

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

CLARK COUNTY NATURAL RESOURCES)	
COUNCIL, and VANCOUVER AUDUBON SOCIETY,)	No. 96-2-0017
and LOO-WIT GROUP SIERRA CLUB, Non-Profit)	
Corporations, COALITION FOR ENVIRONMENTAL)	COMPLIANCE
RESPONSIBILITY AND ECONOMIC)	ORDER
SUSTAINABILITY, an unincorporated association,)	
RURAL CLARK COUNTY PRESERVATION)	
ASSOCIATION, a non-profit corporation,)	
)	
Petitioners,)	
)	
v.)	
)	
CLARK COUNTY, CITY OF VANCOUVER, and)	
CITY OF CAMAS,)	
)	
Respondents.)	
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In *Abenroth, et al. v. Skagit County*, #97-2-0060c (Order dated October 8, 1997) (*Abenroth*) we held that the “procedural” provisions of ESB 6094 (sections 2, 11, 12, 14, 16, 20, and 21) applied where the County’s actions occurred prior to ESB 6094’s effective date of July 27, 1997, and our hearing and decision took place subsequently. That case involved petitions challenging the May 19, 1997, comprehensive plan (CP) adoption and the May 29, 1997, interim development regulations (DRs) adoption. This case involves actions of Clark County in response to a final order of remand dated December 6, 1996. The vast majority of the actions taken by the County occurred prior to July 27, 1997.

This compliance hearing took place in Vancouver on October 9, 1997. Petitioners in this case argued that the “procedural” aspects of ESB 6094 should not/do not apply. We fail to see a difference between a petition hearing and a compliance hearing for purposes of determining whether the “procedural” amendments of ESB 6094 apply. Therefore, we adhere to our ruling in *Abenroth*. We specifically hold that sections of ESB 6094 which amend the procedural aspects

of Growth Management Hearings Boards' (GMHB) hearings apply when both the hearing and decision post-date July 27, 1997, regardless of whether the order involves petitions or compliance. This case, then, is our first opportunity to apply the “procedural” amendments of ESB 6094.

In what is now codified as RCW 36.70A.3201 (Section 2 of ESB 6094), the Legislature specifically set forth its intent in amending RCW 36.70A.320 (3). The Legislature directed that GMHBs apply “a more deferential standard of review to actions of counties and cities than the preponderance of evidence standard.” RCW 36.70A.3201 further states that:

“... in recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for actions in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county’s or city’s future rests with that community.”

RCW 36.70A.320(3) as amended (section 20(3) of ESB 6094) now states:

“ In any *petition* under this chapter, the board, after full consideration of the *petition*, shall determine whether there is compliance with the requirements of this chapter.... The board shall find compliance unless it determines that the action by the state agency, county, or city is *clearly erroneous* in view of the entire record before the board and in light of the goals and requirements of this chapter. (Italics supplied)

Thus, it is clear from these two sections of the Growth Management Act (GMA, Act) that the Legislature directed that the more “deferential standard of review” embodied by the “clearly erroneous standard” be applied to decisions that involve petitions under the Act. Less clear, however, is whether that same “more deferential standard” is intended to apply to compliance hearings established under RCW 36.70A.330. The purpose of a compliance hearing is to determine “whether the state agency, county, or city is in compliance with” the Act. RCW

36.70A.330(1). While section 21 of ESB 6094 amended RCW 36.70A.330, none of the amendments directed a new standard of review for a compliance hearing.

When an ambiguity exists our duty is to harmonize individual provisions of the Act to effectuate legislative intent. To answer the issue of applicability of the clearly erroneous standard of review to compliance hearings it is instructive to review the provisions of RCW 36.70A.320. Subsection (1) of that statute provides that CPs and the DRs “and *amendments* thereto” are presumed valid upon adoption, except as to the shoreline element. Subsection (2) provides that, except for modification or rescission of invalidity requests by the local government, “the burden is on the petitioner to demonstrate that *any action* taken” is not in compliance with the Act. Finally, subsection (3) provides that a GMHB “shall find compliance” unless it determines that the action is clearly erroneous.

