

**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)	(GEOLOGICALLY
(MCCDC),)	HAZARDOUS AREAS)
)	
)	ORDER REGARDING
Petitioners,)	COMPLIANCE
)	HEARING #10, AND
v.)	FINDING
)	CONTINUED
MASON COUNTY,)	NONCOMPLIANCE
)	
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 (MCPPA),)	
)	
Intervenors.)	
_____)	

SYNOPSIS OF THE ORDER

-

We find the County in continued noncompliance for failure to protect geologically hazardous areas (GHAs). RCW 36.70A.060(2) and .172(1). Its failure to comply involves inadequate standards and requirements for minimizing soil and vegetative disturbance and consequent excessive administrative discretion on a case-by-case basis. The County failed to consider limiting density in GHAs and allows the Director of the County Department of Community

Development (Director) to reduce buffers below a 50-foot standard already defined as “minimal” by an agency with expertise. It failed to reference inclusion of best available science (BAS) from the aquatic management section of the interim resource ordinance (IRO) as a protection measure for GHAs. Because of the need to retain scientific or other expert advice in the protection of critical areas as underscored by the Legislature’s adoption of RCW 36.70A.172(2), it is important that the County avail itself of a range of BAS including, the advice of agencies with expertise. As Division I Court of Appeals has said, it is hard to imagine scientific evidence not playing a major role in the context of critical areas. The County has written its ordinance in such a way as to require the assistance of staff with considerable GHA experience. The record does not show the availability of such staff.

INTRODUCTION

The sections of Mason County’s IRO addressing GHAs were challenged by Petitioner John Diehl in 1995. Although our 1996 final decision and order (FDO) did not specifically mention GHAs, the County stipulated on February 10, 1999, that the GHAs were “within the scope of these compliance hearings.” The County’s actions regarding erosion hazard areas, and seismic hazard areas (1993), and landslide hazard areas (1999), were again challenged by Petitioners Diehl and Mason County Community Development Council (MCCDC) in 1999. A compliance hearing, the 10th in this case, was held February 3, 2000, at the Board of Industrial Insurance Appeals, Olympia, Washington. Appearing for Petitioners were John Diehl for himself and Michael Gendler for MCCDC. Chief Civil Deputy Prosecutor Michael Clift represented Mason County. Les Eldridge, William H. Nielsen, and Nan A. Henriksen were present for the Board.

DISCUSSION

Petitioners challenged the County’s response to our remand in three categories of GHAs: Landslide Hazard Areas Mason County Code (MCC) 17.01.100, Seismic Hazard Areas (MCC 17.01.102), and Erosion Hazard Areas (MCC 17.01.104). They contended that the County’s efforts failed to comply with the GMA in some or all of following categories within the three

GHA categories:

- administrative discretion
- standards
- buffering
- restrictions on clearing, and vegetation restoration
- inclusion of BAS
- limiting densities in GHAs
- providing information for individuals considering construction in bluff areas
- monitoring and enforcement

Petitioner Diehl noted that the County had revised the part of the IRO relating to landslide hazard areas but had made no changes regarding erosion hazard areas and seismic hazard areas, relying upon the 1993 ordinances for those areas. He pointed out that the only restrictions in the preexisting **seismic hazard areas** section of the ordinance were taken from the Uniform Building Code and the Mobile Home and Recreational Vehicle Ordinance (MCC 17.01.050) and related only to protection of structures. He asserted that the County had failed to consider limiting density of development in areas subject to soil liquefaction or surface faulting. He charged that Section 17.01.102.D.2 of the County Code set neither standards nor controls on administrative discretion as when it calls for “taking potential seismic effects into consideration.” Further, he noted that the ordinance failed to provide for monitoring and enforcement.

Petitioner Diehl contended that the section on **erosion hazard areas** suffered from the same faults: absence of standards, excessive administrative discretion, and no monitoring or enforcement.

