

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

WHIDBEY ENVIRONMENTAL ACTION)	
NETWORK,)	No. 95-2-0063
)	
Petitioner,)	
)	THIRD COMPLIANCE
vs.)	HEARING ORDER
)	AND FINDING OF
ISLAND COUNTY,)	INVALIDITY
)	
Respondent.)	
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We issued this case's second compliance hearing order on April 10, 1996. In that order, we found that Island County had not yet adopted a comprehensive plan and implementing regulations as required by the Growth Management Act (GMA, Act) and that no interim steps had been taken to preclude new urban development outside interim urban growth areas (IUGAs). Thus, Island County remained out of compliance. We also reviewed and reaffirmed our previous decision on jurisdiction to determine pre-GMA development regulations invalid. In that order, we determined invalid portions of the Island County Code (ICC) that substantially interfered with GMA's goals of restricting urban development to urban growth areas (UGAs) and conserving resource lands.

On July 6, 1997, Whidbey Environmental Action Network filed a new motion requesting that we determine additional portions of the ICC invalid. Challenged were standards for industrial, commercial, and mixed commercial-residential development as applied outside IUGAs and two provisions of Island County's wetlands ordinance.

Whidbey K.S.C., L.L.C. moved to intervene on August 4, 1997. Following a telephonic hearing on August 21, 1997, we granted their motion. The August 27, 1997, compliance hearing was held in Olympia. Present were the three members of the Western Washington Growth

Management Hearings Board (Board). Representing Island County were David Jamieson, Jr., Deputy Civil Prosecutor, and Vincent Moore, Planning Director; representing Whidbey Environmental Action Network (WEAN) were Steve Erikson and Marianne Edain; representing participant Save the Woods on Saratoga (SWS) was David Bricklin; representing intervenor Whidbey K.S.C., L.L.C. was Matthew Turetsky. Also present was William Appelgate.

We separate our analysis into general legal issues, issues relating to the challenge to the ICC's development (industrial, commercial, and mixed-use) standards, and issues relating to the challenge to the critical area regulations. We then examine the specific challenged portions of the ICC to determine if their continued validity substantially interferes with the fulfillment of GMA's goals.

GENERAL LEGAL ISSUES

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General legal arguments raised in opposition to WEAN's request for invalidity were:

1. The Board lacks jurisdiction to determine pre-GMA regulations invalid [Island County's response brief]. This is addressed as general legal issue 1.
2. Principles of claim preclusion, res judicata, and collateral estoppel preclude WEAN from asking for additional invalidation of provisions of the ICC. [Island County's response brief and Whidbey K.S.C., L.L.C. reply brief]. This is addressed as general legal issue 2.
3. The Board may not hold a compliance hearing upon motion of the petitioner. [Island County at the August 27th compliance hearing]. This is addressed as general legal issue 3.

General Legal 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?"

We initially ruled that the Board has jurisdiction to invalidate pre-GMA regulations in this particular case. [WWGMHB, Case No.95-2-0063, Second Compliance Hearing Order and

Finding of Invalidity, at p. 1815 and 1820] We have upheld this ruling in two other cases [WWGMHB, Case No. 95-2-0065, Finding of Non-Compliance....., at p.1546; and Case No. 94-2-0009, Third Compliance Order, at p. 1785].

The County argued that the Board should reverse these previous rulings that it has jurisdiction to consider invalidity of pre-GMA regulations. In support, it submitted appeal briefs to the Court of Appeals and the Supreme Court from one of these cases. In response, SWS submitted a response brief submitted in the same case. Neither court has ruled on this issue yet. Many of the issues raised in these briefs are constitutional ones. The Growth Management Hearings Boards do not have jurisdiction over constitutional issues.

Conclusion: We have carefully reviewed the other arguments raised in these submissions and reaffirm our previous decision that the Board does have jurisdiction to consider invalidity of pre-GMA regulations.

General Legal Issue 2: Do principles of res judicata, collateral estoppel, and/or claim preclusion prevent WEAN from asking for invalidity of additional portions of the ICC?

