BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

WARREN DAWES, JOHN E. DIEHL, GORDON JACOBSON, JUTTA RIEDIGER, VERN RUTTER, and KERRY HOLM, individually and as members of the MASON COUNTY COMMUNTIY DEVELOPMENT COUNCIL, a non-profit association, and THE CITY OF SHELTON,	)	No. 96-2-0023
Petitioners,	)	FINAL DECISION AND ORDER
vs.	)	
MASON COUNTY,	)	
Respondent,	)	
and	)	
PETER E. OVERTON, et al., McDONALD LAND COMPANY, et al., SOUTH 101 CORRIDOR GROUP, INC., and MANKE LUMBER COMPANY,	)	
Intervenors.	)	

SYNOPSIS OF THE ORDER

The Growth Management Act (Act, GMA) calls for local government comprehensive plans (CPs) and development regulations (DRs) to be presumed valid upon adoption. We must find the CPs and DRs and amendments thereto in compliance unless we find by a preponderance of evidence that the local government erroneously interpreted or applied the Act. Further, an ordinance may only be declared invalid if it substantially interferes with the goals of the Act.

Mason County's Comprehensive Plan, and the development regulations implementing it, Ordinance #82-96, were presumed valid by this Board. The evidence brought forward by Petitioners in this case was weighty. It was clear from the evidence that Mason County had

adopted a Plan and an Ordinance which allowed for urban development in rural areas, failed to prevent sprawl, failed to maintain the rural nature of rural areas, allowed for non-resource based industry in rural areas and failed to properly size urban growth areas to accommodate population projections. By adoption of this ordinance, Mason County has erroneously applied or interpreted the Act, and in several areas, has substantially interfered with its goals. The presumption of validity, therefore, was overcome by the presentation by Petitioners of a preponderance of evidence to the contrary.

INTRODUCTION

This case is a consolidation of six cases which challenged Mason County's Comprehensive Plan and its implementing development regulations, Ordinance #82-96. Manke Lumber Company (Manke) originally challenged the inclusion of its property in an Interim Urban Growth Area (IUGA) but later stipulated to a withdrawal of its petition and entered the consolidated case as an intervenor on the side of the County (Case #96-2-0003). John Diehl and the Mason County Community Development Council (MCCDC) also challenged Mason County's IUGA Ordinance (#03-96) in March 1996 (Case #96-2-0004). In May, Warren Dawes (Dawes) and the MCCDC challenged the Final Environmental Impact Statement (FEIS) and the CP and in the same month, John Diehl, the MCCDC and Manke challenged the Final Urban Growth Area (UGA) elements of the CP. The City of Shelton also challenged the CP (Case #96-2-0015). In July, we received challenges to the development regulations in Ordinance #82-96 from Dawes, the MCCDC and City of Shelton (Cases #96-2-0021 and 0023). All of these cases were consolidated into Case #96-2-0023 on July 17, 1996.

A Hearing on the Merits was held August 29, 1996. All three Board members were present. Pamela J. Nelson was the Court Reporter. Mr. John Diehl, Petitioner, and Mr. Joseph Cunnane, representing the MCCDC, appeared. Mr. Eric Valley appeared for Mason County. Mr. Alexander Mackie appeared for McDonald Land Company, et al. Mr. Allen T. Miller appeared for the City of Shelton. Mr. Jack McCullough and Mr. Daniel Drais appeared for Peter Overton, et al. Mr. Larry Stout appeared for the South 101 Corridor Group Inc. Owing to an emergency, Manke did not have a representative present, but did file a brief.

Respondent's motion to limit argument to briefs attached was denied. Intervenor Overton's motion to strike Petitioners' attachments to the brief was denied. The Board took official notice

of the most recent Office of Financial Management population projections. Petitioners' motion to strike Manke's argument in its brief regarding forest lands except as they pertained to development regulations was granted. We determined that Petitioners' declaration regarding SEPA standing would be admitted only if we departed from our previous holdings in *Achen v. Clark County*, WWGMHB #95-2-0067 concerning SEPA standing.

FINDINGS OF FACT

Findings of Fact adopted pursuant to RCW 36.70A.270(6) are included by reference and appended as Appendix I.

