

**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,)	ORDER RE:
)	FINDING OF
Petitioners,)	INVALIDITY AND
)	SECOND FINDING
vs.)	OF COMPLIANCE
)	AND CONTINUED
MASON COUNTY,)	NONCOMPLIANCE
)	
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.)	
_____)	

SYNOPSIS OF THE CASE

While driving on Highway 101 through Mason County, the traveler passes farms, forest land and rivers emptying into Puget Sound and Hood Canal. In 1993, Mason County made an attempt to protect these resources under the guidance of the Growth Management Act (GMA, Act) through its Interim Resource Ordinance (IRO). The Ordinance was challenged by citizen petitioners in 1995 for failure to adequately identify, designate, protect and conserve critical areas and natural resource lands. We found that the petitioners were justified in their challenge and remanded the Ordinance to the County for compliance with the Act in January, 1996.

Mason County's Growth Management Advisory Committee (GMAC), its Planning Commission and staff and its Board of County Commissioners (BOCC) have devoted countless hours of effort responding to the January 1996, remand of their IRO. It is clear from the record that they recognize that Mason County is evolving and that growth pressures will bring change to the County. The point which has been missed in the deliberations is that Mason County must evolve under the law as set forth by the Legislature in the GMA. The Act requires a type of stewardship, protection of critical areas and conservation of natural resource lands. So far in the deliberations, Mason County has failed to come to grips with the requirements for that stewardship. Those resource lands and critical areas have not been afforded the protection called for under the GMA.

An amended ordinance was passed June 25, 1996. It made very few changes in the IRO. Indeed, the record shows that most of the deliberations leading up to the adoption of the new ordinance centered around justifying the old ordinance rather than acknowledging its lack of compliance and making necessary changes. The amended IRO remains non-compliant. In this order we remand it to the County once again. Further, we again consider the request for a finding of invalidity made last year by Petitioners. Because of the risk to irreplaceable resources, we find that portions of the amended ordinance and the IRO substantially interfere with the goals of the Act, and are therefore invalid.

Mason County's current urban population is less than 20% of its total population. A County with 80% of its population in rural areas faces great difficulty in overcoming the problems of sprawl and protection of resource lands. Mason County's efforts through its IRO and comprehensive plan to overcome this obstacle need to be intensified.

PROCEDURAL HISTORY

Subsequent to a compliance hearing held May 21, 1996, we found Mason County in continued non-compliance regarding the adoption of a resource ordinance and the failure to adopt development regulations implementing the comprehensive plan. We determined that the County had complied with the requirement of adoption of a comprehensive plan (April 2, 1996) but we did not address substantive challenges to the comprehensive plan. A second compliance hearing

was held June 28, 1996, in Memorial Hall in the City of Shelton, Mason County, to consider the County's compliance with our Order requiring development regulations and a resource ordinance. Present at that meeting were all three Board Members; John Diehl, representing petitioners; Mr. Eric Valley, Deputy Prosecutor for Mason County; Ms. Sarah Smyth, representing Donald B. Payne, Skookum Lumber Co., and Mason County Private Property Alliance; Mr. Peter Overton, appearing for Overton and Associates; and Mr. William T. Lynn appearing for Manke Lumber Company.

DISCUSSION

Compliance

The County argued that it had now complied with the requirement for passage of development regulations (DRs) implementing the plan by the June 25, 1996, adoption of Ordinance 82-96. We agree that the "failure-to-act" non-compliance has been cured. We do not address substantive compliance in this proceeding.

With regard to the requirement to bring the Interim Resource Ordinance (IRO) into compliance with the Act, the County relied upon the passage of Ordinance 81-96 on June 25, 1996, amending the IRO.

Agricultural Lands

The County outlined the process by which it had reconsidered its previous position on agricultural land and had arrived at an identical conclusion in Ordinance 81-96, that is, there are no agricultural lands of long term commercial significance in Mason County. The County noted that the agricultural lands of present commercial significance are isolated, in proximity to urban development or rural residential development, and subject to conflicting uses. It argued that *Achen, et al., v. Clark County*, WWGMHB #95-2-0067, provided that counties may make "area-wide" determinations of land designation rather than parcel by parcel. Therefore, an area-wide designation of no agricultural lands of long term commercial significance was an appropriate one, though even applied to owners who expressed the intention to continue commercial agricultural practices over the next 20 years.