The County argued:

“WEAN’s claim that other portions of Island County’s existing pre-GMA Zoning Ordinance are invalid should not be considered as the Board’s prior decision is res judicata and WEAN is precluded from raising additional claims that it could have raised in the prior hearing.” [Island County reply brief].

WEAN responded:

“Principles of collateral estoppel, res judicata, and claim preclusion do not prevent the Board from considering WEAN’s motion for invalidity. Two previous decisions by the Central Puget Sound Growth Management Hearings Board concluded that the Hearings Boards lack jurisdiction to consider these arguments. Even if the Board had authority to consider arguments based on these principles, they are not applicable in this particular case, since the issues are different than those addressed in the previous compliance hearings. The County ignores the time dependent nature of the standard that triggers invalidity - substantial interference with the fulfillment of GMA’s goals.” [WEAN reply brief at 14.].

At the August 27th hearing, SWS also argued that WEAN was not precluded from seeking additional remedies to gain compliance with the Board's previous decision.

The County asserted that the Motion for Invalidity was barred by the principle of res judicata. We decline to rule on the County's assertion that the principle of res judicata applies because the facts here would not support its application.

SWS responded to the County's argument by noting that the County had failed to cite any case which stands for the proposition that res judicata applies to preclude a party from seeking additional remedial orders from a court (or administrative agency) subsequent to obtaining an initial judgment. SWS distinguished this situation from one where an applicant is seeking to initiate a new lawsuit (or administrative appeal) raising new legal issues. As SWS correctly noted, this is a situation where the applicant has previously obtained the equivalent of a judgment in its favor and is now seeking to obtain additional remedial orders from the court to assure compliance by the wrongdoing party.

SWS noted that none of the cases cited by the County suggest that a party who has obtained an initial judgment in its favor is precluded from returning to the court (or administrative agency) on successive occasions to obtain additional court (or agency) orders necessary to compel compliance or otherwise obtain the fruits of its original judgment. The County had an opportunity to reply to this argument at the hearing and in post-hearing briefs but has failed to do so. The record is devoid of any legal authority to support the County's proposition that res judicata applies to preclude a party from seeking additional remedial orders.

Moreover, res judicata requires an identity of issues. That is necessarily lacking here. The determination of whether a regulation (or Comprehensive Plan provision) is invalid changes over time. At one time, it may appear that a regulation will be short lived (soon to be amended) and therefore will not cause substantial interference with the Act's goals. Subsequently, it may be evident that the regulation will remain in existence for a longer period of time causing a substantial interference with the Act's goals. Later, if the economy has picked up and numerous development applications are being filed, the likelihood that a noncompliant development regulation will cause substantial interference with the Act's goals increases.

Further, as a policy matter we are reluctant to apply the principle of res judicata because it may undermine efforts of citizens and elected officials to amicably resolve GMA disputes. Petitioners should not be forced to seek invalidation of every conceivable plan element and/or development regulation at the outset. Where there is a possibility for good faith discussions to resolve points of contention, petitioners should be allowed to forego immediately seeking invalidity to allow such efforts to bear fruit. A rule that broadly applied res judicata principles in the invalidity setting would provide a catalyst for petitioners to seek invalidity early in the process when it might be counter-productive to efforts to resolve disputes amicably.

Our decision is also consistent with that portion of the GMA which authorized the Board to schedule multiple compliance hearings. RCW 36.70A.330. Certainly, the Legislature anticipated that additional issues might be raised during the compliance/remand process.

Conclusion: Since the County has yet to comply with our previous order in this case, WEAN is not precluded from seeking additional remedies to compel compliance and prevent continued implementation of development regulations which substantially interfere with the goals of the Act.

General Legal Issue 3: May the Board hold a hearing to consider invalidity upon motion of a petitioner?

At the compliance hearing on August 27th, Island County argued that RCW 36.70A.330(1) prevents the Board from holding a compliance hearing in response to a motion by a petitioner. WEAN responded that the Board could hold a compliance hearing when it chose, whether or not in response to a motion by a petitioner.

