

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

JOHN E. DIEHL, KERRY HOLM, GORDON)	
JACOBSON, and VERN RUTTER, individually,)	No. 95-2-0073
and as members of the MASON COUNTY)	
COMMUNITY DEVELOPMENT COUNCIL (MCCDC),)	7 TH COMPLIANCE
a non-profit association,)	HEARING ORDER
)	
)	FREQUENTLY
Petitioners,)	FLOODED AREAS
)	
v.)	
)	
MASON COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
PETER OVERTON, DONALD B. PAYNE,)	
McDONALD LAND COMPANY, HUNTER)	
CHRISTMAS TREES, HUNTER FARMS, SKOOKUM)	
LUMBER COMPANY, MANKE LUMBER)	
COMPANY and MASON COUNTY PRIVATE)	
PROPERTY ALLIANCE (MCPA),)	
)	
Intervenors.)	
<hr style="width:50%; margin-left:0;"/>		

SYNOPSIS OF THE ORDER

We are encouraged by Mason County’s progress towards protection of frequently flooded areas (FFAs). However, in this order we find that the County remains noncompliant with the Growth Management Act (GMA, Act) and with our 1996 order regarding FFAs. Some of its ordinances are temporary and fail to include best available science (BAS) which would protect functions and values of the FFAs. The provisions of the County’s Interim Resource Ordinance (IRO) related to FFAs and the Flood Damage Prevention Ordinance (FDPO) substantially interfere with planning Goals 2, 8, and 10 of the Act. Satisfying the requirements of FEMA does not, *ipso facto*, satisfy the requirements of the GMA because the purposes of the two are significantly different. Nonetheless, we are optimistic that, by our acceptance of the County’s

proposed compliance schedule, Mason County will be in compliance with the GMA by December 31, 1999.

PROCEDURAL HISTORY

In our Final Decision and Order (FDO) of January 8, 1996, we found the FFA ordinances of Mason County in noncompliance. This seventh compliance hearing, some three and one-half years after the FDO, marks the first significant effort of the County to come to grips with its noncompliant FFA ordinances. Several of the exhibits upon which the County relied to counter charges that it was still noncompliant, however, came to the Board and the other parties on the day of the compliance hearing, held March 9, 1999.

Present for the board were Les Eldridge and William Nielsen, although Mr. Eldridge was forced to leave after expert testimony but prior to argument, owing to illness. He has since listened to all the tapes of the argument he missed. Board member Henriksen was unavailable for the hearing but has since listened to all tapes of the hearing. Representing participant Skokomish Indian Tribe was Richard Guest. Also present was petitioner John Diehl. Mr. Warren Dawes, member of MCCDC, indicated that their representative, Mr. Gendler, would not be present but would rely on the presentations of Mr. Guest and Mr. Diehl to represent the viewpoint of MCCDC. Mr. David St. Pierre, Deputy Prosecuting Attorney, represented Mason County. Participant Skokomish Tribe called Mr. Jim Park as an expert witness.

Motions to Add to or Supplement the Record

A series of motions from the County and petitioner Diehl were considered. The County moved a series of exhibits from information which arrived at the County some time ago but which was known to the prosecutor only on February 18, 1999. After argument concerning the proposed additions, exhibits 1532-1549 were admitted. *See* pages 2 and 3 of March 9, 1999, Identification and Certification of Exhibits for the Record of the Seventh Compliance Hearing, Frequently Flooded Areas, from Mason County. We also admitted four proposed exhibits from petitioner Diehl, including number 1550, minutes from the planning advisory committee in the Skokomish River Valley dated November 16, 1995; number 1551, a letter from emergency services dated January 25, 1999; number 1552, a notice of application for shoreline permit; and number 1553, a professional journal article concerning flood hazards by Denise Mills. On March 16, 1999, we admitted an update of exhibit 909 as exhibit 1554.

We received a Motion to Request Production of Documents from Mr. Diehl on March 16, 1999, and an "Answer" from the County on March 23, 1999. We admitted the three permits listed at 15 on p.3 of the March 23, 1999 County Answer (96-16, 95-72, 95-74) as exhibits 1555, 1556 and 1557, respectively. We admitted the exhibits listed as letters A through EE on page 4 the County's Answer as exhibits 1558-1580. We have reached our decisions in this case without the necessity of reviewing additional documents which Mr. Diehl requested through discovery in his March 16, 1999 motion. We defer ruling on that section of the motion until the schedule is set for the next compliance hearing in the hopes that petitioner Diehl and the County can reach resolution on additional, as yet unspecified, permits to be offered as additions to the record.

