

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

GEORGE F. HUDSON and NASH HUBER,))	No. 96-2-0031
Petitioners,))	
vs.))	RESCISSION OF
)	INVALIDITY AND
CLALLAM COUNTY,))	FINDING OF
)	COMPLIANCE
Respondent.))	
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On April 15, 1997, we entered the final order in this case. The order found that Clallam County was not in compliance with the Growth Management Act (GMA, Act) in its adoption of development regulations (DRs) regulating designated agricultural resource lands. We further determined that certain provisions of the DRs substantially interfered with Goals 2 and 8 and were therefore invalid.

On October 13, 1997, we received a letter from Clallam County stating that a new ordinance regulating the designated agricultural resource lands had been adopted on October 10, 1997. The letter, a copy of which was sent to petitioners' attorney, requested that we fix a compliance hearing date as soon as reasonably possible. Subsequent to the letter, a phone conference between counsel for the County, counsel for petitioners, and presiding officer Nielsen was held. The purpose of the telephone conference was to consider appropriate timelines for production of the record, submission of briefs, and the hearing. The County made clear its intention to request rescission of invalidity as well as a finding of compliance. Thereafter, a compliance prehearing order was entered on October 20, 1997, which established the issues as:

1. Whether Clallam County was in compliance by adoption of Ordinance 627.
2. Whether the prior finding of invalidity should be rescinded or modified.

At the hearing on November 24, 1997, and in petitioners' brief, the argument was presented that the

County had not filed a formal motion for rescission of invalidity and, thus, the issue was not properly before us. We find the position of petitioners to be untenable. The County chose this procedure to allow some additional time for petitioners to prepare and for us to adequately review the record and the arguments. Under RCW 36.70A.330(2), the County could have filed a motion to rescind or modify invalidity which would have required a finding within 45 days of that motion. Had a motion been filed on October 13, 1997, both petitioners and we would have had less time to adequately review this matter. The County's approach benefited both petitioners and us by allowing time for a full and adequate presentation of the record and the issues. The County is to be commended rather than chastised for its approach since the tradeoff for allowing adequate time to reach a decision is the continuation of invalidity. Under these facts, we hold that the 45-day period began November 3, 1997, when the County filed its opening brief.

Since the ordinance was adopted on October 10, 1997, there is no question that the full array of amendments in ESB 6094 apply. Initially, we must establish the respective burdens for the invalidity/rescission issue and for the compliance issue as established by RCW 36.70A.320. Subsection (4) of that statute states that a local government which is subject to a determination of invalidity:

“...has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1).”

The statute is clear that the burden is on the local government to show that it no longer substantially interferes with fulfillment of the goals of the Act.

Recently in *CCNRC et al., v. Clark County, et al.*, #96-2-0017 (order dated December 2, 1997) (*CCNRC II*) we noted that RCW 36.70A.320(2) directs that except for a motion to rescind or modify invalidity, the burden is on the petitioner to show that “any action taken” is not in compliance. In *CCNRC II*, we further held that except for invalidity and the shoreline element of the CP or DRs, the applicable standard of review is the clearly erroneous test. Thus, in this case, we hold that the County bears the burden of showing it no longer substantially interferes with the goals of the Act as to the invalidity issue. Once, or if, that burden is met then the petitioner bears the burden of meeting the clearly erroneous standard as to the compliance issue. Whether the issues are heard concurrently or separately, those are

the respective burdens.

We take this opportunity to clarify some apparent confusion concerning the scope of invalidity and/or compliance hearings. In *Seaview v. Pacific County*, #95-2-0076 (order dated May 28, 1997) (*Seaview*), we held that when a County had previously failed to act in meeting GMA deadlines, was then subject to a determination of invalidity and later took the required action, we would only do a “facial” review to determine if substantial interference no longer applied. Rescission of invalidity in that case was achieved because Pacific County finally adopted a critical areas ordinance. Recently in *C.U.S.T.E.R. Association et al., v. Whatcom County*, #96-2-0008, and *Whatcom Environmental Council v. Whatcom County*, #94-2-0009, (combined hearing) (order dated July 25, 1997), we were presented with a motion from Whatcom County to rescind invalidity. The basis for that request was the recent adoption of the CP and DRs. The prior invalidity was based on actions the County had taken. There was no motion to determine compliance. The matter was submitted by the parties on an understandably limited record. We recognized that the full record concerning adoption of the CP and DRs was not submitted, nor could it have been reviewed within the 45-day timeframe. After a full review of the limited record, we modified the prior invalidity.

