

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

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|---------------------------------------|---|---------------|
| WHIDBEY ENVIRONMENTAL ACTION NETWORK, | ) |               |
|                                       | ) |               |
| Petitioner,                           | ) | No. 95-2-0063 |
|                                       | ) |               |
| vs.                                   | ) |               |
|                                       | ) | COMPLIANCE    |
| ISLAND COUNTY,                        | ) | HEARING ORDER |
|                                       | ) |               |
| Respondent.                           | ) |               |
| _____                                 | ) |               |

On June 1, 1995, in our order on dispositive motions we stated:

Island County is not in compliance with the GMA because of its failure to adopt a comprehensive plan and implementing regulations by the deadlines established in RCW 36.70A.040(3)(d). In order to achieve compliance, Island County must adopt a comprehensive plan and implementing regulations by October 31, 1995. A compliance hearing is scheduled for November 7, 1995.

On November 2, 1995, we received Island County's Motion to Allow Testimony of Vince Moore. The same day petitioners filed a motion to determine development regulations invalid and a motion to add documents to the record.

The compliance hearing was held at 9:00 a.m., November 7, 1995 in Coupeville. The petitioner did not object to Mr. Vince Moore speaking on behalf of the County. Mr. Moore reported that although a complete comprehensive plan and implementing regulations had not been adopted, progress was being made. He presented a comprehensive plan schedule indicating that it was Island County's intent to adopt its comprehensive plan and implementing regulations by July 1, 1996.

Island County objected to arguing either of petitioner's motions since the County had not had the

required ten days to respond. The hearing was continued to a later date to allow for the additional response time. On November 13, 1995, we received Island County's response to petitioner's Motion to Supplement the Record and Motion to Declare Regulations Invalid. The same day we received WEAN's rebuttal to that response.

On November 17, 1995, we sent a letter to the parties confirming that the compliance hearing would be continued telephonically on December 5, 1995 at 2:00 p.m. In that letter we stated:

The issues we will be hearing at that time are:

(1) Does the Growth Management Hearing Board have jurisdiction to consider invalidity of pre-GMA regulations in a case that involves a finding of noncompliance due to "failure to timely act"?

(2) Does continued reliance on the sections of Island County Code cited by Mr. Erickson in his November 2nd motion substantially interfere with the fulfillment of GMA's goals?

Any additional briefing or materials pertinent to those issues must be provided to us by 12:00 noon on December 1, 1995.

On December 1, 1995, WEAN filed a motion to supplement the record and a brief in support of that motion. We received no additional briefing or evidence from the County.

Validity Issue 1: Does the Growth Management Hearings Board have jurisdiction to consider invalidity of pre-GMA regulations in a case that involves a finding of noncompliance due to "failure to timely act"?

The petitioner's brief of October 30, 1995 contended:

The Western Washington Growth Management Hearings Board (the "Board") has authority to make a determination concerning the validity of those provisions of the Island County Code ("ICC") currently in force which constitute development regulations whose "continued validity . . . would substantially interfere with the

fulfillment of the goals” of Chapter RCW 36.70A, the Growth Management Act (“GMA”). Sections of the ICC cited are attached to this brief as Attachment A.

i. The ICC constitutes “Development Regulations” as defined in GMA:

RCW 37.70A.030 Definitions. (8) “Development regulations” means any controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances.

ii. The most recent amendments to GMA (ESHB 1724 Sec. 110) give the Board the authority to determine if :

“ . . . the continued validity of the . . . regulation would substantially interfere with the fulfillment of the goals of this chapter;” [RCW 36.70A.300 (2)(a)]

iii. The most recent amendments to GMA require the Board in this particular case to determine if a finding of invalidity should be made:

RCW 36.70A.330(4). The board shall also reconsider its final order and decide:

(b) If no determination of invalidity has been made, whether one now should be made under the standards in RCW 36.70A.300(2).

iv. The retroactive and remedial nature of this process (determination of the prospective invalidity of development regulations) is not limited to newly adopted regulations. Nowhere does any section of the particular amendments to GMA creating and providing for this process contain any language which would indicate that their application is limited only to newly adopted regulations. While RCW 36.70A.300(4) provides for those situations where a newly adopted regulation contains a “savings clause,” this subsection is limited to those particular instances and in no way affects the other parts of the overall scheme. That the legislature singled out that particular situation for clarification merely indicates a concern that existing regulations in such cases might escape review of their validity by the Board.

v. The legislature clearly intended for those regulations which would remain in force following Board action to be subject to review under this scheme. The intent is for these provisions to be applied to those regulations on which jurisdictions would rely

prior to coming into compliance with GMA.

