

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

ACHEN, et. al.,)	No. 95-2-0067
)	
Petitioners,)	ORDER ON
vs.)	RECONSIDERATION
)	
CLARK COUNTY, et. al.,)	
)	
Respondents,)	
)	
and)	
)	
CLARK COUNTY SCHOOL DISTRICTS, et. al.,)	
)	
Intervenors.)	
_____)	

Subsequent to the Final Order in this case, 16 separate motions for reconsideration were filed. Deadlines were established for submission of written materials by any party to this case who wished to participate. On November 13 and 14, 1995, oral argument was held in Vancouver, Washington. Three categories of motions were presented:

- (1) Requests for a finding of invalidity;
- (2) Non-urban designations; and
- (3) Urban issues.

INVALIDITY

Long after the hearings on the merits were held in this case and during the preparation of the Final Order, some petitioners requested that the Final Order include a finding of invalidity under recently amended RCW 36.70A.300. We informed the parties that we would not consider such a

request at that time but would do so as part of a motion for reconsideration. Three different motions were thereafter filed.

Two of the invalidity requests, from Clark County Natural Resources Council (CCNRC) and Rural Clark County Preservation Association (RCCPA), contended that all or various portions of both the County and cities' comprehensive plans and/or development regulations should be declared invalid. Petitioners Woodside requested invalidity of Clark County's policy establishing a blanket prohibition of surface mining within the 100-year floodplain areas.

RCW 36.70A.300 provides a scheme to invalidate all or portions of a comprehensive plan or development regulations during the period of remand. A necessary prerequisite to a finding of invalidity at this stage is a finding of noncompliance. We did not find all portions of the comprehensive plans (CP) and/or development regulations (DRs) were noncompliant. Therefore, the request that we invalidate all CPs and DRs is denied.

The test for determination of invalidity is found in RCW 36.70A.300(2)(a). That test is whether "the continued validity of the plan or regulation would substantially interfere with the fulfillment of the goals of GMA." While not expressly stated in this section, it is obvious that a party claiming invalidity has the burden of proof. It is also obvious that since a finding of non-compliance must first occur, there is no longer a presumption of validity attached to the local government action. Since subsection .300 deals with a finding of invalidity as part of the final order during remand and since no request was made to supplement the record on the issue of invalidity, we review the requests under the existing record and the reasonable conclusions we can draw therefrom.

Many of the invalidity requests from CCNRC and RCCPA would require actions by us to impose regulations. Such action is beyond the authority granted by the GMA. Additionally, these petitioners did not present sufficient evidence to convince us that continued validity of any parts of the plans or regulations would "substantially interfere" with the goals of the GMA. While Clark County and some of its cities are not in compliance on many issues, that finding alone is insufficient under the provisions of subsection .300. A finding of invalidity should only be made in the most extreme or egregious circumstances. Petitioners CCNRC and RCCPA have failed to

show that such egregious or extreme circumstances exist under the record presented here.

Petitioners Woodside claimed that Clark County's prohibition against surface mining within a 100-year floodplain area "substantially interfered" with Goal 8 found in RCW 36.70A.020(8). Clark County argued that there would be little or no interference with Goal 8 under the evidence here because during the period of remand the status quo of the area would be maintained. We agree with Clark County's contention. Additionally, in the Final Order we remanded on the basis that there was insufficient analysis of the prohibition to sustain it in light of the goals and requirements of the GMA relating to resource lands. We did not say that the prohibition was *ipso facto* violative of the Act. Petitioners Woodside have not shown that during the period of remand this prohibition "substantially interferes" with the goals of GMA.

NON-URBAN SITE SPECIFIC ISSUES

Four separate petitioners requested that we reconsider our decision relating to the designations placed on their property by the County CP. Petitioners Wenthin once again argued that an agricultural designation of their property did not meet the criteria of WAC 360-190-050 or Clark County's use of those criteria. Petitioners Wenthin pointed out that the property in question consisted of only 15 acres thus making it non-conforming, that a pipeline bisected the property, and that the property was on the edge of the agricultural district that has been bounded by using 29th Street. The opposite side of 29th Street consists of rural designations which the Wenthins contended were more appropriate for their property. Petitioners contended that the fact that the property was currently in agricultural use special tax status was not an overriding criterion that should mandate an agricultural classification.

