

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

SEAVIEW COAST CONSERVATION COALITION,))	No. 95-2-0076
a Washington non-profit corporation))	
Petitioner,))	
)	SECOND
vs.))	COMPLIANCE
)	ORDER AND
PACIFIC COUNTY,))	FINDING OF
)	INVALIDITY
Respondent.))	
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In August 1995, petitioner challenged the failure of Pacific County to adopt development regulations (DRs) for critical areas (CAs) and resource lands (RLs) and the County's failure to adopt a comprehensive plan (CP) within the deadlines required by the Growth Management Act (GMA, Act). Pacific County had elected to be governed by the provisions of the Act in 1990. On April 21, 1992, the County adopted "designation policies" for critical areas and resources lands. No further GMA action was taken thereafter.

Pursuant to a stipulation between the parties, we entered an order on December 5, 1995, finding non-compliance for failure to adopt critical area and resource land DRs and a CP. We allowed the maximum 180 days for the County to come into compliance, recognizing that adoption of a CP by that time was unlikely. The County, however, stipulated that it would adopt a CA/RL ordinance by May 31, 1996.

At the compliance hearing on July 18, 1996, the County acknowledged it had not yet completed the DRs, but estimated the ordinance would be adopted within the next 100 days. By order of July 31, 1996, we found the County in continued non-compliance. In addition we issued a finding of invalidity for the County's allowance of residential, accessory and recreational uses in the "interdunal wetlands" areas (which included most of the County's beach environment) because of the failure to adopt critical area DRs.

On November 21, 1996, petitioner filed a motion that requested us to find invalid the Shorelines Master Program (SMP) regulations "applicable to the dredge, fill and alteration of wetlands". We notified the parties that a hearing on that motion would be held in Illwaco on January 24, 1997. We received a response from Pacific County on January 14, 1997, and a reply from petitioner on January 21, 1997.

In reviewing whether a DR substantially interferes with the goals of the Act under sections .300 and .330 we, of necessity, review the action's or inaction's potential to substantially interfere with the goals of the Act because, under section .300(3)(a), a finding of invalidity cannot extinguish rights that have vested under state or local law prior to the date of the order. In reviewing the potential for substantial interference we look to the language of the regulation and the experience, if any, a local government has had in dealing with the actions or inactions under attack. If we find that the action or inaction does substantially interfere with the goals of the Act, we then determine the scope of the invalidity. In making the decision regarding the scope of the invalidity, we take into account the local government's compliance or non-compliance with the Act along with current and past efforts to achieve compliance and meet the deadlines established by the Legislature.

The evidence presented for this hearing included a copy of SMP sections 12 - 18, a portion of the record of three separate substantial development permit applications involving fill of wetlands, a staff memo and a statement by the County relating to the amount of time already spent on the CA/RL ordinance and the likelihood of adoption by April 1997. Of the three substantial development permit processes, one was approved by the County, one was disapproved and a third had not yet been decided.

Under RCW 36.70A.480, SMP use regulations are deemed GMA development regulations. A review of the use regulations found in sections 12 - 18 of the SMP in conjunction with the failure of the County to adopt DRs to protect critical areas, demonstrate a clear lack of protection for the wetlands areas and a lack of objective standards necessary to allow conditions or deny activities on the wetlands within SMP jurisdiction. For instance, the regulations applicable to landfills, found in section 17.62, references a document published by the "State Department of Fisheries",

presumably in 1975 or before, states the materials for landfill must be "clean" (minimum potential for degrading water quality), and requires "retaining walls or similar structures or by vegetation" to be used to protect against erosion. Landfill operations are permitted on urban shorelines and rural shorelines subject only to the provisions of Section 17.62. Section 17.40 prohibits dredging or landfills on "tidal wetlands", but Section 17.41 states that dredging or landfills allowed under 17.40 must comply with the regulations of 17.62. Candidly, we don't understand how one section can prohibit landfills and the immediately following section state that landfills are allowed if the regulations are met. At the very least the sections are ambiguous. Finally, in the natural shoreline areas of Pacific County, Section 17.20 prohibits landfills "except where necessary to protect or preserve the character of that environment or where operations do not change the character of that environment."

The other sections of the SMP are likewise ambiguous and/or do not address environmental, habitat or water quality issues. Section 12 of the SMP deals with residential development, Section 13 with roads, Section 14 with utilities, Section 15 with ports and water related industries, Section 16 with shoreline works and structures and Section 18 with solid waste disposal. All of these sections allow activity on wetlands without the protections required by RCW 36.70A.060. Because of that it could be said that all of these sections substantially interfere with goal 9 (open space, recreation, and conservation of fish and wildlife habitat) and goal 10 (protect the environment and enhance water quality and availability of water).

The evidence in this case specifically pointed to current problems with the failure to protect critical areas associated with residential development, roads and landfills under the SMP. The evidence did show that while there was not much interest in GMA issues subsequent to April 21, 1992, within the last eighteen months the County has made efforts to rectify its lack of compliance. Nonetheless, the essential first step of critical area and resource land DRs had not been completed within that 18 month timeframe. We do recognize the effort that staff and the planning commission have been putting forth in reviewing a proposed ordinance by means of weekly public workshops and other public participation activities. We have taken those factors into consideration in determining the scope of our determination of invalidity.

We find that the following sections of the SMP substantially interfere with goals 9 and 10 of the

Act and are declared to be invalid under the provisions of RCW 36.70A.300:

Sections 12.11, 12.40, 12.41, 12.42, 12.60, 12.80, 13.20, 13.21, 13.40, 13.41, 13.42, 17.20, 17.41, 17.60, 17.61, 17.62, and 17.80. This determination of invalidity only applies to areas within the jurisdiction of the Shoreline Management Act.

In order to achieve compliance Pacific County must have its critical area and resource land development regulations adopted by May 16, 1997. If an ordinance has not been adopted by that time we will hold a hearing shortly thereafter to consider expanding the order of invalidity and/or making a recommendation to the Governor for the imposition of sanctions. Under the provisions of RCW 36.70A.330(1) the County may bring a motion at any time to rescind or modify this invalidity order upon adoption of its critical area and resource land ordinance.

The Findings of Fact and Conclusions of Law required by RCW 36.70A.300 are attached as Appendix I and incorporated herein by reference.

This is a Final Order for purposes of appeal.

Dated this 6th day of February, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge
Board Member

Nan A. Henriksen

Board Member

Appendix I

FINDINGS OF FACT

1. Pacific County does not have any development regulations to protect critical areas as required by the GMA. The deadline for establishing those regulations was September 1, 1991.
2. Pacific County stipulated that it would complete the critical area development regulations by May 31, 1996. That stipulation was incorporated into an order finding non-compliance on December 5, 1995.
3. The current Shorelines Master Program regulations do not provide adequate standards nor the protections required by RCW 36.70A.060, relating to wetlands located within the jurisdiction of the Shorelines Management Act.
4. Portions of Section 12 relating to residential development, Section 13 relating to roads and Section 17, relating to dredging and fill, substantially interfere with goals 9 and 10 of the Act.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this case.
2. Portions of Sections 12, 13 and 17 of the Shoreline Master Program set forth in the Order substantially interfere with Goals 9 and 10 of the Growth Management Act and are subject to a determination of invalidity.