First we review the statute and its amendment in 1995:

RCW 36.70A.330 Noncompliance.

(1) After the time set for complying with the requirements of this chapter under RCW 36.70A.330(1)(b) has expired, or at an earlier time upon the motion of a county or city subject to a determination of invalidity under RCW 36.70A.300, the board, ~~on its own motion or motion of the petitioner~~ shall set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of this

chapter. [Language added in 1995 is underlined; that deleted is struck through.]

Prior to the 1995 amendments, a county or city found to be out of compliance could not compel a Board to hold a compliance hearing earlier than a Board or petitioner motion. When the remedial invalidity enforcement scheme was added to GMA, concern was raised that .330(1) could have had the result of preventing the county or city from bringing responsive regulations before a Board for review prior to the compliance hearing set by a Board or motioned by the petitioner. The amendment now expressly allows such a motion by the affected county or city in these situations.

The first part of the section continues to allow a Board to set a compliance hearing when it chooses. Removed is the requirement that a compliance hearing be set upon motion of a petitioner. However, this in no way prohibits such a motion by a petitioner, it merely provides a Board discretion to decide whether or not to set a compliance hearing to consider the motion.

Conclusion: A Board can choose either to set or not to set an additional compliance hearing. In this case, we have chosen to hold another compliance hearing.

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DEVELOPMENT STANDARDS
(INDUSTRIAL, COMMERCIAL, AND MIXED-USE) ISSUES

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The ICC contains two non-residential (NR) zoning designations: the NR Floating zone [ICC 17.02.100] and the NR zone [ICC 17.02.105]. The same activities are allowed in, and the same standards apply to, both NR zones. The NR Floating zone could be sited on any rural residential lands in the County. We previously determined invalid Island County's NR Floating zone. (WWGMHB, Case No. 95-2-0063, Second Compliance Hearing Order and Finding of Invalidity, at p. 1817-18).

The other NR zoning designation consists of specific parcels that were in commercial zoning designations prior to adoption in 1984 of the ICC. Upon adoption of the current zoning code, these parcels were given the NR zoning designation. At issue in this case is the application of the challenged provisions of the ICC to these parcels.

WEAN contended that:

1. Much of the land zoned NR is undeveloped rural land.
2. The type and scale of industrial, commercial, and mixed-use development allowed in these areas constitutes urban growth.
3. The challenged portions of the ICC which set standards for industrial, commercial, and mixed-use development on NR zoned lands outside of IUGAs violate and substantially interfere with GMA's sprawl reduction goal.

To illustrate its claim that continued validity of these provisions substantially interfered with the fulfillment of GMA's goals, WEAN submitted:

1. Excerpts from the findings of fact for the ICC adopted in 1984 which stated that many of these parcels were "not appropriate locations for commercial or industrial development."
2. Excerpts from the application for a major destination resort by Whidbey K.S.C., L.L.C.

Arguments raised in opposition to WEAN's request for invalidity were:

1. The challenged industrial and commercial provisions of the ICC only apply to the invalidated NR Floating zone and therefore we have no reason to determine these provisions invalid. [Island County Response Brief].
2. Residential use, as allowed in the mixed use provisions of the ICC, is more conforming to GMA's goals than commercial use. [Island County Response Brief].
3. Recent amendments to GMA pertaining to rural lands allow the types of development claimed by WEAN to substantially interfere with the fulfillment of GMA's goals. [Economic Development Council (EDC) response brief].
4. The destination resort, used by WEAN as an example, conforms to GMA's goals. [Whidbey K.S.C., L.L.C. motion to intervene and EDC response brief].

We address each of these issues in turn.

Development Issue 1: Do ICC 17.02.150 (h) and (i) apply to existing NR zoned parcels?

The Deputy Prosecutor argued that these provisions to the ICC applied only to the NR Floating

zone and, since the NR Floating zone had already been determined to be invalid, there was no reason to address WEAN's request for invalidity. WEAN responded that the County Planning Department had not interpreted the challenged regulations this way and, if the Planning Department interpretation was correct, the regulation's continued validity would substantially interfere with the fulfillment of GMA's goals. If the Deputy Prosecutor's interpretation was correct, invalidating the challenged regulations would clear up any confusion as to the regulations' application to existing NR zoned parcels. At the August 27th hearing, neither the Deputy Prosecutor nor Planning Director addressed this specific question. WEAN's claim that different departments of Island County interpreted the application of these regulations differently went un rebutted.