The record revealed that the County took all of the criteria into account including the current use tax status. We are not persuaded that the arguments reasserted in this proceeding carried the burden of proof anymore now than they did during the original hearing. Petitioners Wenthins' motion for reconsideration is denied.

Petitioner David Becker reargued that the agri-forest designation process was a last minute process that did not meet the public participation goals and requirements of GMA. Additionally,

Mr. Becker once again argued that his property did not meet the policies and/or criteria of an agri-forest designation. Petitioner Becker's property is a "cluster remnant" created under the previous comprehensive plan. It was established as an agricultural classification in the 1980 Plan. The reargument here was no more persuasive than the one presented in the original proceeding. Petitioner Becker's motion for reconsideration is denied.

Petitioners Achen pointed out that the property under consideration had previously been segregated and that a "vested" right existed to divide the property into 5 acre parcels notwithstanding the agri-forest 20 acre minimum lot size. Petitioners Achen and petitioner William Becker contended that establishing a designation in which previously segregated and vested properties immediately became nonconforming did not appropriately apply the agri-forest criteria. Petitioners also argued that the 3-minute limit on oral testimony during the public hearings violated the public participation goals and requirements of the Act. These were the same arguments presented during the hearing on the merits.

We remain unconvinced that the presumption of validity attaching to the comprehensive plan designations have been overcome by the evidence in this record. Even if we considered issues concerning segregations and vestings, which we did not and could not, the fact that a property becomes nonconforming is not sufficient to disqualify it from resource land designation. We reaffirm our holding that the unlimited written testimony along with the 3-minute oral testimony restriction during the public hearings did not violate the public participation goals and requirements of the Act. Petitioners Achens' and William Becker's motions for reconsideration are denied.

Petitioners Johnson, DeTour and Wirch moved for reconsideration of our decision regarding the Clark County Aerodrome designation. We carefully listened to the arguments and reviewed the written materials submitted. Petitioners have not presented sufficient evidence to overcome the presumption of validity and their motion is denied. Petitioner DeTour's request that we require the County to institute a Board of Adjustment system under RCW 36.70A.200 - .290 is beyond any authority provided to us by the GMA. That motion is also denied.

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(Nan Henriksen did not participate in the hearing or decision on this section of the Order)

The only motion for reconsideration filed by Clark County requested that we clarify our Final Order concerning the recent amendment to RCW 43.62.035 found in ESB 5876. The County requested that we clearly state that if the revised range is established by the Office of Financial Management (OFM), the County may use those new projections during the remand. That is the exact purpose of the amendments to the statute. We perceive no reason why a county would not or could not use those new figures in establishing proper urban growth areas.

Petitioners Wolverton and Petitioner Beck requested reconsideration concerning their property which adjoins the LaCenter municipal boundaries. Petitioners Wolverton correctly pointed out that we erred in stating their property carried a designation of agri-forest. It received a forest designation under the CP.

The Beck property was and remains under agricultural current use tax status. The Wolverton property is over 60 percent forested and was identified as a forestry candidate area very early in the Clark County GMA process. While there are reasons why either property did not meet all of the criteria for resource land designation, the petitioners have nonetheless failed to meet their burden of overcoming the presumption of validity by showing that the property met none of the criteria. The motions for reconsideration are denied.

The City of Washougal moved for reconsideration of the portion of our Final Order which held that the GMA was violated by the establishment of an urban growth area within the confines of the Columbia River Gorge National Scenic Area. While not filing a motion for reconsideration on its own, Clark County supported the motion of Washougal. Contrary to the assertion presented by Washougal, we did not find a violation of the federal statute but determined non-compliance upon finding the GMA had been violated. The City did not present any new arguments or facts from the record to show reconsideration was appropriate. Washougal's motion is denied.