DISCUSSION

The County relies on three enactments to meet the GMA requirements to protect FFAs: the IRO, Chapter 17.01.090 of the Mason County Code; the FDPO; and a moratorium. The FFA chapter of the IRO was adopted by Ordinance 77-93 (Aug. 2, 1993) and amended by Ordinance 112-97 (Sep. 23, 1997). The FDPO was adopted by Ordinance 59-91 (May 23, 1991) and amended by Ordinances 40-97 (Apr. 22, 1997) and 63-97 (Jun. 17, 1997). The moratorium was adopted by Resolution 113-97 (Sep. 23, 1997) and amended by Ordinances 23-98 (March 3, 1998), 68-98 (June 23, 1998), 80-98 (July 14, 1998), 131-98 (Dec. 17, 1998), and 22-99 (February 2, 1998).

Two of the three enactments relied on by the County are not permanent regulations. The IRO is an interim measure and the moratorium, by definition, is of limited duration. As we said in our September 18, 1997 Order Finding Continued Non-Compliance, “critical area ordinances are not interim in nature” and we admonished the County that the IRO “should be acknowledged to be permanent, not interim.” To comply with the GMA requirement to protect FFAs, the County must adopt permanent FFA development regulations (DRs), preferably in one comprehensive ordinance, rather than the plethora of amending ordinances now in place. We have a firm and definite conviction that the County has erred in failing to adopt permanent ordinances. A moratorium with a sunset provision affords no opportunity for petitioners to challenge the underlying ordinance upon sunset. When the permanent ordinance replaces the moratorium, the sunset clause must be removed and the moratorium ended by permanent action of the Board of County Commissioners (BOCC).

Petitioner Diehl argued that the emergency provisions allow wholesale permitting without review. We find that the record does not support this contention.

Generally, the FDPO prevents new residential construction in FFAs. *See* FDPO 5.3(2). However, the Skokomish River and floodplain are treated differently from other FFAs in Mason County. The County has established a Skokomish River Density Flood Fringe, defined as “an alternative approach to regulating floodplain development whereby the density of development is restricted so that when ultimate development occurs, an insignificant increase in flood stage above that of natural conditions occurs.” IRO 17.01.240.

New construction and substantial improvements are permitted within the density flood fringe, although development is limited to three percent of that portion of each lot located in the density flood fringe. Petitioner Diehl argued that the three-percent lot-coverage standard provided for in the FDPO “does not protect against the ravages of several feet of floodwater” and that the three-percent standard constitutes significant development. Diehl prehearing brief (PHB), at 3. Instead of refuting Petitioner’s argument, the County responded that Diehl’s argument is without merit because FEMA has approved the use of density

floodways. County Response, at 11. However, satisfying the requirements of FEMA does not necessarily satisfy the requirements of the GMA.

The GMA requires the County to adopt DRs that protect FFAs. RCW 36.70A.060(2). The County must “include the best available science in developing policies and DRs to protect the functions and values of critical areas.” In addition, the County shall give “special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” RCW 36.70A.172(1). The record does not reveal that the density flood fringe concept adopted by the County protects the functions and values of the Skokomish River FFA. Further, it is not clear from the record that the 13,000 acres zoned for agriculture present in the southeast portion of the Skokomish FFA is of a residential density low enough to comply with the GMA.

The density floodway approach is appropriate to situations where the flood hazard, including both depth and velocity, is generally constant across the floodplain, where overbank depths are shallow and uniform, and where overbank velocities are low and uniform. Exhibit #908 at 6-77, Skokomish River Comprehensive Flood Management Plan. A motion from the Skokomish Indian Tribe to allow expert testimony was granted. Mr. Jim Park of the tribal environmental staff demonstrated that such low overbank depths and velocities were not characteristic of the Skokomish floodplain. The County was afforded the opportunity to call on its own expert for testimony at the hearing, but opted not to do so.

