BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

OLYMPIC ENVIRONMENTAL COUNCIL, WASHINGTON ENVIRONMENTAL COUNCIL, and STATE OF WASHINGTON, by and through the Commissioner of Public Lands for the DEPARTMENT OF NATURAL RESOURCES,	)	No. 94-2-0017
Petitioners,	)	COMPLIANCE HEARING ORDER
vs.	)	
JEFFERSON COUNTY,	)	
Respondent.	)	

On February 16, 1995, we issued a final order in this case finding that Jefferson County was not in compliance with the Growth Management Act (GMA, Act), with the adoption of Ordinances #07-0705-94 and #06-0705-94 and by refusing to designate or protect agricultural lands in Resolution #67-94. We specified that in order to achieve compliance three things must be accomplished:

> 1. "Within 60 days adopt an ordinance which designates forest lands of long term commercial significance consistent with the goals and requirements of the GMA. This Ordinance must include development regulations that will ensure that land uses adjacent to designated forest lands will not be detrimental to the long-term viability of those designated forest lands for commercial timber production.
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> 2. Within 60 days adopt a development regulation that assures that the use of lands adjacent to mineral lands not interfere with the continued use, and in the accustomed manner and in accordance with best management practices of those designated mineral lands as required by RCW 36.70A.060.
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> 3. Within 60 days adopt an ordinance that designates and protects agricultural lands consistent with RCW 36.70A.020(8), .170,

and .060."

Based upon the agreement of the parties, we signed a Stipulated Order of Continuance of Compliance Date on April 26, 1995. This Order set a new compliance date of June 1, 1995.

The compliance hearing was held July 18, 1995, at 1:30 p.m. in Port Townsend at the Marine Park Community Building. Present at the hearing were representatives for Olympic Environmental Council (OEC), Washington Environmental Council (WEC), Department of Natural Resources (DNR), and Jefferson County (County) along with the three members of the Western Washington Growth Management Hearings Board (Board). Prior to the hearing, a copy of the ordinances, exhibits, and briefs from each party were submitted. At the hearing, each of the parties made a presentation and responded to our questions.

As to requirements 2 & 3 of our order, we note that Jefferson County did pass a Mineral Lands Ordinance #09-0525-95 and an Agricultural Lands Ordinance #08-0525-95. None of the petitioners challenged those actions. Thus, we have insufficient information to make a ruling as to the adequacy of these ordinances. The remainder of this order pertains to our review of Forest Lands Ordinance #07-0524-95 effective June 5, 1995.

In its supplemental hearing memorandum, the County contended that the only purpose of the compliance hearing was to review the County's compliance with the Board's Order. We remind the County that in *Port Townsend, et. al. v. Jefferson County,* #94-2-0006, Compliance Hearing Order dated December 14, 1994, we pointed out that RCW 36.70A.330 directs us to hold a hearing after finding non-compliance "for the purpose of determining whether the . . . county . . . is in compliance with the requirements of this chapter" (the Act).

Furthermore, our order required the County to adopt an interim Forest Lands

Ordinance consistent with the goals and requirements of the GMA. We did not instruct the County as to how they had to achieve compliance but did give guidance as to the flaws in the original ordinance. Some of the most pertinent passages were:

> "The intent of this early classification and designation process is to conserve commercial forest lands while local governments go through the comprehensive planning process, which includes a thorough balancing of the GMA goals, assessment of future population and land allocation needs, and development of an integrated plan for accommodating these needs while minimizing the overall economic cost and environmental impacts of that growth." (p. 702) (References to page numbers are from Code Publishing).
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> "WEC claims that Jefferson County's exclusion of class 4 forest lands from designation as commercial forest was based on improper criteria and ignored abundant evidence that the extensive lands excluded by the County have long been utilized for growing trees for commercial timber production and are capable of sustaining this usage for many years. Given the record in this case, we would agree." (p. 707)
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> ". . . the County used the designation process to create smaller isolated pockets of designated land. The largest designated area has the center removed leaving long fingers of designated land exposed and adjacent to the non-designated land. We find it difficult to understand how this configuration complies with the purpose of this designation exercise which is the conservation of commercial forest lands and their protection from incompatible uses.
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> The final designation scheme omits tens of thousands of acres which are currently devoted to the commercial production of timber and are not currently subject to development pressure . . ." (p. 707)
>
> "A fundamental goal of the Act is to maintain, enhance, and conserve productive forest lands and discourage incompatible uses. This ordinance not only fails to protect and conserve resource lands, but encourages low density sprawl; the antithesis of GMA." (p. 707)

Although the map attached to Ordinance #07-0524-95 appears to be a major

positive step, the ordinance itself does not achieve compliance. The great pains gone to in this ordinance to accommodate development interests of the largest forest land owners leads to a result that continues to threaten rather than conserve tens of thousands of acres that are currently devoted to the commercial production of timber and not currently subject to development pressure.

