

- include best available science (BAS);
- adopt compliant agricultural resource land (ARL) densities in the FFAs;
- monitor dikes;
- address avulsion; and,
- curtail FFA construction.

The County is additionally noncompliant regarding clear mapping and nomenclature, and consistency among FFAs.

Urban densities in the FFAs allowed by Ordinance #16-00 are noncompliant and invalid.

PROCEDURAL HISTORY

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We have appended a table of acronyms (Appendix II).

In our final decision and order (FDO) January 8, 1996, we found the FFA ordinances of Mason County noncompliant. We held a compliance hearing (number seven of all those relating to this case and the second relating to FFAs) three and one half years later, March 9, 1999. We entered a compliance order May 1999 which found the County had still not complied with the GMA goals and requirements for FFAs. We required that the County:

1. Adopt permanent FFA development regulations (DRs), preferably in one comprehensive ordinance.
2. Insure that the critical area functions and values of the Skokomish River FFA were protected and that BAS was included as a basis for adoption of its FFA ordinance.
3. Ensure that the density in the agricultural portion of the FFA was sufficiently limited to conserve productive agricultural lands and discourage incompatible uses.
4. Include a program that enabled monitoring of dike construction and improvements in order to ensure compliance.
5. Address risks of avulsion.
6. Curtail construction in the floodway of the Skokomish River.

Further, we found that Section 5.3 of Ordinance #5991 and Section 17.01.090 of Mason County's DRs substantially interfered with GMA Goals 2, 8 and 10 because they failed to address risks of avulsion, prohibit construction, monitor diking, and include BAS.

Compliance Hearing #11 in this case (the third regarding FFAs) was held May 2, 2000.

Mason County was represented by Chief Deputy Prosecutor Mike Clift. Participant Skokomish Indian Tribe (Tribe) was represented by Richard Guest. Petitioner John Diehl appeared. Petitioner Mason County Community Development Council submitted a joinder to the briefs of petitioner Diehl and the Tribe but did not appear. Present for the Board were Les Eldridge and William H. Nielsen. We corrected a scrivener's error in the May 4, 1999 compliance order, striking the final zero in the figure "13,000" at page 6, line 6, so that sentence then properly read "further, it is not clear from the record that the 1,300 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."

PETITIONERS' AND PARTICIPANT'S CONCERNS

The aspects of Mason County's FFA ordinance challenged by Petitioners and Participant can be characterized as follows:

1. Failure to adequately designate FFAs.
2. Allowance of development inside FFAs and outside the "no new footprint" zones.
3. Continued noncompliance of the Shoreline Management Program (SMP) and habitat conservation areas (HCAs) within the FFA.
4. Adequate dike inspection and monitoring program.
5. Adequate buffers within the agricultural resource lands (ARLs) within the FFA.
6. Protection of critical areas' functions and values within the FFA.
7. Designation of areas of avulsion risk.
8. Consistency of treatment of Skokomish FFA with other Mason County FFAs.
9. Clarification of the density requirements within the FFAs.

BURDEN OF PROOF & STANDARD OF REVIEW

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Compliance

As in all cases before us, the burden is on petitioners to demonstrate that the actions taken by the County are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the action by [Mason County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find the County’s action clearly erroneous, we must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Invalidity

RCW 36.70A.320(4): “A county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.170A.302(1).”

NOMENCLATURE USED IN THE MASON COUNTY FLOOD DAMAGE PREVENTION ORDINANCE (FDPO) #16-00, SECTION 2.0, AND THE KRAMER, CHIN AND MAYO (KCM) AND SKILLINGS-CONNOLLY REPORTS

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Floodways or Designated Floodways – The floodway is the channel of a stream plus any adjacent floodplain areas which must be kept free of encroachment so that the 100-year flood can be carried without substantial increases in flood heights (not more than one foot). The floodway is an extremely hazardous area due to the velocity of waters carrying debris.

Floodway Fringe – The portion of the floodplain that could be obstructed without increasing the elevation of the 100-year flood by more than one foot (Federal Emergency Management Act (FEMA) Flood Insurance Study, Exhibit #1545).