We note that ICC 17.02.105, which established the NR zone, invokes all other sections of the zoning ordinance, including the challenged regulations. Furthermore, whether a regulation interferes with GMA's goals depends both on its language and its actual application. The regulation's effect is inherently dependent on how it is interpreted by those administering it.

Conclusion: In deciding whether the challenged regulation meets GMA's substantial interference test, we will look to the regulation's language and also to its interpretation by those who administer its application.

Development Issue 2: Is residential use, as allowed in ICC 17.02.150 (k), more conforming to GMA's goals than commercial use?

The County, in its response brief, argued:

"Since Island County is not allowing any new zone changes to

Non-Residential, allowing more conforming use, i.e. residential use, on existing Non-Residential zoned property does not interfere at all with the fulfillment of the goals of the GMA." [Island County reply brief].

We interpret this to suggest that residential use is always more conforming to GMA's goals than other (non-residential) uses. GMA, however, makes no such distinction in its definition of urban growth:

(14) "Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources. RCW 36.70A.030.

Thus, GMA does not, in its definition of urban growth, distinguish between residential and other

types of urban growth. Either type of growth may constitute urban growth as defined in GMA. The key questions are whether the allowed growth is urban in nature and, if so, whether it occurs in an area suitable for and delineated by GMA for urban growth.

Conclusion: Residential development is not necessarily more conforming to GMA's goals than non-residential development.

Development Issue 3: Do the recent amendments to GMA pertaining to rural lands now allow the types of development which WEAN claims substantially interfere with the fulfillment of GMA's goals?

The EDC argued in its reply brief that the 1997 amendments to GMA allow the sort of development WEAN seeks to prevent and that:

"To approve their petition would be to ignore long standing, historic county commercial patterns, the amendments to GMA concerning rural development [implemented by ESB 6094], as well as create severe hardship regarding job opportunities and tax revenues." [EDC reply brief at 4.].

WEAN responded that:

"The recent GMA rural lands amendments do not open the floodgates to sprawl. They continue GMA's principle of placing intensive development first in areas of already existing intensive development. They narrowly circumscribe the qualifications for a rural area to be eligible for more intensive development. The area and its use must actually be pre-existing and be capable of being defined by a "logical" boundary based primarily on geographical factors. Undeveloped rural lands may be part, but not all, of an area meeting GMA's qualifications for eligibility as an area of more intensive rural development. Pre-GMA zoning is irrelevant to this determination." [WEAN reply brief at I. B. 5.]

At the August 27th hearing, SWS argued that contrary to EDC's argument, the problem with the challenged provisions of the ICC was that they did continue "long standing, historic county commercial patterns."

Conclusion: The new amendments to GMA contained in RCW 36.70A.070(5) do not apply to County action taken before July 27, 1997. We will issue no advisory opinion on this issue.

Development Issue 4: Does the destination resort used by WEAN as an example show that ICC 17.02.150 (h), (i), and (k) substantially interfere with the fulfillment of GMA's goals?

WEAN argued:

"The proposed destination resort used by WEAN to illustrate how the continued validity of ICC 17.02.150. (h), (i), and (k) substantially interferes with the fulfillment of GMA's goals constitutes major new urban development. Neither the property nor the surrounding area meet GMA's tests for eligibility as a rural area suitable for more

intensive development.

The proposal massively contravenes numerous GMA goals." [WEAN reply brief at 8.] Both EDC and Whidbey K.S.C., L.L.C. characterized the proposed development as a master planned resort and argued that as such, the proposed development does not and cannot interfere with GMA's goals, since GMA makes allowance for master planned resorts. First, we consider whether the resort constitutes urban growth outside of an IUGA. Then we consider whether approval of such development illustrates interference with the fulfillment of GMA's goals, where the county has failed to adopt a comprehensive plan and implementing regulations as required by GMA.

