State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

CITY OF ZILLAH, Petitioners, v. YAKIMA COUNTY, Respondent.	Case No. 08-1-0001 COMPLIANCE ORDER

On August 10, 2009, the Board issued its Final Decision and Order (FDO) in the above-mentioned case. With this FDO, the Board concluded Yakima County's adoption of Ordinance 15-2007, which among other things, amended the Urban Growth Area (UGA) boundary for the Zillah UGA, and failed to comply with the Growth Management Act (GMA), RCW 36.70A. Although the Board did find that the County's methodology utilized when preparing the County's March 2007 Land Capacity Analysis (2007 LCA), including population forecasts and various planning assumptions, was reasonable and therefore not clearly erroneous, the Board concluded that it was unclear from the Record whether the County's analysis adequately reflected the developable status of vacant lands within the existing UGA base.

With this Compliance Order, the Board finds and concludes that Yakima County's Revised Land Capacity Analysis (Revised LCA)[1] adequately demonstrates the Zillah UGA is sized to accommodate its allocated 20-year growth projections as required by RCW 36.70A.110.

[1] Throughout this Compliance Order, reference to the Revised LCA incorporates both the September 2009 Staff Report/LCA and the November 2009 Supplemental Staff Report.

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Therefore, with the adoption of Resolution 521-2009, Yakima County has brought itself into compliance with the GMA.

I. RELEVANT PROCEDURAL HISTORY

On August 10, 2009, the Board issued its FDO in this matter finding Yakima County failed to comply with the GMA, specifically RCW 36.70A.110, when it adopted Ordinance 15-2007.

On October 8, 2009, Yakima County and the City of Zillah jointly requested a five week extension of the compliance period. The Board granted this request on October 15, 2009.

On November 10, 2009, the Yakima County Board of County Commissioners (BOCC) adopted Resolution 521-2009 which set forth revisions and clarifications to Ordinance 15-2007.

On November 13, 2009, the Board received Yakima County's Statement of Actions Taken to Comply (SATC) and the Compliance Index.

On November 30, 2009, the Board received the City of Zillah's Objection to Compliance Action (Zillah Objections).

On December 11, 2009, the Board received Yakima County's Response to Zillah's Objections (County Response).

On December 18, 2009, the Board held a telephonic compliance hearing. Present were Board Members Joyce Mulliken and John Roskelley, Board Member Mulliken presiding.[2] The City of Zillah was represented by James Carmody.[3] Yakima County was represented by Terry Austin and Paul McIlrath.[4]

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[2] Board Member Ray Paolella previously recused himself from this matter.
[3] Also present at the hearing in a supporting capacity for the City of Zillah were Ardele Steele, Associate Planner, and Sharon Bounds, City Clerk.
[4] Also present at the hearing in a supporting capacity for Yakima County were Steve Erickson, Director of Planning, and Phil Hoge, Long Range Planner.

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II. DISCUSSION AND ANALYSIS

As with all GMA enactments, Resolution 521-2009 is presumed valid upon adoption.[5] In compliance proceedings such as the instant matter where a determination of invalidity has not been entered, the burden of proof remains with the City of Zillah which must convince the Board that Yakima County's efforts taken to achieve compliance are clearly erroneous in view of the entire Record and in light of the goals and requirements of the GMA.[6]

With the issuance of the August 10, 2009 FDO, this Board determined Yakima County had properly based the sizing of the Zillah UGA[7] on the Office of Financial Management's (OFM) 20-year population forecast and that the various planning assumptions, including growth rates, density, persons per household, and permanent resident status, relied on by the County were reasonable and, therefore, not clearly erroneous.[8] However, the Board did determine that Yakima County failed to comply with RCW 36.70A.110 by not ensuring the Zillah UGA could accommodate its projected 20-year growth because of a lack of clarity in the County's 2007 LCA as to whether vacant lands could be developed. [9]

In response to the Board's FDO, Yakima County undertook a review of its 2007 LCA which involved an assessment of existing data as well as updated information obtained from the City of Zillah.[10] This process included meetings between Zillah representatives and County staff, with Zillah's concerns taken into account, and a public hearing before the Yakima County Board of County Commissioners (BOCC) to hear and consider all public comments.[11] In addition to analyzing vacant lands within the Zillah UGA, during this