Camas UGA

Petitioner Sun Country Homes, Inc. filed a motion for reconsideration of that portion of the Final Order that held that the record conclusively established the existing city limits of Camas could accommodate any 20-year population growth allocation. We made that finding on the basis of an acknowledgment by the City during the hearings on the merits, the Camas Comprehensive Plan and the Final Supplemental Environmental Impact Statement for the CP. Interestingly, neither the County nor the City of Camas filed a motion for reconsideration of that finding. The City of Camas “supported” the motion of petitioner. Clark County took no position either in a memorandum or at the hearing.

During the reconsideration hearing, the City contended that the statement we referenced was either misstated by the City or misunderstood by us. The City contended at the reconsideration hearing that:

“...what was stated at the hearing on the merits, is that if we were to substantially increase the density above 6 dwelling units per acre, then conceivably the population allocation assigned to the City of Camas might have been capable of being located within the current city limits.”

This current statement is not in accord with our recollection of the statement made during the hearing on the merits, and more importantly, is not in accord with the record in this case.

The Camas CP stated at page 1-7 that:

“The City of Camas was allocated 13,600 additional people for the next 20 years.... The final revised boundary is estimated to accommodate approximately 25,300 people.”

At page 4-3, the land use element of the CP, the following statement is made:

“Our analysis shows the existing city limits can accommodate a population at build out of 21,165 people at a residential density of over 6.0 dwelling units per net acre.”

The City is required by Clark County policies to achieve a minimum density of 6.0 persons per acre. By its own documentation, the City has capacity within its current municipal limits to accommodate well over a 21,000 population increase in the next 20 years. The sub-allocation was slightly over 13,000. The Camas CP does not have any infill policies nor requirements. Rather the previous city policy of a 30% open space requirement for any new development

remained in place. This policy has been in effect for many years. While the record revealed that Camas has a number of critical area issues, this mandatory 30% open space policy is not in compliance with the goals and requirements of the GMA, particularly its anti-sprawl provisions. This issue was best summarized in a November 16, 1994 report from planning director Greenleaf to the Clark County Planning Commission (Ex. 512) later forwarded to the Board of County Commissioners.

In that report, Mr. Greenleaf and his staff stated at page 3:

“Individual communities should be provided with latitude to comply with the GMA and Framework Plan in manners which reflect their individual needs and circumstances. Even with allowances for flexible interpretation, staff finds that residential densities as indicated by Camas staff are not in compliance with GMA goals regarding housing affordability and efficient and relatively compact urban development within urban areas, *nor are they in compliance with policies of the adopted Community Framework Plan regarding housing density or affordability.*” (emphasis added)

At page 4 of this report, staff stated “that the sub-allocation population for Camas can be largely accommodated within the existing city limits.” Finally, the staff concluded at page 6 that:

“Staff recommends that the GMA requirements listed have an emphasis and intent to generally avoid sprawling or leapfrog development by channeling urban growth into existing city limits before areas outside city limits, and to areas already urbanized and served before those areas that are not. This course of development is of particular concern for the proposed Camas plan which appears to contain large areas for 20-year residential growth within its existing city limits. *Rather than to first develop those large undeveloped areas within city limits at truly urban densities, the city proposes to develop the core area at larger quasi-urban densities and to simultaneously develop residential lands outside the city.*” (emphasis added)

As presently constituted the CP of Camas does not comply with the GMA because of its continuation of sprawl within its municipal limits. The Camas CP is not consistent with Clark County’s CP and thus violates GMA. During the hearing on the motions for reconsideration, Clark County conceded that it did no independent analysis of whether any of the cities fulfilled the density requirements established by the Community Framework Plan (CFP). Prior to establishment of the new UGAs, such analysis must be completed by the County.