Zone A – Areas shown on the federal insurance rate map (FIRM) as land within the floodplain

inundated by the 100-year flood.

Area of Special Flood Hazard – Land in the floodplain subject to a one percent or greater chance of flooding on any given year. Section 2.0 of the ordinance states: “Designation on maps includes the letters ‘A’ or ‘V’.” These areas are designated as FFAs.

Flood Zones and Adjoining Areas Subject to Flooding and/or Avulsions (from Skillings-Connolly). Zone A floodplains of the Skokomish plus additional areas subject to flooding and/or avulsions.

Special Flood Risk Area – See Ordinance #16-00, Section 5.4-3.

Special Flood Risk Zone – See Ordinance #16-00, Section 5.4-2.

Detailed Study Area - The detailed study area generally means that portion of the mapped floodplain for which FEMA has performed a detailed study within a special flood risk zone. In Section 5.4-4 of this Chapter the Zone A2 floodplain of the Skokomish River and tributaries is referred to as the “Detailed Study Area.”

As can be seen from the preceding list, the nomenclature describing FFAs lacks the clarity needed to comply with RCW 36.70A.040, .050, and .170.

DISCUSSION

Petitioner Diehl asserted that ARLs located in FFAs contained densities too high to achieve GMA compliance. He noted that County staff, in a memo of August 14, 1991, recognized that increasing residential density on agricultural lands in floodplains would create incompatibilities not consistent with maintaining and enhancing agricultural industries. The staff recommended 20-acre minimum lot sizes for floodplains of Mason County. The County in response declared that the “3% footprint limit applies to the detailed study area of the Skokomish River FFA and therefore these regulations are more restrictive and therefore compliant.” County response brief at 11. Mr. Diehl countered that the 3% limit applies only to the detailed study area and not to

upstream areas of the Skokomish River or other FFAs. He pointed out that the 3% limit is the equivalent of a 1 dwelling unit (du) per acre density. He claimed that the 3% footprint limit would not suffice to maintain and enhance agricultural industries in the face of incompatible residential and agricultural uses.

An acre equals 43,560 square feet. A 3% footprint is 1,306 square feet. A 1,306 square-foot footprint can accommodate a one-story home of that square footage or a two-story home of 2,600 square feet. This is the equivalent of 1 du per acre (1/1). 1/1 is neither a rural nor a resource-land density.

Petitioner Diehl went on to point out that the Union River FFA sets a standard residential density of 1 du per 10 acres for ARLs in the FFA rising to 1 du per 5 acres in ARL-FFA clustered development. But, he noted, for those portions of the Union River FFA within the Belfair urban growth area (UGA), the density rises to 1 du per acre. One du per acre is not an ARL density. Diehl argued that in both ARLs within UGAs and ARLs outside UGAs, the respective densities of 1 to 1 and 1 to 5 with clustering were too dense for the protection of resource lands called for by the GMA.

Petitioner Diehl pointed out that functions and values protection in FFAs relied on noncompliant sections of Mason's resource ordinance. He asserted that the FDPO's restriction on new construction requiring it to be located 200 feet from the ordinary high water mark is not a protection for functions and values because a set-back is not a buffer of undisturbed vegetation. Mr. Diehl argued that the need for adequate buffers to protect function and values in the ARL is not met by the requirement for mere set-backs.

Mr. Diehl pointed out that prohibition of new residential construction within the Skokomish River floodway is a part of Ordinance #16-00. But, he maintained, no part of the Skokomish River FFA is actually designated as a floodway.

Petitioner Diehl noted that there was no mechanism for monitoring and enforcement of diking regulation. As noted in Ex. 2102, the Skillings-Connolly recommendation of August 15, 1997, dikes "squeeze the river flow, cause scour and siltation smothering, and also cause river bottom

rise and water table rise.” Dikes are short- term solutions which only postpone the inevitable effect of avulsion. Mr. Diehl pointed out that the absence of a dike monitoring mechanism has been exacerbated by the County’s acquiescence to local landowners denying access to U.S. Corps of Engineers personnel to inspect their dikes. Ex. 2149.

