BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

WHIDBEY ENVIRONMENTAL ACTION NETWORK,	)	
	)	
Petitioner,	)	No. 95-2-0063
	)	
vs.	)	SECOND
	)	COMPLIANCE
ISLAND COUNTY,	)	HEARING ORDER
	)	AND FINDING
Respondent.	)	OF INVALIDITY
	)	

We issued this case's first compliance hearing order on December 19, 1995. In that order, we found the provisions of RCW 36.70A.330 provided us authority to review existing development regulations for invalidity regardless of whether those regulations were adopted pursuant to RCW 36.70A. We also found that Island County continued to be out of compliance with the Act. We reserved a decision on invalidity until after an additional compliance hearing scheduled for March 28, 1996.

The March 28th compliance hearing was held in the Island County Courthouse Annex. The three members of the Western Washington Growth Management Hearings Board (Board) and representatives of Island County and Whidbey Environmental Action Network (WEAN) were present. Also participating were representatives of the City of Langley, Skagit/Island County Builders Association, Island County Economic Development Council, Whidbey Audubon Society, Save the Woods on Saratoga, and William Applegate.

At the beginning of the hearing, we admitted all evidence requested by the parties. Island County reported that progress was being made on the comprehensive plan.
However, no interim steps had been taken to preclude new urban development outside IUGAs while this planning process was being completed. Thus, Island County remained out of compliance.

We have again reviewed our previous decision on jurisdiction to determine pre-existing non-GMA development regulations invalid. Having carefully evaluated all the arguments provided to us by the parties, we reaffirm that decision.

In considering potential invalidity, petitioner has the burden of showing that Island County's continued reliance on the sections of the Island County Code contested by WEAN substantially interferes with the fulfillment of the goals of RCW 36.70A (Act, GMA). This high standard is intended to focus on development regulations or plans whose continued implementation seriously threatens local governments' future ability to adopt planning legislation which complies with the Act.

As we begin our analysis, we review two of our previous decisions regarding new urban growth outside IUGAs. The *City of Port Townsend v. Jefferson County*, #94-2-0006, decision regarding the Legislature's intent for IUGA designation, we stated:

> " . . . the trade-off for allowing an 18 month extension to complete the comprehensive plan was that the use of areas outside a designated urban growth area for new urban development and urban public facilities and services ended. This requirement from the Act does not mean that a moratorium on any further development must be adopted or that pre-existing and vested development cannot proceed. What it means is that the County has a responsibility to its residents to stop sprawl, commercial and industrial strip developments, and the corresponding tax bill that will become unnecessarily large because of poor planning. As the CPS Board noted at p. 11 of *Tacoma v. Pierce County*, the consequence of existing urbanized areas outside cities not being included in an IUGA is simply that *new* urban development will not be permitted."

More recently in *Whatcom Environmental Council v. Whatcom County*, #94-2-0009, (Third Compliance and Invalidity Order dated 3/29/96), *(Whatcom)*, we stated:

> "The fundamental statement of the anti-sprawl provisions of the GMA is found in RCW 36.70A.110. In subsection (1), the statute directs that urban growth areas be established by a county, "outside of which growth can occur *only* if it is *not urban* in nature" (italics supplied). While there are many goals found in RCW 36.70A.020 relating to the anti-sprawl concept, it is section .110(1) that provides the absolute prohibition of new urban growth in areas outside UGA or IUGA boundaries. While local governments have a wide variety of discretionary choices under the GMA, the language of .110(1) eliminates any discretion of local governments to allow new urban growth outside UGAs."

The Legislature directed local governments to adopt ordinances establishing IUGAs by October 1, 1993. These ordinances were to preclude new urban development outside IUGAs while local governments completed their homework on GMA comprehensive plans and implementing regulations. Local governments were required to adopt comprehensive plans meeting GMA standards by July 1, 1994. Since those deadlines, Island County has continued to make its land use

decisions based on the Island County Code (ICC), Chapter 17.02. The record in this case clearly shows that the continued application of this pre-GMA code has resulted in urban-type development being approved and vested outside IUGAs.