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[5] RCW 36.70A.320(1)

[6] RCW 36.70A.320(2) notes the burden of proof is on the petitioner to demonstrate that any action taken is not in compliance with the GMA. Pursuant to RCW 36.70A.320(4), this standard rule does not apply if a County is subject to a Determination of Invalidity; there, the County has the burden of demonstrating that the action taken no longer substantially interferes with the fulfillment of the goals of the GMA. In addition, RCW 36.70A.320(3) provides the Board's standard of review – clearly erroneous.

[7] The Zillah UGA encompasses both municipal land and unincorporated lands.

[8] August 10, 2009 FDO, at 21, 24, 29-30.

[9] August 10, 2009 FDO, at 35-36, Conclusion of Law I and Order No. 1.

[10] County SATC, at 2.

[11] County SATC, at 2-3; Resolution 521-2009; November 2, 2009 Supplemental Staff Report.

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process Yakima County re-evaluated some of the previous planning assumptions giving further reflection to Zillah's concerns.[12] The results of the County's analysis was a conclusion that the Zillah UGA, as sized by Ordinance 15-2007, could accommodate the 20-year projected population growth.[13] Therefore, Yakima County made no further adjustments to the UGA.

The City of Zillah objected, asserting that not only did the County fail to comply with the Board's directives by changing its methodology, but a serious land capacity deficiency remains in the UGA.[14] Zillah renewed its contention that the land referred to as the "Eastern UGA"[15] must be added to the UGA in order to address these deficiencies.[16]

- **Issues in Compliance Proceedings**

One objection raised by Zillah is that Yakima County changed the LCA methodology when responding to the Board's FDO and any assumptions previously relied upon were binding in the remand [compliance] proceeding.[17] According to Zillah, the sole issue on remand is an assessment of development constraints on vacant lands and the County was not permitted to recalculate any of the needs assessment/assumptions or redefine vacant lands.[18]

As to Zillah's contention that the Board's FDO restricts or binds Yakima County's approach when responding to a finding of non-compliance, this Board has previously stated:[19]

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[12] County SATC, at 3-8, Compliance Index 1- Revised LCA 9/28/09; Compliance Index 2 - Supplemental Staff Report 11/2/09.
[13] Resolution 521-2009.
[14] Zillah Objections, at 1.
[15] In the underlying proceedings, the City of Zillah requested two areas to be added to its UGA – the "Western UGA" and the "Eastern UGA." With Ordinance 15-2007, Yakima County determined that the addition of both of these areas would result in more land than what was needed to accommodate Zillah's projected growth and, therefore, only added the lands contained in the Western UGA. August 10, 2009 FDO at 8-10.
[16] Zillah Objections, at 13.
[17] Zillah Objections, at 1, 3-4.
[18] Zillah Objections, at 1, 3-4.
[19] *McHugh v. Spokane County,* EWGMHB Case No. 05-1-0004, Compliance Order, at 5 (Emphasis added; Internal citations omitted) (March 5, 2007). In Case 05-1-0004, Spokane County had been found non-compliant when expanding a UGA because it had failed to complete several required tasks – Capital Facilities Planning, Land Capacity Analysis, and Consultation with certain individuals/entities. In response to the

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> *The question on compliance is whether the jurisdiction has met the requirements of the Growth Management Act, not whether it complied with the specific directives of the Board's last order.* The Board does not have authority to order the County to take any particular actions to bring itself into compliance. Therefore, *when the Board lists actions to be taken in any given case, that list must be viewed only as guidance and not as the standard against which compliance is measured*. At a compliance hearing, *the question is not whether the Board's direction was followed, but whether compliance was achieved.* The task of a GMHB is to determine compliance with the GMA, not whether there could be better solutions followed by a local government … If non-compliance is found, a GMHB *remands the issue* and is not authorized to direct a specific remedy. *Local governments are afforded a "broad range of discretion" in determining a methodology for compliance*.