With regard to **landslide hazard areas**, Petitioner Diehl charged that the discretion of the Director to reduce the standard 50-foot vegetated buffer around landslide hazard areas, based on results of a geotechnical report or geological assessment, contained no standards upon which to base such a reduction. He further noted that the Washington Department of Fish and Wildlife (WDFW) had characterized a 50-foot buffer as “minimal.”

Mr. Diehl also asserted that the County had failed to include BAS or give special consideration of

the needs of anadromous fish with regard to this section. He noted that GHAs do provide habitat functions and values and that, absent any inclusion of BAS, those functions and values were not considered nor addressed.

Mr. Diehl charged that to compel the Director to make site-specific, case-by-case decisions would make it impossible for the County to weigh cumulative effect. He contended such discretion would make watershed and corridor planning difficult if not impossible, owing to habitat fragmentation. He maintained that in a County whose resources are as limited as Mason County's, the excessive discretion placed a huge burden on the Director when the County failed to provide standards on which decisions can be based.

Petitioner Diehl pointed out that the question of densities in GHAs was never addressed by the County.

MCCDC contended that without standards, people contemplating house construction could not be made aware of the hazards, cited by the Washington State Department of Ecology in its "Management Options for Coastal Bluffs" Ex. 2037. MCCDC pointed out that the IRO did not require a report from individuals who were contemplating *clearing*, as it did for those contemplating *grading*. Ex. 2031. They maintained that the ordinance was vague and its provisions were stated as goals rather than standards. They cited as an example, MCC 17.01.100 D.3.c., which called for "preventing erosion of soils" but which provide neither standards nor guidance on how prevention could be accomplished. "The cited provision is akin to a goal," said MCCDC, "not a regulation. It has no standards and cannot be enforced."

MCCDC maintained that the citation of the County in its brief to the use of BAS referred to a letter from the County's consulting engineer which advanced an opinion on administrative discretion and had nothing to do with "science." (Marty McCabe letter), Ex. 2002.

Regarding administrative discretion, MCCDC cited the Central Board's ruling "that development regulations must provide clear and detailed criteria so that staff has adequate regulatory 'sideboards' to guide its decisions:"

What is within our realm are the development regulations that provide administrators with clear and detailed criteria so that, in wielding professional judgment, the Director has regulatory “sideboards” and policy direction. Failure to provide such parameters does not just place an administrator in an uncomfortable position--it would undermine, perhaps fatally, the duty of the legislative body to articulate in its adopted development regulations its expectations and requirements with regard to critical areas protection. Philchuck v. Snohomish County, CPSGMHB No. 95-3-0047 (Final Decision and Order, Dec. 6, 1995) at 37 (CD-Law). See also Friends of Skagit County v. Skagit County, WWGMHB No. 96-2-0025 (Compliance Hearing Order, Sep. 16, 1998) at 24 (CD-LAW) (“clear regulations are also essential for GMA compliance”).

Regulations that are subject to “multiple interpretations” have been found clearly erroneous. Id.”

The County declined to offer a response in argument. In its brief, it acknowledged a lack of a record to review the parts of the ordinance adopted in 1993 (Section 102, 104) because they were so old. It concluded that it was impossible to determine whether BAS had been addressed because of the lack of available record. It did not comment, however, on the ordinance’s failure to reference the aquatic management section of the MCC, which the County maintained protects fish habitat and riparian areas (Respondent’s brief, pgs. 4, 5).

Regarding Section 100 (Landslide Hazard Areas) the County in its brief noted that 100.D.7 (Bulkhead and Bank Protection) referenced consistency with fish and wildlife habitat area regulations. Sections D.5. (Subdivisions) and D.6. (buffers) do not reference such consistency.

Ex. 2023 and Ex. 2024 show that discussion of a requirement on habitat management consultation with a fish biologist was tabled October 6, 1998, by the Board of County Commissioners (BOCC) and not considered further.

The County offered no comment on the question of density.

As the County made no argument, Petitioners offered no rebuttal. The Board, during questioning, asked why the County was affording discretion to the Director to reduce the 50-foot buffers further when WDFW said that those buffers were already minimal. The County made no

response.