The continued vesting of new urban development outside IUGAs substantially threatens the fulfillment of several GMA goals. As we have previously stated in *Whatcom*:

> "The goals of the Act relating to prohibition of urban growth outside of properly established IUGA areas primarily involve RCW 36.70A.020(1), (2), (3), (8), (9), and (10) . . . Urban growth in non-urban areas discourages development where adequate public facilities and service exist, encourages sprawl, does not allow for efficient multi-model transportation systems, interferes with the maintenance and enhancement of natural resource-base industries, and discourages the retention of open space, conservation of fish and wildlife habitat. Such new urban growth also decreases access to natural resource lands and water, and fails to protect the environment and our State's high quality of life, including air and water quality and availability of water."

Goals 1 and 2 state:

> "(1) Urban Growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (2) Reduce Sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development."

WEAN and the City of Langley contended that:

- The amount and location of residential and commercial growth outside IUGAs that current development regulations allow is essentially unlimited.
- Island County's Code allows new urban residential, new rezones, and other approvals for urban commercial and industrial uses outside IUGAs.
- Residential sprawl and urban development continue to occur throughout the County.
- This perpetuates patterns and intensities of development that are contrary to the GMA urban growth and sprawl reduction Goals 1 and 2.
- These circumstances "substantially interfere with the fulfillment of GMA planning goals" and therefore support a determination of invalidity.

This record showed that under the ICC, Island County is substantially overzoned. Exhibit J-1 (page

entitled "Zoning Built-Out") produced by Island County staff states:
"At current zoning, not including density bonuses, the County could accommodate an estimated 211,500 people" (emphasis added). Under GMA, Island County is required to plan for approximately 20,000 additional people, rather than the extra 130,000 allowed under current zoning with no density bonuses or rezones included. This, in itself, frustrates GMA goals of reducing sprawl and restraining urban development to areas where services can be efficiently provided.

We analyze the challenged sections of the ICC asking the question: Will continued validity of these sections substantially interfere with the fulfillment of the goals of the GMA?

ICC 17.02.060, Residential (R) Zone

The R Zone has a base density of 3.5 dwelling units (du)/acre (ac) outside IUGAs. The zoning code states: "The purpose of the residential zone is to provide for living opportunities at a suburban density." (emphasis added.) The GMA makes no provisions for new suburban development. Urban growth is to be placed within UGAs, and areas outside UGAs are to have rural growth.

3.5 du/ac is clearly an urban density. The zoning maps reveal large areas of Island County outside IUGAs zoned R. Exhibit J-1 shows that those lands now zoned R could accommodate 139,800 people at base density. The County contended that Island County has shorelines and view property everywhere that need more dense zoning. We find nothing in the Act which would allow such a large exception to the general rule that urban growth is prohibited in rural areas.

We find that the continued validity of ICC 17.02.060 substantially interferes with the fulfillment of the goals of the GMA.

ICC 17.02.100, Non-Residential Floating Zone (NR)

NR allows commercial, industrial, and residential development at 6 du/ac in Rural Residential Zone (RR) (1 du/5 ac) outside IUGAs. ICC 17.02.050 (RR zone) declares:

> "The Rural Residential Zone is the principal land use classification for Island County. Limitations on density and uses are designed to provide a rural lifestyle and ensure compatible uses."

This stated purpose of the RR zone is in sync with GMA goals.

In his brief, Mr. Applegate contended that the NR Floating Zone is Island County Code's most egregious threat to the goals of the Act and the above-stated purpose of the RR zone. WEAN and other participants complained that:

- Criteria used in considering approval of NR rezones has no correlation to those required by GMA goals.
- In this record, the County Planning Commission has been instructed to ignore the GMA and only look for conformance with the criteria in the zoning ordinance.
- Since 1993, the Board of County Commissioners has approved every NR request even when the planning staff and/or the Planning Commission have found them not to comply with the criteria of their own ordinance.
- NR zone allows location of commercial and industrial developments throughout unincorporated Island County, thus promoting development patterns that are in direct conflict with the goals of the Act.
- As applied, the NR zone encourages new urban commercial and industrial development outside IUGAs.
- Because of the overly broad range of development allowed anywhere in the RR zone, the NR Floating Zone substantially interferes with GMA goals.

In its reply brief, the County accused us of not considering 1995 amendments to the GMA. It pointed out that the Central Puget Sound Board (CPS) determined that appropriate non-residential uses are allowed in the rural area of the county.