The Tribe noted that the County raised the issue of which party carries the burden of proof in relation to “noncompliance issues versus issues of invalidity.” The County contended that “the arguments of the petitioners and participant on noncompliant issues are difficult to separate from the issues of invalidity,” thus confusing the County. Mason County response at 4. The Tribe reminded the Board that it has “clearly set forth the three issues on noncompliance as enumerated by the Board in its February 11, 2000, memorandum.” The Tribe noted that the County had briefed both issues of invalidity and noncompliance in the same opening brief and now wants to blame the Tribe for the County’s confusion.

The Tribe noted the quote from the Skillings-Connolly report in our earlier order which concluded that there is “a strong possibility of a major avulsion” and also declared that the Valley is in crisis and that overflow pathways are avulsion routes. The Tribe disputed the County’s contention that the addition of the avulsion risk areas and overbank flow paths to the no-new-footprint zones brings the County into compliance. The Tribe maintained that the correlation between the avulsion risk areas and overbank flow pathways detailed in the floodplain and those listed in Section 5.4-2(1)(iv) of the FDPO is vague and ambiguous. The Tribe contended that areas with site elevations of more than 2 feet below the base elevation should be clearly defined and delineated on an official map. This, the Tribe claimed, would help reduce much “guess work” providing a higher degree of certainty to applicants in the permitting process and giving a higher level of assurance to Valley residents that flood hazards are minimized.

The Tribe noted that the County had not responded to the advice of the Department of Community, Trade, and Economic Development that “risks cannot be effectively reduced except by avoidance of the critical area” in some cases involving building and development in FFAs. WAC 365-190-120. The Tribe argued that the newly revised FDPO does not prohibit and limit encroachment in the floodway nor curtail construction, in contrast to the County’s claims that it does. The Tribe averred that the 3% footprint zone touted by the County as its curtailment and

encroachment limitation device allows a density out of place in any rural area, let alone any FFA. The Tribe further pointed out that the County has failed to revise the FDPO to include an adequate diking policy and protections as recommended by the planning advisory committee. Ex. 2101 at 6-98 through 6-99. The Tribe argued that the County had not responded to our requirement for low density in ARLs within the FFAs.

The County responded that Petitioner Diehl was citing “worst-case scenarios” and asserted that the County had included BAS through its use of engineering firms with expertise, i.e., KCM and Skillings-Connolly. The County maintained that it had abandoned the density flood fringe approach and asserted that “what the Tribe wants to call a floodway has been designated as the Detailed Study Area Zone A-2 floodplain.” The County further asserted that the newly adopted ordinance increased restrictions substantially by creating extensive areas of no new footprints. The County did not address the fact that a 3% footprint limits density to 1 du per acre. The County asserted that it had added the area of the Skokomish River and tributaries upstream of the detailed study area floodplain to the Special Flood Risk area. It maintained that the 3% footprint limit constituted additional restrictions in ARLs.

CONCLUSION

We conclude that the County has complied with Item 1 of our 1999 order in adopting permanent FFA DRs. It has failed to comply with Items 2 through 6 of our order. It has failed to meet its burden of demonstrating that its new FDPO no longer substantially interferes with Goals 2, 8, and 10 of the GMA. The County needs to clarify its designation of the Skokomish River FFA so that its boundaries are clear. The vagueness of FFA boundaries makes it impossible to determine whether the County continues to allow new building activity in FFAs. Any new construction within the FFA threatens public safety and fails to comply with the GMA. The record does not demonstrate that new dwellings are precluded in the area outside the “no-new-footprint” zone but within the Skokomish FFA at current allowable density.

