

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

JOHN E. DIEHL, KERRY HOLM, GORDON)	
JACOBSON, and VERN RUTTER, individually,)	
and as members of the MASON COUNTY)	No. 95-2-0073
COMMUNITY DEVELOPMENT COUNCIL,)	
a non-profit association,)	
)	
Petitioners,)	FINAL DECISION
)	AND ORDER
vs.)	
)	
MASON COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
PETER OVERTON, DONALD B. PAYNE,)	
McDONALD LAND COMPANY, ET. AL, SKOOKUM)	
LUMBER COMPANY, MANKE LUMBER)	
COMPANY and MASON COUNTY PRIVATE)	
PROPERTY ALLIANCE (MCPPA),)	
)	
Intervenors.)	
_____)	

INTRODUCTION

On July 14, 1995, the Western Washington Growth Management Hearings Board (Board) received a petition for review from John E. Diehl, Kerry Holm, Gordon Jacobson, Vern Rutter, and the Mason County Community Development Council (Petitioners), charging that Mason County (County) had failed to comply with the goals and requirements of the Growth Management Act (GMA or the Act).

Petitioners alleged that the County had failed to identify and protect forest and agriculture lands as called for under the Act, and that the County's wetlands ordinance improperly excluded

wetlands designated under its Shoreline Master Program. Petitioners further alleged that the County had failed to properly regulate wetlands, aquifer recharge areas, and frequently-flooded areas.

Petitioners charged that the County Code failed to provide adequate guidelines for setting lot size in landslide hazard areas and within 200 feet of the shoreline and failed to provide adequate standards under the Act pertaining to seismic hazard areas. Petitioners further asserted that the County Code failed to meet the Act's requirements and goals on sprawl prevention, identification and protection of wildlife habitat, and retention of open space.

Petitioners contended that the County's Interim Urban Growth Area (IUGA) for the City of Shelton failed to comply with the Act because it allowed annexation outside the IUGA, and because it failed to adopt development regulations for the IUGA. Petitioners also alleged that the County had failed to adopt a comprehensive plan and development regulations by the deadline called for by the Act.

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PROCEDURAL HISTORY

A prehearing conference was held in August, and a motions hearing was held September 21, 1995 in Shelton. Intervenor status was granted to the intervenors referenced below, and the County's Motion to Dismiss for Lack of Jurisdiction was denied. Petitioners' Dispositive Motion was granted in part. We reserved ruling on issues regarding the interim resource ordinance, best available science for anadromous fish protection, and invalidity. We granted the parts of the motion regarding interim urban growth areas, the comprehensive plan, and development regulations. We ruled that the County's sunseting of its IUGA and its allowance of annexations beyond the IUGA failed to comply with the GMA. Further, we held that the County's failure to adopt a comprehensive plan and implementing development regulations failed to comply with the goals and requirements of the Act. We ordered the County to adopt IUGAs and implementing development regulations by January 4, 1996, and to adopt a comprehensive plan and development regulations by April 2, 1996.

The hearing on the merits was held November 8, 1995, in the Shelton Public Utility District #3

offices. All three Board members were present. Appearing for petitioners was Mr. John Diehl. Appearing for the County was Mr. Mike Clift. Mr. Eric Valley was also present for the County. Intervenors Donald B. Payne, Skookum Lumber Company, and Mason County Private Property Alliance were represented by Ms. Sarah Smyth; Mr. Peter Overton represented Intervenor Overton and Associates; Mr. Sandy Mackie represented McDonald Land Company et. al.; and Manke Lumber Company was represented by Mr. William T. Lynn. The Court Reporter was Randi Hamilton.

A November 6, 1995, motion to remand the appeal to the County to address issues raised in the petition and to enter appropriate findings of fact was withdrawn by Mr. Clift at the beginning of the hearing on the merits.

Objection Regarding Jurisdiction

Mr. Lynn, representing Intervenor Manke Lumber, raised an objection regarding jurisdiction at the beginning of the hearing on the merits. We noted his objection and ruled that by accepting the conditions under which Manke was granted Intervenor status, Manke waived its right to a jurisdictional objection at such a late date.

