

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

CITY OF PORT TOWNSEND, OLYMPIC)	
ENVIRONMENTAL COUNCIL, 1000 FRIENDS OF)	No. 94-2-0006
WASHINGTON,)	
)	COMPLIANCE
Petitioners,)	HEARING
vs.)	ORDER
)	
JEFFERSON COUNTY,)	
)	
Respondent.)	
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On August 10, 1994, we issued a final order in this case finding that Jefferson County's Interim Urban Growth Area (IUGA) Ordinance was not in compliance with the Growth Management Act (GMA, Act). We specified that in order to achieve compliance three issues needed to be resolved within a thirty or sixty day period of the August 10, 1994, date. Those issues were:

1. Elimination of IUGA designations outside the city limits of Port Townsend until proper studies and analysis, public participation and adoption took place;
2. Prohibition of new urban (a) residential, (b) commercial or (c) industrial development until an IUGA outside the Port Townsend city limits could be properly designated;
3. Establishment of an appropriate rural density designation for areas outside the IUGA.

We did not fix a specific date for a compliance hearing.

On October 28, 1994, Jefferson County informally requested a compliance hearing. Pursuant to that request, we notified all parties of a compliance hearing date by our letter of November 3, 1994. The hearing was ultimately held December 5, 1994, at the Jefferson County Courthouse. Present for that hearing were representatives for Olympic Environmental Council, 1000 Friends

of Washington, the City of Port Townsend and Jefferson County, along with the three Board members. Prior to the hearing, a copy of the ordinance, exhibits and briefs from each party were submitted. At the hearing each of the parties made a presentation and responded to our questions.

RCW 36.70A.330(1) provides that once the time frame for compliance set forth in the final order has expired:

"...[T]he Board, on its own motion or motion of the petitioner, shall set a hearing for the purpose of determining whether the...county...is in compliance with the requirements of this chapter."

Subsection (2) requires that finding of compliance or non-compliance is to be determined by a Board within 45 days of the filing of such a motion.

Subsection (1) does not provide for setting a hearing based upon the motion of the respondent. We therefore hold that the triggering date for commencing the 45 day period, under the facts of this case, is the date of our notification to the parties that a hearing was scheduled, i.e., November 3, 1994. At the hearing all parties agreed that this interpretation of the provisions of RCW 36.70.330 was correct. As we noted in *Whatcom Environmental Council vs. Whatcom County* WWGMHB #94-2-0009, a Board has no authority to specifically order any particular action be taken after finding non-compliance, RCW 36.70A.300(1)(b). While we may make suggestions or recommendations it is entirely up to the local government to determine how it wishes to come into compliance with the Act. RCW 36.70A.330(1) states that a compliance hearing is for the purpose of determining whether the local government "is in compliance with the requirements of this chapter" (the Act).

Therefore, we hold that the issue to be decided at a compliance hearing is whether the local government has complied with the Act, and not necessarily whether there has been strict adherence to the recommendations issued in the final order. We further hold that matters which were not part of the original finding of non-compliance cannot be used at the hearing as a basis for determining whether compliance has been achieved. We remain committed to the fundamental concept of the Growth Management Act that local decision-makers are the proper persons to implement GMA as long as the parameters established by the Act are adhered to. The specific mechanism for achieving compliance rests solely with local government.

At the time of the compliance hearing we questioned the parties concerning the proper burden of proof and the impact of RCW 36.70A.320, which states that development regulations are "presumed valid upon adoption." Logically, where a respondent has been found to be out of compliance, the burden of proof at the compliance hearing should be upon that respondent. In this case all parties, including Jefferson County, agreed that the burden rests with the County.

Nonetheless, Ordinance #15-1028-94, a development regulation under RCW 36.70A.110(4), appears to be entitled to the presumption of validity under RCW 36.70A.320. It seems intellectually inconsistent to grant a presumption of validity to an ordinance and still require the local government to sustain the burden of proof. The other side of that coin is that once non-compliance has been found, it seems logically inconsistent for the petitioners to again shoulder the burden.

In this case we need not decide that issue because, regardless of the presumption and the burden of proof, our decision is clear.

In the context of the analysis set forth above, we review Ordinance #15-1028-94 adopted October 28, 1994. Section 1 of the Ordinance provides that the interim urban growth area for Jefferson County is established at the Port Townsend city limits. This action most certainly complies with the Act. The inclusion in section 3 of different study areas for possible later inclusion within a final urban growth area is not violative of GMA.

Section 9 of the Ordinance deals with "subdivision densities and lot area outside of interim urban growth areas". Specifically, section 9.10 provides as follows:

"All new subdivisions or short subdivisions occurring *outside* of the Interim Urban Growth Area established by this ordinance shall be designed in such a manner that each *residential* parcel created has a lot area of not less than 1 net acre in size...." (emphasis added)

During the compliance hearing Jefferson County candidly acknowledged that this 1 DU/A was the same as that which we previously found did not comply with the Act. The County acknowledged that no further planning studies, nor analysis had occurred regarding the rural

density issue since our August 10, 1994, finding of non-compliance. Justification for this action was based upon the findings established in the ordinance. Finding 46 states that a moratorium on development was initially enacted, although our record does not contain specific information concerning the moratorium. Finding 50 provides that the ordinance encourages development in areas "where adequate public facilities and services exist or can be provided in an efficient manner."