Thus, contrary to Zillah's assertion, the "remand" in this matter, and the issue for the Board during these compliance proceedings, remains as it did in the underlying proceeding – *is the Zillah UGA properly sized to accommodate its 20-year projected growth as required by RCW 36.70A.110?* [20] The method Yakima County chooses to accomplish this task, so long as it conforms to the GMA, is at the County's discretion.

- **The Revised Land Capacity Analysis for the Zillah UGA**

1. Planning Assumptions

In the 2007 LCA, the County utilized a flat 2.78 person per household rate which resulted in a need for 512 residential units. With its Revised LCA, the County did not perform the same flat rate analysis, but rather adjusted the calculations utilizing 2.5 person per household (PPH) rate within Zillah Lakes, allocating 40 percent of residential units (262 units) to that area, and utilizing 2.78 PPH rate for the balance (277 units) outside of Zillah Lakes.[21] Thus, the County increased the needed residential units to 539 and this number is

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Board's FDO, the County chose to repeal the offending legislation rather than perform the noted tasks. Despite Petitioners' assertions that the County was required to follow the Board's directions, the Board found the County in compliance with the GMA.

[20] It must be noted that the Revised LCA presented to the Board reflects acreage within the "Western UGA" which was added with the adoption of Ordinance 15-2007. Thus, overall acreage calculations do not mirror those presented during the prior LCA review.

[21] The Zillah Lakes Development, at full build-out, is slated to provide a total of 654 residential units. *See* August 2009 FDO, at 25 (Citing to Yakima County HOM Exhibit C – 2007 LCA)

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based on the City's concerns related to Zillah Lakes.[22, 23] These revisions, as to distribution of residential units and PPH, resulted in an additional four acres of residential land outside of Zillah Lakes.[24]

With the exception of the assumptions related to the Zillah Lakes development's ability to accommodate residential units and population growth, the Board sees no other modifications to the various planning assumptions utilized by Yakima County.[25] Nor, was there any modification to the 2025 population projection of 4,019 persons (an increase of 1,424 persons) which was properly founded on OFM's projections and modified to take into account Zillah's specific growth situation.

Conclusion

Zillah's arguments are primarily founded on its erroneous belief that any prior calculations and assumptions were the "law of the case" from which Yakima County could not deviate. As noted *supra,* Yakima County was not bound by the planning assumptions it utilized for the 2007 LCA and, in direct response to concerns raised by the City of Zillah it appears to have only modified planning assumptions related to the Zillah Lakes development. The original issue before the Board, which remains here as well, is whether the resulting UGA is

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[22] In its HOM Opening Brief at 18, the City stated: "… The Zillah City Council recommends that population projected (2% Growth Rate in Zillah Lakes 7-year build out at 2.5persons/household)." And, HOM Opening Brief, at 19, the City stated: "The record reflects that 60% of the residences included within the development will be second (i.e. not permanent homes). Thus, the County's calculation is sustained by Zillah's own assumptions as to the seasonal occupancy of Zillah Lakes along with the average household size. *See* Compliance Index 1 – County Revised LCA; August 2009 FDO at 28 (referencing arguments presented by Zillah as to the Zillah Lakes occupancy rates.

[23] In its objections, Zillah contends the County reduced the residential need from 612 units to 277 units. *Zillah Objections, at 8.* As with many of Zillah's argument, this statement lacks citation to the Record, but the Board does note that Zillah may have erroneously extracted this number from a LCA the County prepared which utilized a 2025 population forecast of 5,932 which was promoted by Zillah. *See Attachment 1 to September 2009 Staff Report/LCA.* This LCA, however, is not the LCA upon which the UGA was sized, but was prepared merely to "allay any concern" of Zillah. *September 2009 Staff Report/LCA, at 3.*

[24] In the 2007 LCA, the County determined 50 acres of residential land was needed outside of the Zillah Lakes development ((8500 sq ft lot x 512 households x ½) ÷ 43560 sq ft /acre). With the modification to reflect Zillah Lakes' seasonal occupancy, the total needed acreage became 54 acres ((8500 sq ft lot x 277 households) ÷ 43560 sq ft/acre).