DISCUSSION AND CONCLUSIONS

ISSUE 1. Did Mason County fail to properly classify, designate, and protect Natural Resource Lands and Critical Areas? If so, did the County fail to comply with RCW 36.70A.020, .050, .060, AND .070?

Forest Lands

Petitioners argued that the County criteria for designation of forest lands of long-term commercial significance were so narrowly drawn that they excluded large areas which clearly met the criteria of the Growth Management Act. They further asserted that the reasons for these exclusions were not present in the record. The criteria included a requirement for enrollment in the Open Space Property Tax classification, which Petitioners pointed out, allowed anyone who opted not to enroll commercially-significant forest land in the tax program to avoid having land included in the forest land designation. The criteria also included a minimum block size of 5,000

acres, so that blocks of land in use and of long-term commercial significance smaller than 5,000 acres were excluded from designation. Petitioners pointed to these and other criteria as examples of the exclusionary nature of the criteria, without rationale. Further, Petitioners noted that the soil index was not used as a criterion which thereby allowed the other criteria to exclude many parcels of highly productive soil types.

Petitioners contended that the County mapped forest land ownership before deciding what criteria would be used and what would be included as forest land of long-term commercial significance. Subsequent to the mapping, the Resource Lands Committee (Ex. 263A) directed the County's consultant to "come up with quantitative criteria that best matched the map." This Board has previously held that first establishing a desired outcome and then developing data or criteria to support that outcome does not meet the test of a reasoned decision based on appropriate factors. *Moore-Clark Incorporated v. Town of La Conner*, #94-2-0021, *OEC, et.al., v. Jefferson County*, #94-2-0017.

The County did not address the question of forest land designation in its brief. Intervenor Manke argued that property tax classification was not inappropriate because WAC 365-190-060(5) included the very same factor. What the WAC does not do, however, is make the property tax classification an exclusionary criterion. The Department of Community, Trade and Economic Development (CTED) clearly recognized that property tax classification status is optional with the owner. Making participation in the tax program a prerequisite for forest land designation effectively leaves the designation decision to the land owner. This does not comply with GMA.

Manke further argued that the 5,000 acre size was an appropriate threshold because it is sound practice to isolate forest land from conflicting uses. Again, Intervenor Manke ignored the exclusionary characteristic of the criterion by overlooking the fact that blocks smaller than 5,000 acres may well be commercially-significant forest land in productivity and need the same kinds of protections afforded the larger blocks.

Petitioners also noted that setbacks recommended by the local Growth Management Advisory Committee (GMAC) of 150 feet from property lines of designated long-term commercial forest land had been deleted by the Planning Commission. The setbacks were recommended to mitigate

the impact of “inholding lands” which allowed a density of 1 du/2.5 acres in lands adjacent to long-term commercial forest lands. (Inholding lands are blocks of less than 640 acres surrounded by Long-Term Commercial Forest Lands (LTCF), and which do not meet LTCF Land classification criteria). Keith Simmons of Simpson Timber, Vice-Chair of the GMAC, asserted that the deletion of setbacks should, in fairness, trigger the deletion of the inholding land designation (Ex. 100) so as to replace the protection lost with deletion of setbacks. Yet, the setbacks were not included in the Interim Resources Ordinance (IRO) and inholdings remained. As Mr. Simmons pointed out, development adjacent to commercial forest lands at 1 du/5 acres or 1 du/2.5 acres without setback would exacerbate this conflicting use.