In its November 13 response brief, the County contended that this Board has no authority to consider pre-GMA development regulations that were not challenged in petitioner's original Petition for Review.

Because WEAN has not filed a petition alleging that any Island County zoning regulation is not in compliance with the GMA, Shoreline Management Act, or SEPA, the Board does not have the authority to hear WEAN's allegations via a "Motion to Determine Development Regulations Invalid.

The County further contended that even if WEAN had filed a petition alleging that the existing pre-GMA zoning ordinance was not in compliance with GMA, this Board would still not have jurisdiction because that Ordinance was not adopted pursuant to the GMA.

In its November 13th brief, WEAN responded:

A petition for review can allege procedural non-compliance by "failing to adopt" plans and development regulations required by GMA. Under the County's interpretation such actions can never result in Board issuance or even consideration of a determination of invalidity. As the basis of the cause of action, "failure to act" petitions for review cannot ever allege substantive non-compliance (such as substantial interference with the fulfillment of GMA's goals), due to their inherently procedural nature. Substantive issues cannot possibly be the basis of the petition. Since in all failure to act petitions to date the non-compliance consists of failure to adopt GMA mandated plans and regulations, the respondent jurisdiction will always be operating under plans and regulations that were not adopted pursuant to GMA. RCW 36.70A.280 does not allow challenges of these pre-GMA plans and regulations to be the basis of petitions for review, because the action triggering the possibility of compliance review of those plans and regulations is adoption, which must have occurred following passage of GMA. Hence, the cause of action must be different-the failure to act. However, once an appeal based on another cause of action, including failure to act, has reached a stage ripe for the application of the new scheme (i.e. the Board has found the respondent out of compliance), imposition of the new invalidity scheme by the Board is allowed by RCW 36.70A.300(2) and required for

pending cases by RCW 36.70A.330(4). The scheme does not differentiate between newly adopted plans and regulations and the existing, “pre-GMA” regulations. (pg. 4)

The new scheme is clearly intended to provide “a supplemental remedy for non-compliance” (Ibid). The remedy is temporary (it only applies until compliance with GMA occurs) and selective (the particular parts of the subject plan or regulations must be specified). The scheme’s purpose is quite clear: to prevent the continued use of plans and regulations which result in substantial interference with the fulfillment of GMA’s goals. In creating this standard, the legislature recognized a truism in planning and land management: actions today may foreclose options tomorrow. The heart of GMA are its goals of reducing sprawl, conserving resource lands, and producing environmentally and energetically efficient and sound land use patterns. Continual non-compliance with, and defiance of these goals, will inevitably, if carried on for a long enough time, make it impossible to ever fulfill those goals. Hence, the new scheme is clearly intended to prevent continued non-compliance and defiance from forever destroying the possibility of substantive compliance. (pg. 2)

The effect of acceptance of the County’s interpretation would be to allow permanent defiance of GMA in “failure to act” cases. Previously, the County argued that petitions for review based on a failure to act may not be brought. This would obviously allow permanent defiance of GMA. Even if the Governor (without being asked to do so by a Hearings Board) actually did impose sanctions, the County could continue to defy GMA by continued operation of those plans and regulations which had the effect of sabotaging possible future compliance (“substantially interferes with the fulfillment” of GMA’s goals). The County’s current argument, if upheld, would have the same effect. The County could defy GMA forever simply by failing to adopt a new comprehensive plan and implementing development regulations. There would be no mechanism by which any citizen or even the Governor could compel the abandonment of those development regulations which most flagrantly interfere with growth management. The legislature created the new invalidity scheme “to provide a supplemental remedy for non-compliance” (Olympic Environmental Council et. al. v. Jefferson County, WWGMHB Case No. 94-2-0017, Compliance Hearing Order at 1031) and clearly intended for the scheme to prevent the abuse outlined above. (pg. 6)

The last sentence cited by the County (that the Board has no jurisdiction over any legislative action not undertaken pursuant to GMA) is no longer true, due to the passage of the new invalidity scheme. The new scheme provides a mechanism which allows (and in the instant case requires) Board consideration following a finding of non-compliance of the effects of these pre-existing plans, regulations, and policies.