Petitioners argued that the County had ignored our Order and the requirements of the Act. They noted that the GMAC (which included the County Commissioners) had voted on May 3, 1996, not to designate any agriculture land, then called for the drafting of Findings of Fact to support their decision. Discussion regarding those findings demonstrated the existence of farm land of long-term commercial significance. The Findings were merely an attempt to factually justify the decision after it had been made. The discussion included Mr. Valley's observation that: "We're going to write Findings saying we find there aren't any agricultural lands of long term significance, but I'll tell you now as I do that, I'll do an analysis of the Washington Administrative Code (WAC) and fit it in and show it to you guys next week. We can't simply apply the WACs to support the conclusion we just reached." Farmer Peggy Van Buskirk noted: "I would hope we still make money off our place in 20 or 30 years. It's still there and hopefully in 20 years or 50 years it will still be there." And again Mr. Valley: "You can have a viable farm and make money, but we, a bottom up planning group, decide it's not long-term commercially significant." No discussion centered on the number of farms presently in the County (145 according to Ex. 653, p. 51) or the 8,277 acres of land classified as agri-aquaculture. The later-adopted Findings of Fact simply stated that in areas of the County containing agricultural activities there were other uses which were potentially incompatible with them.

CONCLUSION - Agriculture

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The record shows little effort by the County to limit incompatible uses. No map is in the record which shows the location of farm land in Mason County, nor does the record show discussion of criteria enumerated in RCW 36.70A.030(10), used to establish long-term commercial significance.

The County has not engaged in any deliberation nor analyzed any data to show that current farm land fails to meet criteria set forth in the Act for long-term commercial significance. The record does not show an examination of the growing capacity, productivity, and soil composition of these farms, nor an assessment of whether these areas are in proximity to population areas, and, if so, what the effect of that proximity would have on the prospect of long-term commercial significance. The agriculture section remains out of compliance with the Act.

Forest Lands

The January 1996, Order noted that the original IRO contained exclusionary criteria for forest land designation. The first criterion allowed anyone who opted not to enroll forest land of long term commercial significance in the open space tax program to avoid having land included in the forest land designation. It also precluded the lands of those not enrolled from being so designated after 1992. The second criterion featured a minimum 5,000 acre block size. Petitioners pointed out that the very same criteria still apply in Ordinance 81-96. These criteria are not in compliance with the Act.

The record shows discussion of blocks as small as 2,000 acres, and of the impact of neighbors on forest lands. Much of the discussions emphasized the need for protection of forest lands from urbanizing encroachment. Setbacks from forest land in inholding lands were recommended by GMAC members. The recommendation was not acted upon.

CONCLUSION - Forest Lands

The record shows much discussion of forest land protection. The IRO and Ordinance 82-96 (DRs), however, show little evidence of effort by the County to actually protect forest lands from encroachment. Specifically, minimum lot size in rural areas is still allowed at 12,800 sq. ft. and inholding lands are allowed to develop at 1 du/2.5 acres. Mr. Wing, in a letter to Mr. Fink June 7, noted that his data on incidents regarding “impact of neighbors” do not point to a minimum block size that is acceptable. The record shows in Ex. 651 that the harvest from non-industrial private forests of less than 1,000 acres amounted to 52,417,000 bd. ft. in 1994, demonstrating the commercial significance of smaller blocks.

The GMAC deliberations did not demonstrate an understanding of the effect of exclusionary criteria. Ms. Holly Manke-White, at the May 9, 1996, GMAC meeting noted that, “Designation is not arrived at by one criteria (*sic*) alone. It’s a combination of all seven criteria and how they mesh together.” The first six criteria of IRO Section 17.01.060 A. (forest lands) “mesh together” as a mandate and each must apply (they “shall be used”, and are each connected by the word “and”). They exclude land which does not meet all six criteria. The first two exclude land which otherwise should be designated as forest land of long term commercial significance. The county has discretion in determining its own criteria, but may not leave designation to the whim of an

owner (criterion #1) or prevent an owner, who would otherwise qualify, from having his land designated because of lack of property tax classification (criterion #1) or exclude otherwise qualified land solely because it is not part of a block of 5,000 acres or more (criterion #2). In arriving at the 5,000 acre block minimum the County did so in large part because of its concern over the effects of encroachment on blocks smaller than 5,000 acres. Yet, they have taken no action which significantly reduces the impact of encroachment. The forest land section of the amended IRO remains out of compliance with the Act.

Wetlands, Fish and Wildlife Habitat, Best Available Science For Anadromous Fish

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Petitioners pointed out that the County had taken no action in response to our finding in the order that the selection of a 50 ft. buffer for wetlands did not comply with the Act. They further noted that there was no protection given for Type I streams, apparently because of their associated riparian habitat being protected by the Shoreline Master Program (SMP). They noted the comment of the Skokomish Tribe that the SMP "has been a failure in...protecting water bodies" (Ex. 654). Petitioners also noted that there was no protection for Type V waters, protection that the State Department of Fish and Wildlife had termed "essential". The petitioners referred to the recommendation of the Planning Commission on June 10, 1996, "that a tiered system be used, that wetlands are first categorized into one of several tiers and different levels of vegetative areas are used for protection".

The County responded that the BOCC had determined that there was not time enough for adequate public participation to examine a 4-tier system and so had taken no action on the recommendation.

Petitioners pointed out that the County had made no effort to examine best available science in regard to protection of anadromous fish. They noted that while this Board had determined that the original IRO had predated the requirement in Section 105 of ESHB 1724, the County had ample opportunity in its amendment of the IRO to apply the requirement of that section of the Act and had failed to do so.