Our past decisions are consistent with the 1995 amendments to the GMA and CPS decisions. We have said that no new urban commercial or new urban industrial development can occur outside IUGAs. We have not precluded the placement of natural resource-based industries or rural commercial development outside IUGAs. The Act allows <u>appropriate</u> non-urban uses outside IUGAs. Non-residential uses outside IUGAs must, by their very nature, be dependent upon being in a rural area and must be compatible both functionally and visually with the rural area. The NR Floating Zone provides no controls to preclude urban development outside IUGAs. This zone would not meet the CPS standards referred to by the County. *(Peninsula Neighborhood Association v. Pierce County*, #95-3-0071).

The record in this case clearly supports the petitioner's contentions. We find that ICC 17.02.100 allows new urban commercial and new urban industrial development outside IUGAs and

substantially interferes with the fulfillment of the goals of the GMA.

Density Bonuses in RR Zone (1 du/5 ac)

Contested sections include:

- ICC 17.02.050 c.2. For a Planned Residential Development (PRD) over ten acres base density increased to 1 du/2 ac.
- ICC 17.02.050 c.3. For a PRD over 20 acres where property has been established as Transfer of Development Rights (TDR) receiving property, base density increased to 1 du/1 ac.
- ICC 17.02.050 c.4. For a PRD over 100 acres where property has been established as TDR receiving property, base density increased to 6 du/ac.
- ICC 17.02.170(c)(2)(a). Specifies number of TDRs that can be utilized on RR zoned property/ provides that PRDs under 100 acres not to exceed 1 du/ac.
- ICC 17.02.170(c)(2)(b). Specifies number of TDRs that can be utilized on RR zoned property/ provides that PRDs 100 acres or larger, not to exceed 6 du/ac.

Petitioner contended that the above sections allow, facilitate, and encourage residential development at suburban and urban densities throughout the rural part of Island County. It further contended that continued reliance on these sections substantially interferes with Goals 1 and 2.

TDRs provide a tool for permanent preservation of sensitive lands and open space. PRDs or clustering, designed properly and limited as to scope, could also protect sensitive areas, riparian trails, and green space in the rural area. The GMA encourages local governments to consider using TDRs, PRDs, and clustering. If these TDR provisions designated receiving property inside IUGAs or effectively limited the patterns, location, and size of such developments within rural lands so as not to constitute new urban growth, there would be no need for a declaration of invalidity.

Attachment D of the 1984 zoning code shows that PRDs are allowed to be placed virtually anywhere in the County. There are no limits on the total amount of development which may be built outside IUGAs at these increased densities. 17.02.050c.4. and 17.02.170(c)(2)(b) allow densities of 6 du/ac in RR zone. This density is clearly urban and is not required to meet criteria for fully contained communities or master planned resorts as defined in GMA.

As currently written, development at these increased densities constitutes sprawl and/or

impermissible urban development outside IUGAs and substantially interferes with the goals of the Act.

Increased Density on Agricultural and Forest Land

ICC 17.02.080b.3.(a) and (b) and 17.02.080d.3. allow increased densities and cluster developments on agricultural lands. They make agricultural land TDR receiving property and require such lots to be smaller than 1 du/2.5 ac.
ICC 17.02.090b.3.(a) and (b) and 17.02.090d.3. allow increased densities and cluster developments on forest lands. They make forest land TDR receiving property and require such lots to be smaller than 1 du/2.5 ac.

ICC 17.02.170c.2.(c) designates agricultural and forest lands as receiving properties for TDRs thereby allowing increased development densities on those lands.

Petitioner contended that the above provisions substantially interfere with GMA's goal of encouraging the conservation of productive forest and agricultural lands and discouraging incompatible uses (Goal 8).

All natural resource lands (NRL) regardless of location within NRL blocks appear to be eligible for these increased densities. The greatest threat to long-term productive NRLs is nearby conflicting uses. *Olympic Environmental Council v. Jefferson County*, #94-2-0017, *(OEC)*. As currently written, these provisions substantially interfere with Goal 8.

Reclassification of Resource Lands

ICC 17.02.210d.1(c) allows reclassification of Agricultural (AG) and Forest Management (FM) lands to RR (1 du/5 ac).

ICC 17.02.210d.6. allows reclassification of AG and FM lands to R (3.5 du/ac).

These sections allow rezone of all resource lands on demand, except for agricultural lands with class II or III soils. Petitioner charged that no rezone of resource lands has been denied by Island County since the passage of GMA. This claim was not disputed by the County.