The resort will include a:

"200 room lodge with food service, convention facilities, meeting rooms, theater, swimming pool, spa, game room, gift store, and related administrative and support spaces; 78 one and two bedroom cottages; two remote meeting rooms; an athletic club; outdoor recreation and sports courts; horse stable and rink; maintenance facilities, walking, biking and riding trails; parking areas [for over 450 cars]; a visitor center; convenience store and equipment rental area; and utility systems". [Attachment F]. At its peak capacity, the resort will have over 100,000 visitors per year and 250 full time equivalent employees, many of whom will be "navy wives" commuting from Oak Harbor on North Whidbey. [Oral report of John Hitt, Executive Director, Island County Economic Development Council, to the Langley City Council, 8/6/97, as heard by Steve Erickson]." [WEAN reply brief at 10. C.].

From the evidence submitted by all parties, at capacity the resort, if built, will have a population of nearly 1,000 people on parcels of land totaling about 160 acres. This many people in this small an area appears to be an urban density. When coupled with a 200 room lodge, 78 one and two bedroom residential cottages, parking for over 450 cars, and numerous other structures, the resort will "make intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources".

RCW 36.70A.030(14). Thus, the resort appears to meet GMA's definition of urban growth. Due to its scale it will certainly require urban services and facilities. It is located several miles outside of Langley's IUGA.

At the August 27th hearing we examined aerial photographs and zoning maps of the area of the resort proposal. [Exhibits L-1, M-1, N-1, and O-1]. This evidence shows the area as primarily forested, with a grass airstrip characterized by Whidbey K.S.C., L.L.C. as "abandoned" [Exhibit S]. It clearly does not appear to meet GMA's definition of being characterized by urban growth.

RCW 36.70A.030(14).

The question then remains:

If a county has failed to adopt a comprehensive plan pursuant to GMA, or if the GMA plan fails to make specific allowance for master planned resorts, is a master planned resort outside of UGAs inconsistent with GMA's goals?

GMA prohibits siting master planned resorts and major industrial developments outside of UGAs unless a comprehensive plan makes specific allowance for them. Again, this indicates that these special exceptions to GMA's prohibition on new urban growth on undeveloped lands outside of UGAs must occur within the context of overall GMA planning requirements and goals. These include providing adequate supporting services and facilities, and making a conscious, reasoned choice following a process that includes public participation at the plan level where policy is formed. The siting of a master planned resort or major industrial development in a county which is over three years overdue in adopting a comprehensive plan must necessarily be outside of this context, and therefore the development cannot conform to GMA's goals. We express no opinion on whether the development is vested at the date of this order. If it is, nothing herein will affect its allowance. RCW 36.70A.300(3)(b).

Conclusion: The resort application used by WEAN as an example demonstrates that the continuing validity of ICC 17.02.150 (h), (i), and (k) substantially interferes with the fulfillment of GMA's goals. The resort would easily meet GMA's definition of urban growth; would certainly require urban services and facilities; and is located several miles outside of Langley's IUGA. The area meets neither GMA's definition of being "characterized by urban growth" nor that of being an "existing area or use" where more intensive rural development may be allowed. Because of the County's failure to adopt a GMA comprehensive plan with specific provisions for master planned resorts or major industrial development outside UGAs, a regulation which could allow the siting of a master planned resort or major industrial development outside of an IUGA must necessarily substantially interfere with the fulfillment of GMA's goals.

CRITICAL AREA ISSUES

WEAN has requested invalidation of two provisions of Island County's critical area ordinances regarding wetlands, arguing that because they fail to include the best available science and/or involve a complete exemption from regulation, they substantially interfere with GMA's critical

areas protection goal. [WEAN motion to invalidate development regulations].

Island County responded that because WEAN did not challenge the ordinance within 60 days of its adoption, it may not do so now. [Island County reply brief].

