

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

NORTH CASCADES AUDUBON SOCIETY,)	
Washington Wetlands Network, Greater Ecosystem)	
Alliance, Point Roberts Heron Preservation)	
Committee, Watershed Defense Committee,)	
Friends of Chuckanut, and Washington)	
Environmental Council,)	No. 94-2-0001
)	
Petitioner,)	FINAL ORDER
)	
vs.)	
)	
WHATCOM COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
STEVE BRISBANE,)	
)	
Intervenor.)	
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On January 14, 1994, prior to consideration of a critical area ordinance, a declaration of non-significance (DNS) was issued by the Whatcom County Planning Department as the lead agency (Ex 3). That determination was appealed to the Whatcom County Hearing Examiner who upheld the decision by order dated March 17, 1992 (Ex 4).

On June 23, 1992 the Whatcom County Council approved a critical areas ordinance (Ex 1). The County Executive signed the ordinance on July 8, 1992. Under the provisions of the Whatcom County Charter § 2.30 the ordinance became effective ten days thereafter.

The ordinance was the result of a comprehensive and thorough review of the requirements of RCW 36.70A.060(2). Numerous public hearings and meetings were held, at least four different drafts of the ordinance were made and all parties agree that compliance with the public

participation requirements of the Act was obtained.

As an apparent alternative to appealing the ordinance to this Board, intervenor filed a request for referendum with the County Auditor within the 45 day requirement of Whatcom County Charter § 5.60. Within five business days the auditor assigned a number and transmitted the referendum petition to the Prosecuting Attorney who then formulated the ballot question during the following ten days. Signatures sufficient to place the matter on the ballot were collected within the next 120 days. The auditor "verified" and "validated" the signatures, then submitted the measure at the next general election. The election was held on November 2, 1993 and passage of the referendum was certified November 17, 1993. The text of the referendum consisted of striking various words, lines, sections and chapters of the council's ordinance (Ex 1-A).

During the pendency of the referendum petition process Whatcom county commenced an action in Superior Court challenging whether the referendum should be allowed. The Superior Court ruled that the critical areas ordinance was subject to the referendum. The Supreme Court accepted direct review, *Whatcom County vs. Brisbane*, #60655-2. That issue was not raised by the petition filed in this case and the parties and we agreed it was properly left with the Supreme Court.

A petition for review challenging the compliance of the November 17, 1993 ordinance with the Growth Management Act (GMA, Act) was filed January 18, 1994. A motion to allow intervenor status to Steve Brisbane was unopposed and after review, an order granting intervention was entered March 2, 1994.

A prehearing conference was held March 10, 1994. A prehearing order was not entered until April 20, 1994 because the parties requested and we granted additional time for clarification of the issues and of the record. The hearing on the merits was held May 12, 1994 in Bellingham, Washington. At the request of intervenor and because of the delay of the county in providing required exhibits, post-hearing briefs were allowed and received from petitioner and intervenor on May 20, 1994. The county did not file a brief of any nature nor did it actively participate at the hearing on the merits, deferring to intervenor as to briefing and argument.

This is a unique case. It may well be, as suggested by *Snohomish County v. Anderson*, 123 Wn.2d 151 (1994) that referenda have no place in the GMA process. Nonetheless, in the posture of this case, we are required to review this ordinance as adopted by the referendum for compliance with the GMA.

To begin our review we must first determine the nature of this referendum as it relates to the Act. Petitioners contend that the ordinance adopted by the county council on June 22, 1992 was a completed process and that the referendum adopted by the voters in November 1993 constituted an amendment to it.

Intervenor contends that the referendum was a "veto" by the people and merely the final step in a single continuing legislative process. Intervenor cites Wash. Const., Art. II, § 1, RCW 35.17.230, RCW 35A.11.090, *Trautman, Initiative and Referendum in Washington; a Survey*, 49 Wash. L. Rev. 55 (1973) and Supreme Court cases dealing with the Home Rule Charters of the cities of Seattle, Tacoma and Spokane. Additionally we have independently reviewed § 15.39 *McQuillin, Municipal Corporations*, 3rd ed (1989) and *Postema v. Snohomish County*, 73 Wn. App. 465 (1994). All of these references support intervenor's position. None of them apply to the Whatcom County Charter.

The distinguishing characteristic between those references and the Whatcom Charter involves the timing of the effective date of an ordinance with the filing of a referendum. In all the authority cited by intervenor an ordinance could not go into effect until the expiration of the time period allowed for filing a referendum. The Whatcom county referendum process, however, is entirely different. The ordinance passed by the council did go into operation and was later suspended when the referendum petition signatures were validated.

