

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

WHATCOM ENVIRONMENTAL COUNCIL,)	
)	
Petitioner,)	No. 94-2-0009
)	
vs.)	SECOND
)	COMPLIANCE
WHATCOM COUNTY,)	ORDER
)	
Respondent.)	
_____)	

This matter was heard at the Bellingham City Council Chambers on December 14, 1995. The hearing was held pursuant to a notice issued by the presiding officer dated November 30, 1995. A number of cities, as well as Whatcom County and Petitioner, filed written materials. At the hearing oral presentations were made by Whatcom County, various cities and citizens. Petitioner did not have an opportunity to make a formal oral presentation prior to the noon recess.

During the noon recess, we made a series of decisions rendering the balance of the hearing unnecessary. These decisions set forth below were made in line with the notice of November 30, 1995 and the motions submitted by Whatcom County and the participating cities.

1. Jurisdiction exists for a Growth Management Hearings Board to hold further hearings and make further rulings even though the finding of noncompliance in this case was dated February 23, 1995.

The threshold issue in this case was whether we have jurisdiction under RCW 36.70A.330 to hold further hearings to determine compliance and/or invalidity. Whatcom County and the Cities contended that since our last Order in this case was dated February 23, 1995, and since the amendments to the statute did not become effective until July 23, 1995, no jurisdiction existed for us to revive that Order. We do not agree.

The recent amendments to RCW 36.70A.330 provide that a Board "shall schedule additional

hearings as appropriate” after and following an initial compliance hearing. We have recently held in *Olympic Environmental Council, et.al., v. Jefferson County*, #94-2-0017, (Compliance Order 8/17/95) that the provisions of these amendments were retroactive in application. In that case the compliance hearing had not been completed prior to the effective date of the statutory amendments. We do not find a distinction involving the completion of the compliance hearing process to be determinative. The legislation is remedial. There is nothing in the language of the amendments evidencing an intent to limit the scheduling of additional hearings to only those arising or completed after July 23, 1995.

2. Whatcom County continues to not be in compliance with the GMA because of its failure to take any action concerning the interim urban growth areas (IUGAs).

In the February 23, 1995 Order, we noted that Whatcom County had refused to take *any* action concerning the noncompliant nature of the IUGA Ordinance. The evidence at the November 14, 1995 hearing was the same. While much planning has subsequently occurred, there has still been no action by the County Council to adopt a different IUGA Ordinance or to adopt a comprehensive plan which includes urban growth areas. Whatcom County continues to be in noncompliance in this regard.

3. A finding of invalidity is not appropriate at this time.

Whatcom County and various cities strenuously requested that we postpone a decision on a finding of invalidity because of the short time frame directed by the provisions of RCW 36.70A.330. When the Legislature added the remedy of invalidity to the provisions of the Act, there was no change to the mandatory requirement that a final order be issued within 45 days of the beginning of the compliance hearing process. Because of scheduling difficulties, it was necessary to hold the compliance hearing December 14, 1995 and require written submissions to be received not later than December 8, 1995.

We accede to the County’s and Cities’ requests to hold an additional hearing for the purpose of providing adequate preparation time. At that hearing we will initially determine whether or not Whatcom County has come into compliance with the goals and requirements of the Act. If we determine that the noncompliance continues to exist, we will then address the issue of whether to

declare the IUGA Ordinance invalid under the standards provided in RCW 36.70A.300(2). It is not necessary for any participant to resubmit the same written materials that have previously been received. Any “person” meeting the standing requirements of RCW 36.70A.330(2) who gives notice to us by January 23, 1996, will be allowed to participate. It is not necessary for prior participants to send another notice.

4. Whatcom County has the burden of proving compliance. A challenging participant has the burden of proving invalidity.

In *Port Townsend v. Jefferson County*, #94-2-0006 (Compliance Order 12/14/94), we discussed the issue of the burden of proof at a compliance hearing. We recognized that the issue was immaterial because of the overwhelming evidence of noncompliance. Here, Whatcom County urged that we adopt a ruling on this issue prior to the next hearing.

The presumption of validity (a totally different concept than a determination of invalidity under RCW 36.70A.300 and .330) applies to comprehensive plans and development regulations when they are adopted. RCW 36.70A.320(1). A determination in a final order that a local government is not in compliance with the Act necessarily involves overcoming that presumption. There is nothing in the Act which evidences a legislative intent for the presumption to be resurrected at the time of the compliance hearing. Rather, logic directs that a local government has the burden of showing that it has come into compliance after remand.

That same logic directs that a party challenging the validity of a local government action under RCW 36.70A.300(2) either at the hearing on the merits or at the compliance hearing, bears the burden of showing that the standards for invalidity are met.

ORDER

Whatcom County is not in compliance with the goals and requirements of the Growth Management Act regarding the Interim Urban Growth Area Ordinance because of its failure to act since the original finding of noncompliance. This matter is remanded to Whatcom County with direction to come into compliance by January 19, 1996. A further hearing pursuant to RCW

36.70A.330 is scheduled for the County Council Chambers, Bellingham Washington, commencing at 9:00 a.m. January 30, 1996, and continuing, if necessary, until noon, January 31, 1996.

Petitioner agreed to rely on the materials already submitted. Any further written submissions by Whatcom County or other participants must be received in the Board's office no later than 4:30 p.m. on January 22, 1996. A short reply memorandum, if desired, by petitioner must be received and served on Whatcom County and known participants no later than 4:30 p.m. January 26, 1996.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Dated this 28th day of December, 1995.

William H. Nielsen
Presiding Officer

Nan A. Henriksen
Board Member

(Not Available For Signature)
Les Eldridge
Board Member