WEAN responded:

"Once the County is found in non-compliance, its regulations are no longer presumed valid. They may be invalidated, including previously adopted critical area regulations. GMA's new "best available science" standard postdates GMA's deadlines for adoption of protective critical area regulations. The regulations become subject to invalidation whether or not they are the cause of action leading to the County's being found in non-compliance. Otherwise, the County can avoid complying with the "best available science" standard forever, simply by failing to adopt a comprehensive plan pursuant to GMA and never amending the particular portion of the suspect development regulation." [WEAN reply brief, at 19.]

At the August 27th hearing, WEAN also argued that the exemption from regulation amounted to a failure to designate critical areas, and that the Board could determine invalid the challenged regulations because when the County failed to adopt the comprehensive plan in 1994, it also failed to review its critical area regulations as required by GMA.

Although we have previously found that we have jurisdiction to invalidate pre- GMA ordinances, we have no such authority for invalidating ordinances adopted under GMA and unchallenged within 60 days of publication of notice of adoption.

The County and WEAN supplied us with information which puts in question whether Island County's wetlands ordinances were actually adopted under GMA and whether publication was adequate. However, no petition has been filed appealing these issues. Even though we have concerns about the contested sections' noncompliance with GMA and potential interference with the goals of the Act, the ordinances are presumed valid.

If anyone wishes to pursue these and other alleged short-comings of Island County's procedures regarding adoption and review of critical areas ordinances, a petition must be filed. The County and others would thus be afforded the full petition process to respond to such claims.

INVALIDITY

In our December 19, 1995, ruling that we had jurisdiction to invalidate development regulations adopted prior to GMA, we noted that the challenged regulations appeared to substantially

interfere with the fulfillment of GMA's goals. We provided the County with an additional three months to come into compliance or take interim steps to preclude new urban development outside IUGAs. The County failed to take any actions during that period.

In our second compliance hearing order and finding of invalidity, April 10, 1996, we noted that GMA directed the adoption of ordinances establishing IUGAs by October 1, 1993, that precluded new urban development outside IUGAs prior to adoption of comprehensive plans by July 1, 1994. Since missing those deadlines, Island County has continued to make land use decisions based on the ICC, Chapter 17.02. Island County has taken no steps to restrain urban development outside IUGAs while the County continues work on its comprehensive plan, now over three years late.

In its reply brief at page 10 WEAN argued:

"As WEAN previously argued regarding the time dependent nature of the standard for imposing invalidity:

'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.....Continual non-compliance with, and defiance of these [GMA] 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.' [WEAN's Brief of 11/13/95, cited in WWGMHB Case No. 95-2-0063 at p. 1145].

Hence, whether a development regulation meets GMA's test of substantial interference depends on three factors:

- a. The magnitude (or egregiousness) of the violation of GMA;
- b. How long the violation has occurred;
- c. How much longer it will likely occur absent invalidation.

These factors mean that while invalidation of a regulation which constitutes a violation over a brief period may not be justified, the same violation continued for longer, or even indefinitely, may easily meet the standard for invalidation. The nature of the County's continued non-compliance is indefinite, with adoption of a comprehensive plan and implementing regulations pursuant to GMA always just four months away. For this reason, we believe that the challenged portions of the ICC now meet the standards for invalidation, and we request that the Board conclude likewise." [WEAN reply brief at 15. C.].

We will keep this three-pronged test in mind as we examine each of the challenged regulations,

ICC 17.02.150 (h), (i), and (k), set against the backdrop of Island County's long standing, continuing non-compliance.

ICC 17.02.150 (h)(1) (a), (c), and (d), Industrial Development Standards

The challenged section of the ICC "illustrates some typical industrial uses" allowed throughout the rural residential zone. [ICC 17.02.150 (h) (1)]. These are:

- (a) Boat building;
- (b) Saw mills;
- (c) Light fabrication, assembly or manufacturing;
- (d) Warehousing or storage.