We further conclude that new dwellings would be at risk from the results of a major avulsion. The Skillings-Connolly report, which represents BAS in this case, was unequivocal in its warnings about the public safety risks of major avulsion. Pg. 27, Ex. 2108. The report also

declared that there was substantial risk associated with living within these flood zones and adjoining areas subject to flooding and/or avulsions (Exhibit #2108). Skillings-Connolly recommended: “Mason County should continue the provisions of their existing moratorium for the Zone A floodplains of the Skokomish River including the South Fork and Vance Creek drainages. The County should also consider expanding the moratorium to include those additional areas subject to flooding and/or avulsions as described in this report.” The County has failed to clearly respond to its own consultant’s warning in a way that complies with GMA.

The County acknowledged that it is still noncompliant in the FFA with regard to SMP and HCA DRs still pending in other scheduled compliance hearings for this case. This failure to comply demonstrates the County’s continued failure to protect critical area functions and values in the FFA. The County failed to delineate functions and values needing protection in its brief and was unable to do so in response to our questions at the compliance hearing. The County has failed to show how it has taken steps to protect functions and values or critical areas.

The refusal of dike owners to allow dike inspections in five of the nine dikes which the FDO required to be subjected to a monitoring program leads us to conclude that the requirement for an effective dike monitoring program has not been achieved and that the County remains in noncompliance.

The record does not show that there are buffers in the ARL areas within the FFA and, if there are, whether they are sufficient to protect critical area functions and values in the Skokomish FFA.

The County was unable to answer questions at the compliance hearing regarding the actual density in the FFA within no-footprint-zones and within the non-ARL, rural sections of the FFA. We conclude from the record that the “3%” density limitation is equal to a 1 du per acre density. A 1/1 density is not appropriate for rural areas, nor for ARLs. The County’s density in FFAs fails to comply with the Act and substantially interferes with Goals 2, 8, 9, and 10. The density provisions fail to assure protections of ARLs from incompatible uses.

We conclude from the record that special flood hazard areas as defined by FEMA in Exhibit #1545, mean the 100-year floodplain or the “A Zones” as best delineated on the FIRM map,

Exhibit #1544 or appendix M. This zone is the 100-year floodplain (the area with a one percent chance of flooding in any given year, as defined in sections of the ordinance). The definition section uses a plethora of confusing definitions (see p. 5 “nomenclature”) for this area and other associated and sometimes overlapping areas.

The maps in this record are as confusing as the nomenclature. They do not show areas of special flood hazard clearly delineated by letters A or V. The flood hazard area map, Exhibit C of Ordinance #16-00 contains no such delineations. The KCM map, Exhibit 615, contains no such delineations. The FIRM map exhibit (Appendix M or Exhibit #1544) contains a number of notations of “Zone A” or “Zone A2”, but no letter “V” appears. Letter V apparently indicates velocity zones. Exhibit #2108. The Skillings-Connolly analysis contains a map on page 22, figure 7, which denotes potential avulsion locations designated by such labels “area V-1” or “area V-4” or “area S-1 or S-2.” This hodgepodge of delineations on different maps makes the declaration “designation on maps always includes the letters A or V” difficult to apply. No new footprint zones appear to preclude construction in Zones 1, 2, 3, and 4 and in Zone 1A. We are unable to find maps in Ordinance #16-00 which include the letter “A” in Zones 1, 2, 3, and 4.

Regarding mapping adequacy, the County’s consultant states:

“While some fairly detailed mapping exists of the floodplain for significant portions of the Skokomish River, the upper reaches have not been adequately surveyed to provide sufficiently detailed information to better define areas of potential hazard. Skillings-Connolly Final Report, September 29, 1999, p. 27.

Although it appears from the record that the County has actually designated the 100-year floodplain and additional of areas subject to flooding and/or avulsion as an FFA or an area of special flood hazard, the County has failed to clearly delineate this designation and has apparently failed to preclude new construction within this area. Until it does so, the County will be noncompliant and in substantial interference with the goals of the Act.

