State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

KITTITAS COUNTY CONSERVATION et al., Petitioners, v. KITTITAS COUNTY, Respondent, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU Intervenors, ART SINCLAIR and BASIL SINCLAIR, Amicus Parties.	Case No. 07-1-0004c **ORDER ON PARTICIPANT AMERICAN FOREST LAND COMPANY'S MOTION FOR CLARIFICATION AND RECONSIDERATION REGARDING LEGAL ISSUE 3**

On February 4, 2009, the Eastern Washington Growth Management Hearings Board (Board) issued its Partial 2nd Compliance Order in regards to nine legal issues previously found non-compliant by the Board in the above-captioned matter. Participant American

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

Forest Land Company (AFLC)[1] seeks clarification and reconsideration in regards to just one of these issues – Legal Issue 3. This issue pertains to Kittitas County's criteria for the designation and de-designation of Forest Lands of Long-Term Commercial Significance (LTCS Forest). With its motion, AFLC requests the Board reconsider its finding that the County's action, with respect to Legal Issue No. 3, continues to be GMA-noncompliant.

I. PROCEDURAL HISTORY

On August 20, 2007, the Board issued its FDO in the above-captioned matter. The case represented a challenge to Kittitas County's enactment of Ordinance 2006-63 amending its Comprehensive Plan (CP) pursuant to RCW 36.70A.130. In the FDO, the Board found Kittitas County had complied with the GMA in some regard, but several of its actions were also non-compliant and, for some, warranted the imposition of a Determination of Invalidity.

On August 7, 2008, the Board issued its 1st Compliance Order which, relevant to the present motion, found the County in continuing non-compliance as to Legal Issues 3.[2]

As noted *supra,* on February 4, 2009, the Board issued its Partial 2nd Order RE: Compliance, finding Kittitas County once again in continuing non-compliance as to Legal Issue 3.

On February 17, 2009, AFLC filed a Motion for Clarification and Reconsideration Regarding Issue No. 3.

On February 18, 2009, AFLC filed a Correction to its Motion for Clarification and Reconsideration Regarding Issue No. 3, which solely denoted that the table contained in its original motion had erroneously been identified as "mbf" (thousand board feet) but were, in fact, "mmbf" (millions of board feet).

---

[1] American Forest Land Company (AFLC) did not participate in the original proceedings in this matter, with the Board's Final Decision and Order being issued in August 2007. In June 2008, after the case had entered into the compliance phase, AFLC sought and was granted participation into the case in regards to forest lands. Since that time, AFLC has submitted briefing related to both compliance hearings in this case.

[2] August 7, 2008 1st Compliance Order, at 9-12.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

II. DISCUSSION

Pursuant to WAC 242-02-832, a party may file a motion for reconsideration with the Board. A motion for reconsideration shall be based on a least one of the following grounds:[3]

> (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;
>
> (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or
>
> (c) Clerical mistakes in the final decision and order.

Although the WAC does not specifically address a Motion for Clarification, the Board has previously responded to this type of Motion.[4]

AFLC does not cite to a specific provision of WAC 242-02-832 which supports its motion. However, in reading the motion, it appears AFLC is contending the Board has misinterpreted facts that are material to AFLC, which would result in a motion based on WAC 242-02-832(2)(a).

AFLC asserts it appears the Board took "judicial notice of an alleged fact" and then relied "on that alleged fact as a basis for its decision finding Kittitas County in continuing non-compliance as to Legal Issue 3."[5] AFLC points to a single aspect of the Board's 2nd Compliance Order, citing to Page 24 where the Board stated:

> The Board is also cognizant of the fact that most of Washington's wood and timber products are exported out-of-state, with a significant percentage of raw logs exported to foreign markets, and therefore the consideration of the "proximity to markets" would be of little relevance due to the global marketplace.

---

[3] WAC 242-02-832(2)

[4] *See e.g., Wilma, et al v. Stevens County,* Case No. 06-1-0009c, Order on Clarification (June 25, 2008); *Loon Lake Property Owners, et al v. Stevens County,* Case No. 01-1-0002c, Order on Clarification (Oct. 26, 2001). *See also, Friends of San Juan, et al v. San Juan County,* WWGMHB Case No. 03-2-0003c, Order on Clarification (Oct. 7, 2003), *King County v. Snohomish County,* CPSGMHB Case No. 03-3-0011, Order on Clarification (Dec. 15, 2003).