Resource Redesignation

It is not clear from a reading of the resource redesignation section (17.01.130) of the Ordinance whether the opt-in and opt-out provisions, apparently limited to the first 60 days following the effective date of the ordinance, were available once again after one calendar year. If indeed they are and the opt-out provisions are not moot, then Petitioners’ concerns regarding the redesignation criteria are well founded. The Act calls for designation and protection of forest lands of long-term commercial significance. That protection includes preclusion of incompatible uses in proximity to the commercial forest lands. Yet the criteria for redesignation under section 3 of .130 include the proximity of designated land to urban and suburban areas (which ought to have been considered prior to designation), the compatibility and intensity of adjacent and nearby land use and settlement patterns (presumably protected against by the initial designation), and the history of land development permits issued nearby. Further, if the redesignation is approved and the land is not developed under the new designation within three years, the land reverts to commercial forest designation. This seems to argue against the redesignation in the first instance, as land that is still viable for commercial forest production should not be taken out of that designation.

The allowance of a continuation of tax benefit under open space classification for three years after redesignation is also puzzling. Neither the County nor the Intervenors were able to adequately respond to questions concerning the reasons for this long period of benefit after the status justifying benefit has ended.

Agricultural Lands

Petitioners pointed out that the Ordinance was adopted with no designation of agricultural lands of long-term commercial significance and, consequently, no development regulations protecting such land. The County argued that because Mason County's percentage of agricultural land was among the smallest in the state it was unnecessary to designate and protect agricultural land.

Mr. Mackie, representing McDonald Land Company, et. al., stated that while farming continues to this day in Mason County it is a "labor of love" rather than commercially viable. Petitioners pointed out that in order to be commercially viable land does not have to provide the entirety of an owner's income. They noted that exhibit 552 identified 7,088 prime agricultural acres in the County, plus 23,000 "unique" acres involved in the production of Christmas trees. Exhibit 507, the remarks of Mr. Jim Hunter to the Resource Subcommittee is telling. In describing the history of agriculture in Mason County, he cited an average income of \$12,000 a year and stated "there is farming going on to be sure."

The County could not answer the question from the Board concerning the volume of agricultural acreage under the Open Space Tax Benefit classification. It is impossible to conclude from the record that there is no agricultural land of long-term commercial significance in Mason County. Many of the exhibits point to the existence of such land.

The Act contains no threshold below which agricultural land of long-term commercial significance should not be designated.

To ignore the existence of agricultural lands because, as Mr. Hunter suggests, it may freeze the assets and the potential for owners to later subdivide, is to fly in the face of the intent of the agricultural land category. The Act is clear that if there is commercial viability, the land must be designated and conserved. Mason County has failed to do so.

Wetlands

Petitioners argued that wetland protection should be consistent throughout the County. They asserted that the exemption of wetlands protected by the Shoreline Master Program creates an

inconsistency not in compliance with the Act. Ms. Smyth, representing three intervenors, argued that the State agencies with expertise in this area had not objected to the differences, but had recommended that they be reconciled in the comprehensive plan. We have previously held that all critical areas need be designated, but all need not be protected. *Clark County Natural Resource Council v. Clark County*, #92-2-0001 (Clark County I). The Central Board has held that all designated areas need not be protected to the same degree. *Pilchuck v. Snohomish County*, CPSGMHB 95-3-0047. While the exemption from designation of Shoreline Master Program wetlands is troublesome, to some degree it is a rather fine technical point. It appears that all wetlands in Mason County receive protection or designation either under this ordinance or the Shoreline Master Program. The inference one can draw from the need for reconciliation of the dual treatment of wetlands at the time the comprehensive plan is adopted is that the IRO is truly interim. We have previously held in *Clark County I*, #92-2-0001, and *North Cascades Audubon Society, et.al. v. Whatcom County*, #94-2-0001, that critical areas ordinances are not interim in nature. Yet, they are subject to amendment and must be consistent with comprehensive plans. Thus, this flaw is not fatal. The most troubling aspect of the wetland regulations in the IRO is the 50-foot buffer for all wetland categories. (See our later discussion under Fish and Wildlife Habitats and Buffers).