Two statements made in the County's Compliance Hearing memorandum might help explain the County's continued noncompliance with the Act.

> "Under this ordinance, property rights are a paramount consideration." (p.15)
>
> ". . . strike the balance between designation and preservation of critical resource lands and enhancement of these land's (sic) potential economic value." (p.21)

As we explained in our final order, natural resource conservation must be the paramount consideration in interim resource land ordinances. Enhancement of these lands' potential economic value at the expense of conservation is not a legitimate goal in this process.

Several provisions in this ordinance are out of compliance with the Act. We will begin with the two most threatening to the conservation of forest resource lands. The first is Section 4.20.1.9 — the net yield criterion that excludes from designation of Commercial Forest Lands of Long-Term Commercial Significance any parcel that may not produce "a net yield of 25,000 board feet of timber per acre over a 50 year growing cycle, based on the total age of the tree stand." The second is Section 6.20.1 - the 'opt out provision' which allows land owners to remove from designation any of their parcels that they can show may not meet the 25,000 board feet criterion of Section 4.20.1.9.

Prior to passage of the ordinance, a July 14, 1995, letter from DNR to the BOCC on p. 3 stated:

> "It is our opinion that two criteria make this ordinance out of compliance with GMA: 1) net yield of 25,000 bd ft for long term commercial forest in Jefferson County and 2) opt out option.
>
> The maps generated by the county showing the designated commercial and rural forest in eastern Jefferson do not factor in the lands which are eligible to be removed from the forest land designation due to "low net yield." This designation criteria is based on a minimum net yield of 25,000 board feet of timber produced per acre over a 50 year period. The information we provided to you November 6, 1994, on the economic viability and importance of forest lands of long term commercial significance in eastern Jefferson County, shows the net yield chosen for commercial forest land designation would exclude all land grade 4 and some land grade 3 lands in east Jefferson County. It would effectively move all these lands into the rural resource zone. This zone will not adequately protect commercial forest lands in the future."

On page 4, DNR continued:

> "Tying productivity levels to designated forest lands could prove as a disincentive to practice good and intensive forest land management. This brings up the concern that landowners that want to convert their land from forest to non-forest lands will reduce the productivity, or the net yield, of the land to be eligible to convert by employing the least productive management regimes. Again, we recommend removing this great uncertainty in the designation of forest lands by removing the yield criteria from the designation of forest lands.
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> In addition, it appears that designated forest lands can be removed at any time the forest land parcel does not meet any one of the necessary criteria. This may have the effect of eroding the forest land base as the lands adjacent to the forest land is developed and subdivided, or the land is removed from the Timber Tax Designation or any change is made which removes one of the forest land designation criteria. Forest lands designation should be stable, providing

predictability to facilitate long-term forest management. We recommend establishing forest lands which provide the predictability and stability necessary to manage forest over the long term. Only through amendments of the comprehensive plan should forest lands be taken out of the forest land designation. Allowing the removal of forest lands' designation after the land has been designated eliminates the substance of the ordinance and makes it out of compliance with the Growth Management Act."

WEC's compliance hearing memorandum at pages 4-6 also pointed out the flaws of these two provisions.

"The February 16 order of this Board required that Jefferson County's compliance actions be consistent with the evidence in its own record. The productivity thresholds at issue are clearly inconsistent with the record's evidence regarding the inclusion of class 4 lands. See WEC's Prehearing Brief of December 15, 1994.

The net yield criteria will cause designations, and therefore conversions, to occur in a random pattern based on non-contiguous soil types contained within broad land grade units. This consequence in turn will result in the break up of the largest blocks of commercial forest land, undermining their integrity in direct contradiction with the intent of the GMA. The interspersed conversions will have the effect of increasing the burden on the remaining commercial forest lands.

