

**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,
	)	CONTINUED
	)	vs.,
	)	NONCOMPLIANCE
WHATCOM COUNTY,	)	AND RESCINDING A
	)	FINDING OF INVALIDITY
	)	Respondent,
)	
	)	and,
)	
STATE OF WASHINGTON, DEPARTMENTS)	
OF ECOLOGY, FISH AND WILDLIFE, AND)	
COMMUNITY, TRADE AND ECONOMIC)	
DEVELOPMENT,)	
)	
)	Intervenors.
_____)	

SYNOPSIS OF THE ORDER

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In this Order we find that the 1997 adoption by Whatcom County of its 1992 Critical Areas Ordinance (CAO) on an interim basis (the interim 1997 CAO) removes the substantial interference with the goals of the Growth Management Act (GMA, Act) which characterized the 1995 and 1996 CAOs that led to a finding of invalidity in 1995. The County has made significant progress towards compliance.

Recently, the County and Intervenor State of Washington joined in a stipulation in agreeing that a final ordinance replacing the interim 1997 CAO would be adopted no later than September 1, 1977. The Parties also agreed that the finding of invalidity and finding of noncompliance should be lifted. Petitioners objected to a finding of compliance and the rescision of invalidity on the grounds that the interim 1997 CAO was adopted on an temporary basis and did not address several issues including best available science and shellfish.

We agree with the State and the County that substantial interference with the goals of the Act is no longer present as a result of the adoption of the 1992 ordinance on an interim basis. We therefore rescind the finding of invalidity. If the interim ordinance expires without passage of a permanent ordinance, we will reconsider a finding of invalidity. We do not find compliance because an interim critical areas ordinance with a termination date does not comply with the Act. We continue the finding of noncompliance until the ordinance or its successor is made permanent.

PROCEDURAL HISTORY

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Whatcom County began its attempt to protect critical areas with passage of a 1992 CAO. The 1992 CAO did provide a significant level of protection. A County referendum the next year removed many of those protections. When the referendum was found by the State Supreme Court to be an inappropriate mechanism for the implementation of the GMA, the County Council adopted an emergency ordinance and later extended it in 1995. Those subsequent provisions for protection were at the same level as the referendum's. We found the 1995 CAO to be so lacking in protection for critical areas that it substantially interfered with the goals of the Act. We therefore declared it invalid in December 1995. The County amended the 1995 CAO in April 1996. In September 1996, we found the amended CAO still noncompliant and invalid. The County readopted its 1992 ordinance on an interim basis in May 1997, Ordinance 97-012. A Compliance Hearing was held May 19, 1997. Board members Eldridge and Nielsen were present. Daniel Gibson, Chief Civil Deputy and Alexander Mackie appeared for the County. Petitioners were represented by Toby Thaler and Intervenor State of Washington by Deborah Mull.

DISCUSSION

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The County argued that its treatment of Category IV and Category III wetlands, and provisions for mitigation in the interim 1997 CAO removed substantial interference with the goals of the Act and that only in the shellfish area was the new ordinance not compliant. The State asserted that it was willing to give the County the benefit of the doubt with its interim ordinance because the

1992 ordinance was substantially better than what was later adopted. The State requested that, if Whatcom County failed to adopt a permanent ordinance, any finding of compliance which we enter would be made null and void.

Petitioners lamented the existence of a "moving target" as they characterized the succession of CAOs adopted during this case. Petitioners asked that we not rule regarding compliance and invalidity of an interim ordinance when passage of a permanent ordinance was imminent. They contended that, with any agreement in which adoption of a new ordinance would terminate this proceeding, they would "lose leverage". Petitioners asked us to retain jurisdiction in some way over the question of a compliant CAO. They pointed out that we had ruled that CAOs were not interim in nature. WWGMHB #94-2-0001. The State responded that the 1992 ordinance was better than nothing and that there had been no adequate CAO in effect for years. The State asserted that the County was cooperating but requested that the parties' rights to challenge all aspects of a new ordinance be preserved. The County remarked that it could extend the interim ordinance if a new one was not passed by September 1 and that it was willing to formally indicate its intent not to let its interim ordinance lapse. It suggested a finding of compliance contingent on passage of a new ordinance. The County conceded that we could reasonably find noncompliance (but not invalidity) regarding shellfish and best available science.

CONCLUSION

We conclude that the adoption of this previously-existent ordinance removes substantial interference with the goals of the Act. We cannot, however, find compliant a CAO that is interim in nature and which the County admits falls short of compliance in shellfish protection and the use of best available science. We are unwilling to find compliance contingent on the passage of a new and permanent ordinance. We note that any new ordinance would be subject to challenge by new petitions for review.

ORDER

The December 1995 Finding of Invalidity is rescinded. Ordinance 97-012 (the interim or emergency 1992 ordinance readopted March 11, 1997) is not in compliance with the Act.

Subsequent to the passage of a new 1997 CAO, which the County has indicated it intends to accomplish by September 1, 1997, we will reconsider the question of compliance. In the event Ordinance 97-012 is allowed to lapse without the passage of a permanent CAO, we will reconsider the question of invalidity. We deny Petitioners' request for a recommendation of sanctions.

The County should, in its adoption process, address the following areas of concern: shellfish, best available science, criteria for fish and wildlife habitat boards, wetlands, stream buffers, wildlife habitat conservation areas, and exemptions.

So ORDERED this 1st day of July, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member