

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

SEAVIEW COAST CONSERVATION COALITION,)	
a Washington non-profit corporation,)	No. 95-2-0076
)	
Petitioner,)	ORDER
)	RESCINDING
vs.)	INVALIDITY
)	
PACIFIC COUNTY,)	
)	
Respondent,)	
)	
CITIZENS FOR RESPONSIBLE GROWTH, INC.,)	
BUILDING INDUSTRY ASSOCIATION OF)	
WASHINGTON, DICK REINERS, ROBERT)	
SCHMIDT AND ROBERT HILL,)	
)	
Intervenors.)	
<hr/>		

On July 31, 1996, we entered an Order finding that Pacific County was not in compliance with the Growth Management Act (GMA, Act) because of its failure to adopt development regulations (DRs) to protect critical areas and conserve resource lands by September 1, 1991. We also held that an ordinance (SDR-1) which allowed single family residences, accessory uses, and recreational uses in the interdunal areas of Pacific County without critical area DRs, substantially interfered with goals 9 and 10 of the Act.

On February 6, 1997, we entered a second Order which found that Pacific County had not yet complied with the Act because it still had not adopted DRs for critical areas. We held that without a critical area ordinance, portions of the Pacific County Shorelines Master Program substantially interfered with goals 9 and 10 of the Act. The specific factual patterns and analysis relating to those declarations of invalidity are found in the respective orders.

On April 15, 1997, we received a motion from Pacific County to rescind the two orders of invalidity. The basis of the County's motion was the adoption of a critical area and resource land

ordinance. Because of the 45-day limitation found in RCW 36.70A.330(2), we established a hearing date of May 6, 1997, and required that any response to the motion by Petitioner was to be filed by April 29, 1997. On April 25, 1997, we received a joint motion to intervene from Citizens for Responsible Growth, Inc., Building Industry Association of Washington, Dick S. Reiners, Robert Schmidt, and Robert A. Hill. Neither the Petitioner nor the County objected to the intervention. Petitioner filed its response on April 29, 1997, and in addition moved that the invalidity as to the SDR-1 zoning on the interdunal area be continued because the ordinance allegedly allowed urban growth outside of established interim urban growth areas. On May 5, 1997, we received a brief from potential intervenors.

At the hearing on May 6, 1997, we orally granted intervention. A written order was entered on May 7, 1997. We entered a separate order on May 7, 1995, that severed the motion to continue the invalidity finding over the SDR-1 zoning and fixed a new hearing date for that issue.

Not surprisingly, the parties presented vastly divergent views regarding the nature and scope of the hearing for the County's motion to rescind the declarations of invalidity. The County and the Intervenors contended that the scope of the hearing was, or should be, limited to whether the County had adopted a critical areas ordinance and whether a facial examination of that ordinance (referred by the County as the "smell test" and by the Intervenors as the "grin test") was sufficient to show that substantial interference with the goals of the Act no longer existed.

Petitioner argued that it was, or should be, required that a more complete examination of the ordinance take place. Petitioner further contended that the ordinance was flawed because of a lack of standards concerning fill of wetlands, insufficient buffers, and the lack of building setback requirements. All of these deficiencies, Petitioner argued, were not in accordance with the requirement of RCW 36.70A.172 relating to the use of "best available science". During the questions portion of the hearing a lengthy discussion was held concerning the relationship of RCW 36.70A.330(4)(a), RCW 36.70A.300(2)(a), and RCW 36.70A.300(3)(b). We begin our analysis of this case by reviewing those three sections of the Act. Section .330(4)(a) states that whether a determination of invalidity "should be rescinded" is governed by the standards contained in RCW 36.70A.300(2). Section .300(2) is the "substantial interference" standard, which is the same one used initially to decide a determination of invalidity question.

Section .300(3)(b) states that any development application filed after the date of a determination of invalidity can only vest to an ordinance that is (1) enacted in response to an order of remand, and (2) found as a result of a compliance hearing, "to comply with the requirements" of the Act. The intriguing question is *when* the provisions of Section .300(3)(b) require a Growth Management Hearings Board to make a substantive determination of whether the newly adopted ordinance complies with all the requirements of the Act.

However, the first issue to be resolved is whether Pacific County, after adoption of its ordinance, still substantially interferes with the fulfillment of the goals of the Act.

The original petition in this case was filed in August 1995, and a stipulated order of noncompliance was entered on December 5, 1995. In that order, the County agreed that it would adopt a critical areas and resource lands ordinance by May 31, 1996. Two months after the agreed deadline had passed, we entered our first finding of invalidity and more than six months later we entered our second. Fundamental to both determinations of invalidity was the failure of the County to adopt DRs that protected critical areas.

We have made a facial review of the new ordinance in this proceeding solely for the purpose of determining whether it constitutes a valid, good faith attempt to comply with the requirements of the Act. The ordinance is entitled to the presumption of validity set forth in RCW 36.70A.320. There is no evidence in this record that the new ordinance substantially interferes with the goals of the Act.

During the hearing much discussion was had concerning the evolving struggle all three Boards are having regarding the scope of issues to be decided in a compliance hearing. The May 6, 1997, hearing was not, and did not purport to be, a compliance hearing. Rather it was a hearing on the County's motion to rescind the two determinations of invalidity.

In interpreting the GMA, our role is to give effect to the Legislative intent and to avoid unlikely or absurd results. *Kennewick v. Board For Firefighters*, 85 Wn. App. 366 (1997). Here, Pacific County adopted a 64-page ordinance after a public participation process extending over one year

with an initial record index of over 220 items. It would be an absurd result to conclude the Legislature intended a thorough substantive review of that ordinance and a determination of compliance within 45 days after the filing of the motion.

Additionally, anyone with standing has a legislatively-mandated right under RCW 36.70A.290(2) to file a petition challenging compliance within 60 days after publication of the appropriate notice by the County. Obviously, if we were to determine compliance or noncompliance under the 45-day time limitation in Section .330(2), the 60-day appeal period would be rendered meaningless or alternatively another hearing concerning challenges to the ordinance would be necessary. Either is an absurd result. We decline Petitioner's invitation to review any or all of the ordinance for compliance with the Act in a motion hearing where no prior substantive review of the ordinance has been made. *Watershed Defense Fund v. Whatcom County* #94-2-0003, *Diehl v. Mason County* #95-2-0073 (Order dated February 22, 1997).

There is a further reason why it is not necessary for us to immediately delve into the issue of compliance of this ordinance with the Act and be forced to decide compliance within 45 days. As we stated in *Achen v. Clark County* #95-2-0067 (Order dated November 20, 1996) the language of the Act makes clear that Growth Management Hearings Boards are not involved in issues concerning whether a piece of property or a permit application has or has not vested. Consequently when vesting does or does not occur under RCW 36.70A.300(3) does not present issues over which we have jurisdiction. Those determinations are to be made by local government with review, if necessary, by the courts.

Petitioner has presented no evidence that the ordinance is other than a good faith attempt to comply with the Act. We specifically do not make any finding or examination, under the facts and record in this case, as to whether the critical areas ordinance adopted by Pacific County complies with the Act. Whether or not it actually does comply with the Act is a question that will only be reviewed upon filing of new petitions by those with standing under the provisions of the GMA.

The motion of Pacific County is granted and the determinations of invalidity entered on July 31, 1996, and February 6, 1997, are rescinded.

So ORDERED this 28th day of May, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge
Board Member

Nan A. Henriksen
Board Member