

**BEFORE THE WESTERN WASHINGTON GROWTH
PLANNING HEARINGS BOARD**

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| WHATCOM SAND & GRAVEL ASSOCIATION, |) | |
| |) | |
| Petitioner |) | |
| |) | No. 93-2-0001 |
| vs. |) | |
| |) | FINAL ORDER |
| |) | OF DISMISSAL |
| WHATCOM COUNTY, a public corporation, |) | |
| |) | |
| Respondent |) | |
| |) | |
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On March 25, 1993 Whatcom Sand and Gravel Association (WSGA) filed a petition with the Western Washington Growth Planning Hearings Board (Board). The Petition questioned Whatcom County's action and inaction regarding mineral resources directed by RCW 36.70A.050, 36.70A.060(1), 36.70A.170, and WAC 365-190. Specifically, petitioner challenged Whatcom County ordinances 92-028 and 92-029 adopted May 26, 1992; ordinance 92-079 adopted October 27, 1992; an administrative decision made about January 27, 1993 to enforce conditional use permit requirements on mining areas and activities previously thought to be outside the County's jurisdiction; and failure of the County to include coverage of sand and valuable metallics within the ordinances.

On April 13, 1993 respondent Whatcom County, filed a motion to dismiss asserting that petitioner failed to timely file a petition. WSGA claimed the County had mislead its members and the public prior to the January 27, 1993 decision in a manner that would now allow this board to review Whatcom County's previous lack of compliance with the Growth Management Act (GMA).

On April 29, 1993 argument was presented on that motion at the county courthouse. William H. Nielsen, presiding officer, and Nan A. Henriksen were present. Because no record had yet been received, on May 5, 1993 we issued an order reserving a decision on the motion until completion of the hearing on the merits.

On July 12, 1993 at 9:00 a.m. the formal hearing was held in Bellingham. Nan A. Henriksen was the acting presiding officer. Because of a sudden illness William H. Nielsen was unable to attend

the hearing. He subsequently reviewed the tapes. Lesa R. Starkenburg appeared for petitioner. Karen N. Frakes appeared for respondent. Evidence and arguments were presented as to the merits, as well as the motion to dismiss.

In *Clark County Natural Resources Council v. Clark County*, #92-2-0001 we determined that the legislature did not intend RCW 36.70A.270(5), regarding entry of findings of fact, to apply when our review involved only written and documentary materials. In this case we authorized Alvin Starkenburg, spokesman for WSGA, to testify for petitioner and Jeff Griffin, planning department employee, to testify on behalf of the County. We therefore adopt the following:

FINDINGS OF FACT

1. Whatcom County's planning efforts for mineral resources started in mid 1990. A citizens' advisory committee was formed in 1991. It was composed of people from a variety of backgrounds, including witness Alvin Starkenburg. The committee assisted the planning department in formulating a mineral resources classification system. A consulting firm made recommendations (Ex. 4). A classification system suggested by the Washington State Department of Natural Resources (DNR) (Ex. 2) was also incorporated in the staff recommendation.
2. The staff-proposed ordinances were submitted to the Planning Commission on January 14, 1992 and public hearings were held through February 14, 1992 with representatives of petitioner in attendance. A Planning Commission recommendation was forwarded to the County Council on February 18, 1992 (Ex. 12).
3. The classification system proposed by staff involved a two-tiered approach. Mineral Resource Area 1 (MRA-1) encompassed areas where DNR permits allowing gravel mining had been issued. MRA-2 areas involved potential gravel deposits that had not yet received DNR permit approval. The Planning Commission recommended adoption of the MRA-1 classification and elimination of MRA-2.
4. The County Council held its first hearing April 14, 1992 and returned the proposed ordinances to staff for changes. Representatives of petitioner were present during the adoption process and the citizens' advisory committee continued to meet. The County adopted ordinances 92-028 and 92-029 on May 26, 1992. The parties stipulated that the notice of adoption required by RCW 36.70A.290(2) was published shortly thereafter. The adopted areas denominated as Mineral Resource Lands (MRL) corresponded to the former MRA-1 designation. MRA-2 areas were eliminated.

5. Ordinance 92-028 amended the Comprehensive Plan and 92-029 amended the Zoning Code. 92-028 involved the classification and designation requirement of GMA. 92-029 dealt with conservation of mineral resources by utilizing an MRL overlay zone restriction of a 20 acre minimum lot size in rural zones, and a 40 acre minimum lot size in agriculture zones. An interim regulation prohibiting buildings with permanent foundations in the MRL overlay zone was also part of ordinance 92-029.
6. The County continued study of a further ordinance through the summer. Representatives of petitioner maintained their involvement with staff and public hearings. During September 1992 the Planning Commission held hearings and recommended adoption of ordinance 92-079 which dealt with regulation of surface mining, accessory operations, noise and other environmental aspects of mining. The ordinance was adopted October 27, 1992 and notice of adoption was thereafter published.
7. The County changed its administrative requirements for surface mining on or about January 27, 1993 under the authority of *Baker v. Snohomish County Planning*, 68 Wn. App. 581, 841 P.2d 1321 (1992). Conditional use permits issued by the County for all aspects of mining operations were thereafter required.
8. Early in the planning process, sand was identified concurrently with gravel deposits.
9. Valuable metallics do not exist in Whatcom County except within National Forest boundaries.
10. There is a lack of sufficient evidence to show petitioners were misled in a manner that would prevent the County from claiming expiration of the 60 day appeal period.

