

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

JOHN E. DIEHL, KERRY HOLM, GORDON JACOBSON,)	
and VERN RUTTER, individually, and as members of the	)	No. 95-2-0073
MASON COUNTY COMMUNITY DEVELOPMENT	)	(FFA)
COUNCIL (MCCDC),)	
	)	15 TH
Petitioners,	)	COMPLIANCE
	)	HEARING ORDER
v.	)	(FREQUENTLY
	)	FLOODED AREAS)
	)	REGARDING
MASON COUNTY,	)	COMPLIANCE
	)	AND INVALIDITY
Respondent,)	
)	
and)	
)	
PETER OVERTON, DONALD B. PAYNE, McDONALD)	
LAND COMPANY, HUNTER CHRISTMAS TREES,)	
HUNTER FARMS, SKOOKUM LUMBER COMPANY,)	
MANKE LUMBER COMPANY and MASON COUNTY)	
PRIVATE PROPERTY ALLIANCE (MCPPA),)	
)	
Intervenors,)	
)	
)	

Synopsis of the Order

We find that the County has complied with the requirement that agricultural resource lands (ARLs) preclude densities greater than one dwelling unit (d.u.) per 10 acres within Frequently Flooded Areas (FFAs). We find the County noncompliant with respect to clear mapping, clear nomenclature and clear delineation of avulsion zones. The sections of Ordinance #5-01 regarding new construction and diking substantially interfere with the fulfillment of the goals of the Growth Management Act (Act, GMA).

The County has made progress toward removing confusion over the location of no-new-footprint (NNF) zones by producing (but not adopting) a map (Exhibit #3000) which shows some NNF zones in purple. The County's brief asserts that the map's purpose is to "clearly state where and when new construction is precluded". It cannot then maintain (as it unaccountably does in its reply briefs) that the map is for illustrative purposes only.

Introduction

Notwithstanding the fact that this compliance hearing was set on the Board's action rather than a motion from Mason County and that post-hearing briefs were allowed until June 18, 2001, we opt to enter this order relating to invalidity within 30 days from the date of the hearing, in the spirit of RCW 36.70A.302(6). On June 5, 2001, a compliance hearing was held at the City of Shelton Community Center. Mr. Robert Fink and Mr. Robert Sauerlender represented Mason County (County). Participant Skokomish Indian Tribe (Tribe) was represented by Mr. Richard Guest. Intervenor Hunter Farms and Hunter Christmas Trees (Hunter) were represented by Ms. Sarah Smyth McIntosh. Petitioners MCCDC and John Diehl opted not to participate in argument although Mr. Diehl requested that his dispositive motion of May 17, 2001, serve as his brief. Les Eldridge and William H. Nielsen were present for the Board.

We granted the County's motion to exclude the Diehl declaration of May 17, 2001, absent objections from the parties present. We admitted proposed Exhibits #2850 and #2851.

Mr. Sauerlender noted that this hearing, addressing invalidity, was not scheduled on the County's motion. We allowed Intervenor Hunter to submit a motion to supplement the record by June 8, 2001. Other parties had 10 days subsequent to June 8, 2001, to respond.

On June 8, 2001, we received a motion to supplement the record from Intervenor Hunter with two tapes that represented testimony from the May 10, 2001 public hearing of the Board of County Commissioners (BOCC) on flood plain maps of the Skokomish Valley and the related ordinance (#5-01). On June 11, 2001, we received a response from Skokomish Indian Tribe and on June 13, 2001, a response from Petitioner John Diehl, accompanying his motion to supplement.

In their motion, Intervenor Hunter did not speak to the reasons why the tapes would be necessary or be of substantial assistance to the Board in reaching its decision. The Tribe noted that final action on Ordinance #5-01 was taken January 19, 2001 and that testimony on May 10, 2001 would therefore be untimely. The Tribe contended that amendments to Ordinance #5-01, the subject of the May 10, 2001 hearing, would properly be subject matter for a future compliance hearing. Mr. Diehl declared that avulsion interpretation zones and conditional footprint zones are not safe nor appropriate for new construction and, therefore, disputed mapping of those zones would be irrelevant unless we retreat from our previous decision that the County must preclude new construction in the flood plain. Mr. Diehl noted that the statements of Craig Sigmund included on the tape would, in his opinion, be of substantial assistance to the Board on reaching a decision on the question of accuracy of mapping.