CONCLUSION

Landslide Hazard Areas (LHA) - MCC 17.01.100:

The requirement for geotechnical reports or assessments is an excellent start, but standards against which those reports' conclusions can be measured are needed. We conclude that the County was clearly in error in Section D.1.d (Clearing and Grading) by failing to define "minimize" and in setting no standards for minimum soil disturbance. It clearly erred by not requiring a permit for clearing activities, thus leaving the door open for an undetermined degree of vegetative clearing in landslide hazard areas. The provision in Section D.1.c that "trees and vegetation shall be retained to the extent feasible" is not a standard, but merely, as Petitioners noted, an "exhortation to do the right thing."

The County also clearly erred in Section D.2.a. and b. (Vegetative Management) by failing to define "minimum disturbance of trees and vegetation" and making limbing of trees, (rather than tree removal) a preference instead of a requirement or standard. The "standard" of minimized vegetation removal is not defined in Section D.2.b. and therefore does not provide a "standard" upon which the Director can rely.

The County clearly erred in failing to provide standards for land division design which "minimize impacts" to anadromous fisheries and fish habitat (Section .100.5 – Subdivision Design and Lot Size). "Minimizing impacts" must be more clearly defined. Beyond that, the County clearly erred in not extending this attempt at protecting anadromous fisheries and fish habitat to lots not subject to short plats, subdivisions, and large lot divisions. Petitioners are correct in pointing out that, with the thousands of already-platted lots in the County, this constitutes a substantial oversight. Further, the requirement in Section .100.5.a. which calls for all improvements being designed to avoid buffers for aquatic management areas and wetlands, fails to take into account the provision in Section 100.6.c which allows the Director the discretion to reduce the buffer below 50 feet. WDFW declared that a 50-foot buffer width was "minimal."

Seismic Hazard Areas (SHA) – MCC 17.01.102:

Densities in SHAs are not addressed in the development standards section (102.D).

No cross-reference to BAS in the aquatic management section is provided. (That section has been found in continued noncompliance – Order on Compliance Hearing #9, this date).

SHAs are defined as “critical areas requiring immediate protection from incompatible land uses” (102.B). No definition of standards for “protection” or “incompatible land uses” is provided. The Director is left without guidance, and property owners, without certainty.

The development standards section of .102 simply states:

“Development in Seismic Hazard Areas must be in compliance (with) Section 17.01.050.”

Section .050 (Relationship to Other Regulations) provides:

“1. The following adopted County policies and regulations shall be enforced consistent with the terms of this Chapter:

- a. Uniform Building Code
- b. Uniform Fire Code
- c. Mason County Health Code
- d. Mason County Environmental Policy Ordinance
- e. Mason County Mobile Home and Recreational Vehicle Ordinance
- f. Mason County 6-year Transportation Improvement Program
- g. Title 16, Mason County Subdivision Ordinance including Large Lot Requirements
- h. Parking Standards Ordinance
- i. Other adopted ordinances by Mason County

Where this Chapter is found inconsistent with any of the above documents, the more applicable terms shall prevail. All county application forms, review procedures, or

standards that are inconsistent with this Chapter shall be amended within three months of adoption of this Chapter; except where to do so would require approval by State authorities, or extended local public review, in which cases, no time limit is established.”

These do not constitute development standards which comply with the Act.

-
Erosion Hazard Areas (EHA) – MCC 17.01.102:
-

Densities in EHAs are not addressed in the development standards section (102.D).

No cross-reference to BAS in the aquatic management section is provided despite the County’s contention in its brief that “The fish habitat and riparian protections contained in the aquatic management provisions of the Resource Ordinance provide much of the protection needed for anadromous fish and other aquatic species.” (That section is found in continued noncompliance – Order on Compliance Hearing #9, this date).

The County adopted EHAs as “critical areas requiring immediate protection from incompatible land uses” (102.B). No definition nor standards for “protection” or “incompatible land uses” is provided. The Director is left without guidance, and the property owners, without certainty.