[5] AFLC Motion, at 2.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

AFLC contends the record is devoid of evidence to support this statement; especially in regards to wood/timber products originating in Kittitas County. AFLC further asserts the Board's statement is founded on "an incorrect assumption that there is a robust global market for wood and timber products from Kittitas County."[6] AFLC then submits statistics as to the condition of the timber market in Washington State, in general, and specifically to Kittitas County.[7]

AFLC is first reminded that a Motion for Reconsideration/Clarification is not the time to present new evidence to the Board. Evidence supporting whether the County's action was compliant with the GMA was due prior to the issuance of the Board's Compliance Order, not after. However, since AFLC submits this evidence to counter what it believes is an erroneous assumption posited by the Board, the evidence will be allowed.

Although the statistics presented by AFLC demonstrate a decline in Washington's timber industry, the Board's finding of non-compliance was not solely founded on the County's inclusion of the "proximity to markets" within its LTCS Forest designation criteria.[8] Rather, in the February 2009 Partial 2nd Compliance Order, the Board explicitly held:[9]

> By establishing a permissive process which defines **forest lands by terminology other than that provided within the GMA and by including factors to determine the long-term commercial significance of forest land which fall outside of the GMA's mandate to conserve, maintain, and enhance, Kittitas County fails to comply with the RCW 36.70A.020(8), 36.70A.060, 36.70A.170.** Since the **County's de-designation process establishes a distinctly separate process and relies on flawed criteria**, a failure to maintain and enhance the industry is immortalized and **violates the cited GMA provisions as well**.

---

[6] AFLC Motion, at 2.
[7] AFLC Motion, at 3-5.
[8] The Board's knowledge as to the timber industry comes from its everyday experience with media and government reports, such as CTED's 2008 Wiser Report which ranks the wood/wood products industry as 8th for Washington exports, and Employment Security's LMEA reports as to the state of industries within Washington. Although AFLC would like the Board to believe not a single piece of Kittitas County wood every leaves the County, this, given today's marketplace, is a hard fact to accept.
[9] February 2009 Partial 2nd Compliance Order, at 28 (Emphasis in Original)

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

Thus, although the Board used the consideration of markets as an example of the type of factor which appeared to be inapplicable to GMA's mandate to maintain and enhance the commercial forest industry, as the Board also did with the availability of water supplies, the Board's conclusion that Kittitas County's designation criteria failed to comply with RCW 36.70A.020(8), .060, and .170 was not based solely on this single, isolated criterion – as AFLC appears to believe. Rather, the determination of non-compliance was based on the County's failure to develop criteria which adequately reflects the GMA's mandate to conserve these lands and maintain and enhance the industry which relies on them. This failure stemmed not only from the inclusion of inapplicable criteria but also the County's use of permissive, non-inclusive terminology, the duplicity of factors, the lack of objective standards for applying criteria, and developing an unclear designation process.[10]

V. ORDER

Based upon a review of the Board's February 4, 2009, Partial Second Order RE: Compliance and Participant American Forest Land Company's Motion for Clarification and Reconsideration, the Board **DENIES** reconsideration of the Board's conclusion set forth in the February 2009 Order that the County's action, with respect to Legal Issue No. 3, continues to be GMA-non-Compliant.

The Board's conclusion set forth in the February 4, 2009, Partial Second Order RE: Compliance, finding Kittitas County's designation and de-designation process for its LTCS Forest land non-compliance, is affirmed.

///

///

[10] February 2009 Partial 2nd Compliance Order, at 19-25.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

No other aspect of the Board's February 4, 2009, Partial Second Order RE: Compliance is modified by this Order.

SO ORDERED this 2nd day of March 2009.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
Joyce Mulliken, Board Member

_____
John Roskelley, Board Member

_____
Raymond Paolella, Board Member

NOTE: This order constitutes a final order as specified at WAC 242-02-832(4). Orders on Reconsideration are not subject to additional motions for reconsideration. WAC 242-02-832(3).

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964