Critical Aquifer Recharge Areas

Aquifer recharge areas are designated in the IRO, but their protection, according to the record, is permissive. No septic maintenance requirements are apparent in the record for dwellings within critical aquifer recharge areas. Agricultural activities are “encouraged” to use best management practices. Residential uses “may” require an enhanced on-site sewage disposal system. “Care must be used” when applying herbicides, fertilizers, and pesticides to protect recharge areas. No specific requirements are present in the ordinance to ensure meeting these laudable goals. Petitioners quoted County planning staff who saw that appropriate regulations were lacking in the IRO to protect critical aquifer recharge areas and said so: “The proposed aquifer recharge section is deemed inadequate by the planning staff to protect aquifer recharge areas long term” (Ex. 99). The County Health Services’ Brad Banner proposed enhanced septic tank regulations to protect critical aquifer recharge areas. His March 1993 recommendations were never acted upon (Ex. 529A). The County must adopt regulations adequate to protect critical aquifer recharge areas.

Frequently Flooded Areas

Petitioners cited a memorandum from staff member Robin Tyner dated October 11, 1991 (Ex. 50) in which he stated the current ordinance contained no lot size minimum or density requirements. Mr. Tyner also pointed out that the ordinance only regulated housing design requirements in the floodplain, but did not address whether or not housing should be there. The County cited a number of other ordinances as regulating the floodplain, including the Flood Protection Ordinance (Ex. 525), SEPA (Ex. 211), and the Mason County Code (Ex. 555). The County defended its failure to include the Skokomish River valley in the floodplain regulations by noting that the Federal Emergency Management Agency (FEMA) withdrew its Federal Insurance Rate Map from the Valley in 1991. The County pointed to its building requirements, including a requirement that the first floor of any new building be at least one foot above the elevation of the surrounding terrain, as examples of adequate regulation in compliance with the Growth Management Act. The IRO Ordinance merely stated that development in frequently flooded areas must be in compliance with existing ordinances. There were no specific floodplain development regulations. These regulations are necessary to comply with the requirements of the Act, and should cover the Skokomish River floodplain.

Fish and Wildlife Habitats and Buffers

Petitioners argued that the aquatic management areas section of the ordinance, .110, contained “minimal and unjustifiable vegetative buffers.” They cited 25 feet for Type 4 waters and 50 feet for Type 3 as inadequate to protect fish and wildlife habitat. They also noted that the priority habitats of distinctive species were not classified nor designated and so the buffers were not tailored to those habitats. The County responded that it had considered the 4-tier program in Department of Ecology’s model ordinance but rejected it because the GMAC felt the public could not understand and the County therefore could not implement that program. They were also concerned about property rights and takings questions. According to the County, the 50-foot buffer selected in the Wetlands section (17.01.070) for all wetlands was “based on the most common wetland type in Mason County, type III.” Rivers and streams in the Aquatic Management section (17.01.110) had a variable setback according to water type (i.e., 75 feet for Type 2, 50 feet for Type 3, 25 feet for Type 4).

The GMAC's decision to select one buffer size for wetlands is puzzling in light of the contrast between this "one-size fits all" approach and the variable buffer sizes for rivers and streams. CTED guidelines, WAC 365-190-180(5), call for a variety of protections according to species and habitats. No reason is apparent from the record for the rejection of these guidelines concerning wetlands buffers. Absent justification to the contrary, the guidelines should be followed.

Conclusion: Issue 1

The record shows clearly that many hours of discussion and deliberation went into the formation of the interim resource ordinance. We agree with the observation of Intervenors that some aspects of the ordinance constitute "a good start." Nonetheless, compliance with the Act, not hours spent in deliberation nor degree of consensus, is the criterion which must be applied. Some forest land of long-term commercial significance was unjustifiably excluded. No long-term commercially significant agricultural lands were designated and that failure to designate was not accompanied by convincing supporting data. The treatment of buffers between wetlands and streams and lakes was inconsistent and without justification for the inconsistency. Inadequate protections were afforded aquifer recharge areas and floodplains. The IRO is not in compliance with the goals and requirements of the Act.