Petitioner Diehl's motion to supplement the record attempted to resubmit his declaration of May 17, 2001. We had excluded his declaration at the compliance hearing. While we acknowledge that the Diehl declaration and the tapes submitted by Intervenor Hunter may well be of substantial assistance in some future compliance hearing, we now deny both motions (Hunter and Diehl) for supplementation of the record for this order.

In our order of May 29, 2001, we had denied the motion of Intervenor Hunter for continuance of the compliance hearing in order to promote the prompt and orderly conduct of the proceedings. In that order we mistakenly identified South 101 Corridor Group, Inc. as the Intervenor which Hunter's counsel had represented throughout the duration of this case. In fact, she has represented Intervenor Mason County Private Property Alliance, Skookum Lumber Company, and Donald Payne for the duration of this case. South 101 Corridor Group, Inc. is a party in the companion Mason County comprehensive plan case #96-2-0023c (*Dawes*).

Burden of Proof

The County has the burden of proof under RCW 36.70A.320(4) to demonstrate that the "ordinances it enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter..." Petitioners have the burden under the clearly erroneous standard for compliance issues.

Summary of Issues

In our compliance order regarding the eleventh compliance hearing (July 24, 2000) we required the County to address the following issues, which we found invalid and/or noncompliant:

1. Clearly map and clearly designate FFAs.
2. Eliminate the confusion caused by the use of multiple definitions for the FFAs.
3. Include avulsions risk areas in the designation and mapping of FFAs.
4. Bring the Shoreline Management Program (SMP) and Fish and Wildlife Habitat Conservation Area (HCA) ordinance into compliance and enumerate the functions and values protected by a compliant ordinance.
5. Preclude densities greater than one unit per ten acres in the ARLs.
6. Express densities in terms of units per acre in no-new-footprint zones and comply with GMA requirements for rural densities in rural areas and resource densities in ARLs.
7. Establish a diking monitoring and regulation program that precludes individual homeowners from frustrating inspections.

Contentions & Conclusions

Clear Mapping, Clear Nomenclature, Avulsion Areas

The County contended that the CTED (now OCD) guidelines, WAC 365-190, state that critical area mapping is inexact, and that maps of critical areas are intended only for general guidance to the community. In response to questions from the Board, the County acknowledged that the colored map entitled “Skokomish River/Vance Creek Flood Plan Frequently Flooded Areas Analysis”, sheets one and two, was being brought before the Board for the first time during this compliance hearing. We assigned this map Exhibit #3000.

In its brief the County argued that with the adoption of Ordinance #5-01 Mason County has brought its frequently flooded areas resource ordinance into compliance with the Act. Rather than expand on its brief, the County opted to incorporate by reference the entirety of Exhibit #2801, pages one through eight, the staff report to the Mason County Board of Commissioners (BOCC) authored by Allen Borden, long range planner for Mason County. In this document, Mason County notes that “it depends on the flood insurance rate maps (FIRM) developed by the

Federal Emergency Management Agency (FEMA) for Mason County (Community #530115) in May 1988 and December 1998. Further, Exhibit #2108 states in regards to maps:

“Mason County has better defined and **will better delineate** on maps these areas and will clearly state where and when new construction is precluded. Mapping, **when complete**, should indicate the avulsions risk areas and other no-new-footprint zone in the Skokomish River Valley or at least show where detailed reviews shall be required when current information is inadequate to make a determination.” (emphasis supplied)

Intervenors Hunter noted that the presentation of Exhibit #3000 at the hearing was the first time that people had an opportunity to understand the mapping system. Ms. Smyth McIntosh observed that there was “too much purple” (a reference to the color of the no-new-footprint zone in Ex. #3000) and that it was difficult to understand what the map means. She averred that the new ordinance and the new map were a surprise to the Hunters, whose property rights, she claimed, had been thus taken away. She noted the controversy regarding avulsion zones and contended that the County’s delineation was too vague. She maintained the ordinance should be adjudged “void for vagueness”. She felt that the map should be workable and understandable and that there were a number of property right takings occurring in the “purple” area, particularly, Sections 17, 16, 8 and Section 9 near Hunter Creek. She noted the perception on the part of many Mason County citizens that the Growth Management Hearings Board was not deferential enough to County actions, but in response to questions, declared that, in this case, deference to County actions would be inappropriate.

