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 COMMUNITY DEVELOPMENT COUNCIL, a non-profit association,	)	No. 95-2-0073
Petitioners,	)	ORDER FINDING CONTINUED NON-COMPLIANCE, PARTIAL COMPLIANCE, AND RESCINDING INVALIDITY
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.	)	

SYNOPSIS OF THE ORDER

We commend the County for moving its resource ordinance closer to compliance. In this order we find the County in compliance with the Growth Management Act (GMA, Act) and with our 1996 order regarding wetlands and resource redesignation. We rescind our earlier finding of invalidity regarding wetlands. We find that the County remains in noncompliance regarding agricultural designations, frequently flooded areas (FFAs), critical acquifer recharge areas, aquatic management areas, and administrative discretion. Further, we observe that the lengthy passage of time without compliant FFA and aquatic management area regulations may have

exacerbated the ordinance's substantial interference with the goals of the GMA. Accordingly, we require a schedule of compliance within 30 days of this order and reserve judgment on a finding of invalidity regarding FFAs and aquatic management areas.

We deny the County's motion on limitation of issues as we had made it clear in our most recent Compliance Hearing Order that all aspects of our original remand except forest lands designation would be considered. We note that the County has included best available science (BAS) in its development of wetlands regulations.

PROCEDURAL HISTORY

On January 8, 1996, we entered a Final Decision and Order remanding Mason County's interim resource ordinance (IRO) to the County for compliance with respect to the following provisions:

1) agricultural lands
2) forest lands
3) wetlands
4) fish, and wildlife habitat (including aquatic management areas)
5) frequently flooded areas
6) critical aquifer recharge areas
7) resource redesignation
8) administrative discretion

The County was to bring its ordinance into compliance with the GMA within 120 days of the date of that Order. A second compliance order regarding continued failure to adopt a compliant resource ordinance was entered June 5, 1996. A third compliance order regarding continued resource ordinance noncompliance, and a finding of invalidity, invalidating Section 17.01.060(A)(1) and (2) (forest lands of long-term commercial significance) and Section 17.01.070(E)(1) (wetlands) was entered September 6, 1996. In response to that September 6, 1996, Order, the County passed Ordinance 36A-97. That ordinance addressed only wetlands and resource redesignation. A fourth compliance hearing was held June 25, 1997, regarding Ordinance 36A-97. All three Board members were present. Mr. Kevin Teague represented Petitioners Mason

County Community Development Council (MCCDC). Mr. John Diehl, Petitioner, represented himself. Mr. Eric Valley, Deputy Prosecuting Attorney, represented the County. Mr. Peter Overton represented Intervenor Overton and Associates. Ms. Sarah Smyth represented Intervenors Skookum Lumber Company, Donald B. Payne, and the Mason County Private Property Alliance. The hearing was held at the Mason County PUD #3 Auditorium.

UNTIMELY SUBMISSION OF EXHIBITS

Mason County failed to submit three copies of briefs and exhibits by the June 1, 1997, deadline prescribed in the pre-compliance hearing order dated April 11, 1997. When subsequently requested to provide them by the Board, the County responded that the Washington Administrative Code only required one copy. We refer Mr. Valley to WAC 242-02-570 (2): "the original and three copies of briefs and exhibits not previously filed with the board….." and "cited in the brief shall be filed with the Board…… as provided by a Board or presiding officer." Next, as the hearing opened, Mr. Valley submitted seven copies of exhibits omitted from attachment to the County's brief. These included exhibits 861, 785, 807, 820, 837, 856, and 874. He characterized these as "essential to our argument on wetlands, the issue today." They included meeting minutes of the Ad Hoc Committee. He noted that they contained discussion of scientific data (ex. 785, 807). He did not cite to any specific pages in these voluminous documents. We noted their untimely submission. We further note that the failure to submit briefs and exhibits as called for pursuant to WAC 242-02-570(2) makes it difficult for the Board to carry out the requirements of RCW 36.70A.270(7) which calls for "expeditious disposition" of cases. Failure to submit these materials in a timely fashion caused the Board considerable delay in its review of essential exhibits in this case.

PRE-ARGUMENT MOTIONS

Mr. Valley then announced he intended to make a number of motions prior to making his argument. He was offered the opportunity to submit his motions in writing. He declined. He moved to strike references to terrestrial habitat in petitioners' briefs and to limit the discussion to wetlands only (Motion 1). He then moved to request the Board for clarity on our previous orders as to issues regarding BAS (Motion 2). He argued that BAS was entitled to the presumption of

validity.

Mr. Valley next moved to strike references to Thurston County in the record as irrelevant and stated that under the rules of evidence reference to another county's wetlands ordinance would be prejudicial (Motion 3). Ms. Henriksen pointed out to him that Thurston County was referenced in his brief (Exhibit 772 and 774) by the County's consultant, Mr. Wright, in his wetland alternatives letter which also included references to Skagit County and City of Shelton ordinances. Mr. Valley then conceded that his motion should be denied. Ms. Smyth offered a clarification that Mr. Valley's motion was really to determine whether topics in petitioners' briefs were relevant.

