BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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

In *Watershed Defense Fund, et.al. vs. Whatcom County,* WWGMHB #94-2-0003, the forerunner of the instant case, petitioners challenged the failure of Whatcom County to adopt an Interim Urban Growth Area (IUGA) by October 1, 1993 as required by RCW 36.70A.110(4). That petition was filed March 9, 1994. The County adopted an IUGA Ordinance on May 24, 1994. On July 19, 1994 we entered an order of dismissal and denied the attempt by those petitioners to challenge the merits of the newly adopted IUGA. The reasons for that decision are set forth in the order.

On July 25, 1994 this petition was filed by Whatcom Environmental Council challenging the compliance of the IUGA with the Growth Management Act (GMA, Act). A prehearing conference was held September 1, 1994 and a formal order entered September 7, 1994. The hearing on the merits was held October 19, 1994.

The issues established in the prehearing order involved petitioner's challenge to all the IUGAs and the County's failure to; (1) use OFM population projections, (2) follow the goals and requirements of the GMA regarding urban growth infilling, (3) establish an identifiable boundary line, (4) prepare or use a land capacity analysis, and (5) adopt development regulations prohibiting new urban growth outside the IUGAs.

The order further directed that the record would be submitted by each party at the time of

submission of the opening, responding and reply briefs. A schedule of briefing was established which required petitioner's opening brief to be filed by September 23, 1994 and respondent's brief to be filed by October 7, 1994. The brief of petitioner was timely filed and was accompanied by 12 exhibits. The County's brief was not received until October 13, 1994 and the 2 exhibits submitted by the County were received October 14, 1994. The one week late filing by the County had the ripple effect of causing petitioner's reply brief to be filed one day before the hearing.

Whatcom County candidly acknowledged in its brief and at the hearing on the merits that the requisite land capacity analysis had not been done prior to adopting the IUGAs in question. The County had also made the same acknowledgment during oral argument on a dispositive motion in the related case of *Denke vs. Whatcom County*, WWGMHB #94-2-0013 *(Denke)* which challenged the adopted IUGA for the Bellingham area. In that case no briefing, exhibits nor arguments were presented on behalf of the County's action until a motion for reconsideration was filed 10 days after the final order was entered.

Whatcom County devoted the argument in its brief in this case primarily to the issue of using different population projections than those presented by the Office of Financial Management (OFM).

We decline to deal with the OFM issue for two reasons. First, because of the acknowledged lack of a land capacity analysis, it is not necessary for us to address it in order to make a final determination.

Second, the record before us is not complete enough to allow a reasoned decision. In *City of Port Townsend, et.al. vs. Jefferson County*, WWGMHB #94-2-0006 *(Port Townsend)* we held that a deviation from the OFM projections was possible if a county could "clearly show" a justification for that deviation. In this case, we have only one exhibit submitted on behalf of the County's position. That exhibit shows that in 1992 an independent contractor hired by the County developed a different set of figures. We do not have any record concerning the reasons for commissioning the study, nor a tape nor summary of any debate of the study, nor why the study's numbers provide better projections than the OFM numbers, nor any other material evidence. A

decision on the OFM projections must be based on more evidence than the mere fact that the numbers are different.

We recommend, but do not require, the use of the petition method to resolve conflicts with OFM projections, *see Kitsap vs. OFM*, CPSGMHB #94-3-0014. Justification can await a potential challenge to other action but a risk of wasted time exists if the OFM projections are found to be controlling.

Because the land capacity analysis issue is controlling and the record is limited we also choose not to decide the issue concerning urban growth "infilling". Whatcom County has recognized its failure to establish an identifiable boundary and has made assurances the problem will be rectified in future actions. Thus, the issues to be resolved in this case involve the impact of the County's failure to execute or complete a land use analysis prior to establishing the IUGA and the question of whether the County failed to adopt development regulations prohibiting new urban growth outside a properly established IUGA.

The parties have essentially treated their presentation of these issues as we would expect in a dispositive motion and the ordinance itself indicates the flaws of which petitioner complains. Therefore, we do not need to approach this case with our usual four-question analysis.

Whatcom County's brief at page two sets forth its view of the IUGA process:

> "The approach of the County to adoption of IUGAs was to solicit from the cities their proposal for IUGAs and then to approve or reduce as deemed appropriate. (Reduction of the cities' proposed IUGAs was not a policy per se; it rather is what occurred with regard to most of the cities' proposed IUGAs). The County's approach was a result of the application of RCW 36.70A.110(2) which called upon the county to consult with the cities in the establishment of IUGAs".