Participant Skokomish Indian Tribe (Tribe) observed that the map had been shown in black and white in the January hearings regarding the adoption of the ordinance but was incomplete, and still seemed to be incomplete. The Tribe went on to note that, in the County’s argument that the WAC guidelines (WAC 365-190-040(2)(d) (mapping) do not require mapping, the County had left out the phrase, “counties and cities should clearly articulate that the maps are for information or illustrative purposes only unless the map is an integral component of a regulatory scheme” (emphasis supplied). The Tribe contended that Exhibit #3000 and Exhibit #2816 (the black and white maps) are clearly integral components of a regulatory scheme.

The Tribe pointed out that it does not object to the County’s density floodway approach but

contended that that approach needs more regulation in order to preclude threatening lives downstream. The Tribe noted that the County is making progress, but that overbank flow paths are not clearly mapped in Exhibit #2816, page 2 of 2. In January, noted the Tribe, the County said other maps would follow. The Tribe supported Petitioner Diehl's contention that the maps are still not complete.

The Tribe's concerns over Exhibit #2816 after review by its floodway expert, Mr. Jim Park, were as follows: Section 7 contains a lower valley-upper valley disconnect between FFA areas through which overbank flow paths pass. A considerable portion of Section 7 therefore appears to allow development despite the fact the avulsion-flow-path arrows appear in the portion of the section allowing development. Consultant Kramer, Chin and Mayo (KCM) identifies this as an area of flood hazard. This is likewise true in Section 18 at Swift Creek near the Sigmund-Fulz Dike. The Tribe contended that Section 18, which appears to now be a conditional footprint zone and an avulsions interpretation zone, needs to become a no-new-footprint zone. The Tribe pointed out the nomenclature here is still not clear, despite our requirement that it be clarified.

The Tribe noted that the Jerry Richerts farm area in Section 8 shows avulsion arrows in an avulsion interpretive zone, which is not completely in a no-new-footprint zone. In Section 17, near the Church Dike area, the same conditions apply. Section 16, in the open fields behind the Hunter Dike, appears to be listed as a conditional footprint zone. The Tribe contended it should be a no-new-footprint zone. In conclusion, the Tribe declared that the mapping here is an integral component of a regulatory scheme which either prevents or allows development, and that a better map and clearer nomenclature is needed.

Conclusion: Issues of Clear Mapping, Clear Nomenclature, and Avulsion Areas

The County acknowledged in response to questions that Exhibit #2816 was adopted before being finalized and that no formal action has been taken by the BOCC on Exhibit #3000.

It is clear that Exhibit #3000, the colored map, has not been formally adopted by the County. Exhibit #2801, which the County relied upon as the body of its brief, states that, "Mason County...will better delineate on maps these areas and will clearly state where and when new construction is precluded". Yet, the findings of fact (Attachment B) adopted as part of Ordinance

#5-01 state that “mapping was completed and reviewed as part of the public hearing record and included within the ordinance sections”. Exhibit #3000 was not prepared at the time of adoption and does not appear within the ordinance’s sections. The County’s finding that “mapping was completed” is not supported by the record.

The conditional footprint zone and the avulsion interpretation zone are not referred to in the ordinance. Yet citizens looking at the colored map could clearly place their property within these zones. The County must define Exhibit #3000 within the ordinance. As Ms. Smyth McIntosh said, it is unrealistic to expect citizens to refer to five or six different source maps to determine the effect of the ordinance on their property.

The purpose of the no-new-footprint zone is to restrict new construction. Maps delineating some of the no-new-footprint zones referred to in the ordinance are appended to the ordinance as Exhibits A, B, and C. It is clear that the maps delineating all of the NNF zones are intended as integral parts of a regulatory scheme to preclude new construction. They need, therefore, to be part of the ordinance so that citizens may understand exactly where the County has precluded new construction. The integral relationship of the legends of Exhibit maps #2816 (black and white) and #3000 (colored) with the ordinance raises more questions about the clarity of the nomenclature.