[25] The County continued to use: 25% Market Factor, 15% Street Needs, 0.0227 acre/capita Commercial/Retail Needs, Community Land Needs based on existing per capita acre.

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properly sized to accommodate projected growth. Discretion to the County's planning decisions holds true in this compliance proceeding just as it did in the underlying proceeding:[26]

> RCW 36.70A.3201 requires the Board grant deference to Yakima County's planning decisions so long as these decisions fall within the bounds of the GMA. Planning is a science based on trends and assumptions drawn from those trends. In reviewing the briefing and the exhibits presented by Zillah, the City provides no evidence why the County's assumptions are clearly erroneous and result in an inadequately sized UGA for the population allocated in violation of RCW 36.70A.110. The County's assumptions are reasonable …

Thus, the City of Zillah has failed to carry its burden of proof in demonstrating Yakima County violated RCW 36.70A.110 when adopting Resolution 521-2009 in this regard.

2. Vacant Lands Analysis

As the Board noted in the August 2009 FDO, a LCA is a critical assessment utilized to determine if an UGA has sufficient land capacity to accommodate the growth projected to occur in the succeeding 20 years.[27] For a UGA to be properly sized, the vacant land inventory within a LCA must accurately reflect the buildable nature of this land. The County's reassessment of the Zillah UGA's vacant land is a primary objection of the City's. However, as noted in the FDO, Zillah itself challenged Yakima County's vacant land analysis – asserting it failed to reflect recent development activity, market choices, critical areas, and other development constraints that would make properties unbuildable and the FDO noted this failure for the basis of its finding that RCW 36.70A.110 had been violated.[28] With its Revised LCA, Yakima County has conducted a thorough and refined analysis of the vacant lands within the Zillah UGA; one that should be mirrored in future updates to the County's UGAs and reflects the varied concerns previously raised by Zillah.[29]

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[26] August 2009 FDO, at 29-30.
[27] August 2009 FDO, at 18.
[28] August 2009 FDO, at 30; Zillah HOM Opening Brief, at 20-21.
[29] Zillah complains that it is entitled to a consistent, uniform, and non-discriminatory application of the same methodology as was applied to all other municipalities in Yakima County. This complaint is perplexing to the

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Specifically, the County's Vacant Land Analysis looked at two things: (1) sensitive and critical areas and (2) partially-developed and under-utilized land.[30] This process resulted in County Planning staff reviewing mapped areas likely to be physically and legally undevelopable due to steep slopes, floodplains, wetlands, streams, required buffers, access and covenant issues and, these maps were based on the County's GIS system.[31] In addition, the review also took into account the recent revision to FEMA Floodplain Maps, site-specific wetland delineation studies, U.S. Army Corp of Engineers applications/decisions, and on-site photographs.[32]

The development potential of vacant lands, including those that were completely vacant as well as those which were partially-developed, was assessed so as to determine the viability of these lands for development, especially infill development which is an essential aspect of GMA planning.[33] For partially-vacant land, the County classified these lands as parcels of two acres or more but allocated one acre to the existing residence and facilitated this analysis with aerial photography and Tax Assessor records.[34]

It is evidence from the Record that the City of Zillah was included in the development of the Revised LCA. In response to the September 2009 LCA/Staff Report, Zillah submitted a listing for 40 parcels which it believed should be removed from the County's assessment as vacant, primarily due to the potential presence of critical areas or because it believed the

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Board in that in the underlying proceedings Zillah argued in juxtaposition to what it now seeks - as it previously asserted its local circumstances warranted deferential treatment.

[30] Sept. 2009 Revised LCA; Nov. 2009 Supplemental Staff Report; Resolution 521-2009.

[31] Yakima County Exhibit C, and Zillah Exhibit C. Both of these exhibits have a LCA commentary prepared by the City of Zillah. This commentary not only details the process, but notes that Yakima County's GIS system includes mapped data from a variety of sources including 2006 aerial photos, LIDAR contour lines, FEMA floodplains, and stream/wetland surveys.

