

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

THEODORE A. MAHR, et.al.)	
)	
Petitioners,)	No. 94-2-0007
)	
vs.)	FINAL ORDER
)	
THURSTON COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
PEASE PENSION FUND)	
)	
Intervenor.)	
_____)		

On June 10, 1994, Petitioners filed an action challenging Thurston County's April 11, 1994, adoption of an Interim Urban Growth Area (IUGA) around the westerly portion of Olympia. The petition primarily involved challenges to the State Environmental Policy Act (SEPA) decisions of Thurston County and the City of Olympia. Olympia was named as a party on the basis of an October 1993 Declaration of Non-Significance (DNS) concerning a sewer extension contract for a large development called Cedrona within a previously-established IUGA boundary. Pease Pension Fund, the developer of Cedrona, later filed a motion to intervene.

A prehearing conference was held on July 19, 1994. A prehearing order, entered July 20, 1994, established three issues for resolution:

1. Did the adoption of the interim urban growth area on April 11, 1994, violate the goals and requirements of the Growth Management Act specifically RCW 36.70A.020; .060; and/or .110?

2. Did the adoption of the interim urban growth area on April 11, 1994, violate the joint planning process directed by a 1988 "Agreement" executed between the County and the City?

3. Did the County conduct a proper SEPA analysis leading up to the adoption of the interim urban growth area?

Within 7 days, WAC 242-02-558, Petitioners filed a motion to reinstate issues concerning International Treaties such as the Biodiversity Treaty and Pacific Salmon Treaty, federal statutes such as NEPA, the Clean Water Act and the Endangered Species Act, state statutes such the Shoreline Management Act, and judicial interpretations regarding spot zoning, appearance of fairness and conflict of interest. Olympia filed a motion to dismiss itself as a party.

A motions hearing was held on August 31, 1994. A written decision was entered on September 7, 1994. That order denied petitioners' motion on the basis that no jurisdiction existed to entertain those issues. Olympia was dismissed as a party on the basis that no GMA action was taken by the city because the challenge to the October 1993 DNS for the sewer extension was not within our jurisdiction, and also was untimely. The unopposed motion for intervention was granted.

The hearing on the merits was held on October 4, 1994. Near the conclusion of the hearing, Thurston County acknowledged that a final urban growth area boundary had been adopted as part of the joint comprehensive plan adopted in conjunction with Olympia in July 1994. We raised the issue of "mootness" because of that adoption and asked the parties to submit post-hearing briefs.

Both the County and Petitioners contend that we should decide this case on its merits even if moot, because the issues involve "matters of continuing and substantial public interest." *Department of Ecology v. Adsit* 103 Wn.2d 698,705 (1985) (*Adsit*). The County's memorandum contends that the criteria set forth in that case are met in the instant case. Those criteria involve:

- (1) The public or private nature of the question presented;
- (2) The desirability of an authoritative determination which will provide future guidance to public officers;
- (3) The likelihood that the question will recur.

Because both Petitioners and the County have asked us to decide the case on the merits, the

Intervenor has expressed no opinion, and the criteria of *Adsit* are met, we have decided to do so. Petitioners' motion to consolidate this case with a subsequently filed case as an alternative to dismissal is denied.

The issues in this case involve the three general areas of questions we are called upon to answer; a claim challenging SEPA compliance; a legal interpretation question concerning the 1988 Urban Growth Management Agreement between Thurston County, Olympia, Tumwater, and Lacey; and a generic complaint concerning compliance with the goals and requirements of the GMA.

Petitioners' main challenge is the SEPA violation claim. The contentions are (1) the DNS decisions were unlawfully segmented because the County kept one file for the IUGA and a separate file for the corresponding change in zoning outside the IUGA boundary, and (2) the DNS decisions were improper. Petitioners further request that we review the actions of Thurston County *de novo* and accept lead agency status.

In our very first case, *Clark County Natural Resources Council v. Clark County*, WWGMHB #92-2-0001 (*Clark County*), at page 10 we held that our SEPA review standard for a DNS was the same as that of a court, i.e., clearly erroneous, *Norway Hill v. King Cy.*, 87 Wn.2d 267 (1976). We do not review the SEPA action *de novo*, RCW 36.70A.290(4). We are not a proper body to accept lead agency status, RCW 43.21C.075.

The critical factor for our SEPA review in this case is found in Ex. 72, a resolution adopted by the Thurston County Commissioners on September 23, 1993. That resolution established an IUGA as required by RCW 36.70A.110(4) prior to October 1, 1993. The subsequent action of the County Commissioners on April 11, 1994, which is the action under challenge here, dramatically reduced the size of the September 23, 1993 IUGA. The major reason found in the record for reduction of the IUGA was to protect critical, and other environmentally sensitive areas, as petitioners and other members of the public had requested. Petitioners have not shown that the proposed action would have a probable adverse environmental impact. WAC 197-11-660 (2), (3)(b).

At three separate times during the adoption process the County re-examined the changed ordinance draft and issued a new DNS. We do not find any of those decisions to be "clearly

erroneous". Nor do we agree with petitioners that having a separate file for SEPA review of the zoning decision outside an IUGA unlawfully segments the review and thus violates SEPA.

Petitioners also claim that the action of April 11, 1994, violated the joint planning process agreement executed in 1988 between Thurston County and the cities of Tumwater, Olympia, and Lacey. Ex. 41. While we have doubts as to the standing of petitioners to challenge the parties' interpretation of their agreement, that defense was not raised nor argued.