DISCUSSION & CONCLUSIONS

Rural Centers

We refer to Rural Activity Centers (RACs), Rural Community Centers (RCC), Fully Contained Communities (FCCs), and Working Rural Areas (WRAs) collectively as "Rural Centers".

Petitioners argued that the basic flaw with Rural Activity Centers was that they permitted urban development in rural areas. The area of the RACs collectively exceeded that of the City of Shelton. Petitioners observed that the permitted uses in the RAC contained many urban uses that were not dependent upon a location in a rural area, and were neither functionally nor visually compatible with the rural area. Examples included auto repair, banks, daycare centers, convenience stores, dry cleaners, apartment buildings, hardware stores, health clubs, hotels, light industry, professional offices, liquor stores, restaurants and video stores. Petitioners argued that the scope of permitted uses would require urban governmental services such as sewer and water. They noted that the CP wastewater section stated "planning level costs are developed for additional facilities in potential rural activity centers." CP at VI. 3-6.

Petitioners pointed out that the Central Puget Sound Board had previously stated that it could:

> "conceive of a well designed compact rural development containing a small number of homes that would not look urban in character, not require urban governmental services, not have undo growth inducing or adverse environmental impacts on

> surrounding properties. Such a rural development proposal could constitute compact rural development rather than urban growth."

However, the Central Board pointed out that in their case, there were no parameters to prevent urban growth from occurring. *Kitsap Citizens for Rural Preservation v. Kitsap County*, CPSGMHB, #94-3-0005. Petitioners argued that the situation here was similar. The concept of rural centers was not objectionable in itself, but merely the lack of limitations which allowed them to become, in essence, UGAs in all but name.

Petitioners also argued that the lack of limitations on urban development in the rural area was further exacerbated by the minimum 12,500 sq. ft. lot size allowable throughout the rural area and the presence of an inventory of 20,000 existing vacant lots in the County. The existence of the 20,000 lots is unaccompanied by any cluster cap provisions or other mechanisms (e.g., aggregation requirements) in the DRs or CP to preclude new urban development in the rural area.

The County argued that the RAC was beneficial because placing a limit on development that might otherwise continue to the Shelton city limits made a RAC designation for Taylor Towne compatible with Shelton's vision statements. It contended that providing boundaries for such areas was consistent with the GMA's goal of eliminating sprawl. Intervenor South 101 Corridor Group (South 101) argued that additional growth in the Taylor Towne area was acceptable because the area could not be primarily used for agriculture, mining, production of food or other agricultural products. South 101 asserted that the RAC did not constitute urban growth because there was no immediate demand for urban governmental facilities and services.

Petitioners pointed out that the Working Rural Area (WRA) was "a floating designation without any geographic specificity that could be plunked down anywhere." Additionally, Petitioners alleged that within the WRA, urban development could sprout up anywhere because Master Planned Resorts, industrial uses, commercial and retail and mixed-use development were allowed. They contended that, "under the commercial and industrial provisions in the WRA, there are absolutely no provisions that would require these development(s) to be dependent on a rural location or to be functionally and usually compatible with the rural area." Petitioners argued that this lack of definition for the WRAs precluded "predictable outcomes" regarding

urban development in rural areas and constituted growth areas in the nature of a "wild card". The County responded that the FCC and its allowance of projected growth were "creatures of the Growth Management Act itself".

Conclusion - Rural Centers

The land availability summary CP, Table IV-3.19 listed 5,102 acres designated as RACs. The land demand column of that summary, noted that only 585 acres were needed for a combination of residential and non-residential uses in the RACs during the 20-year growth period covered by the CP. Thus, the RACs are, by these figures, 9 times larger than necessary for the 20-year growth period.

Of the 585 acres needed in the RACs, only 230 are residential acres. Permitted density in an RAC is 8 dwelling units (du)/acre. Thus, 230 acres could accommodate as many as 1,840 du. At the county average of 2.3 people per du the 230 acres could accommodate 4,232 people. If the land capacity for RACs is 9 times greater than the land needed in the residential category, RACs can therefore accommodate 38,000 people. The population allocated under Table IV-3.19 shows only 542 people are anticipated to be added to the RAC areas. It is clear that using either maximum density figures or the County's own estimate of land demand, the RACs are severely oversized. There is no analysis in the record regarding this considerable oversizing of areas accommodating urban densities in the rural areas.