WEAN argued that:

".....we recognize that if this regulation does apply to the grandfathered Non-Residential zone, some of the types of development permissible under it would not violate or interfere with GMA's goals. Given the regulation's construction, it is possible to invalidate those portions allowing the offending types of development, leaving only clearly resource dependent uses. However, we reiterate our previous request that the Board in its decision make clear that the use of "Sawmills" to illustrate the kinds of allowable development refers to their resource dependent nature. If the Board does not believe it can do this, then we request that all of ICC 17.02.150 (h) be invalidated." [WEAN reply brief at 17. E.].

In determining if the challenged regulation meets GMA's substantial interference test, we use the three-pronged test.

1. The challenged regulations affect the entire Rural Residential zone, which is the predominant zone in Island County. Aerial photographs of the site of Whidbey K.S.C., L.L.C.'s master planned resort for example, show a large parcel of NR land that is essentially undeveloped. [Exhibits L-1, M-1, N-1, and O-1; Board index No. 35, 36, 37, and 38]. On isolated, undeveloped lands such as this, siting of boat building, light fabrication, assembly or manufacturing, warehousing or storage as allowed by the ICC is clearly sprawl. Saw mills, if they support activities on natural resource lands, may be allowable outside of UGAs.

2. These activities have been allowed by the ICC since its adoption in 1984.

2. The result is:

"Island County has historically seen a development pattern of scattered and decentralized retail and industrial developments. These rural, unincorporated commercial and industrial areas account for nearly 50% of all county sales activities and over 50% of all county jobs, including our three incorporated cities." [Economic Development Council's reply brief at

2.; Board Index No. 4.].

3. Island County's continuing delays in complying with GMA's sprawl reduction goal are discussed elsewhere. Continuing to allow implementation of these sections of the ICC will only exacerbate the situation described by the EDC, where "scattered and decentralized" industrial, commercial, and retail developments sprawling throughout the rural areas of Island County make the efficient provision of services and facilities increasingly difficult and create permanent transportation inefficiencies.

We find that the continued validity of ICC 17.02.150 (h) (1) (a), (c), and (d), as applied outside IUGAs, substantially interferes with the fulfillment of the goals of the GMA. ICC 17.02.150 (i), Commercial Development Standards

WEAN requested the invalidation of the entire section. The challenged section includes illustrations of some of the typical commercial uses allowed throughout the rural residential zone. [ICC 17.02.150 (i) (1)]. These are:

- (a) grocery stores and supermarkets;
- (b) hotels and motels;
- (c) restaurants;
- (d) bowling alleys;
- (e) office buildings;
- (f) home furnishings and appliances.

The same arguments were raised for and against the invalidation of this section as were raised regarding ICC 17.02.150 (h) (1) (a), (c) and (d). We make a similar ruling. These activities are clearly not resource supporting or dependent. Depending on the scale of the particular development, its location on undeveloped lands outside of IUGAs may constitute sprawl or urban growth. Allowing the continuing siting of such development outside of IUGAs frustrates GMA's goals for reducing sprawl and locating urban growth where services can be efficiently provided.

We find that the continued validity of ICC 17.02.150 (i), as applied outside IUGAs, substantially interferes with the fulfillment of the goals of the GMA.

ICC 17.02.150 (k), Mixed-Use Development Standards

This section of the ICC allows mixed commercial and residential development on all NR zoned lands, including lands which are currently undeveloped and isolated from developed areas.

Because it allows the same type and scale of commercial development as ICC 17.02.150 (i), it suffers from the same problems. Additionally, the challenged section contains no limits on the density of the residential uses associated with the commercial development. This is again a recipe for sprawl or urban growth outside of UGAs. This clearly frustrates GMA's goals of sprawl reduction and locating urban growth where services can be efficiently provided.

We find that the continued validity of ICC 17.02.150 (k), as applied outside IUGAs, substantially interferes with the fulfillment of the goals of the GMA.

We have attached findings of fact and conclusions of law supporting the above declarations of invalidity as Appendix 1 and incorporated them herein.