In this case, we have a discrete ordinance and a full record which is capable of being reviewed within the 45-day period. We also have issues of both invalidity and compliance before us. Under those circumstances we will review the issues presented by the parties and the full record submitted. Admittedly, we have concerns about what action to take if a petition is filed challenging Ordinance 627 within the 60-day time limit after publication if that deadline is subsequent to the date of this order. We will cross that bridge if and when we reach it.

Reviewing petitioners’ challenge to the public participation process, the record demonstrated a 6 month public process and at least 4 iterations of the original ordinance proposal. Initially, staff drafted a proposal that was presented at a public work session on June 16, 1997. Thereafter, 2 public hearings were held on July 1 and July 15, 1997. In response to the comments presented at the public hearings, 4 additional work sessions were conducted which led to changes embodied in draft #2. On September 16 and September 18, 1997, public hearings were conducted as to draft #2. A work session was held on September 30, 1997,

which led to the production of draft #3. That draft was released to the public on October 6, 1997. At a work session on that date, changes were made which resulted in draft #4, also released to the public on that date. A notice was published October 7, 1997, indicating that the Commissioners would be deliberating draft #4 on that date, but that written comments would continue to be accepted until October 9, 1997. Deliberations began October 7, 1997, and were later continued to October 10, 1997. Further changes were made to draft #4 during the deliberations and a final ordinance was adopted October 10, 1997.

This is an entirely different situation than the one in *Friends of Skagit County et al., v. Skagit County et al.*, #95-2-0065 (order dated April 4, 1996) (*Skagit*). In response to an order of invalidity in that case, Skagit County adopted an ordinance under RCW 36.70A.390 without any public participation or public hearing. The County relied on RCW 36.70A.140 which directs a local government enacting an ordinance in response to invalidity to provide for public participation that would be “appropriate and effective under the circumstances presented by the board’s order.” We held that the County violated the goals and requirements of public participation under those circumstances.

This case is also substantially different from the commercial code rewrite that occurred in *Achen v. Clark County*, #95-2-0067, (order dated October 1, 1996). In that case, Clark County provided little notice of a complete revision to its existing commercial code. The revision culminated in a “streamlined” adoption process with minimal public participation at the Planning Commission and the Board of County Commissioner hearings. We held the process did not comply with the Act, noting that the Act provided for both “early and continuous” and “effective” public participation, especially where invalidity was not involved.

One of petitioners’ major concerns here was the short notice, and lack of notice, concerning the changes made between draft #3, draft #4 and the final ordinance. While it is true that these last three iterations involved little, if any, public involvement, we do not find a violation. The changes were based upon prior public comment from the public hearings as well as staff and Commissioner concerns as to the adequacy of the language to fully implement the County’s intent. The changes that occurred after the last public hearing on draft #2 were minor clarifying rewrites that did not involve any substantial changes. After

reviewing this record, we do not find a violation of the Act.

Clallam County used a public participation process that spanned some four months, involving 4 public hearings as well as continued opportunities for written comments. We have previously held that in appropriate circumstances written comments can be substituted for and supplemental to oral testimony. *Taxpayers for Responsible Government v. City of Oak Harbor*, #96-2-0002. RCW 36.70A.140 does give a local government greater discretion to limit public participation “as appropriate and effective” in dealing with an invalidity finding.

Petitioners complained that the County did not supplement its 1995 Environmental Impact Statement (EIS). Petitioners pointed out that the County did not even do an environmental checklist for Ordinance 627 to determine if EIS supplementation was necessary.

Again, this is not similar to the *Skagit* case. There, the County had no prior environmental documents upon which to rely, but declared an emergency waiver of a checklist under WAC 197-11-880. We held that the plain language of WAC 197-11-880 did not apply to an alleged confusion over property rights which was the basis of the “emergency.”

This case is entirely different because Clallam County has relied upon its final EIS and the range of alternatives provided therein. Petitioners’ main argument was that the passage of two years since the EIS was completed mandated a reexamination. The significant SEPA issue under these circumstances is whether the prior EIS provided an examination of environmental impacts under a range of alternatives that could be covered by this new ordinance. Petitioners did not make such an argument or point out why the prior range of alternatives was not still appropriate. Their argument was based exclusively on the passage of time. We are satisfied that SEPA compliance for Ordinance 627 has been achieved. Thus, we review the substantive aspects of Ordinance 627.