The trigger for Board consideration is a finding of non-compliance, regardless of the nature of the cause of action which results in that finding.

Either an adoption or failure to act may be the basis of the cause of action which results in triggering Board consideration of a determination of invalidity.

Now that WEAN's procedural complaint (the failure to meet GMA's statutory deadlines) has progressed to the point of being subject to RCW 36.70A.330(4), the Hearings Board has no choice other than to implement the new invalidity scheme.  
(pg. 7)

### Conclusion

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We start with an analysis of our jurisdiction to review portions of the Island County Zoning Code that were adopted prior to and/or outside the scope of the GMA. The County's failure to adopt development regulations pursuant to GMA thus is not in compliance with the Act. Recent amendments to RCW 36.70A.330(4) direct that we "shall" reconsider the final order and decide, where no previous determination of invalidity was made, whether one should be made at this stage under the standards set forth in RCW 36.70A.300(2). That statute provides in part:

A finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and *development regulations* during the period of remand, . . .  
(emphasis added)

A noncompliance finding does not affect comprehensive plans or development regulations unless there is a further finding that they are invalid under subsection (2) standards.

To answer the issue in this case, we compare the definition of "development regulations" with the definition of "comprehensive plan."

RCW 36.70A.030(4) states:

"Comprehensive land use plan," "comprehensive plan," or "plan" means a generalized coordinated land use policy statement of the governing body of a county or city *that is adopted pursuant to this chapter*. (emphasis added)

RCW 36.70A.030(7) states:

“Development regulations” means the controls placed on development or land use activities by a county or city, including, but not limited to, *zoning ordinances*, critical areas ordinances, Shorelines Master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto . . . (emphasis added)

Interestingly, the balance of that definition was recently changed, but the part quoted here has not been amended since the inception of GMA.

In looking at the definitions of a comprehensive plan versus the definition of a development regulation, the plain language of the Act provides that a comprehensive plan is one adopted pursuant to RCW 36.70A, whereas a development regulation, which includes a zoning ordinance, is not required to be one adopted “pursuant to this chapter.” The provisions of RCW 36.70A.330 require us to reconsider our Final Order and make a determination of whether invalidity should be imposed. They also provide us authority to review existing development regulations regardless of whether those regulations were adopted pursuant to RCW 36.70A.

Validity Issue 2: Does continued reliance on the sections of Island County Code cited by Mr. Erickson in his November 2nd motion substantially interfere with the fulfillment of GMA goals?

WEAN asserts that the Island County Code currently in force substantially and on its face interferes with the fulfillment of GMA’s goals by allowing, encouraging, and facilitating urban development and sprawl outside of IUGAs in the rural parts of Island County; encouraging residential development of resource lands; allowing rezones on demand of resource lands; and allowing business, commercial and residential development without limitation outside of IUGAs throughout the rural part of Island County. It facially appears to us that many of the referenced sections do substantially interfere with the fulfillment of GMA’s goals of reducing sprawl; containing urban development to areas where services can be efficiently provided; and encouraging the conservation of productive forest lands and productive agricultural lands and discouraging incompatible uses.

We recognize that a finding of invalidity may have significant impacts. It is therefore necessary for us to have all the information available to make an informed and fair decision. In order to ensure that the County has adequate opportunity to present information refuting the evidence presented by WEAN and the facial appearance of substantial interference, we will reserve our decision on a finding of invalidity. We will conduct another hearing on March 28, 1996, to allow the County to report its progress toward reaching compliance and to provide additional arguments and evidence regarding invalidity. We will address each of the contested sections of the Island County Code at the March 28th hearing.

Order

Pursuant to RCW 36.70A.330(3), we find that Island County continues to be in non-compliance with the Act. We will reserve determination on a recommendation of sanctions until after the March 28, 1995, hearing and subsequent decision on invalidity.

So ordered this 19th day of December, 1995.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Nan A. Henriksen  
Presiding Officer

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Les Eldridge  
Board Member

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W<sup>m</sup> H. Nielsen  
Board Member