

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

WHATCOM ENVIRONMENTAL COUNCIL,)	
WATERSHED DEFENSE FUND, and)	No. 95-2-0071
WASHINGTON ENVIRONMENTAL COUNCIL,)	
)	ORDER FINDING
Petitioners,)	COMPLIANCE
)	
v.)	
)	
)	
WHATCOM COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
STATE OF WASHINGTON, DEPARTMENTS)	
OF ECOLOGY, FISH AND WILDLIFE, AND)	
COMMUNITY, TRADE AND ECONOMIC)	
DEVELOPMENT,)	
)	
Intervenor.)	
_____)	

INTRODUCTION

By order dated July 1, 1997, we found that Whatcom County's 1997 adoption of its previously rescinded 1992 critical areas ordinance (CAO), removed the substantial interference with the goals of the Growth Management Act (GMA, Act) which had characterized the 1995 and 1996 CAOs. We stated that the County had made significant progress toward compliance. We continued the finding of noncompliance because the new Ordinance was interim in nature. We noted that the three state agencies with expertise, which participated in this case as intervenors, believed Ordinance #97-012 to be otherwise in compliance with the Act.

We further noted that the County should, prior to adoption of a final CAO, address areas of concern which included shellfish, best available science, criteria for fish and wildlife habitat boards, wetlands, stream buffers, wildlife habitat conservation areas, and exemptions.

On November 17, 1997, we were notified by Intervenor State of Washington that a new critical areas ordinance (Ordinance #97-056) was adopted on October 21, 1997. Notice of adoption was published October 23, 1997. As of the 60th day after the adoption (December 24, 1997) no petitions challenging the ordinance had been

filed. Since no petitions were filed, we examine compliance through this process rather than through a new petition process. We held a telephonic compliance hearing April 7, 1998.

On March 6, 1998, we were notified that Petitioner Washington Environmental Council would submit no briefs and would not participate in the compliance hearing. Further, its representative, Toby Thaler, who had previously represented Whatcom Environmental Council and the Watershed Defense Fund (WDF) withdrew from representation of those two petitioners. Ms. Sherilyn Wells of WDF then indicated her intention of briefing the issues and participating in the compliance hearing. WDF was the only petitioner to submit a brief for the final compliance hearing in this case. Ms. Mull, representing Intervenor State of Washington, was present to respond to questions, but the State submitted no brief. The State believed “the County is now in compliance with the critical areas provisions of the Growth Management Act.” Ms. Wells represented WDF and Mr. Dan Gibson represented Whatcom County. Present for the Board were Les Eldridge and William Nielsen.

WDF’S MOTION TO SUPPLEMENT THE RECORD

WDF requested that all its documentation not part of the new record be considered by the Board under WAC 242-02-522(13), 540, 650(1), 660, 670, or RCW 36.70A.172(2). We will not grant a request to supplement the record, or to take official notice, using such a broad and loosely-framed approach.

As the County pointed out, the materials referred to in Petitioner’s brief, which were not in the record, were not appended to its brief and, if provided at all, arrived well beyond the deadlines for brief filing.

The motion is denied.

SYNOPSIS OF THE ORDER

WDF pointed out numerous ways in which it believed the ordinance could be improved, but did not sustain its burden of proving that the ordinance failed to comply with the Act. We do not have a firm and definite conviction that the County has erred. We find Ordinance #97-056 in compliance with the GMA.

DISCUSSION

WDF asked us to find the new ordinance noncompliant and invalid. WDF argued that the ordinance was too flexible, that its exemptions were broad enough to swallow the ordinance, that the lack of credentials set forth for the technical administrator brought the qualifications of the position into question, that the same applied to the qualifications of the independent professional on the assessment team, and that the ordinance allowed the County far too much latitude in its implementation.

WDF asserted that the County’s long history of inadequate CAOs precluded its compliance with the Act. WDF contended that the omission of references to National Marine Fisheries Service requirements and to the proposed listing under the Endangered Species Act of the Puget Sound Chinook salmon fatally flawed the ordinance.

WDF questioned the County’s commitment to adequate enforcement of the ordinance, and, coupled with great latitude afforded administrators, feared that inadequate enforcement could lead to wide-spread violations and environmental deterioration.

The State believed that there was enough “meat in the ordinance” that, with proper decision-making and interpretation, compliant implementation would result.

The County contended that the parameters for Board consideration should be limited to issues raised by the Board in its previous order as no one had chosen to file a petition challenging the new ordinance. It asserted that the Petitioner sought to greatly expand the record, raise new issues, and cite materials not in the record. It cited the relevant consideration in this case as “has petitioner demonstrated by competent evidence that the County is clearly erroneous in its adoption of the current ordinance as it relates to the issues properly under consideration in this compliance hearing?”

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CONCLUSION

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All parties appearing at the compliance hearing agreed that #97-056 is a very different ordinance from the 1992 CAO readopted and extended through Ordinances #97-12 and #97-018. We cannot determine from this record that the differences between the two ordinances demonstrate deficiencies in #97-056 sufficient to lead us to a finding of noncompliance or invalidity. For example, the new ordinance’s 100-foot standard buffer for regulated wetlands (with variance provisions for larger or smaller buffers) is not clearly less compliant than the four-tiered-regulated-wetlands buffers in the 1992 ordinance which ranged from 200 to 25 feet. As the County pointed out, testimony from Mr. Dick Grout of the Department of Ecology in favor of the new ordinance reflected the satisfaction of Intervenor State of Washington with modifications made by the County which addressed the State’s previous concerns. In response to a question, the State cited Mr. Grout’s belief that,

while the ordinance may not be the best possible, its substantial modifications led the State to conclude that the ordinance was in compliance with the Act.

We have often stated that our responsibility is to decide whether actions of jurisdictions comply with the Act rather than whether they could have found a better solution than the one they adopted. *Diehl v. Mason County*, #95-2-0073.

WDF was concerned that the County might not implement the ordinance adequately. Our responsibility at this stage is to determine whether an ordinance or plan is in compliance with the Act and not whether the quality of implementation will be sufficient.

Petitioner asserted that the ordinance afforded too much latitude to administrators in view of the prior history of noncompliance in the County. We find no evidence in this record that the County's effort regarding Ordinance #97-056 constitutes anything other than a good-faith effort.

Petitioner expressed concern that the ordinance would allow adverse critical area impacts with appropriate mitigation where property rights or public services are seriously compromised by critical area protection. Petitioner asserted that this was "extra-constitutional." The private property language in this ordinance is within the discretion afforded the County by the Act.

We do not have a firm and definite conviction that the County has erred in adopting Ordinance #97-056. Petitioner WDF has failed to meet its burden of proof in its assertion that the ordinance is noncompliant and substantially interferes with the goals of the Act.

We find the ordinance in compliance with the GMA.

So ORDERED this 15th day of July, 1998.

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

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member