ISSUE 2. Did Mason County allow annexations beyond the Interim Growth Area (IUGA) boundary and limit the life of the IUGA fixed at the Shelton City Limit to January 1, 1995? If so, did the County fail to comply with RCW 36.70A.110 and RCW 35.13.005?

and

ISSUE 3. Did Mason County fail to adopt Development Regulations implementing IUGAs? If so, did the County fail to comply with RCW 36.70A.110(4)?

These issues were decided at the September 21, 1995, motions hearing. We ruled that neither IUGA ordinance nor development regulations were currently in effect and therefore the County had failed to comply with RCW 36.70A.110. We noted that the ordinance also violated RCW 35.13.005. We ordered that the County rescind section 2 of the ordinance's agreement allowing annexation of property outside the IUGA and bring the IUGA ordinance and implementing

development regulations into compliance with the Act by January 4, 1996.

ISSUE 4. Did Mason County fail to adopt a Comprehensive Plan and Development Regulations? If so, did the County fail to comply with RCW 36.70A.040(3) and .070?

This issue was decided in the motions hearing of September 21, 1995. We ruled that Mason County, by failing to adopt a comprehensive plan (CP) and development regulations (DRs), was not in compliance with the goals and requirements of the Act and ordered the County to adopt a CP and DRs by April 2, 1996.

ISSUE 5. Did Mason County fail to use best available science in designating and protecting critical areas? Did the County fail to give special consideration to Anadromous Fisheries Conservation and Protection? If so, did the County fail to comply with RCW 36.70A as amended by Section 105 of ESHB 1724?

The amendments to this chapter concerning best available science and special protection for anadromous fish are now codified under RCW 36.70A.172. We have addressed the general question of conservation and protection measures for anadromous fish habitat under Issue 1 of this order.

Regarding the use of best available science, Petitioners argued that the language included in Engrossed Substitute House Bill (ESHB) 1724, Laws of 1995 “shows a legislative intent to “raise the bar” with respect to the minimum that cities and counties planning under the GMA must achieve to be in compliance with its requirements.” The County contended that the best scientific expertise available was sought and considered in drafting and approving the County’s interim resource ordinance. The record is not specific concerning this “scientific expertise” (Ex. 556). The County argued that the application of Section 105 of ESHB 1724 was not retroactive. The County also pointed out that the term “best available science” is not defined in the Act. We agree with both these contentions. This provision is not remedial in nature. It is presumed to have prospective application.

Conclusion - Issue 5

Mason County’s IRO was adopted long before the requirement for best available science became

part of the Act. That requirement is not applicable in this case.

ISSUE 6. Would the continued validity of Ordinances 97-93 and 27-94 substantially interfere with the fulfillment of the goals of RCW 36.70A.020?

The Petitioners asserted that the interim resource ordinance currently in effect substantially interferes with the fulfillment of GMA's goals by failing to conserve productive forest and agricultural lands, fish and wildlife habitat, and protect the environment. The County argued that the IRO is an interim ordinance and must be made consistent with the policies of the County's comprehensive plan when it is completed and adopted. By order of this Board, the adoption date for a comprehensive plan is April 2, 1996. We are mindful that a finding of invalidity may have significant effects. Because of the imminence of the comprehensive plan adoption date which will coincide with the compliance date set following the remand of the IRO, we will reserve ruling on the question of invalidity until after April 2, 1996.

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CONCLUSION

Mason County has failed to comply with the requirements of RCW 36.70A.060, .050, and .020 and 170 in that it has failed to properly designate agricultural lands and forest lands and has afforded inadequate protection for aquifer recharge areas, floodplains, and wetlands. The County has also allowed permissive resource redesignation.

ORDER

The IRO is hereby remanded, and the County must bring it into compliance with the GMA by April 2, 1996. The County should pay particular attention to the deficiencies noted in this Final Decision and Order in its amendment of the ordinance.

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

SO ORDERED this 8th day of January, 1996.

Les Eldridge
Presiding Officer

Nan A. Henriksen
Board Member

William H. Nielsen
Board Member