Finally, perhaps the most significant immediate consequence of the two "net yield criteria" sections, together with ordinance section 4.40, is that there is in fact no immediate designation of "forest land" in Jefferson County under this ordinance. Such a designation can only occur or be final after the net yield of each parcel of land has been determined. The map attached to the ordinance is therefore extremely misleading."

".....Section 6 allows land to be removed from forest land designation upon petition. All the landowner needs is the opinion of a forester that a parcel cannot produce the minimum yield. As noted above, and in the submittal by the Olympic Environmental Council, the net yield criteria are based on legally and technically flawed assumptions.

> The landowner is also permitted to include in his or her calculation of the net yield reductions resulting from undefined critical area "set asides" on the parcel. This provision allows the landowner credit for reduced yield for portions of land parcels that could (or should) not be developed even if it were allowed to convert to other uses.
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> In essence, section 6 gives landowners almost unfettered discretion to remove their land from designation.
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> As with the initial net yield designation criteria, the "opt out" provision will operate in a random, unpredictable fashion, causing the progressive fragmentation of remaining resource lands. Such an inevitable consequence violates the goals and requirements of the GMA, Board precedent, and the stated purpose of the ordinance itself to sustain and enhance commercial forestry in Jefferson County."

All three petitioners contended that the ordinance used this arbitrary "threshold of productivity" and the opt-out provision to effectively exclude Grade IV forest lands from designation. OEC quoted Commissioner Huntingford as stating during May 24, 1995 BOCC deliberations: "The 25,000 board foot figure would do the same thing as excluding Land Grade IV."

Nor are sections 4.10.4, 4.20.1.6 and 4.20.2.6 of the classification criteria in compliance as written. They exclude from designation any: "... [P]art of the parcel [that] lies within one half (1/2) mile of lands characterized as rural or suburban in the Jefferson County Rural Lands Characterization Study (dated November 8, 1994)." The November 8 report is actually entitled ‘‘Jefferson County Urban Characterization Study.’’ Some resource lands would have to abut ‘‘lands characterized as rural’’. We were told at the compliance hearing that the language was intended to refer to rural centers or suburban land. It is significant that the GMA specifically references that urban and rural lifestyles are to be supported, but no reference is made in support of suburban forms of development that are characterized by sprawl and lead to added public

expenditures for services and facilities. Requiring resource lands to be 1/2 mile from "suburban" lands provides no protection or buffering at all for the resource since there is currently no restriction on "suburban"- i.e. 1 DU/Acre-development in rural Jefferson County. The November 8 report sheds little light on this confusion.

The potential for irrevocable disintegration by redesignation of parcels in the core of the commercial forest blocks to rural forest is compounded by the development allowed within the rural forest lands:

> Section 7.10.2 - Transfer of Development Rights (TDRs) allows owners of land designated commercial forest to transfer development rights to rural forest lands in its ownership. There appears to be no density limit or cap on the total number of units allowed in such a cluster development. At the compliance hearing the County stated that the maximum would be 256 one acre lots in a 640 acre section. This would have to be defined as suburban sprawl in the heart of commercial forest land and a result not in compliance with GMA.
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> Section 7.20.1 - Underlying Density of Rural Forest Lands. "The maximum residential density for designated rural forest lands shall be one dwelling unit per 20 acres when the property owner elects not to use any of the subdivision methods provided in the following subsections." (emphasis added)
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> Section 7.20.2 - Cluster Development allows owners of rural forest lands to develop 40% of their land with a maximum base density of one dwelling unit per five acres calculated across the entire area of the parcel and with a minimum lot size of one gross acre. The effect is to permit removal from forest designation of 40% of the area designated and to concentrate conflicting uses within forest land blocks.

Section 7.20.3 - Resource Management Subdivisions allows the subdivision of rural forest lands into 10 acre lots. There is no provision regarding maintenance of the minimum 70% of each ten acre parcel that is required to remain in forest resource production. This section, like clustering, would produce "quasi-resource lands" with potential for significantly greater conflicts and a big question as to who would be the caretakers/managers of these "mini-forests"?