§ 5.60 of the Whatcom Charter provides that any legal voter can file a referendum petition within forty-five days of passage of an ordinance by the "county council". The section goes on to provide that after the signatures are gathered, the "auditor shall verify" the sufficiency of the signatures and "if validated" place the matter on the ballot.

§ 5.50 of the charter provides that:

“... [U]pon *registration and validation* of a referendum petition, the measure will be ineffective pending the outcome of the referendum procedure.” (Italics supplied)

We do not read these sections of the charter, as suggested by intervenor, to mean the suspension of the ordinance takes effect at the time of filing of the referendum petition. Rather under the clear language of § 5.50 the suspension of an ordinance only occurs after both filing and validation of the signatures.

Even if intervenor is correct in his interpretation of § 5.50, it is undisputed that for some period of time of 20 or 30 days the ordinance as passed by the council was legally effective. We hold that as to the Whatcom County Home Rule Charter provisions regarding this referendum in relation to the Growth Management Act, the referendum ordinance constituted an amendment to the ordinance adopted by the council and signed by the county executive in July 1992. We address the specific issues raised by the petition in that context.

We first review this record to determine if compliance with RCW 43.21C (SEPA) relating to the adoption of the amended critical areas ordinance has occurred. Petitioners contend that under the authority of WAC 197-11-660(2), (3)(b) a new DNS or perhaps EIS was necessary because the referendum amendment involved “substantial changes” to the ordinance adopted by the council which were “likely to have significant adverse environmental impacts” The conclusion petitioners reach is that a new checklist and possibly an EIS must now be prepared before the referendum amendment “can be permitted to take affect” (*sic*).

Intervenor contends that since the entire process including the referendum is one continuum that the action by the county council in June of 1992 was merely a “draft” while the referendum action constituted the finally adopted critical areas ordinance. Intervenor further contends that petitioners failed to prove any significant adverse environmental impacts resulting from the referendum ordinance and when measured against the original DNS for the January 1992 draft (Ex 19) the referendum ordinance actually provided far greater environmental protection.

We believe that both arguments miss the point. Once the referendum petition signatures were validated by the auditor it was incumbent upon the “responsible official” WAC 197-11-788, or

“lead agency“ WAC 197-11-758 to prepare an environmental checklist and issue a determination of significance or nonsignificance. WAC 197-11-315. The referendum here qualified as a legislative proposal and under WAC 197-11-704(1)(c) a legislative proposal is defined as an action. A threshold determination was therefore required by WAC 197-11-310 and an environmental checklist should have been prepared as a part of the threshold decision. WAC 197-11-315.

It is undisputed in this case that no such threshold determination occurred prior to submission to the voters. The referendum ordinance is therefore not in compliance with the GMA. *Lassila v. Wenatchee*, 89 Wn.2d 804, 817 (1978) holds that when no environmental review takes place prior to the adoption of a legislative proposal, the ordinance is void and the entire process must begin at the point where the SEPA review was required.

The obvious question as to who would have been denominated as the lead agency or responsible official shows one of the many difficulties associated with using referenda as a growth management methodology. The difficulty in answering that question does not eliminate the necessity to comply with the clear mandates of SEPA.

While our holding on the SEPA issue is sufficient to remand to the county council, because of the uniqueness of this case we believe it is appropriate to address the process issues presented.

The only GMA reference to amendments is found in RCW 36.70A.130(1) which states:

“...[D]evelopment regulations shall be subject to continuing evaluation and review by the county or city that adopted them.

Any amendment or revision to a comprehensive land use plan shall conform to this chapter, and any change to development regulations shall be consistent with and implement the comprehensive plan.”

While this section of the GMA does not specifically set forth a process for amendments to development regulations before the adoption of the comprehensive plan, it would be ludicrous to interpret the Act to exclude that possibility. A reasonable reading of RCW 36.70A.130(1)

evidences a legislative intent that amendments “shall conform” to the Act. In order to determine the scope of the GMA requirements for an amendment to a critical areas ordinance we first examine the provisions of RCW 36.70A.060.

We note that the ordinance in question both as adopted by the county council and as amended by the referendum refers to itself as a “temporary” ordinance. We are further aware of the apparent widespread belief that all critical area ordinances adopted prior to the comprehensive plan are “interim” or “temporary” in nature. Even the Central Puget Sound Board has so stated.