The record showed that the boundary of the Taylor Towne RAC would accommodate 3 to 4 times the residential and commercial activity now present. There are presently 48 residences and 40 businesses within the area. Nothing in the record shows a distribution of projected population to the RAC in those proportions. The creation of a RAC capable of growing to four times its present density and intensity of commercial and industrial use without being designated as an urban growth area is not in compliance with the Act. The Act precludes rural centers from expansion beyond current development, except for infill. Any activities permitted in the RACs must be dependent on a location in a rural area, functionally and visually compatible with that area and limited in size and density to preclude future need for urban services. Infill of historical development patterns is allowable, as long as it is contained and does not create a new pattern of sprawl.

UGAs

Intervenor City of Shelton pointed out that the City and County used differing population projections on which to base their estimates of growth. We agree with the City's contention that the County and the City must plan consistently and that the City and County should reenter discussions on population projections and UGA sizing.

Conclusion - UGA Sizing

Assuming that the urban residential acreage listed in Table IV-3.19 of 4,266 acres was developed at a very low urban average of 4 du/ac it would yield 17,064 du. At an average of 2.3 people per du (Hovee, Ex. 731) that would amount to 39,247 in population. The total population increase in the land demand summary table is estimated at 26,866. The urban growth areas (UGAs) are also oversized, although not as severely as the rural centers. The UGA sizing does not comply with the Act.

Performance Standards

The County argued that its performance standards were its chosen guide to development and would assist in providing affordable housing. Indeed, the Growth Management Advisory Committee had agreed that performance standards would "guide development rather than traditional zoning" (Mason County Draft Plan/EIS pg. II-4.10) Ex. 1025, the January 24, 1996, minutes of the ad hoc committee included discussion of performance standards in lieu of density as "a kind of assumed zoning density regarding the carrying capacity of land".

Conclusion - Performance Standards

The performance standard section of Ordinance #82-96, MCC 1.03.030b calls for on-site septic systems which meet the regulations of Mason County and Washington State and which consider advanced forms of pre-treatment prior to discharge into the soil. The standards call for "system maintenance and monitoring by certified professionals under a program managed by the Mason County Health Department". There are no other requirements under that section of the ordinance. Under the amendments to Title XVI, Plats and Subdivisions, Ch. 16.23, Cluster Subdivisions and Ch. 16.22 Performance Subdivisions, there is no section entitled "performance

standards". Density bonuses are allowed provided they meet design and performance criteria. There are sections entitled "additional open space criteria" which "encourage such criteria as interconnection with designated open space and direct access from as many lots as possible and minimization of fragmentation of open space. A site design consideration section, 16.22.037 states that the "siting of house lots should avoid the following" and lists, among others, interruption of scenic views, construction on hilltops or ridge lines. We conclude that the use of the words "encourage" and "should" do not constitute performance standards per se. Standards are requirements or thresholds. These criteria are desirable but not a requirement. The only performance standards contained in the ordinance are those regarding system "considerations" including the regulations of the County and State Departments of Health, Department of Ecology, as well as considerations of advance forms of pretreatment and proprietary pretreatment devices. We hold that septic systems standards alone, even if they were requirements as substitutes for minimum densities would not preclude urban densities in rural areas and therefore do not comply with the goals and requirements of the Act.

-

Population Projections

The County has used the high growth scenario by consultant H. D. Hovee projecting a population in the year 2014 of 81,102. Mr. Hovee's mid-range scenario, in contrast, predicted county population at approximately 65,000. Under the Office of Financial Management (OFM) figures for Mason County (high range projection), 73,477 is the highest figure allowable for counties under the 1995 amendments to the Growth Management Act. The Hovee high range projection adopted by the County is approximately 8,000 people higher than the highest range allowable for use. Because the Legislature directed a range in population projections rather than a single number, there is no authority for a county to adopt a projection that exceeds the range limits.