The original record demonstrated that the greatest impediment to commercial forestry is density of nearby residential development. In order to reach the GMA goals and requirements for conserving productive forest lands, forest lands must not only be designated but also protected from incompatible uses. Development must be regulated so that it occurs in densities and physical patterns compatible with commercial forest management.

Some of the above tools might be appropriate if rural forest lands designation was limited to the periphery of commercial forest blocks to be used as a buffer. However, unlimited TDRs and unlimited clusters would be inappropriate in either case. The Central Puget Sound Growth Management Hearings Board in *Kitsap Citizens for Rural Preservation, et.al., v. Kitsap County*, #94-3-0005, found that the Kitsap County ordinance allowing unlimited TDRs and clusters in rural areas was not in compliance with GMA. That is doubly true in natural resource lands.

We remind the County that section 2.00.11 of the Ordinance states: "Special development standards for lot size and configuration, fire protection, water supply, and dwelling unit location should be adopted for development within or adjacent to forest land." Through this ordinance the County has not implemented the needed development regulations and enforcement mechanisms to protect the forests from the allowed development.

We turn to the issue of "invalidity" of this new development regulation as requested by petitioners. Recent amendments to RCW 36.70A.300 and .330,

enacted by ESHB 1724 sections 110 and 112, became effective subsequent to the compliance hearing on this matter, but prior to the issuance of this compliance order. During the compliance hearing, the issue of the application of these two sections of ESHB 1724 was thoroughly discussed and we received post-hearing briefing from the parties as to the application of these new amendments to this case.

In *Johnson v. Continental West*, 99 Wn. 2d 555 (1983), our Supreme Court recognized the rule concerning retroactive application of an amendment to be that if the legislation is "clearly remedial" it should be "construed to apply retroactively even though not expressly stated."

A review of the language of sections 110 and 112 leads to the conclusion that they are clearly remedial in nature. The entire scheme is designed to provide a supplemental remedy for non-compliance.

Nothing in ESHB 1724 states whether or not sections 110 and 112 are to be applied retroactively. However, section 112 (4) (b) requires that a Board, at the time of the compliance hearing, "shall" reconsider its final order and decide, where no previous determination of invalidity has been made, whether one should then be made. This shows a legislative intent for application of ESHB 1724 to pending cases. Given this broad directive from the legislature to reconsider a final order if no determination of invalidity has been previously made and the presumption that a remedial amendment applies retroactively, we hold that sections 110 and 112 apply to this case. Thus, we are required to determine whether portions or all of this new ordinance are invalid.

The standards for determination of invalidity are found in section 110(2) of ESHB 1724. The first element of that section requires a determination that the development regulation "would substantially interfere with the fulfillment of the goals of this chapter" be made in order to find invalidity. That determination is required to be supported by "findings of fact and conclusions of law".

Initially we are unsure why the legislature was only interested in determining whether the regulation would interfere with the "goals" of the Act rather than "goals and requirements". Nonetheless, that is the language that was used. RCW 36.70A.020(8) institutes a goal that would "maintain and enhance natural resource base industries, including productive timber," and "encourage the conservation of productive forest lands" and "discourage incompatible uses". We are also perplexed by the requirement of section 110(2)(a) that the determination of invalidity be supported by "findings of fact and conclusions of law". Here, as with almost every case, we reviewed the ordinance based solely on the record. Findings of fact are made by tribunals and/or courts which hear live testimony and make determinations of veracity. A review based solely on the record is analogous to a trial court's determination of a summary judgment motion or a writ of certiorari. The appellate courts have long held that in such cases based solely on written documentation, findings of fact and conclusions of law are superfluous. *Hemenway v. Miller*, 116 Wn. 2d 725, 731 (1991), *Leavitt v. Jefferson County*, 74 Wn. App. 668, 677 (1994).

Nonetheless, the statute clearly requires such an exercise and we have attached our findings of fact and conclusions of law as appendix A and incorporate them herein by reference.

We have no confusion as to section 110(2)(b) requiring that the determination of invalidity specify the particular part of the regulation that is invalid and the reasons therefore. As noted earlier, sections 4.20.1.9 (25,000 bd. ft. minimum) and 6.20.1 (opt out) are not in compliance with the goals and requirements of the Act. Additionally, those two provisions are so grievously noncompliant that their continued validity would substantially interfere with the fulfillment of the goals of the Act. We therefore determine those two provisions to be invalid under the provisions of ESHB 1724 sections 110 and 112.