Gutschmidt v. Mercer Island, CPSGPHB #92-3-0006, *Association of Rural Residents v. Kitsap County*, CPSGPHB #93-3-0010. We believe that those who hold the “temporary” or “interim” view are misreading the statute. We find nothing in the Act that requires *or even allows* critical area ordinances to be anything but permanent.

In our September 9, 1992 Order re: Jurisdiction in *Clark County Natural Resources Council v. Clark County*, WWGPHB #92-2-0001 we held that critical area ordinances are not “interim” or “temporary”. We take this opportunity to more fully explain our reasons.

In order to correctly understand the requirements of RCW 36.70A.060 we first look to the session law as adopted in Laws 1990 1st ex. s. c17 § 6:

New Section. Sec. 6. NATURAL RESOURCE LANDS AND CRITICAL AREAS--DEVELOPMENT REGULATIONS. (1) Each county that is required or chooses to plan under section 4 of this act, and each city within such county, shall adopt development regulations on or before September 1, 1992, to assure the conservation of agricultural, forest, and mineral resource lands designated under section 17 of this act. Regulations adopted under this section may not prohibit uses permitted prior to their adoption and *shall remain in effect until a county adopts development regulations pursuant to section 12 (RCW 36.70A.120)* of this act. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals. (Italics supplied)

Each county that is required or chooses to plan under section 4 of this act, and each city within such county, shall adopt development regulations on or before September 1, 1991, precluding land uses or development that is incompatible with the *critical areas* that are required to be designated under section 17 of this act. (Italics supplied)

(2) Such counties and cities shall review these designations and development regulations when adopting their comprehensive plans under section 4 of this act and implementing development regulations under section 12 of this act and may alter such designations and development regulations to insure consistency.

Resource land regulations and critical area regulations were treated distinctly differently. Resource land regulations had a certain expiration date i.e. the adoption of development regulations under the comprehensive plan. No such expiration date is found in the paragraph dealing with critical area development regulations. Subsection (2) requiring review of “these designations and development regulations” when adopting comprehensive plans and implementing development regulations, clearly applies to both resource lands and critical area development regulations. Nothing in subsection (2) (now RCW 36.70A.060(3)) requires the designations and regulations to be changed after they are reviewed.

The following year, Laws 1991 1st ex. s. c32 § 21 amended this section of the Act. Significantly the amendments further distinguished critical area development regulations from resource land regulations, by requiring critical area designation and development regulations for all counties and cities in the state, not just for “planning counties and cities“. The Legislature also renumbered paragraph two of subsection (1) of the original act and correspondingly renumbered subsection (3). No other changes were made to subsection (3).

Resource lands regulations apply only to “planning counties and cities“ and have a sunset date. Critical area regulations apply to all counties and cities and do not have a sunset date. RCW 36.70A.060(3) applies to both resource land and critical area regulations and mandates review at the time of comprehensive plan and implementing development regulations adoption but does not *require* alteration. Obviously, those counties and cities not planning under GMA would not consider their critical area ordinances to be “temporary“ or “interim“. We specifically reject the notion, as we did in *Clark County*, that critical area development regulations are “temporary“ or “interim“ or are in any way reviewed with a “lesser standard of compliance“ than any other portion of the Act. We believe that future generations may well conclude that critical area development regulations were the most significant achievement of the Act.

We hold that an amendment to a critical area ordinance occurring before the adoption of a

comprehensive plan and implementing regulations, requires full compliance with all aspects of the GMA.

The ultimate question then becomes whether this amendment complies with the Act. We continue to believe that our four question framework announced in *Clark County* is a viable and valuable analytical tool. We use this structure to allow the public and the decision-makers within our jurisdiction to have a predictable model for our review and to provide consistency in our decisions. This framework does not alter the burden of proof set forth in RCW 36.70A.320. We review this case in accordance with the questions that apply to the issues presented.

1. IS THE ORDINANCE THE RESULT OF A CONSIDERED APPLICATION OF APPROPRIATE GOALS AND REQUIREMENTS OF THE ACT?

The record of the referendum amendment, while sparse, shows the focus was upon the critical areas ordinance as required by RCW 36.070A.060(2). Nothing in the record nor on the face of the referendum amendment indicate anything to the contrary.