-
The County clearly erred by setting no standards for minimums soil disturbance by not requiring clearing permits, by failing to define minimum disturbance of trees and vegetation, by allowing buffer reduction below 50 feet, and by failing to extend protection of critical areas to already-platted lots not subject to subdivision, also need to be addressed in the EHA section.

These omissions fail to comply with RCW 36.70A.060(2), .020(7), (10), and .172(1).

The record shows that the Director must review a LHA geotechnical report or assessment and make an “administrative determination” regarding development. Ex. 2000. Consultant McCabe said “I see no problem with vesting significant decision making authority with the DIRECTOR (*sic*), understanding that he/she is relying on staff members with more direct landslide training and experience for assistance in actually evaluating the situations at hand.” Ex. 2002. We cannot discern from the record that staff members with such experience are available.

ORDER

Sections 17.01.100, .102, and .104 of the IRO are remanded to the County to be brought into compliance with the Act on or before September 1, 2000. In order to comply with the Act the County must:

1. Reference, as it pertains to GHAs, inclusion of BAS used in the Aquatic Management section of the IRO.
2. Consider appropriate densities in GHAs;
3. Provide standards and definitions as discussed in the conclusion section, e.g., define and set standards for “minimum soil, tree, and vegetation disturbance,” and “minimize impact to anadromous fish;”
4. Require permits for clearing;
5. Extend protection of GHAs as critical areas, with special consideration for the needs of anadromous fish, to already-platted lots not subject to further subdivision;
6. Remove the discretion to reduce buffer width below 50’. The County has failed to include the BAS embodied in the evidence presented by an agency with expertise (WDFW).

By this order we also set a compliance hearing for November 8, 2000, at the Shelton Civic Center, 525 Cota Street, Shelton, Washington. The briefing schedule and motions hearing schedule for the compliance hearing is appended as Appendix II.

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.

We append Findings of Fact for GHAs pursuant to RCW 36.70A.270(6) as Appendix I.

So ORDERED this 22nd day of March, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

Nan A. Henriksen
Board Member

William H. Nielsen
Board Member

Findings of Fact

APPENDIX I

Case #95-2-0073

1. The LHA section (100) does not reference consistency with fish and wildlife habitat area regulations for subdivisions (100.5) and buffers (100.6).
2. The ordinance sets no standards for minimum soil disturbance.
3. The ordinance requires no clearing permit and therefore sets no standards for vegetative clearing.
4. The ordinance does not require limbing of trees but rather, allows tree removal for view purposes, expressing only a “preference” for limbing.
5. The ordinance allows the Director the discretion to reduce the 50-foot buffers in GHAs.

6. Washington Department of Fish and Wildlife has declared a 50-foot buffer “minimal.”
7. The record recommends reliance on “staff members with more direct landslide training and experience for assistance in actually evaluating situations at hand.” The record does not show such staff members are available.
8. The record shows no consideration of densities in GHAs.

APPENDIX II – Briefing and Hearing Schedule

Compliance Hearing #14 – GHAs

Case #95-2-0073

-

Case #95-2-0073 – Geologically Hazardous Areas (Compliance Hearing #14)

Progress Report on Actions taken to Comply	July 14, 2000
Compliance Due	September 1, 2000
County Additions to the Record Due	September 8, 2000
Motions & Further Additions to the Record Due	September 18, 2000
Response to Motions Due	September 25, 2000
Motions Hearing (9:00 a.m.) (if necessary)	September 29, 2000
Petitioners’ Briefs Due	October 13, 2000
Response Briefs Due	October 27, 2000
Reply Brief (optional)	November 3, 2000
Compliance Hearing (9:00 a.m.)	November 8, 2000

The hearings will be held at the Shelton Civic Center, 525 Cota, Shelton, Washington.

Intervenors and Participants, and Amicus Curiae should select the appropriate due dates from the schedule above.

-

-