His next motion was to strike references to public participation and remarks of a personal nature in Mr. Diehl's brief regarding FFAs (Motion 4). He then moved to strike references to Mason County having conceded that it was in noncompliance regarding agriculture (Motion 5). He stated that the County has conceded nothing, but merely acknowledged that study on the question of agricultural designation was ongoing.

His next motion was a request for all parties to stipulate to the deletion of resource redesignation as a issue (Motion 6). Mr. Valley then objected to what he characterized as the Board's stated past practice not to accept testimony (Motion 7). He averred that the reason that his wetlands biologist was not present was that the Board had stated its consistent policy not to hear such individuals. He stated that the WAC requires that "the Board shall accept evidence that reasonable and prudent people would rely on."

We note that the WAC does not require the Board to accept such evidence. The Act requires that the Board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence <u>if the Board determines that such additional evidence would be necessary or of substantial assistance to the Board</u> in reaching its decision. RCW 36.70A.290(4), (emphasis added). The section to which he probably alludes, WAC 242-02-650, Rules of Evidence, Admissibility Criteria, states that "all relative evidence including hearsay evidence is admissible if, in the opinion of the presiding officer, the offered evidence is the kind of evidence upon which reasonable and prudent persons are accustomed to rely in conduct of

their affairs." This is a section addressing admissibility of hearsay, not a requirement for the Board to accept evidence. It is only after the Board has determined that additional evidence is necessary under .290(4) that the presiding officer may be called upon to apply the "reasonable and prudent-person" rule.

In order for the Board to consider supplemental evidence and determine if it is necessary or of substantial assistance, we need to have a request from a party to admit such evidence. The County never submitted such a request. We remain open, as always, to admit supplemental evidence if it is necessary or of substantial assistance.

At this point, Mr. Valley requested a continuation of the hearing so that he could be allowed to present such testimony at a unspecified date. He speculated that we would hear "some people saying this and some people saying that" during argument, and that perhaps "an impartial expert" would be beneficial in sorting out questions of fact.

After the parties had spoken to the motions, the Board took under advisement Motion 1 (limiting discussion) and Motion 2 (requesting clarity on previous orders including the question of BAS). We denied the motion to strike sections of the Diehl brief regarding FFAs and public participation (Motion 4). We denied the motion to strike references to Thurston County (Motion 3), and the question of whether the agricultural designation in the critical area ordinance was not in compliance (Motion 5). We granted Motion 6 stipulating compliance regarding resource redesignation. We denied Motion 7, regarding expert witness testimony.

DISCUSSION

Wetlands

Our January 1996 order called upon the County to reconcile inconsistencies in treatment of buffers between the "wetland" and "streams and lakes" sections of the IRO. The order required analysis for the rejection of protection afforded wetlands by the four-tier system recommended by the Department of Ecology (DOE). Petitioners acknowledged that the County's response in Ordinance 36A-97 was a step in the right direction by adoption of a four-tier system. They asserted that the buffer widths for the four tiers: 125 feet, 85 feet, 50 feet, and 25 feet

respectively, with 15-foot add-on building setbacks for higher intensity use, failed to adequately protect wetlands, particularly Category I wetlands. MCCDC argued that the County had not offered scientific evidence to justify choosing less-than-minimal buffer widths. Petitioner Diehl argued that the County had not included BAS and that the undisturbed buffers were inadequate and did not provide a variety of protections to species and habitats. Mr. Diehl cited in his brief DOE's rating system recommendation of 100 to 200 feet for Category II wetlands and quoted DOE as maintaining that the 85 foot width proposed by the County would "undoubtedly be insufficient to fully protect species that are not threatened or endangered."

The County maintained that it had included BAS in its deliberations, citing to Exhibits 807 and 820 and the remarks of Mark Bentley of the DOE and their own consultant, Wayne Wright, Senior Environmental Scientist and Vice President of Applied Environmental Services Incorporated.

The record shows that DOE does indeed recommend a minimum Category I wetland buffer of 200 feet. Applied Environmental Services presented four alternatives for buffer width to the Ad Hoc Committee and the County, three of them based on ordinances of other jurisdictions; City of Shelton, Skagit County, and Thurston County. Each of those alternatives presented a Category I buffer of 100 feet or a range from 100 to 150 feet. The consultant did acknowledge that Thurston County's Category I buffer widths were more restrictive (200 to 300 feet) than the consultant's high intensity-low intensity alternative he modeled after Thurston County's ordinance. Applied Environmental Services noted that the modification to the Thurston County buffers in their Thurston County alternative could be supported by literature or other accepted ordinances throughout the Puget Sound. Mr. Wright, in his presentations to the Ad Hoc Committee, had earlier alluded to his recollection that the King County minimum for Category I wetlands was 100 feet. His recommended buffer widths were 100, 75, 50, and 25.

In the record, Mr. Bentley of DOE offered that the buffer widths were at the minimum end of the scale. He also remarked that "most of the science recommends a minimum of 100 feet as necessary to protect wetlands." Nonetheless, he told the Ad Hoc Committee that their proposed

numbers "can be workable" and that "the 50 and 25 foot buffers for Category III and IV are probably fine" (Exhibit 807).