CONCLUSION

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

After the first compliance hearing, we gave the County over three additional months to either come into compliance or take interim steps to restrain sprawl and urban growth outside of IUGAs. The County took no action prior to the second hearing and finding of invalidity. The County has taken no voluntary action since. The only means to date by which development in Island County has been affected by GMA is through our previous invalidation of portions of the County's zoning code. Those parts of the code were invalidated because they egregiously violated and interfered with the most fundamental goals of the GMA. The parts of the code we invalidate today are likewise egregiously affecting those fundamental goals.

Urban growth outside of interim urban growth areas (with a few exceptions) is prohibited. This is the purpose of GMA's requirement to designate interim urban growth areas. The County has had nearly four years since GMA required it to do so to constrain urban growth and sprawl.

To compel compliance with GMA, we have only two powers: invalidating plans and regulations which substantially interfere with the fulfillment of GMA's goals and requesting the Governor to impose financial sanctions.

WEAN also requested that we recommend to the Governor that sanctions be imposed. Although sanctions may be justified at this time, we wish to give Island County one more opportunity to

bring itself into compliance before we take such action.

An additional compliance hearing is scheduled for February 4, 1998. If Island County has not adopted a comprehensive plan by that date, we will consider recommending sanctions.

So ORDERED this 6th day of October, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

William H. Nielsen
Board Member

APPENDIX 1

FINDINGS OF FACT

1. Island County has failed to adopt a comprehensive plan by July 1, 1994, as required by the RCW 36.70A.040(3)(d). No implementing regulations have
1. been adopted.

2. Island County has established interim urban growth areas. RCW 36.70A.110(1) prohibits urban growth outside of IUGAs.
3. After missing the deadlines for adoption of a comprehensive plan and implementing regulations, Island County has continued to make land use decisions based on the pre-GMA Island County Code (ICC), specifically Ch. 17.02.
4. On April 10, 1996, we determined invalid some provisions of the ICC that allowed urban growth outside of IUGAs. [WWGMHB, Case No. 95-2-0063, Second Compliance Hearing and Finding of Invalidity].
- 4.
5. Since that finding of invalidity, Island County has continued to rely on the ICC to make land use decisions and has failed to take any interim steps to prevent urban growth outside of IUGAs prior to adoption of a comprehensive plan and implementing regulations as required by RCW 36.70A.110.
- 5.
6. Provisions of the ICC not previously determined invalid allow approval of new commercial, industrial, and residential urban growth outside of IUGAs. These types of development include boat building; light fabrication, assembly or manufacturing; warehousing or storage; grocery stores and supermarkets; hotels and motels; restaurants; bowling alleys; office buildings; home furnishings and appliances; and residential development with no limitation on density or scale. These uses typically require urban public services and facilities.
7. ICC 17.02.150 (h) (1) (a), (c), and (d); 17.02.150 (i), and 17.02.150 (k) allow the uses listed above. There is nothing in the ICC to preclude these uses at a scale and intensity that avoids urban growth. When placed on isolated and undeveloped land, they constitute sprawl.
8. These uses are not consistent with the continued use of natural resource land.
9. Island County continues to accept and process under these provisions development applications which constitute urban growth, such as the application for a master planned resort to be sited outside of an IUGA.
10. The provisions of the ICC and their application by Island County outside of IUGAs, as noted in findings 1-9, substantially interferes with the fulfillment of the goals of the Growth Management Act, particularly goals 1, 2, and 8.

From the foregoing findings of fact we make the following:

CONCLUSIONS OF LAW

1. We have jurisdiction over the parties and subject matter.
2. The intensity and type of development allowed by the ICC are urban growth as defined in GMA. RCW 36.70A.030(14). Its location on undeveloped lands in rural areas constitutes sprawl.
3. The industrial development standards found in ICC 17.02.150 (h) (1) (a), (c), and (d). given as illustrations of typical industrial activities allowed by the ICC are urban industrial activities that do not support natural resource activities.
4. The commercial activities allowed under ICC 17.02.150 (i) are urban commercial growth.
5. The mixed commercial and residential activities allowed under ICC 17.02.150 (k) are urban commercial and residential growth.
6. The provisions of the ICC noted in this Order, as applied outside IUGAs, are invalid under the provisions of RCW 36.70A.330 and 300(2).
- 6.
- 6.