We conclude that the clearly erroneous standard applies to compliance hearings as well as original petition hearings for the following reasons:

1. Subsection (1) continues the language concerning presumptively valid amendments to the CP and DRs;
2. The new language in subsection (2) places the burden on petitioner to show that “any action” of the state or local government is not in compliance; and
3. The new language contained in subsection (3) requires a finding of compliance unless the “action” is found to be clearly erroneous.

This holding harmonizes the obvious legislative intent found in ESB 6094. An opposite holding would establish a different standard of review for compliance hearings and could lead to a morass of technical arguments involving artificial distinctions between petition hearings and compliance hearings. If the Legislature intended such a result a more clear amendment to RCW 36.70A.330 should have been made.

We turn then to the clearly erroneous standard of review test as enunciated by the Supreme Court. The standard was first set forth in *Ancheta v. Daly*, 77 Wn.2d 255 (1969), in response to a series of amendments in 1967 to the Administrative Procedures Act (then RCW 34.04). In *Hayes*

v. Yount, 87 Wn.2d 280 (1976), the Court distinguished the arbitrary or capricious standard noting that the clearly erroneous standard was “more rigorous.” The Court defined clearly erroneous as allowing reversal of an agency action “where the reviewing court is *firmly convinced* that a mistake has been committed, even though there is evidence supporting the action.” That particular language was carried through in *Nisqually Delta Association v. Dupont*, 102 Wn.2d 720 (1985), where the Court quoted from *Hayes*, especially the “firmly convinced” language. In *Department of Ecology v. PUD*, 121 Wn.2d 179, 201 (1993) the Court used slightly different language to express the clearly erroneous test as:

“...when, *although there may be evidence to support it*, the reviewing court on the entire record is left with the *firm and definite conviction* that a mistake has been committed. (italics supplied)”

Those cases, and many others, also recognized that “due deference must be given to the specialized knowledge and expertise of the agency” and that the “policy contained in the authorizing statute” (*Hayes* at 286), was an integral part of determining whether a “mistake” has been made. These concepts parallel directly the deference language of RCW 36.70A.3201 and the policy language contained in the last sentence of RCW 36.70A.320(3).

Thus, in this and future cases, after reviewing the entire record submitted by the parties in light of the policies, goals, and requirements of the GMA, we will always find the state agency or local government in compliance with the Act unless and until the person or entity challenging the action has persuaded us to a point where we form a definite and firm conviction that a mistake has been made. In the former preponderance test we merely needed to be convinced that the agency or local government misinterpreted or misapplied the Act. By contrast, under the new standard we must really be convinced. Just where that point lands on the continuum between more likely than not and absolute certainty cannot be more precisely defined. It will necessarily have to be resolved on a case-by-case basis. The clearly erroneous standard will apply in all situations except those dealing with invalidity or the shoreline element.

In our December 6, 1996, final order we noted three items of noncompliance in Clark County’s critical area coverages. Those noncompliances involved designations and protections for critical aquifer recharge areas (CARA), geological hazardous areas (GHA), and fish and wildlife habitat

areas (FWHA). By stipulation the parties narrowed the issues for the October 9, 1997, hearing, acknowledging that in all other respects in this case Clark County had achieved compliance. Petitioners also acknowledged that as to the CARA and GHA designations the County was now in compliance with the Act. Petitioners challenged the public participation process but directed that challenge specifically to the FWHA designations and protections. That issue will be addressed later in this order.

CARA

The process that Clark County used in designating and protecting CARA involved initial review by two separate focus groups, a comparison of ordinances from other counties and a Department of Ecology (DOE) model ordinance, and ultimately designations throughout the county of category 1 and category 2 aquifer recharge areas. Category 1 designations involved a determination of higher-grade recharge areas than those designated as category 2.