ORDER

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We find that Mason County is in continued noncompliance regarding Items 2 through 6 of our previous compliance order concerning FFAs. It has failed to meet its burden of demonstrating

removal of substantial interference, and is in continued invalidity regarding risks of avulsion, prohibition of construction, monitoring of diking, and inclusion of BAS. The County also failed to comply with the requirements to protect ARLs from incompatible uses, and has substantially interfered with Goal 8 (natural resource industries). The density provisions in the FFA are noncompliant and substantially interfere with Goals 2 (open space), 8, 9 (reduce sprawl), and 10 (environment). The County failed to comply with the designation requirements in sections .040, .060, and .170 of the Act. It failed to comply with the internal consistency requirements of the Act. In order to comply with the GMA and remove substantial interference with its goals, the County must:

1. Clearly map and clearly designate as FFAs the areas variously referred to as floodplains, floodways, areas of special flood hazard, special flood risk areas, special flood risk zones, or detailed study areas, and clearly preclude new construction within them;
2. Eliminate the confusion caused by the use of multiple definitions for the FFAs;
3. Include avulsion risk areas in its designation and mapping of designated FFAs;
4. Bring its SMP and HCA ordinances into compliance and enumerate the functions and values protected by a compliant ordinance regarding SMP and HCA in the FFAs;
5. Preclude densities greater than 1 unit per 10 acre in the ARLs, including those within the UGAs;
6. No new footprint zones, if used, must express densities in terms of units per acre and must comply with GMA requirements for rural densities in rural areas and resource densities in ARLs; and
7. Establish a diking monitoring and regulation program that precludes individual homeowners from frustrating inspections..
8. Any findings of noncompliance and/or invalidity in previous sections of this compliance order are incorporated in the Order section by reference.

Ordinance #16-00 substantially interferes with the goals of the Act and is declared invalid.

The above requirements must be carried out within 180 days of the date of this order. A progress report is due November 20, 2000. A report on actions taken to achieve compliance and remove invalidity is due January 16, 2001.

Findings of Fact and Conclusions of Law pursuant to RCW 36.70A.302(1)(b) are adopted and attached as Appendix I and incorporated herein by reference.

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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.

So ORDERED this 24th day of July, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member

APPENDIX I

Findings of Fact

1. Ordinance #16-00 does not clearly prohibit construction in FFAs.
2. The nomenclature used to describe FFAs includes: A zones, floodways, detailed study areas, areas of special flood hazard, flood zones and adjoining areas subject to flooding and/or avulsions. The record contains a variety of maps used to depict FFAs. The variety of nomenclature and maps makes it difficult to clearly understand the delineation of the designated FFAs, particularly in the Skokomish River Valley.
3. The continued noncompliance of the Mason County SMP and HCAs and the failure to clearly require vegetative buffers in the ARL constitute a failure to protect functions and

values of the FFA, a critical area.

4. No effective monitoring for diking activity exists in Mason County.
5. The risks of the affects of a major avulsion are not addressed by Ordinance #16-00.
6. DRs addressing the Skokomish FFA are not consistent with other Mason County FFAs.
7. The densities allowed within the FFA are not appropriate for resource lands nor for rural lands.
8. The agricultural use exemption process does not assure adequate ARL buffers.
9. Any finding which is more correctly a conclusion of law should be so deemed.

Conclusion of Law

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Ordinance #16-00 substantially interferes with GMA Goals 2, 8, 9, and 10 because it fails to address risks of avulsion, clearly prohibit construction, monitor diking, delineate appropriate densities, clearly delineate the extent of the FFAs, or include BAS. Ordinance #16-00 is declared invalid.

APPENDIX II

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Table of Acronyms

| | |
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| ARL | Agricultural Resource Land |
| BAS | Best Available Science |
| DR | Development Regulation |
| du | Dwelling Unit |
| FDO | Final Decision and Order |
| FDPO | Flood Damage Prevention Ordinance |
| FEMA | Federal Emergency Management Act |
| FFA | Frequently Flooded Areas |
| FIRM | Federal Insurance Rate Map |
| GMA, Act | Growth Management Act |

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|-----|--------------------------------|
| HCA | Habitat Conservation Area |
| KCM | Kramer, Chin and Mayo |
| RCW | Revised Code of Washington |
| RO | Resource Ordinance |
| SMP | Shoreline Master Program |
| UGA | Urban Growth Area |
| WAC | Washington Administrative Code |