Conclusion - Population Projections

In Case #94-2-0006, *City of Port Townsend et al., vs. Jefferson County*, we held that if a local government could clearly show OFM projections are inadequate and a different set of figures needed to be used to accomplish the goals and requirements of the Act, then those non-OFM figures could be used. It is important to note that this was prior to the change in legislation which required OFM to establish a range of projections. Our holding in *Pt. Townsend* is therefore no longer valid. We now hold that the outer limits of the

OFM range are the minimum and maximum within which population projections must fall.

The County's use of the Hovee high range scenario does not comply with the Act.

-

Capital Facilities and Level of Service (LOS)

Petitioners argued that the capital facilities element of the CP did not comply with the Act because the capital facilities analysis was incomplete in many areas. They alleged that Levels of Service (LOS) were not established for most public services. They contended the oversizing of the various rural centers and the inflated population projection coupled with the uncertainty of location for such rural centers as the WRAs made capital facilities analysis virtually impossible.

Petitioners cited Ex. 1,300, a letter from the State Department of Community, Trade and Economic Development (CTED) to County Commission Chairman Cady, in which CTED remarked that:

> "the plan does not have LOS standards for many public services and does not identify a process to reassess the land use element if funding should fall short and LOS standards cannot be met.
>
> The extensive capital facilities and services required to support the land uses proposed in the plan will be very expensive. The lack of a detailed cost and fund source analysis for water systems, surface water management and solid waste makes it difficult to predict the feasibility of the development. Four of the five classifications of rural lands are acknowledged in the plan as having the potential of becoming communities that will require urban services, yet no projection or provision is made for these. According to the plan, the County regularly receives requests from smaller, independent water systems for some kind of county management, yet the plan also states that the County is in no position to take on additional systems."

Petitioners noted that the development regulations "appear to set LOS standards for park and recreation but do not give any hint of how such standards are to be maintained."

The County contended that the CP did provide LOS for transportation, for park service, CP pg. VI-5.13, and solid waste CP pg. VI-9.2, among others.

Petitioners further noted that the County failed to identify and reserve transportation and utility

corridors, as well as other lands useful for public purposes.

Petitioners maintained that these failures precluded the capital facilities plan element from adequately inventorying capital facilities, forecasting future needs and locations, and identifying sources of public money for capital facilities. They observed that the following CFP elements were still unfinished: the criminal justice system, administrative buildings, water supply systems, and stormwater management facilities.

-

Conclusion - Capital Facilities and LOS

The CP showed a listing of both National Park LOS and average LOS standards of similar-sized counties. It is unclear as to which is the County LOS for Parks. The solid waste section listed the 1994 LOS, but it is not clear whether that is the established LOS for future use.

Establishment of specific Urban Growth Areas with finite boundaries and quantifiable allocation of population must first be made before any credible capital facilities analysis can be made. It is impossible to analyze future facilities needs and costs if it is uncertain as to where population will be located and how far flung it will be. The capital facilities element of the CP does not comply with the Act.

Open Space Corridors

Petitioners contended that RCW 36.70A.160 requires each county to identify open space corridors within and between urban growth areas including lands useful for recreation, wildlife habitat and trails. They further contended that the plan map (Ex. 1108), failed to identify corridors within and between UGAs and showed open space only as it existed in 1991.

Respondent maintained that the County has plenty of open space and that the development regulations require 50% of developable land be maintained in open space.

Conclusion - Open Space

The maps of open space lack specificity. Recreation areas and transportation and utility corridors are not identified. Open spaces need to be identified and prioritized and delineated on a map.

Critical Aquifer Recharge Areas

Petitioners alleged that significant parts of the two urban growth areas were located in critical aquifer recharge areas. Petitioners maintained that, aside from an operations and maintenance program for septic systems, no action had been taken to address the problem urban development poses for critical aquifer recharge areas. They cited as examples increased impermeable services, household and agricultural chemicals, animal waste and domestic hazardous waste. The County cited its septic maintenance program and sewage treatment as examples of aquifer recharge protection.

