable water; 3. Fish and wildlife conservation areas; 4. Frequently flooded areas; and 5. Geologically hazardous areas. RCW 36.70A.172 further requires that "in designation and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas."

There is no specific method the City is required to use for the identification of these Critical Areas. The areas must be identified and mapped in such a way to allow the landowner to know where the critical areas are and what they must do.

The City of Spokane has identified the critical areas and this identification is reflected in the maps prepared by the City and provided to the Board. These maps are part of the GIS system that clearly located the critical areas and is available to the landowner. The landowner is able to locate the critical areas. The ordinances adopted by the City clearly state what needs to be done by the landowner. The ordinances go further to define "Critical Areas" and provide that if they exist and are not yet identified, how they must be designated and properly protected.

The Petitioner has the burden of demonstrating by the evidence in the record that the methods chosen by the local government to designate critical areas do not comply with the goals and requirements of the Growth Management Act. It is not the role of the Growth Management Hearings Boards to determine if the ordinance might have been done differently or better. (FOOSC v. Skagit County 96-2-0025 FDO 1-3-97).

The City met the requirements to use the best available science in such designation. This is clearly reflected in the record and the specific references found in the "whereas" clauses in the ordinances adopted in May, 2001. The Petitioners have not rebutted these claims except for the bare allegation that the City did not use the best available science.

CONCLUSION: The City of Spokane has properly designated the Critical Areas

within the City in compliance with the requirements of the Growth Management Act.

SO ORDERED this 15<sup>th</sup> day of November, 2001.

EASTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS

BOARD

---

Dennis A. Dellwo, Presiding Officer

---

Judy Wall, Board Member

---

D. E. "Skip" Chilberg, Board

Member