However inartfully stated in the Final Order, it was clear from this record that compliance could never be achieved by a decision of the County to extend the Camas UGA beyond its existing city limits. Petitioner Sun Country Homes contended that by making such a determination, we were in fact “telling the City what it had to do” in contravention of our authority under RCW 36.70A.300. The ultimate decision on the establishment of an UGA is made by the County. Nonetheless, Sun Country Homes has made a valid point. In *Port Townsend v. Jefferson County*, #94-2-0006, we held that after remand a local government must comply with the goals and requirements of the Act and not necessarily with every recommendation made in our Final Order. Recently, in *Friends of Skagit County, et. al. , v. Skagit County*, #95-2-0065 (Order dated 8/30/95) we held that upon a finding of noncompliance regarding interim urban growth areas (IUGA) the Act directed all IUGAs to be reviewed regardless of whether each was individually challenged. The GMA emphasis on local decision-making and consistency with our earlier decisions require us to grant the motion for reconsideration and remand the Camas UGA issue to the County for determination in the context of all UGA determinations.

Battle Ground UGA

Within the established UGA of Battle Ground exists a major subdivision known as “The Cedars.” The petitioners who challenged the Battle Ground UGA conceded that “The Cedars” was appropriately contained within the UGA. Petitioner Saunders requested us to reconsider “The Cedars” area and issue a finding of compliance as to it. In light of our discussion of the Camas UGA, we deny the motion for reconsideration. *Friends v. Skagit County*.

60/40

In the Final Order in this case we determined that the cities of Camas, Battle Ground and Ridgefield were not in compliance with the Act because of their failure to adopt a 60 percent single-family to 40 percent multi-family ratio (60/40). The 60/40 ratio was determined as being established under the County’s Community Framework Plan (CFP) an offshoot of the County-wide Planning Policies (CPP). The three cities moved for reconsideration of that holding.

The Cities generally contended that our decision was in error because the GMA does not give the County authority under the CFPs to impose a 60/40 requirement and secondly that the CFPs did not impose or adopt such a requirement. The City of Ridgefield also claimed that the 60/40 ratio

was not raised as an issue in the petition.

The County supported the Cities' claims. In its Memorandum for Reconsideration the County stated at page 1:

“Nothing in the CFP...suggests that the CFP should be accorded the status of a CPP. To the contrary, the CFP expressly distinguishes between CPP and CFP policies.... The County's 50-year CFP establishes broad brush policies which form the basic structure of the comprehensive plan. Although it could have been adopted as a CPP, it was not. Accordingly, the CFP policies are not binding upon the cities.”

This new position by the County appears inconsistent with the position found in the record and asserted during the hearings on the merits. In Clark County brief #1, page 2, in explaining the development of the CPPs and the CFP, the County stated:

“...the Framework Plan provided policy direction for both the County *and the Cities* in the development of the 20-year Comprehensive Plan. The Community Framework Plan addressed the regional issues associated with the GMA process, while the County-Wide Planning Policies, for the most part, addressed process issues....” (emphasis added)

The CFP itself at page 12 recognizes the relationship for the County and the Cities in stating that:

“To implement the Community Framework Plan, the County, towns and cities would have to amend certain land use and development policies in their 20-year Comprehensive Plan process....”

CPP 2.1.b directs that both the County and “each municipality” will accept a “fair share” of the region's affordable housing needs. CFP 2.2.4 states that:

“All cities, towns and the County share the responsibility for achieving a rational and equitable distribution of affordable housing.”

The methodology for achieving compliance with both the CPPs and the CFP found at page 12 of the CFP is that:

“Approximately 40 percent of the new housing would be duplexes, townhouses, or apartments.”

The vacant lands analysis established by the County and each city (Ex. 122-129) used a

foundational assumption of a 60/40 ratio in determining proper boundary lines. If the County now believes that this 60/40 ratio should not apply to cities, a significant question about the validity of the vacant lands analysis would be presented.