2. DID THE PROCESS COMPLY WITH THE PUBLIC PARTICIPATION REQUIREMENTS OF THE ACT?

In *Clark County* we held that the enhanced public participation requirements of RCW 36.70A.140 are and should be requirements for adoption of any critical area development regulation. We expand that holding to include pre-comprehensive plan amendments. We note that the Supreme Court in *Anderson* at 157 suggests that GMA requires the enhanced public participation process even for adopting county-wide planning policies.

Intervenor contends that the ballot box is the ultimate public participation. Intervenor also points to the record to show that a number of informational meetings and debates concerning the changes to the critical areas ordinance by the referendum were held.

This contention holds some initial appeal. However, as the Central Puget Sound Board has pointed out in *Edmonds and Lynnwood vs. Snohomish County*, CPSGPHB #93-3-0005 (1993) at 26, the GMA requires a dual process; both iterative and interactive. An

iterative process is one that involves a number of drafts, adjustments and reiterations over a period of time as information is available, additional decisions, etc. An interactive process involves people participating in a dialog, expressing their opinions and responding to those opinions expressed by others. Perhaps that is what the Supreme Court in *Anderson* at 156 meant in suggesting that the use of a “yes/no” vote in the GMA context was inappropriate.

We agree with the dual process analysis for public participation and hold that the inability of this particular referendum to provide for an alternative to an “all or nothing” decision does not comply with the public participation requirements of GMA.

Our holding is not affected by a determination of whether the referendum amendment constituted a new independent legislative action or whether it was merely a final step in the continuing legislative process. As a new amendment the record shows that no iterative process was used. That failure of process does not comply with the Act.

Even if we consider the referendum as the final step in a completed action and therefore incorporate the public participation process involved in reaching the council’s original decision, our holding would not change. While we agree that it is appropriate and necessary for us to look at the “totality” of the process we are met with a situation where the final council action and the referendum amendment involve a difference of some forty pages. The referendum struck words, sections and chapters from the council’s ordinance. At that stage of the continuing process, GMA requires individualized review rather than a “take it or leave it” basis.

3. WAS THE DELIBERATION AND DECISION-MAKING PROCESS REASONED?

(a) Is the ordinance supported by reasoned choices based upon appropriate factors actually considered as contained in the record?

We pointed out in *Clark County* at page 6, that this question:

“...addresses the separate issue of the reasonableness of the process independent of public participation. It is possible to have a process with extensive public participation but with decisions based upon inappropriate factors and which

ignore appropriate factors.”

We further held that the Clark County Commissioners in going through the various drafts made:

“reasoned choices utilizing *information available to them that was appropriate, necessary and contained in the record.*” (Italics supplied)

RCW 36.70A.290(4) requires us to base our decision on the record, except for rare occurrences of supplemental evidence. In this particular case we have no “record” with which to determine whether there was appropriate information available to the voters and whether the voters took part in a reasoned deliberation and decision-making process. When a valid ordinance has been adopted and shortly thereafter a significant quantum of changes are made and those changes are challenged, it is incumbent upon the defenders of the changes to at least produce a record that would allow us to review whether appropriate factors were considered with the necessary information available and a reasoned decision thereafter adopted. This record reveals a list of meetings that were held and well attended. Exhibit 23 shows a number of claims made by intervenor as to why the referendum should pass. We have no record containing responses nor a showing of what was considered by the decision-makers.

Intervenor has consistently contended that we should treat the referendum decision with the same deference that we would a decision by the county council. We believe that may be an appropriate standard but note that deference also imposes obligations which have not been met in this case. Intervenor may well claim that it is impossible to meet those obligations, but that is simply another reason why the referendum process seems inappropriate for the GMA.

Because the process leading up to the adoption of the referendum amendment to the critical areas ordinance is so flawed and totally out of compliance with the Act, we do not reach the issues dealing with the substance of the referendum changes under question 4.

We remand this matter to the Board of County Commissioners with directions to employ proper compliance with SEPA and to consider the referendum changes in the context of staff review,

public participation, public hearing and a reasoned decision-making process. The council may reject all of the changes, may accept all of the changes or may do something else.

Since the Prosecuting Attorney's office did not actively participate in this case we have no suggestions as to the time necessary to complete these process issues. We recognize that notice requirements alone will take some time and therefore direct that the adoption of an ordinance be completed by November 17, 1994. A compliance hearing to determine if an ordinance has been properly adopted is set for 10:00 a.m. November 23, 1994.

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

DATED this _____ day of June, 1994.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

W^m. H. Nielsen
Board Member

Nan A. Henriksen
Board Member