The record in this case continues to demonstrate that the conclusion that adequate public facilities and services can be provided in an efficient manner, particularly in the Tri-Area, is an assumption which may or may not be true. Certainly, there are major questions concerning the availability of water in the Tri-Area. There is no current data concerning if, when and at what cost a sewer system will be necessary. There is no evidence, because no current studies have been done, to support the finding that public facilities and services can be provided in an efficient manner. For those reasons and the reasons that we set forth in our Final Order, it is clear that the rural densities in section 9 of the ordinance are not in compliance with the Act.

In the August 10, 1994, Order we found that the failure to prohibit urban residential, urban commercial and urban industrial development outside a properly established IUGA violated the Act. The new ordinance at section 8.10 appears to prohibit new commercial, industrial or planned unit development rezones. The county candidly acknowledged that some 400 acres of undeveloped commercial and industrial development zones currently exist outside the IUGA and that no change was made to prohibit new urban development in those areas. This failure to follow the clear dictates of the Act to prohibit new urban growth outside an IUGA after October 1, 1993, renders Jefferson County in non-compliance.

Nor do the provisions of section 5.10 satisfy these compliance problems neither on their own nor in conjunction with section 8.10. Section 5.10 says:

"Except as allowed by the adopted Interim of (*sic*) Level of Service Standards, new development occurring outside of the interim urban growth area shall be designed in such a manner as not to cause the extension of urban governmental services. Nothing in this subsection shall be construed as restrictive or prohibitive of the in-fill of existing platted areas lying outside of the interim urban growth area where urban governmental services are provided...."

Initially, the section references and uses the "Interim Public Level of Service Standards" adopted December 1, 1993, as the defining characteristic, rather than prohibiting extension of urban governmental services outright. The interim Level of Service Standards adopted as attachment B looks very similar to the Level of Service Standards we found to be inadequate in our August 10, 1994, Final Order. The attachment B matrix simply defines whether certain public services are "allowed", "not allowed", "conditional" or "provisional" and does not establish any definitive level of service standard.

Additionally, the matrix refers to "Rural Center", a designation which is defined as "unincorporated communities designated in the revised comprehensive plan." To this point we are unaware that any revised comprehensive plan has even been adopted that uses this designation. "Rural Lands" are defined as "those areas not otherwise categorized herein that could be developed to rural densities consistent with the comprehensive plan (until amended)." Presumably, this classification is all of Jefferson County outside the municipal limits of Port Townsend. The use of these inadequate "Interim Level of Service Standards" as the defining criteria of section 5.10 does not comply with the Act.

There is concluding language in this section that says:

"Further, nothing in this ordinance shall be construed to impose an obligation on the City of Port Townsend to extend or otherwise make available water service that it is not otherwise obligated to make available and serve."

In other words, there is no obligation to supply water unless there is an obligation to supply water.

Finally the reference in section 5.10 stating that nothing in the ordinance is to be construed as "restrictive or prohibitive of the in-filling of existing platted areas lying outside" the IUGA read in conjunction with section 6.10 is disturbing. That section states:

"Nothing in this ordinance shall effect the use of existing lots of record provided said use is consistent with applicable Federal, State or County Statutes, Laws, Codes, Regulations or Ordinances."

Although it is not a basis of our finding of non-compliance in this hearing, we take this opportunity to comment concerning the "in-filling" portion of section 5.10 and all of section 6.10.

If the intent of section 6.10 is to somehow vest "lots of record" that might not otherwise be vested, then the attempt is not in compliance with the Act's prohibition against new urban development outside an IUGA. As shown by the record in this case, there are some 10,000 small individual lots in the Tri-Area, many of which were platted in the late 19th Century or early 20th Century. Many of those lots may or may not be "vested" for a variety of reasons including RCW 58.17.170 which states:

"...[A]ny lots in a final plat filed for record shall be a valid land use notwithstanding any changes in zoning laws for a period of five years from the date of filing..."

If those lots are not "vested", the County's attempt to vest them through this ordinance is not in compliance with GMA. The effect of investing these lots is that development of them becomes regulated solely by septic tank and water service criteria. While those are significant issues for any new urban residential, urban commercial or urban industrial development as of October 1, 1993, much more information and analysis needs to be available and used before allowing any such development.

CONCLUSION

We recognize that on occasion the GMA requires local government officials to make hard and sometimes unpopular decisions. Nonetheless, GMA requires that these decisions be made and that they be made within the parameters established by the Act. Here Jefferson County has not made those kinds of decisions but has tried to provide alternatives which are clearly not in compliance with the Act.

Pursuant to RCW 36.70.330(3) we find that Jefferson County is not in compliance with the Act. We recommend to the Governor that the sanctions authorized by the Act be imposed.

DATED this 14th day of December, 1994

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William. H. Nielsen
Board Member

Nan A. Henriksen
Board Member

Les Eldridge
Board Member