For instance, no-new-footprint zones are listed in two sections on the maps; those inside the detailed study area, and those outside. The ordinance, however, makes no mention of no-new-footprint zones outside the detailed study area. Yet, according to the FIRM map, the special flood risk zone includes the “Zone A areas outside the detailed study area” which one could assume, absent clarification, are more than two feet deep during the base flood (like their counterparts inside the detailed study area). The failure of the ordinance to clarify or even mention these zones in the ordinance would clearly generate unanswerable questions for citizens who live in them. The Kramer, Chin and Mayo maps, which are part of the ordinances, Exhibits A, B and C, do not list the A Zone.

The A Zone corresponds to the green areas and the blue areas in Exhibit #3000 (upper reaches and delta, outside the detailed study area). The green areas are defined as base flood areas, areas

inundated by the base flood according to the FEMA flood insurance rate map (FIRM) and which are not mapped into any of the other units. Are these green areas ones which would fall in the conditional footprint zone classification if they were inside the detailed study area? If so, would construction be allowed? We were unable to discern the answer from the record.

As there is no definition of avulsion interpretation zones (AIZ) in the ordinance, it is impossible to know whether construction is allowed within these areas. In response to questions, the County noted that the AIZ were in the “less than two feet” category. This is not clear from the map legend, and is contrary to the County’s brief which refers to “avulsion areas and other NNF zones”. AIZs are defined in the map legend as areas within 100 feet of overbank flow paths, but are not mapped as no-new-footprint. The County has not explained its reasoning in assuming that AIZs were “less than two feet”, and why less than two foot flood areas were safe for new construction.

The record shows “classified and designated” FFAs are “100-year floodplain areas and the avulsion risk areas (whether inside or outside of a mapped floodplain)” (Exhibit #2801 at 3 of 5) and “are synonymous with areas of special flood hazard”. Areas of special flood hazard are defined as the FIRM map Zones A and A2. Therefore, in designating FFAs it is essential to have the FIRM map as part of the ordinance, as the ordinance definition of an FFA coincides with Zones A2 and A. Invalidity cannot be rescinded until this is accomplished.

Further, we require the County to reconsider the areas outlined by the Tribe where the record indicates avulsion is probable because of dike failure or other causes. It includes Section 7’s avulsion interpretation zone, Section 8’s Jerry Richerts farm area, Section 18’s Swift Creek-Sigmun-Fulz Dike areas, Section 17’s Church Dike (near the Skokomish Community Church), and Section 9’s open fields behind Hunter’s Dike.

We conclude that the record does not demonstrate that the County has clearly mapped and designated FFAs, eliminated the confusion caused by the use of multiple definitions, and clearly delineated avulsion risk areas in the designation and mapping of FFAs. The County has made some progress toward those requirements, but not sufficient to enable us to rescind our finding of substantial interference with the fulfillment of the goals of the Act. Additionally, Petitioners

have shown continued noncompliance.

SMPs, HCAs, and Critical Areas Functions and Values

In its brief the County cited the SMP, the HCA ordinance (Chapter 17.01.110 of the Mason County code (MCC)), and the wetlands chapter (Section .070 MCC) as sources to be “utilized when reviewing and evaluating a proposed use”. The County claimed that the most restrictive standards among those regulations would be applied. The County acknowledged that the Fish and Wildlife HCA chapter is currently noncompliant.

Mr. Diehl noted that the HCA ordinance rests on an outdated and noncompliant SMP and that the County has provided no other basis for protecting functions and values regarding fish and wildlife habitat. He asserted that the County remains noncompliant regarding this aspect of FFA protection. The Tribe averred that the application of “the most restrictive development standards as part of the proposal review” fall well short of addressing concerns outlined by us in our prior orders and fail to adequately demonstrate how the County has removed substantial interference with the goals of the GMA.

Conclusion: SMPs, HCAs, and Functions and Values

We conclude that the County’s HCA ordinance and the integration of the FFA ordinance with the SMP are still under review by the County for amendment and remain noncompliant and/or invalid. FFA functions and values and their protection are not addressed under this record.