The County, leaning toward a four-tier approach, and attempting to determine the extent of buffer width, took all this into account and arrived at a decision: a finite buffer width for each category rather than a range, a 15-foot add-on building setback to accommodate somewhat more intense use, and the discretion of the county administrator to increase the standard width on a case-by-base basis when necessary to protect wetland functions and values based on local conditions including "critical habitat of threatened or endangered species" and "variations in sensitivity" (Ordinance 36A-97,3.). Has the County included BAS in its decision? It certainly received a variety of scientific offerings from a spectrum of sources. The buffer widths are at the minimum end of the accepted scale, and below DOE's recommended minimums, but not outside the recommendations of DOE personnel. The County had before it a range of recommendations from sources with expertise. They arrived at a decision within the range presented.

We have often stated that our responsibility is to decide whether jurisdictions comply with the Act, rather than whether they could have found a better solution than the one they adopted. Accordingly, we conclude that Mason County's wetlands section of its IRO complies with the Act and that our earlier finding of invalidity should be lifted.

Aquatic Management Areas

Our January 1996 order required the County to follow the Community Trade and Economic Development guidelines in WAC 365-190-080(5) and provide for adequate protection for these areas. The County in its brief states, "it has adopted a new 25-foot buffer for Type 5 waters and documented its consideration and implementation of BAS including protection of anadromous fish" but noted in argument that the ordinance adopting that buffer was not in the record. Petitioner Diehl also referred to the addition of the 25-foot buffer in his brief while arguing that "there was no change to the IRO pertaining to fish habitat and no fish habitat conservation areas per se nor development regulations appropriate to such areas."

While we understand that an ordinance regarding stream buffers was passed in May, it was not part of the record and we must await its inclusion in the briefs for the next compliance hearing before consideration of a finding of compliance for this subject area. Petitioner MCCDC noted Mason County's expressed intent (Exhibit 861) to address fish and wildlife conservation areas including priority species and species of local importance "over the course of the next year." We encourage the County to do so by the date of the next compliance hearing.

Frequently Flooded Areas, Agricultural Lands of Long Term Significance, Critical Aquifer Recharge Areas, Administrative Discretion

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The County noted in its brief that it is still in the process of adopting regulations specifically addressing these noncompliant sections in response to our January 1996 order. Mr. Valley remarked during argument that flood prevention ordinance was now in place, just adopted but not yet in the record. We look forward to receiving this addition to the record prior to our next compliance hearing. The County remains in noncompliance regarding these subject areas.

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Resource Redesignation

At the compliance hearing the parties agreed to stipulate that the County's deletion of the resource redesignation regulations which we held noncompliant now renders the County in compliance with the Act.

Invalidity

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Petitioners requested consideration of findings of invalidity in several areas, including frequently flooded areas and aquatic management areas. We note that 17 months have elapsed since the deadline (April 2, 1996) which our January 1996 order set for the County to be in compliance. The extended length of time that Mason County has been without a compliant ordinance in these areas may well approach substantial interference with the Act and be grounds for a finding of

invalidity. We will accordingly require a statement of actions taken to comply and a schedule of actions to be taken to comply, within 30 days of this order (October 18, 1997). Chapter 429, Laws of 1997, Section 14 (3)(b). Upon review of this statement and schedule we will set the next compliance hearing and may consider additional findings of invalidity at that time.

Interim Nature of the IRO

As we noted in our January 1996 order, critical area ordinances are not interim in nature (97-2-0001, *Clark County Natural Resource Council, et. al., v. Clark County* and 94-2-0001, *North Cascades Audubon Society, et. al., v. Whatcom County*). Notwithstanding Mr. Wright's observation on January 3, to the Ad Hoc Committee that "all laws are interim", critical areas ordinances are the cornerstone of the GMA and are not designed to be interim in nature. As our colleagues in the Central Puget Sound Board have said, "the land speaks first." The Act does call for resource ordinances and critical area ordinances to be reviewed by counties for consistency with their comprehensive plans (CPs) once the CPs are passed. Mason County passed its CP in 1996. The interim resource ordinance should be acknowledged to be permanent, not interim, and made consistent with a compliant CP.

CONCLUSION

We find Mason County in continued noncompliance with the following aspects of the Act:

1. Aquatic Management Areas
2. Frequently Flooded Areas
3. Critical Aquifer Recharge Areas
4. Agricultural Lands of Long-Term Commercial Significance
5. Administrative Discretion

We find Mason County to be in compliance regarding wetlands and resource redesignation and we rescind our finding of invalidity regarding Mason County IRO Section 17.01.070(E)(1) (wetlands). The County is required to provide a statement of actions taken to comply with noncompliant sections of our order and a schedule of actions yet to be taken within thirty days of

this order (October 18, 1997).

So ORDERED this 18th day of September, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Les Eldridge
Board Member

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William H. Nielsen
Board Member

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Nan A. Henriksen
Board Member