DECISION

RCW 36.70A.290(2) provides that all petitions must be filed with the Board within 60 days of publication of a notice of adoption. WAC 242-02-220 is in accord.

The Supreme Court has recently reaffirmed the long standing rule that:

Administrative agencies are creatures of the legislature without inherent or common law powers and may exercise only those powers conferred either expressly or by necessary implication.

Kaiser Aluminum v. Labor & Industries, 121 Wn.2d 776, ____ P.2d ____ (1993).

At the time of the County's motion to dismiss hearing we had no evidence before us. We were reluctant to decide whether circumstances might exist which would allow us to go beyond the 60 day limitation without reviewing the facts. Because insufficient facts were presented in this case that would authorize us to disregard the mandate of RCW 36.70A.290(2), we need not and do not decide whether we might have the authority to adopt an estoppel theory under proper facts and the rule set forth in *Kaiser Aluminum*.

A review of the ordinances shows that the GMA aspects of this case occurred only in the May 1992 adoptions. The October 27, 1992 ordinance dealt with regulations of mining sites and mining operations. Likewise, the administrative decision of January 1993, even if it could be categorized as an "action", pertained to surface mining requirements on non-designated lands, not the classification, designation and regulation of mineral resource lands to assure their conservation under RCW 36.70A.050, .060 and .170.

Petitioner also contended that we have jurisdiction over the issues of sand resources and valuable metallics since Whatcom County had not included them. The record and testimony show that sand resources were addressed, albeit minimally, during the process of adoption of ordinances 92-028 and 92-029.

Valuable metallics were also discussed during that time. The County concluded no deposits existed outside National Forest property. It is not necessary to legislate matters required by GMA if there is no relationship to or impact with the governing body. *Clark County Natural Resources Council v. Clark County #92-2-0001*

The appeal period for this case expired 60 days after the County published notice of the adoption of ordinances 92-028 and 92-029 after May 26, 1992. Petitioner has failed to present facts or legal theory to convince us to extend the deadline. Whatcom County's motion to dismiss is granted.

This is a Final Order under RCW 36.70A.300 for purposes of appeal.

DATED this _____ day of September, 1993.

WESTERN WASHINGTON GROWTH PLANNING HEARINGS BOARD

Nan A. Henriksen
Board Member

W^m H. Nielsen
Board Member

ADDENDUM

THE FOLLOWING DISCUSSION IS NOT PART OF THE OFFICIAL DECISION OF THIS CASE.

It has been, is, and will continue to be our policy to decide only the issues presented and not to engage in speculation or unrequested direction to local officials charged with making final GMA decisions. This case is a rare exception for two reasons. First, the requirement of conserving mineral resources will soon be before the council as part of the comprehensive plan due July 1, 1994. Second, the political heat generated by the inevitable conflict between surface mining and residential development, in conjunction with the frustration of local officials' perception of DNR supremacy, caused both Whatcom County staff and elected officials to lose focus as to GMA requirements. Had this case been timely filed it is doubtful compliance with GMA could have been found.

In determining its classification, designation and conservation obligations, the council rejected designation and interim protection of other than existing deposits because of a fear that such designation would give "rights" to mining operators. The council also rejected staff's attempts to formulate a policy dealing with competing and conflicting uses of mineral deposits in rural, agriculture and forestry zones.

The only impact of the May 26, 1992 ordinances was to prohibit mining operators who had existing DNR permits from subdividing and/or building permanent foundation homes on their own mining property. Other mineral resource areas not already characterized by urban intrusion, which had long term significance for extraction, required to be designated and conserved by RCW 36.70A.170(1)(c) and .060(1), were rejected by the council for consideration.

Among the goals of GMA are the reduction of conversion of undeveloped land into low-density residential development and the discouragement of incompatible uses while maintaining and *enhancing* natural resource industries. RCW 36.70A.020(2)(8). RCW 36.70A.060(1) requires

regulations that "assure that the use of lands adjacent to... mineral resource lands shall not interfere with the continued use... of these designated lands... for the extraction of minerals."

Whatcom County needs to focus on these goals and requirements for adoption of the July 1, 1994 comprehensive plan and development regulations.

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