The lack of FFA protection offered by the density flood fringe concept is underscored when further BAS is reviewed. There is no dispute that the Skillings-Connolly report constitutes BAS for the Skokomish River valley. *See* Index 1526 and County Response, at 5. That report concluded that there is a “strong possibility of a major avulsion.” Index 1526, at 3. Mr. Park testified that “the valley is in crisis” and that “overflow pathways are avulsion routes.” He expressed his agreement with the Skillings-Connolly report which noted the likely increase of flow and flooding across Highway 101 and on the southern flood plain, downstream of 101. He noted that time is growing short for accommodation of fisheries issues in the face of probable avulsion.

The report recommended that the County issue a warning to Skokomish Valley residents, advising them of the potential for river avulsions. Index 1526, at 4-5.

Based on the Skillings-Connolly report, inclusion of BAS means that the County’s FFA regulations must contemplate the likelihood of river avulsion. The County states that it included BAS in its FFA regulations by adopting the moratorium prohibiting most development in the Skokomish River Valley. While the moratorium may protect FFAs, it is a temporary measure. As we stated above, permanent regulatory measures are necessary to protect FFAs as required by the GMA. The permanent FFAs adopted by the County must contemplate the potential for river avulsions by including BAS, as was done in the County’s

moratorium.

Another BAS requirement is that the County “shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” RCW 36.70A.172(1). Mr. Park noted that flood “overflow gets trapped” and damages fish when dikes are present. The record contains no evidence that anadromous fisheries were given any consideration in the development of the County’s FFA regulations. To comply with the GMA, the County must consider anadromous fisheries in the development of its FFA regulations.

Associated with the risk of avulsions and the preservation or enhancement of anadromous fisheries is diking. It is not clear that the County’s regulations will protect FFAs from these negative impacts. The County does not know whether and to what extent diking is occurring. Mr. Park testified that “diking prevents even distribution of sediment” and builds up the river bed. The permanent FFA regulations adopted by the County must include a program that will enable the County to monitor dike construction and improvements for possible effects on the FFAs. We have a firm and definite conviction that the County erred in failing to address avulsion risk, include BAS and monitor diking.

INVALIDITY

Petitioners Diehl and MCCDC argued that a number of the many ordinances establishing FFA regulations should be subject to findings of invalidity because they allowed extreme emergency situations to continue and to be exacerbated. They argued that Ordinance 112-97 which amended Ordinance 77-93 (IRO) substantially interfered with the goals of the Act by failing to prohibit new residential construction in the floodway, and by ignoring the risks to residents of avulsion. They argued that flood threats to residential property are further exacerbated by the allowance of diking activity, including construction and reconstruction of dikes, without monitoring.

The County argued that construction or reconstruction of residential structures in designated floodways is prohibited in Section 5.3(2) of Ordinance 59-91. Section 5.3(2) applies to designated floodways. On page 11, at 22 of its response brief, the County declared that “there are no designated floodways in the Skokomish River Valley,” rather, “there are density floodways.”

We find that failure of the ordinances to address risks of avulsion, together with the continued allowance of diking activity without monitoring, the continued allowance of an inappropriate level of construction in the Skokomish River floodway, and failure to include BAS, substantially interfere with GMA goals 2 (sprawl reduction), 8 (natural resource industries, including agricultural) and 10 (environment). Section 5.3 of the FDPO Ordinance 59-91 and section 17.01.090(D) of the IRO are declared invalid.

ORDER

The County has not complied with GMA's goals and requirements for FFA. In order to comply Mason County must:

1. Adopt permanent FAA development regulations, preferably in one comprehensive ordinance.
2. Ensure that the functions and values of the Skokomish River FFA are protected and that BAS is included as a basis for adoption of its FFA ordinance.
3. Ensure that the density in the agricultural portion of the FFA is sufficient to conserve productive agricultural lands and discourage incompatible uses.
4. Include a program that will enable monitoring of dike construction and improvements to ensure compliance with its ordinance.
5. Address risks of avulsion.
6. Curtail construction in the floodway of the Skokomish River.

We approve the requested schedule for adoption of a new FFA ordinance by the end of December, 1999, pursuant to RCW 36.70A 300(3)(b). This schedule approval grants the County's request to allow it time to fully digest the information to be gathered between the date of this order and its requested compliance date of December 31, 1999.

Findings of Fact and Conclusions of Law pursuant to RCW 36.70A.302(1)(b) are adopted and appended as Appendix I.

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

Pursuant to WAC 242-02-830(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 4th day of May, 1999.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member

Nan A. Henriksen
Board Member

-
-