The agreement provides that "nothing contained herein shall alter the decision-making powers" of any of the parties. One decision-making power is the requirement that the county legislative body establish an IUGA. If, as petitioners claim, the 1988 agreement restricts the authority of the County to adopt IUGAs without the agreement of the cities, which it does not, it would in any event be superseded by RCW 36.70A.110.

The final issue in this case involves a claim of non-compliance with the goals and requirements of RCW 36.70A.020, .060, and .110. This is the issue that involves the more generic kind of decisions that we are called upon to make. Since there appears to be occasional confusion about our view of the relationship of the record, the presumption of validity, the burden of proof, and the way that those concepts are being applied, we take this opportunity to restate and clarify our position.

As we said in *Clark County*, page 3:

"...[T]he ultimate question to be decided is whether the ordinance before us complies with the requirements and goals of the Act. RCW 36.70A.320 presents a perplexing dichotomy as to the nature and standards of review to be used in answering that ultimate question. On the one hand, the Legislature has directed that the development regulation is "presumed valid upon adoption", while in the same section directs that "a preponderance of the evidence" is the proper test to determine compliance. In addition, RCW 36.70A.290(4) states that our decision is to be based on the record...."

The record is the source of our evidence. *Whatcom Environmental Council vs. Whatcom County*, WWGMHB #94-2-0009. The concepts of presumption of validity, preponderance of the evidence or burden of proof deal with the application of the evidence as found or not found in the record. If the record is incomplete or insufficient because of the failure to submit pertinent portions, the failure to preserve, or the failure to consider an important matter, the absence of evidence can be

persuasive for carrying a burden of proof. A presumption of validity can be overcome by the absence of evidence or the lack of proper consideration by the decision-maker, as shown or not shown by the record.

After we reviewed the record submitted in this case, we determined that the tapes of the public hearing of March 4, 1994, were approximately 50% unintelligible. A letter was directed to the parties pointing out this deficit and requesting the County provide better tapes. Thurston County located a video tape that had been made of the public hearing and submitted it in lieu of the tape-recording. Petitioners submitted a motion to remand the case on the basis that the record was insufficient. Arguments were heard at the time of the hearing on the merits. We deny Petitioners' motion.

Under the provisions of WAC 242-02-520 the record is determined by first listing all documents, including tapes of hearings, and then the:

"...[P]arties shall not simply designate every document but shall carefully review the index, and designate only those documents that are reasonably necessary for a full and fair determination of the issues presented".

Unlike courts, we do not require transcripts of tapes nor do we require that every piece of evidence used by or submitted to the local government be part of our record. Consequently, unless there is a dispute as to accuracy and authenticity, the mechanism in providing the evidence is immaterial. This is particularly so where, as here, there was no challenge to the public participation process and the actual decision-making process occurred at a later time and was fully recorded, Ex. 71.

Petitioners rest their GMA challenge to the IUGA on a perceived violation of RCW 36.70A.020 (10), i.e., a failure to protect the environment and enhance water quality and availability of water. The County contends that language in *Port Townsend, et.al. v. Jefferson County*, WWGMHB #94-2-0006 implies that a threshold showing must be achieved by a petitioner prior to undertaking our four-question analysis. If there was a total absence of testimony in a record, the County's position might be persuasive. Such a situation would lend itself to a dispositive motion prior to the hearing on the merits. In the instant case, however, the record reveals disputed testimony concerning water and environmental issues within the various IUGA

proposals.

As we have indicated in previous cases we use the four-question analysis for two purposes; to provide a predictable analytical framework for our standard of review and to ensure consistency within the cases that we decide. When there is some evidence in the record, we find the four-question model to be useful for analysis. This use does not in any manner shift the burden of proof to the County, but is rather a recognition that our exclusive source of evidence is that which is found in the record, except in rare instances not applicable here.

There was no challenge to the question 1 and question 2 issues concerning appropriate interpretations of the Act and public participation. Our review of question 3, concerning the appropriate factors taken into consideration in the decision-making process, is largely determined by reference to Ex. 71 (tapes of the March 24, 1994, work session) and Ex. 72 (the September 23, 1993, resolution) establishing the previous IUGA. As noted in our SEPA discussion, the withdrawing of significant amounts of environmentally sensitive land from the September 23, 1993, IUGA cannot be deemed an environmentally "adverse impact". Likewise, it is clear from the evidence submitted in this case that the Commissioners were aware of RCW 36.70A.020(10) and properly analyzed that goal within the context of their decision on the IUGA. As noted by Chairman Nichols in the March 24, 1994, hearing, in virtually every instance in which sensitive area or water quality issues were raised, the Commissioners did not include the area in question within the IUGA.

Our review of the record shows that the answer to question 4, concerning whether the decision falls within the range for which the Commissioners have discretion, is yes. Petitioners could not point to portions of the record, or the absence of evidence, to carry their burden of proving that the determination made by the County was out of compliance with the GMA. Rather, the evidence showed that the analysis, discussions and conclusions were of the appropriate nature and were within the range of discretion afforded to the local governments by the Act.

We find that the April 11, 1994, resolution by the Thurston County Board of Commissioners is in compliance with the GMA.

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

DATED this 30th day of November, 1994

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William. H. Nielsen
Board Member

Nan A. Henriksen
Board Member

Les Eldridge
Board Member