[32] *Id.*

[33] The Board notes Zillah has 4 residential zoning districts – R1 (< 7 du/acre), R2 (7-12 du/acre), R3 (13+ du/acre), and SR (1 du/acre). Zillah Municipal Code, ZMC 17.14. Thus if a 5 acres parcel is located within the UGA, is now zoned R1 but only has 1 house, it is appropriate to deem the balance of the property as available for development as another 5 houses may be developed on this site.

[34] Revised LCA.

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land would not be developed within the 20-year planning period.[35] The County, with its November 2009 Supplemental Staff Report, responded to each of the City's concerns, finding a parcel addressed by the County's Revised LCA did not prohibit development, such as parcels located within a 100-year floodplain, or that "subjective intent" does not govern whether a parcel is developable.

In addition, the function of a Market Factor, which Yakima County set at 25 percent, is to reflect the fact that not all vacant land within the UGA will, in fact, develop within the 20-year planning horizon.[36] Thus, the Market Factor reflects landowner intent to some degree. However, just because a landowner "intends" to continue to utilize property in the same manner it is currently being used does not necessarily mean that in 5 or 10 years this position will not change, especially with market influences.[37]

Lastly, the LCA prepared by Zillah was premised on a population of 5,932, which was previously rejected by the Board as it was not based on OFM's projections, and this, along with using incorrect acreage amounts, resulted in an erroneously inflated size for the UGA which is not supported by the GMA.[38]

Conclusion

The City of Zillah has failed to carry its burden of proof in demonstrating Yakima County violated RCW 36.70A.110 when adopting Resolution 521-2009 when it re-evaluated the suitability of vacant land within the Zillah UGA for future development. The Board finds, after reviewing the arguments, the County's analysis, and the exhibits presented, including

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[35] Zillah Objections, Attachment A.

[36] *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd*., 164 Wn.2d 329, 353 (2008)

[37] Zillah's statement in this regard was related to Borton Orchards, which it asserted had no intention of development its vacant lands. Zillah Objections, at 11. Within this argument, Zillah cites to RCW 36.70A.365 – Major Industrial Development (MID) as does the City's LCA Analysis ("Borton Fruit Warehouse Plant was removed from the calculations as the business met the GMA requirements (RCW 36.70A.365) as a [MID]"). The Borton property is not a MID.

[38] For example, the Board notes the following: Population used by Zillah was 5,932; Commercially zoned land incorrectly includes industrial-land (80 acres); Community Facilities incorrectly includes the SVID canal (48 acres); and omission of "partially vacant" land.

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the Revised LCA, adequately demonstrates the Zillah UGA is appropriately sized to accommodate its 20-year projected growth. Acreage encumbered by critical and/or sensitive areas, including buffers, were deemed "undevelopable" and the amount of vacant land was reduced accordingly. This is the correct methodology to be utilized as it removes from consideration those lands which are not suitable for development and for which state and local regulations actually prohibit development.

In addition, the County assessed partially-vacant or under-utilized parcels. With the GMA's goal of focusing growth within the UGA, to disregard the development potential of these types of parcels would eviscerate that goal.[39] Thus, it was not clearly erroneous for Yakima County to incorporate the development capacity of these lands during the revision of the Zillah UGA as this was one of the primary steps in developing a solid LCA.

III. ORDER

Based upon the foregoing, the Board ORDERS that Yakima County, with the adoption of Resolution 521-2009, has complied with the GMA, specifically RCW 36.70A.110, and has demonstrated the Zillah UGA is sized to accommodate the projected 20-year growth. Therefore, the Board issues this FINDING OF COMPLIANCE for Yakima County and Case No. 08-1-0001 is closed.

SO ORDERED this 4th day of January, 2010.

_____
Joyce Mulliken, Board Member

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John Roskelley, Board Member

[39] See WAC 365-195-335(3)(e); Dept. of Commerce Publication: *Issues in Designating Urban Growth Areas: Part I: Providing Adequate Urban Land Supply, 1992*¸ Page 3-4.

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Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review:

Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

Enforcement:

The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail. Service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

Service:

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

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