Goal 8 of the GMA relating to natural resource industries provides three prongs

for resource based industries such as timber.

(1) To maintain and enhance;

(2) To encourage conservation; and

(3) To discourage incompatible uses.

The "net yield criteria" section is technically flawed in its assumptions. A major flaw is the total disregard of the impact of RCW 84.34 forest land tax classification on the economic sustainability of forest lands with net yield of less than 25,000 bd. ft.

This provision substantially interferes with enhancement and maintenance of the resource timber industry by circumventing the evidence in the record that appropriately-located Grade IV forest lands are a productive resource worthy of enhancement, maintenance and conservation. Removal of this level of forest land in eastern Jefferson County under the record presented in this case, substantially interferes with goal 8 of the Act. The net-yield provision further violates the enhancement, maintenance and conservation aspects of goal 8 by providing a disincentive for good forestry land management.

Likewise, the automatic "opt-out" provisions of the ordinance violate all three prongs of goal 8. The opt-out provision would allow a property owner to remove portions of a forest designation at any location, even within the central core of a block. As shown by this record the conversion of forest land to the incompatible uses allowed by the current ordinance seriously undermines, if not destroys, the economic viability of this resource-based industry. The ordinance substantially interferes with goal 8, particularly by encouraging, rather than discouraging, incompatible uses not only along the fringe of the forest designation, but potentially in its very heart.

Therefore, we determine that the continued validity of this development regulation would substantially interfere with the fulfillment of goal 8 of the GMA and that sections 4.20.1.9 and 6.20.1 are invalid under the standards provided by

ESHB 1724, section 110(2).

CONCLUSION

Jefferson County continues to avoid its legal obligations of compliance with the goals and requirements of the Act. We find that Jefferson County Ordinance #07-0524-95 is not in compliance with the GMA and that sections 4.20.1.9 and 6.20.1 are invalid.

So ordered this 17th day of August, 1995.

_____
Nan A. Henriksen
Presiding Officer

_____
William H. Nielsen
Board Member

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Les Eldridge
Board Member

APPENDIX A

FINDINGS OF FACT

1. On February 16, 1995, a final order was entered. The order determined that the forest land designation and classification systems employed by Jefferson County did not comply with the Growth Management Act.

2. The final order directed that Jefferson County reconsider its ordinance and adopt one that would be in compliance with the Act by April 26, 1995. This date was later extended by agreement of the parties and the Growth Management Hearings Board to June 1, 1995. A compliance hearing was

held on July 18, 1995. In response to the order of non-compliance, the County adopted Ordinance #07-0524-95.

3. Section 4.20.1.9 establishes that land will not be designated as "forest land" under the GMA when a parcel of land will not sustain an average 25,000 bd. ft. per year yield over a 50-year cycle.

4. Section 6.20.1 provides that any owner of property in the preliminarily designated forest lands is allowed to take property from the designation upon a showing that the 25,000 bd. ft. standard is not met.

5. The forest land designation as shown on the map attached to the ordinance does not indicate where any of the minimum yield or opt out areas are or will be. The map does not accurately reflect actual long-term designation of forest land.

6. The 25,000 bd. ft. criterion does not take into account the economic benefits of classification of the land under RCW 84.34. The arbitrary level established does not include currently productive appropriately-located forest land Grade IV properties.

7. The 25,000 bd. ft. provision does and would allow gaps, "donut holes" and segmentation of large blocks of forest land.

8. The opt-out provision decreases the stability of long-term designation, would allow "donut holes" and would breakup large blocks of appropriately designated forest land.

9. The opt-out provision would also provide an incentive for the practice of poor forestry management in order to enable conversion of property for development purposes. Such conversion would then provide more opportunity for incompatible uses in and around forest lands.

10. Incompatible uses are the biggest threat to maintenance, enhancement and conservation of the timber resource.

From the foregoing findings of fact, we make the following:

Conclusions of Law

1. Both sections 4.20.1.9 and 6.20.1 substantially interfere with the fulfillment of RCW 36.75.020(8).

2. Sections 4.20.1.9 and 6.20.1 should be and are hereby declared invalid under the provisions of ESHB 1724 section 110.