ARL Densities Greater than One Per Ten, Appropriate Rural and Resource Densities In ARLs

In its brief, the County declared that each land use designation in the County’s specific residential densities is maintained and applies within FFAs. Within FFA areas, claimed the County, any ARL densities greater than one dwelling unit per 10-acres are not allowed. The County stated that clustered subdivisions entirely within the FFA are not allowed. Clustered subdivisions partly in the FFA are allowed only if all buildings are outside the flood plain.

Petitioner Diehl maintained that the County has still not precluded densities greater than one d.u. per 10-acres in ARLs. Petitioner Diehl contended that clustered subdivisions are allowed in

ARLs only partially within the FFA and that concentrated development on the periphery of an FFA is not compatible with Goal 8 of the Act, which mandates that uses incompatible with productive agricultural lands be discouraged.

The Tribe noted that Section 5.4-4 of the ordinance was amended to include the following language: “New construction and substantial improvements may be allowed where not otherwise prohibited and in accordance with other county regulations, such as resource lands”. Exhibit #2800, page 23. The Tribe contended that we should “find that the amendments adopted address our concerns in precluding densities greater than one d.u. per 10-acres in response to our order”.

Conclusion: ARL, Resource Lands and Rural Densities

We find that the County has removed substantial interference with the fulfillment of the goals of the Act regarding densities in the ARLs and expression of densities in terms of units per acre. In order to achieve compliance, the County must provide a density overlay map for the Skokomish FFA showing densities in the ARLs and rural areas.

Diking, Monitoring, and Regulation Program Precluding Individual Homeowners From the Ability to Frustrate Inspections

The County noted that Section 5.4-5 regulates some parts of the flood plain but not others, and that the avulsion risk stems from the fact the riverbed is perched and the river may choose a new channel at any time. The County conceded that many dikes were not built to proper standards and that it has not been able to gain access to all dikes. Exhibit #2801, the County’s brief, noted that a new subsection (6) has been added to require monitoring of permitted structures. The section calls for, at a minimum, a monitoring of performance which includes a post-construction inspection for compliance with conditions of approval. Section 5.4-5(4) provides, in part, that activities related to the repair maintenance or construction of bank stabilization dikes levies are subject to...appropriate inspections during and following construction and/or repair.

The Tribe observed that the County had missed the point. The Tribe declared that “permitting and monitoring new dike or levy construction in the Skokomish River Valley does not address the hazardous situation caused by the existing dikes which are substandard and consistently fail during flood events”. During the 11th Compliance hearing the Tribe argued: Mason County

references the draft *Skokomish River Diking Study* as initiating:

“[t]he process of developing a base study of the diking in the Skokomish River Valley and when completed will provide the new benchmark for ongoing monitoring of the construction and maintenance of existing dikes. What Mason County has failed to do is revise the FDPO to include the diking policy and protections as recommended by the PAC, set forth in its entirety within the Flood Plan. Finally, even a cursory review of the draft *Skokomish River Diking Study* reveals that the study inventoried only nine levee structures. The remaining levees were not field surveyed due to property owners denying rights of entry to the U.S. Army Corps of Engineers. The Tribe is unaware of any effort by Mason County to address this lack of review, inspection and evaluation which will expedite the creation of this benchmark.”

Skokomish Indian Tribe’s Response Brief for 11th Compliance Hearing at 8 (internal citations omitted).

The Tribe continued that while it was commendable to regulate new construction and ongoing maintenance of permitted dikes, the amendment to Section 5.4-5 did not address the clearly expressed concerns regarding existing substandard dikes which present a deadly hazard. The Tribe contended that the County had failed to demonstrate compliance with our order to establish a diking monitoring and regulation program that precludes individual homeowners from frustrating inspections.

Petitioner Diehl noted the same concerns, that the County monitoring of “approved permits” does not provide regulation of its existing dikes. He noted that the County appears to regard the existing dikes as “legally established” though as far as the record goes, none was issued a permit as originally constructed. He cited county consultant KCM’s identification as a “chronic problem area” the “pattern of discontinuous diking along the main stem” where it “has concentrated flooding in the unprotected areas where the higher flow velocities create the potential for gully erosion and other flow-related damage which did not exist prior to dike construction”. Exhibit #2101 at 4-10. Petitioner Diehl cited Exhibit #2850 at i as evidence that investigators were denied access to property containing privately constructed dikes or levies.