CONCLUSION: Wetlands, Fish and Wildlife Habitat, Best Available Science

The County has made no effort in Ordinance 81-96 to address the non-compliant features noted in our Order regarding wetlands and fish and wildlife habitat. The IRO remains out of compliance in this section. Further, in order to comply with the goals and requirements of the Act any future ordinance needs to address best available science.

Frequently-Flooded Areas

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Our January 1996, Order noted the lack of specific regulations governing frequently-flooded areas. We observed that there were no minimum lot size nor density requirements in these areas. The County cited a minor amendment to the IRO which identified a 1988 flood insurance study as a guide to development. No other changes were made. The BOCC discussed adopting flood control regulations based on a recently completed study of the Skokomish River Flood Plain but the County felt that additional public hearings were necessary prior to taking any action.

CONCLUSION: Frequently-Flooded Areas

The County remains out of compliance regarding frequently-flooded areas.

Critical Aquifer Recharge Areas

Our January Order noted the absence of adequate DRs to protect critical aquifer recharge areas. Petitioners argued that the amended IRO did not address the problems of best management practices for agriculture; on-site sewage disposal systems for critical locations; and appropriate limits on the use of fertilizers, herbicides and pesticides. They noted that only with respect to septic system maintenance was there any response to the specific concerns expressed in our Order. The earlier permissive language cited by the Board has not been changed.

CONCLUSION: Critical Aquifer Recharge Areas

We conclude that the critical aquifer recharge area section is still not in compliance with the Act.

Resource Redesignation

The County has removed the lack of clarity surrounding the opt-out provisions noted in the January Order. It is apparent that the opt-out option ended after 60 days following the effective date of the Ordinance. The County has not addressed the questions raised in our January Order regarding proximity to urban and suburban areas, intensity of adjacent use, and reversion to commercial forest.

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CONCLUSION: Resource Redesignation

This section remains out of compliance with the Act.

Administrative Discretion

The lack of specificity in guidelines for administrators with regard to frequently flooded areas, geological hazard areas, aquatic management areas and resource land redesignation noted by the Board in our January Order and Order Regarding Motions to Reconsider were not addressed in the amendment to the IRO.

CONCLUSION: Administrative Discretion

This section remains out of compliance with the Act.

Invalidity

These issues have been pending since July 14, 1995, and have been remanded since January 1996. In the eight months since the remand, the County has managed to make only a minimal response to the non-compliant aspects of the Interim Resource Ordinance. The extended period of time which agricultural lands and some forest lands have been undesignated, and the absence of adequate buffers and habitat protection for certain critical areas are especially egregious. We find those sections of the original IRO and their amendments in Ordinance 81-96 to substantially interfere with the goals of the Act. Accordingly, portions of the sections on forest lands and wetlands are declared invalid. The section on Agriculture (17.01.064) does not designate lands

and therefore its invalidation would serve no purpose. Findings of Fact and Conclusions of Law are included as Appendix I.

ORDER

We find the IRO ordinance (#77-93) and its amendments (#81-96) to be in continued non-compliance with the goals and requirements of the Act. We find the following sections of the IRO to substantially interfere with the goals of the Act: Sections 17.01.060, A. 1. and 2. (Long Term Commercial Forest Lands), 17.01.070, E. 1. (Wetlands). The Ordinance is remanded to the County to be brought into compliance with the Act within 120 days of this Order.

SO ORDERED this 6th day of September, 1996.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member

Nan A. Henriksen
Board Member

FINDINGS OF FACT

Appendix I

1. Ordinance #77-93, Interim Resource Ordinance (IRO) was adopted August 3, 1993.
2. A petition challenging this ordinance was filed July 14, 1995.
3. The ordinance was found to be out of compliance and remanded on January 8, 1996.

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4. Among the sections of the IRO which were found in noncompliance in the January order were Sections 17.01.060 (Long Term Commercial Forest Land); Section 17.01.064 (Agriculture); and Section 17.01.070 (Wetlands).

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5. None of these sections were brought into compliance by the amendments to the IRO in Ordinance #81-96 signed by the County Commission on June 25, 1996.

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6. Mason County has failed to designate agricultural lands of long-term commercial significance.

7. Mason County has continued to use exclusionary criteria for forest lands of long-term commercial significance which exclude land which otherwise should be designated.

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8. Mason County has retained a 50-foot buffer for wetland protection and has not adopted a tiered buffer system recommended by agencies with expertise and its own Planning Commission and Planning Department.

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9. The conditions above have been in effect for more than six months since the remand of the IRO for their correction.

CONCLUSIONS OF LAW

1. Sections 17.01.060, A. 1. and 2. and .070 E. 1. of the IRO substantially interfere with the fulfillment of RCW 36.70A.020(8), (9) and (10). These sections of Ordinances #77-93 and #81-96 are hereby declared invalid under the provisions of RCW 36.70A.300(2).