Initially we note that the statement contained in the foregoing parenthesis about the IUGA reductions is not accompanied by any evidence contained in our record to show what reductions were done or why the decisions were made. The record is the source of evidence upon which we base our decision about compliance or non-compliance. The requirement of RCW 36.70A.290(4)

that our decisions be based on the record is entirely different than the concepts of presumption of validity, preponderance of evidence or burden of proof. Regardless of who has the burden of proof and no matter how presumptively valid an action is, if the record does not contain evidence to refute claims which have validity, the preponderance will be met. The absence of evidence is often as compelling as its presence. Here, the County claims it made appropriate decisions on the initial city proposals. We have not been provided any evidence to support that claim. Given language within the ordinance, the absence of a land capacity analysis, and lack of evidence in the record, there is no doubt petitioner has overcome its burden.

Findings #8, 9, 10 and 11 of the Ordinance state that the cities' proposals would remove 3,273 acres of agriculturally zoned land, as well as additional acreage currently zoned rural which are being productively farmed and/or have prime agricultural soils. The findings go on to say that significant gravel resource areas, flood hazard areas and wetlands were included within the proposals of the cities. The findings conclude that encroachment on resource lands or critical areas is inevitable if cities need to expand their boundaries, but point out that at the time of adoption of the IUGA it was "not clear that the Cities have as yet planned for in-filling and more intense development that is in keeping with the goals of the Growth Management Act and the County-wide Policies."

Reviewing Ordinance #94-033 we note that in addition to the cities' proposed IUGAs the County included areas non-adjacent to a city that had "development characteristics and/or zoning which was clearly urban". Regardless of the interpretation of IUGAs the County adopted, the GMA does not allow existing zoning to be a sole criterion upon which to base an urban growth area. In the record submitted to us there is not a scintilla of evidence as to what facts were presented to, considered, and determined to be compelling by the County Council in making the decision to include those non-adjacent areas. The ordinance itself contains findings indicating the original proposals by the cities were over-sized. Some type of current data analysis is necessary to show why the inclusion of non-adjacent areas did not exacerbate the problem. The County acknowledges that no such planning took place. The IUGAs are not in compliance with the GMA.

Petitioners claim that the County failed to adopt any development regulations that further the

legislative intent of preventing *new* urban development outside IUGAs is dramatically demonstrated by the language of section 1c:

> "The IUGAs will not be interpreted as overriding any existing plan policies, zoning tests or zoning maps in the review of development proposals or *for any other purpose*." (Italics supplied).

We are at a loss to understand how this language provides for protection of areas outside IUGAs as contended by the County.

Section 3 of the ordinance provides that no interim development regulations for the IUGAs need be created as the existing zoning is already in compliance with the GMA. Again there is nothing in the record, except a copy of Title 20 Whatcom County Code, presented to us to substantiate this conclusion. Nor is there any evidence to help us understand the rather perplexing language in finding 16:

> "Existing zoning within the proposed IUGAs together with other development regulations *prevents* development which could *preclude* logical urban development patterns, whether annexation occurs or not." (Italics supplied).

RCW 36.70A.110(4) was passed by the Legislature to prevent new urban development from occurring outside a logically established IUGA until the comprehensive plan is completed. Whatcom County did not fulfill that requirement in Ordinance #94-033.

During the argument at the hearing on the merits, the County contended that neither we nor either of the other Boards have the authority to order the drawing of an IUGA at the municipal boundaries of a city, nor did we possess the authority to order the County to adopt development regulations to further the legislative intent of preventing new urban development outside a properly established IUGA. We totally agree.

Our authority under GMA is to decide whether a challenged action is or is not in compliance. RCW 36.70A.320. We disagree, however, with the County's contention that we went beyond that authority in either the *Port Townsend* or *Denke* cases. In neither case did we require that Jefferson or Whatcom County do anything. What we did say was that "in order to achieve

compliance" certain actions were necessary. We would not serve the governments in our jurisdiction appropriately if we merely found non-compliance and then gave no direction as to why, or how to achieve compliance. A county individually determines whether to take a particular action in order to achieve compliance.

We also do not agree with the County's contention that *we* determined that IUGAs should be drawn at municipal boundaries. RCW 36.70A.110(4) requires the establishment of IUGAs by October 1, 1993. RCW 36.70A.110(1) requires that municipal boundaries are to be included within an IUGA. Our holding in *Port Townsend*, *Denke* and now this case is that without proper planning analysis of the necessity for land areas outside municipal boundaries, the availability of public facilities and services to those areas and the recognition of the cost of providing those facilities and services, an IUGA beyond municipal boundaries cannot be established. Since the Act requires establishment of IUGAs by October 1, 1993, municipal boundaries must be used until proper analysis shows a need to expand the boundary.

THEREFORE, IN ORDER TO ACHIEVE COMPLIANCE, WHATCOM COUNTY MUST:

1. Establish IUGAs initially at municipal corporation boundaries within 60 days and not extend any IUGA without proper analysis of current data and appropriate public participation; and

2. Adopt development regulations within 60 days that prohibit new urban growth in areas outside properly established IUGAs.

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

DATED this_____day of November, 1994.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member/Presiding Officer

Les Eldridge
Board Member

Nan A. Henriksen
Board Member