Conclusion: Diking

The contentions of Petitioner Diehl and Participant Skokomish Indian Tribe are persuasive. Nothing in the amendments to the Mason County Code regarding diking addresses our concerns that individual homeowners can preclude inspections of existing dikes. In its reply brief the County quoted the language of WAC 365-190-020 requiring counties to govern “development that could adversely affect critical areas” and then noted the further provision that “for each critical area, counties and cities planning under the Act should define changes in land uses in new activities by prohibiting clearly inappropriate actions and restrictions (sic), allowing or conditioning other activities as appropriate”.

From this, the County draws the astounding conclusion that the WAC (which is advisory in any case) contemplates only future actions, and that the language addressing new activities prohibits “governing” existing development that could adversely affect critical areas. We can think of no activity or development more appropriate for restricting or conditioning than the maintenance of existing dikes in an FFA where dike failure is common. “Governing of development that could adversely affect critical areas” certainly includes prevention of dike failure. We require that County address the monitoring and inspection of existing dikes in order to remove invalidity and noncompliance, and that it provide a list of existing dikes.

Findings

We find the County in compliance regarding densities greater than one unit per 10-acres in the ARLs. We find that Section 4.4-2 and Section 5.1 through Section 5.4-4 (new construction) and Section 5.4-5 (dikes) do not comply with the Act and substantially interfere with the fulfillment of the goals of the Act and are declared invalid.

Section 2.0 of the ordinance (definitions) remains noncompliant.

HCAAs and SMPs remain noncompliant.

ORDER

Within 180 days from the date of this order the County must:

1. Formally adopt a final map (in color) of frequently flooded areas. See Exhibit #3000.
2. Provide a Skokomish River FFA map overlay delineating rural and resource area densities.
3. Include in the ordinance definition section (2.0) complete definitions of the categories on the legend of Exhibit #3000.
4. Re-examine the avulsion interpretation zone areas as noted by the Tribe to determine whether they should indeed be included in no-new-footprint zones.
5. Examine the base flood area categories to determine whether they should be no-new-footprint areas and clearly demonstrate the reasons for the decision.
6. Bring its SMP and HCA ordinances into compliance and enumerate the functions and values protected by a compliant FFA ordinance.
7. Establish a diking monitoring and regulation program that precludes individual homeowners from frustrating inspections, and provides for the inspection and monitoring of existing dikes.
8. Provide a list of existing dikes.

A progress report on compliance and invalidity is due October 30, 2001.

A report on actions taken to achieve compliance and remove substantial interference with fulfillment of the goals of the Act is due December 31, 2001.

Findings of Fact and conclusions of law pursuant to RCW 36.70.320(1)(6) are adopted and attached as Appendix I and incorporated herein by reference.

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

Pursuant to WAC 242-02-832(1), motions for reconsideration may be filed within ten days of this order.

So ORDERED this 27th day of June, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member

APPENDIX I

Findings of Fact Pursuant to RCW 36.70A.302(1)(b)

1. Exhibit #3000 was not formally adopted by the BOCC.
2. The legend of Exhibit #3000 is not included in the ordinance.
3. Exhibits #2816 and #3000 are integral parts of a regulatory scheme which regulates construction in the Skokomish River FFA.
4. The County's HCA ordinance remains noncompliant.
5. Ordinance #5-01 does not enumerate critical area functions and values in the Skokomish River FFA.
6. No provision is contained in the ordinance for inspection of existing dikes.
7. Conditional Footprint Zone and Avulsion Interpretation Zone do not appear in Section 2.0 of the ordinance (Definitions).
8. Nothing in the GMA or WAC 365-190 precludes inspection of existing dikes.

Conclusions of Law

Section 2.0 (definitions) of the ordinance remains noncompliant. Sections of the ordinance pertaining to new construction and diking (4.4-2 and 5.1 through 5.4-4) substantially interfere

with Goals 2, 8, 9, and 10.