Conclusion - Critical Aquifers

The operations and maintenance program for septic systems is a laudable effort. However, the record does not show any discussion of steps to protect the aquifer from pollutants other than septage. The CP describes in detail the nature of critical aquifer recharge areas, but neither the CP nor the DRs address the aspects of protection called for under the Act. CP Section CA-302 calls for the County to regulate activities posing a threat to groundwater via permit. The DRs are silent on the regulation via permit of these aquifer recharge areas. CP Section CA-300 calls for the adoption of permanent regulations that address classification, designation and appropriate land uses and development standards for critical aquifer recharge areas. The DRs do not provide these development standards or protections.

The County must follow its CP and adopt permanent regulations which address protection of critical aquifer recharge areas.

Final Environmental Impact Statement

In their criticism of the Final Environmental Impact Statement (FEIS) Petitioners noted the difficulties inherent in analysis and comparison of alternatives which incorporate what they considered the rather amorphous aspects of the County's rural areas plan and regulations. Petitioners cited former County Planner Erik Fairchild's letter, Ex. 656, in which he wrote that "the existing CP and DEIS inadequately addresses basic planning information that is necessary to assess environmental impacts….The alternatives that are discussed do not provide specific information such that it is clear what development patterns will actually result and therefore, what

environmental impacts will occur." The record regarding the EIS contains a letter from Mr. Stephen Penland of the State Department of Fish and Wildlife to Shane Hope of CTED, stating that "the existing urban growth area (Shelton) is projected to have the same share of growth (20.8%) under the preferred alternative as under the no action alternative". Department of Health (Ex. 1022) commented that "there are no defined densities in the County. It would be very difficult for service providers to plan for future development. It is difficult to plan when an area could go 1/2 acre tracts, 5 acre tracts or worse yet a random mixture of both."

The County contended that the environmental impact statement satisfies all statutory and regulatory requirements.

Conclusion - FEIS

It is clearly difficult to analyze impacts of a plan which provides for rural centers, some of uncertain location, which strongly resemble urban growth areas, particularly when they are from 2 to 10 times larger than necessary for anticipated population. On the strength of this shortcoming alone, the FEIS must be remanded to the County to engage in a more thorough analysis of the environmental impacts generated by the proposed reworking of the CP and DRs that would comply with the Act.

Housing

Petitioners noted that the housing policies in the plan encourage far-flung and inefficient suburban-style development outside UGAs. They maintained developers have little incentive to build in urban areas in Mason County because of the County's permissive housing policy in rural areas. The County responded that its efforts regarding clustering, minimum lot sizes and maximum density supported the Act's housing goal.

Conclusion - Housing

We fail to see how a rural lands policy which encourages expansion of urban clusters to a magnitude beyond the needs of a 20-year population projection, thus virtually assuring the need for urban infrastructure and services, could be construed as a method of holding housing costs down countywide. We encourage the County to re-examine its efforts to encourage affordable housing as it reworks its population allocations, rural areas and urban growth sections of the CP.

Conclusion

The County has made progress toward the adoption of a CP and DRs which could form the basis for County compliance with the Growth Management Act. Nonetheless, the CP and DRs are deficient in several key areas and fail to comply with the Act.

The Comprehensive Plan is seriously flawed. The County used a population projection not permitted under the Act and over 10 percent higher than the highest OFM projection. Further, the sizing of the UGAs accommodates a third more than the projected population allocated to them. Additionally, the rural centers are oversized and/or allow urban activity, and/or have population allocated without any indication of their location.

-

ORDER

The CP and DRs are remanded to the County to be brought into compliance within 180 days of this Order. In order to achieve compliance:

1. The County must reassess the rural center classifications in its rural areas to preclude expansion of urban development in the rural areas.

2. The population projection must be no greater than the high range of the OFM projection.

3. The population must be allocated in a way which accommodates urban growth in properly sized UGAs, thus promoting a variety of affordable housing.

4. Rural population centers must accommodate only commercial enterprises which serve neighborhood needs and only industrial enterprises which are resource-based.

5. Critical aquifer recharge areas in urban growth areas must be adequately protected.

6. Urban growth in rural areas must be avoided by consideration of the adoption of mechanisms to preclude new urban development.