The structure of the CFP and of the CP for Clark County leads to the inescapable conclusion that the CFPs were intended to apply in the same manner as CPPs. Both the CP and the CFP first set forth the respective CPP for each element of the CP, then set forth the CFP as a follow-up and obvious supplemental policy requirement. As noted in the staff report referenced at page 9 of this Order, the CFP density policies were used as requirements and minimums for each city to achieve. The CFPs establish a myriad of policy decisions that were consistently applied by the County and accepted by the cities for all phases of the GMA comprehensive plan process, except the 60/40 requirement. Neither the County nor the Cities contended that any of these other policies were not applicable.

Regardless of whether the CFP was adopted under RCW 36.70A.210, the record unequivocally demonstrated that the CFPs were adopted as policy directions for the development of both the County comprehensive plan and those of the Cities. Under GMA, the County has the authority to do so as to the regional issues set forth in the CFP. Affordable housing is certainly one of those regional issues.

The more troublesome question presented by the Cities' motions to reconsider is whether the CFPs actually directed the use of a 60/40 ratio. We agree there is no specific CFP that requires a mandated 60/40 ratio.

As noted above, this record is replete with references showing that both the County and the Cities used the CFP as criteria for much, if not all guiding principals for the CPs. During the hearing on the motion for reconsideration, Clark County asserted that the density requirements determined by the CFP had been adhered to by the Cities and that those requirements were sufficient to satisfy the County's affordable housing goals. Obviously, if the density requirements of the CFP must be met by the Cities, so must any affordable housing requirements. The County was unable to explain why some CFP requirements applied to the Cities while the 60/40 ratio did not.

The lines of demarcation between the goals and requirements of the Act as they relate to anti-sprawl and affordable housing are often blurred. Nonetheless, it can be said that density requirements relate primarily to anti-sprawl and compact development goals and requirements. In and of themselves, they do not address affordable housing goals and requirements. This record was abundantly clear that none of the cities of Camas, Battle Ground or Ridgefield came close to achieving compliance with GMA affordable housing goals and requirements.

Nonetheless, because of the confusion about the CFP requirement, the County's apparent change in attitude and the claims of the Cities, we will grant reconsideration and remand this issue to the County and to the Cities for clarification and decision. We do so with the following caveats.

The record showed inadequate compliance with the affordable housing goals and requirements of the GMA by Camas, Battle Ground and Ridgefield. Our review of the record determined that the County had achieved compliance with these goals and requirements. A significant portion of that compliance was found in CP policy 5.7.1

which stated that the County would:

“Provide opportunities for new development to occur in a housing type ratio of 60 percent single-family and 40 percent multi-family.”

A change in that policy during remand would present serious questions about the County's continued compliance. We also note that the entire multi-year GMA adoptive process was premised upon each city adopting a CP and development regulations consistent with the one which would be last adopted by the County. The Camas, Battle Ground and Ridgefield CPs are inconsistent with that adopted by the County, particularly policy 5.7.1.

Ridgefield asserted that since the petitions filed in this cases did not specifically challenge the affordable housing sections of its CP, we cannot now find noncompliance. Ridgefield fails to recognize the impact of WAC 242-02-558. Issue #22 of the amended Master List of Issues was sufficient to include the challenged affordable housing noncompliance. We reviewed the materials submitted by Ridgefield in support of its claim that the affordable housing goals and requirements had not been violated. After review of those materials we find Ridgefield not in compliance.

Additionally, during the hearings on the merits, Ridgefield submitted its CP as an exhibit and relied heavily on the relationship between the CP and the UGA. At page 4 of its hearing brief, Ridgefield stated that the UGA and CP “must be considered together in determining the compliance with the Growth Management Act.” This theme was carried through the entire memorandum. When reviewing a CP or development regulation that has obvious and glaring non-compliance we will not overlook that feature based upon some hypertechnical legal analysis. *Loomis v. Jefferson County*, #95-2-0066.

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

So ordered this 6th day of December, 1995.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Presiding Officer

Les Eldridge
Board Member

Nan A. Henriksen (Except Urban Section)
Board Member