

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

WHIDBEY ENVIRONMENTAL ACTION NETWORK,)	
)	No. 95-2-0063
Petitioner,)	
)	ORDER DENYING
vs.)	RECISION OF
)	INVALIDITY
ISLAND COUNTY,)	
)	
Respondent.)	
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On April 10, 1996, and October 6, 1997, we entered separate orders invalidating certain provisions of the Island County Code (ICC). On December 8, 1997, after a public hearing on the matter, the Board of County Commissioners (BOCC) adopted Ordinance C-78-97. A motion for recision of the two invalidity orders was received from Island County on December 12, 1997. The motion requested recision under the provisions of RCW 36.70A.302, as amended by ESB 6094. We notified the parties that we interpreted the provisions of RCW 36.70A.330(2) to require a finding on the motion within 45 days of December 12, 1997. We made the determination that RCW 36.70A.302(6) did not apply because legislative action, which was the basis for the motion for recision, had been taken by the County. Section .302(6) applies to situations where no legislative action has been taken, but a county or city request the hearing to present further information or ask for clarification of the invalidity finding. This interpretation is in accordance with provisions of WAC 242-02, which became effective January 20, 1998. We did provide the County the opportunity to proceed under the provisions of .302(6), but the County declined that option.

A schedule of briefing was established and a hearing was held January 14, 1998. We recognize the effort that went into adoption of Ordinance C-78-97 and appreciate the County's attempts to remove the invalidity. On balance, we do not find that the County has sustained its burden of showing that the ordinance no longer substantially interferes with fulfillment of the goals of the Growth Management Act (Act). RCW 36.70A.302(7)(a), RCW 36.70A.320(4).

Initially, we must determine what is necessary for a city or county to sustain its burden of showing a plan or regulation or interim control no longer substantially interferes with the goals of the Act. We agree with the County that recent amendments to RCW 36.70A.302(7)(a) allows a local government to either amend the invalid plan or regulation or to subject such plan or regulation to “interim controls.” The amendment or interim control resolution or ordinance must no longer substantially interfere with the goals of the Act. In *Port Townsend v. Jefferson County*, #94-2-0006 (Compliance Order dated December 14, 1994), we said that the issue before us in compliance hearings is not whether a local government specifically complied with our order, but whether the local government complied with the Act. The same holds true in the rescision or modification of invalidity context. We must determine whether substantial interference with the goals of the Act has been removed, not just whether the items in the order have been addressed. A local government may not adopt an ordinance that either imposes new independent invalidity provisions or otherwise does not remove the substantial interference of the goals of the Act.

An examination of Ordinance C-78-97 and the exhibits submitted in support of the motion demonstrates the failure of the County to show that it no longer substantially interferes with the goals of the Act. Initially, the ordinance itself “adopts the attached vesting rules and interim application procedures” as a response to the April 10, 1996, and October 6, 1997, orders of invalidity. The attached schedule B is entitled “Interim Application Procedures.” As an example, item 3c pertaining to the agriculture zone and 4c pertaining to the forest management zone, both continue to accept applications for “new subdivisions, short subdivisions and planned residential developments” except for any transfer of development rights. Items 5b, 6b and d and 7b all state that “new site plan review applications” would be accepted for uses that comply with the compliance order of April 10, 1996, and October 6, 1997.

Ex. #23, a document dated November 26, 1997, is a statement from the responsible official that the ordinance was categorically exempt from the State Environmental Policy Act procedures of WAC 197-11-800(20). The basis for this categorical exemption was that the ordinance only affected “procedures containing no substantive standards respecting use” of the zoning code. That same language was adopted as part of Ordinance C-78-97. The public hearing held by the BOCC involved a great deal of discussion by the County’s legal advisor that the ordinance and attachment B were designed to answer the specific rationale expressed in our two invalidity

orders. Nothing beyond that specific scope was presented or discussed. The record showed that the ordinance merely expressed the current policy adopted by the planning department as a response to the invalidity orders. The language of the ordinance, the supporting documentation and the method of presentation at the public hearing before the BOCC consistently expressed that the ordinance was purely “procedural” in effect. While the County’s legal advisor used the term “moratorium” during the public hearing process, there is nothing in the language of the ordinance itself that succinctly imposes such a determination.

In our hearing on January 14, 1998, the County contended that this “procedural” ordinance had a “substantive effect.” The County noted that the opposing parties had not directed any of their argument to the substance of the ordinance, but only to the procedural applications. The logical explanation for that approach, by the opposing parties, is that the County had consistently stated that the ordinance was one of procedure only and thus there was no “substance” to address.

We do not find that the ordinance satisfies the statutory requirement that it be an “interim control.” Certainly, the ordinance here is “interim” because it expires at the adoption of the comprehensive plan and development regulations (DRs) (an adopted work plan targets April 27, 1998, for adoption) or December 8, 1998, whichever occurs sooner.

The difficult question is whether the ordinance is a “control” sufficient to satisfy the statute. A subset of the “control” issue involves the County’s use of compliance with our previous orders as a basis for accepting or not accepting a permit application. Our orders are not intended to be DRs or interim controls. We have observed that courts, parties, and others occasionally interpret language in our orders that, at best, seems strange to us. It is incumbent upon a local government to specifically articulate exactly what will and will not be allowed in the invalidated zones or areas in order to sustain its burden showing that it no longer substantially interferes. Using our previous orders as a DR is sufficient in and of itself for us to find that the County has failed in its burden of proof in this case.

This ordinance, as a procedural interim control, does not satisfy the statutory requirements sufficiently to enable us to determine that substantial interference no longer exists. It would appear to be difficult for a purely “procedural” ordinance to satisfy the statute. We do not hold that a procedural ordinance could never achieve rescission. We hold that under the record in this

case, Ordinance C-78-97 does not remove the offending ICC provisions from continuing to substantially interfere with the goals of the Act.

The County's motion is denied.

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

Pursuant to WAC 242-02-830(2), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 26th day of January, 1998.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge
Board Member

Nan A. Henriksen
Board Member