7. Minimum densities must not be so high and minimum lot sizes so small as to promote urban density in rural areas.

8. Open space and recreation areas and transportation and utility corridors must be identified and mapped.

9. The FEIS must provide an analysis of environmental impacts of the CP and DRs adopted in response to this remand.

10. The population allocated to the oversized rural centers must be reallocated to the UGAs and the UGAs properly sized to accommodate it.

11. The bonus densities in the rural areas must be limited.

The following portions of the Mason County Comprehensive Plan and Development Regulations substantially interfere with the goals of the Act, pursuant to RCW 36.70A.330(2).

1. CP Section III-3-Rural Lands.
2. Ordinance #82-96: Development Regulations.

a) Section 1.03.032 - Minimum Lot Sizes.
b) Section 1.02-042 - General Rural Areas.
c) Section 1.02.044 - Rural Activity Centers.
d) Section 1.02.047 - Resource Conservation Master Plan.
e) Section 1.02.048 - Working Rural Areas.

3. Ordinance #82-96: Amendments to Title 16, Plats and Subdivisions. Section 16.22.039 (Mixed Uses) only as it applies to Rural Activity Centers and Rural Community Centers.

Findings of Fact and Conclusions of Law are included in this Order by reference and appended as Appendix II.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

SO ORDERED this 5th day of December, 1996.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

Les Eldridge
Board Member

_____

Nan A. Henriksen
Board Member

_____

William H. Nielsen

Board Member

APPENDIX I

COMPLIANCE FINDINGS OF FACT

-

1. The adopted CP of Mason County creates working rural areas which have no geographical location and which have population growth allocated to them.

2. The population projection adopted in the CP is higher than the high range of the Office of Financial Management population projection.

3. The urban growth areas and the rural centers in the CP are sized to accommodate from two to ten times more population than the County has allocated to them.

4. Rural centers allow commercial enterprises that serve more than neighborhood needs and allow industries which are not resource-based.

5. Minimum densities in rural areas are densities which are urban in nature.

6. The CP and DRs afford protection to critical aquifer recharge areas only in terms of a septic maintenance program.

7. The County has not passed a cluster cap ordinance, an aggregation ordinance, nor any other mechanisms to preclude new urban development in rural areas.

8. Open space and recreation areas and transportation and utility corridors are not identified nor mapped.

These findings of fact are made pursuant to RCW 36.70A.270(6).

APPENDIX II

INVALIDITY FINDINGS OF FACT

1. Rural Activity Centers are sized to accommodate from 2 to 10 times the population allocated to them under the comprehensive plan.

2. The inventory of 20,000 existing vacant lots in the rural areas of the County is unaccompanied by any cluster cap provisions or aggregation requirement in the CP or the DRs.

3. The WRA allows commercial development serving greater than neighborhood needs and industrial development that is not resource-based.

4. Working rural areas have population allocated to them and have no geographical locus.

5. The County has chosen a population projection higher than the maximum range of the OFM projections. The County has allocated more than 50 percent of that projection to the rural areas.

6. The rural centers as characterized in the CP and DRs allow urban densities and/or activity in rural areas.

These findings are made pursuant to RCW 36.70A.300(2)(a)

-

CONCLUSIONS OF LAW

1. The CP and DRs in the following elements substantially interfere with the goals of the Act:

A. CP Section III-Rural Lands.

B. Ordinance #82-96: Development Regulations.

1) Section 1.03.032 - Minimum Lot Sizes.
2) Section 1.02-042 - General Rural Areas.
3) Section 1.02.044 - Rural Activity Centers.
4) Section 1.02.047 - Resource Conservation Master Plan.
5) Section 1.02.048 - Working Rural Areas.

C. Ordinance #82-96: Amendments to Title 16, Plats and Subdivisions. Section 6.22.039 (Mixed Uses) as it applies to only to Rural Activity Centers and Rural Community Centers.

2. The aforementioned sections substantially interfere with the fulfillment of RCW 36.70A.020(1),(2),(3),(4),(8) and (12). These sections are declared invalid under the provisions of RCW 36.70A.300(2).

Nothing in these conclusions precludes the County from considering build out eligibility for pre-existing, noncontiguous lots of separate legal ownership.

These conclusions are reached pursuant to RCW 36.70A.300(2)(a).