Petitioners' complaints related to the adoption of DRs, or the failure to adopt DRs, to protect those CARA designations. Initially, petitioners contended that the DRs did not include any "recharge" provisions. The County responded that such recharge provisions were inextricably linked to the stormwater ordinance adopted as part of the remand in response to the companion case in *Achen v. Clark County*, #95-2-0067 (*Achen*). We agree with the County and will address "recharge" in the *Achen* case.

In adopting its CARA DRs, the County encouraged the participation of and review by the Washington State Department of Health (DOH) and DOE. The County also reviewed (Ex. 133, 134) existing county, state, and federal regulations pertaining to clean water. At the compliance hearing, the County pointed out that the CARA ordinance prohibited development either in category 1 or category 2 areas unless best management practices required by existing regulations ensured that no degradation to the aquifer recharge area would occur. After reviewing the record in light of the policies, goals, and requirements of the Act, we do not have a firm and definite conviction that a mistake was made by the County in its action regarding CARAs, except with regard to the stormwater issue noted above.

GHA

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In completing its GHA designations, the County adopted a map setting forth erosion, steep slope, landslide potential, and earthquake potential areas. The DRs to protect these GHAs were based on flexible standards that, in the words of the County, directed new development to “stay away or do a big study.” The only exemption in the final DR was for clearing of a 2,000 square foot (40 x 50) or less area. The DR also directed that if the required study determined that development was possible if properly mitigated, the mitigation recommendations would constitute the mitigation requirements of the County’s SEPA ordinance.

The need for flexibility in standards related to GHAs was shown in the record to be the best available science and to be the appropriate action for the County to take. We do not have a firm and definite conviction that a mistake was made with regard to GHA designations or protections. We do not find a GMA violation by transferring GHA mitigation to SEPA compliance. Clark County is in compliance with the Act relating to GHAs.

FWHA

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In response to the December 6, 1996, order, the County adopted a completely overhauled system of identification and DRs in Ordinance CCC 13.51. Petitioner Rural Clark County Preservation Association (RCCPA) contended that the public participation process for adopting this ordinance did not comply with the goals and requirements of the Act. The public participation process was summarized in Ex. 517 and involved the establishment of a focus group who held meetings from January 8, 1997, through March 1997 and developed a draft ordinance. A substantial notification mailing list was established and used. After the draft ordinance was developed a series of six general meetings were held throughout the County. Thereafter, both the Planning Commission and Board of County Commissioners each held a public hearing prior to adoption of the final ordinance. RCCPA’s challenge was directed primarily to the establishment of the focus group and the process used by it to establish the draft ordinance.

Often in GMA issues a specialized knowledge group is necessary to establish a base from which

a local government may then proceed. Certainly, fish and wildlife habitat and the necessary scientific evidence associated with that issue could easily lead a local government to the option of the establishment of a focus group. The twelve member focus group consisted of three members from the Washington Department of Fisheries and Wildlife (DFW), three citizens of the local wildlife committee environmental group (two of whom were members of RCCPA), two forest land owners, one public utility district employee, one member of Clark County Citizens United, a member of the Home Builders Association, and a member of the Association of Clark County Realtors. The diversity of memberships on this focus group is precisely what is anticipated by GMA.

RCCPA complained that public participation goals and requirements were violated because the focus group refused to let nonmembers (the public) participate in their meetings. The meetings were open to public view but participation was not allowed. RCCPA's conclusion was that once the focus group had completed a draft ordinance "the deal was done" and that the further meetings and hearings in which the public did participate were meaningless. Hence, concluded RCCPA, the "early and continuous" provisions of public participation were violated.

We do not take such a cynical view, particularly under the record shown here. While it is possible that a result similar to the one advanced by RCCPA could be reached, we are not left, in this case, with a definite and firm conviction that a mistake was made regarding the public participation goals and requirements of the Act. The focus group was necessitated by a requirement for specialized knowledge, involved a balanced membership, and thereafter a variety of public meetings and hearings to comment on the draft ordinance were held. While the restriction of public input to the focus group is not admirable, it is understandable and in the context of this record does not constitute a violation of the public participation provisions of GMA.