In *OEC* Compliance Hearing Order dated 8/17/95, we discussed at length the threat of automatic "opt

out" provisions to Goal 8. That discussion pertained to forest management lands but would apply equally to agriculture lands. We stated that Goal 8 of the GMA relating to natural resource industries provides three prongs:

(1) to maintain and enhance;
(2) to encourage conservation; and
(3) to discourage incompatible uses.

We concluded:

> "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."

ICC 17.02.210d.1(c) and ICC 17.02.210d.6, as written and applied substantially interfere with Goal 8 of the GMA.

CONCLUSION

The record presented to us in this case clearly demonstrates that the continued validity of the above sections, as currently written and implemented, is resulting in and will continue to result in land use patterns that make it more difficult each day for the County to adopt a GMA comprehensive plan and implementing regulations that fulfill the goals of the Act.

We do not take this finding of invalidity lightly. Skagit/Island County Builders Association, Island County Economic Development Council, and Island County all pointed out the hardship that would be caused by a declaration of invalidity. We regret any such burden, but remind those participants that we have not caused this hardship. The County has had years to take action to preclude new urban development outside IUGAs and to protect natural resource lands from conflicting uses. Our December 19 decision provided Island County 90 additional days to take such interim action. The long-term costs to the citizens and taxpayers of Island County, due to this failure to adopt regulations which produce development patterns allowing the efficient and economical provision of services and the continued viability of natural resource lands, greatly outweigh any temporary hardships.

In order to limit the potential confusion about the impacts of this declaration of invalidity and clarify its intended effect, we point out that no finding of invalidity can preclude vested lots from consideration of eligibility for a building permit. Our declaration does not preclude house construction at base density in Rural Residential, Agricultural, and Forest Management zones. It does not preclude remodels or repairs. It will not affect any kind of construction within current IUGAs.

RCW 36.70A.300(2) sets forth the standard for a finding of invalidity. Invalidity may be found only if a Board determines that continued validity of the regulations would substantially interfere with the fulfillment of the goals of the Act. We have found that to be the case. A Board must specify which particular parts of the regulation are determined to be invalid and the reasons therefore. We have done that in the text of this decision. We have also attached the findings of fact and conclusions of law required by section .300(2) as Appendix 1 and incorporate them herein.

Dated this 10th day of April, 1996.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Nan A. Henriksen
Presiding Officer

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Wm H. Nielsen
Board Member

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appendix I

1. Island County did not adopt a comprehensive plan by July 1, 1994, as required by the GMA. No implementing development regulations have been adopted.

2. Island County established interim urban growth areas. RCW 36.70A.110(1) prohibits urban growth outside of IUGAs. Development regulations were required under the GMA by October 1, 1993.
3. Since missing the deadlines, Island County has continued to make land use decisions based on the pre-GMA Island County Code (ICC), specifically Ch. 17.02.
4. The ICC allows new urban residential, new rezones and other approvals for urban commercial and industrial uses throughout the area outside IUGAs.
5. The patterns and intensities of development in areas outside of IUGAs since the missed deadlines are urban development under the definition provided in the GMA.
6. The residential zone found in ICC 17.02.060 provides for 3.5 du/ac outside of IUGAs. Such density is urban.
7. The use of the non-residential floating zone provided for in ICC 17.02.100 allows urban commercial, urban industrial, and urban residential (6 du/ac) development outside IUGAs.
8. Since 1993 the Board of County Commissioners has approved every non-residential floating zone request even when staff and/or the planning commission have recommended denial.
9. The use of planned residential developments, density bonuses and transfer of development rights with increased densities, without any limitations for areas outside the IUGAs, constitute urban growth.

10. The allowance of agricultural and/or forest lands to be transfer of development rights receiving properties, and thus be required to divide into lots smaller than 1 du/2.5 ac, discourages conservation of productive forest and agricultural lands and encourages incompatible uses.
11. The allowance of automatic reclassification of agricultural and forest management lands to either rural residential or residential zones does not encourage maintenance and enhancement of resource lands nor their conservation, and encourages incompatible uses.
12. The provisions of the ICC and their application by the County, as noted in findings 1-11, substantially interferes with the goals of the Growth Management Act, particularly goals 1, 2 and 8.

CONCLUSIONS OF LAW

1. The Board has jurisdiction.
2. The provisions of ICC noted in this Order are invalid under the provisions of RCW 36.70A.330 and .300(2).