Clark County pointed out that in its designation process it adhered to the guidelines established in WAC 365-190-030(5). Petitioners generally agreed that the designation process had been a good one except for the lack of establishment of habitats of local importance. In the final order in this case, we noted that the overwhelming scientific evidence in the record virtually required establishment of the three FWHAs of local importance that were not otherwise previously

designated by DFW as priority habitat and species areas. In response to the remand, the County defined habitat of local importance in CCC 13.51.040. A process was established to start implementation in the Fall of 1997. The compliance record did not contain any information refuting the previously submitted scientific evidence in support of the three local designations. We have a definite and firm conviction that the County has not complied with the Act. When previously submitted evidence was unchanged and only a process for future designations was established compliance cannot be achieved. RCCPA also requested that we find invalidity for the County's failure to act in this regard.

In previous cases we have recognized the difficulty of establishing invalidity in instances where a lack of designation was the problem. RCCPA has not demonstrated that substantial interference with the goals of the Act has occurred by this failure to designate nor has it demonstrated how or where a finding of invalidity could be imposed. We find that the test for invalidity has not been met.

There are two other provisions of this ordinance where we do have a firm and definite conviction that a mistake has been made. The first deals with the buffer averaging provisions of the ordinance and the second deals with the current farming and agricultural uses exemption.

Generally, the buffers or "riparian zones" defined in the ordinance are in accordance with DFW recommendations and are in compliance with the Act. CCC 13.51.090(2)(c) allows "external riparian zone averaging" based on the average shore-side building setback of existing neighboring residents. No scientific basis appears in this record to substantiate the need for such an averaging system. The clear impact of such an averaging is obvious. When existing residences have already degraded portions of the habitat areas, the ordinance allows new development to further degrade them. This is not in compliance with the Act under the clearly erroneous standard, particularly in light of the best available science and special protection of anadromous fish provisions set forth in RCW 36.70A.172.

As to the exemption of existing agricultural uses we recently addressed a similar exemption in *Friends of Skagit County v. Skagit County*, #96-2-0025. We said:

“We agree with Petitioners that the GMA not only allows but requires the County to reasonably regulate existing agricultural activities that are damaging CAs and their buffers.... There is no incentive to improve practices if existing activities are already exempt. As written, the agricultural exemption is too broad and fails to comply with the Act.”

That order was entered on January 3, 1997, subsequent to the remand in this case. No argument concerning a scientific basis or reasoned process in support of the exemption was provided by Clark County. No evidence in support of the exemption was contained in the record. The County did note that the exemption was similar to one found in the prior ordinance that was subject to a finding of noncompliance. Although we did not directly deal with the existing agricultural exemption provision of that ordinance, we found that the ordinance itself did not comply with the Act on a variety of issues.

We noted in the remand order that the ordinance was poorly drafted and difficult to understand. We observed that the double negative exemptions from exemptions provisions were, at the very best, unclear. As noted above, the County went through an extensive process to develop the current ordinance in response to that order of remand. Now that this ordinance is clear and in light of the record developed by the County we specifically determine with regard to the agricultural exemption that we have a firm and definite conviction that a mistake was made by the County. The agricultural and existing farming activities exemption is too broad and does not comply with the Act.

We find that under the provisions of ESB 6094, the County is generally in compliance with the Act. The noncompliant sections include the failure to designate habitat of local importance, the external riparian zone (buffer) averaging provisions of CCC 13.51, and the existing farming and agricultural practices exemption found in CCC 13.51. We decline the request to recommend sanctions to the Governor. The County has a period of 120 days from the date of this order to come into compliance with the Act.

So ORDERED this ____ day of November, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

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Board Member

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Board Member