In response to the remand order and finding of invalidity, Clallam County adopted an entirely new approach to conserving agricultural land and enhancing the agricultural industry under RCW 36.70A.060 and .020(8). In reviewing the total 6,200 acres of previously designated agricultural lands, the County observed that some 3,900 acres were undeveloped, while 2,300 acres had previously been subdivided into 5-acre or smaller parcels. The County determined

that different treatment was needed for the undeveloped versus the subdivided acreage.

In the undeveloped 3,900 acre sections, which had previously been zoned as 2.4 or 4.8 dwelling units (du)/acre, the County downzoned to minimum lot sizes of 16 acres. Each of the 16-acre minimum parcels was entitled to one single-family residence on no more than a 1-acre parcel. As a technique to conserve parcels larger than 16 acres, the ordinance allowed clustering at no greater rate than 1 du/16 acres with restrictions to maintain the unclustered areas as permanent agricultural lands. Additionally, development rights at the rate of 1 du/5 acres plus a 50% bonus were awarded. Those 1/5 development rights could only be transferred to the unincorporated areas of an established urban growth area (UGA). No transfer to resource lands or rural areas was allowed. Additionally, the landowner could also transfer any or all of the 1/16 cluster rights to the UGA.

A more difficult problem for the County was presented by the 2,300 acres in the previously divided agricultural designated area. The divisions were made before the GMA was adopted in 1990. As so often happens, the previously divided areas included some of the best agricultural lands in the county. The County determined that to simply downzone this area would be ineffective because of the previous vesting of 5-acre or smaller parcels. The County's approach was to provide sufficient incentives to the landowners to recombine these divisions into sustainable agricultural lots. To accomplish that purpose landowners were given an option to combine into 16-acre minimum lots with allowable clustering on no more than 25% of the total area. Clusters were based upon a ratio of 1 du/5 acres plus a 50% density bonus. Additional development rights on the basis of 1 du/5 acres plus 50% bonus for the 16-acre minimum lot sizes were also awarded. These 1/16 development rights would all be transferred to UGAs. The clustering development rights could be transferred to UGAs or used on-site. A 2-acre maximum lot size was established. A maximum of 14 du and a minimum of 6 du per cluster was established.

Petitioners did not believe that Ordinance 627 complied with the Act and disputed that the order of invalidity should be rescinded or modified. Petitioners contended that the cluster provisions would allow for urban growth in resource areas and would thwart Goal 8 of the Act. They pointed out that in other cases we have held that divisions under 5-acre minimum lot sizes constituted urban growth. What we held was the less than 5 acre sizes were

inappropriate under those circumstances. It is important to recognize what was contained in the record in each of those cases and what the impact of the challenged zoning was. We decide each case individually based on local circumstances and the record before us.

RCW 36.70A.177 is a new section of the Act (ESB 6094 § 23) and sets forth legislative direction that in *agricultural* lands of long term commercial significance innovative zoning techniques are appropriate. Included within that concept is cluster zoning that allows “new development” when the remaining portion of the land is left in agricultural or open space uses. Thus, compact new development in agricultural zones is now specifically authorized by the Act. Ordinance 627 provides a minimum cluster size of 6 du and a maximum of 14. It provides a maximum of 2-acre lot size but does not establish a minimum. It allows compact development with appropriate cap limitations that is consistent with the Act. Other restrictions in the ordinance insure that use of the remainder resource land is not thwarted. For example, the ordinance provides that the development section “should” be located in a manner that minimizes impact to the agricultural reserve acreage. Petitioners contended that the word “shall” was necessary to comply with the Act. Given the need for flexibility of cluster developments and the overall criteria established in this ordinance, we do not agree.

Petitioners also pointed to the allowable and conditional uses set forth in the ordinance. Many of the uses were contended to be incompatible with conservation and enhancement of the agricultural resource area. The ordinance at CCC 33.07.070 - .110 provides for permitted uses and conditional uses (permit required) within the development portion of the zone. Additionally, permitted and conditional uses on the reserved agricultural lands are set forth. Temporary (less than 1 year) asphalt and concrete plants and rock aggregate processing are permit required conditional uses on the agricultural reservation portion. Likewise, outdoor oriented recreation facilities are an allowable use on the development portion and a conditional use on the reserved area if designed to be compatible with the agricultural use. Given the specific local conditions and restrictions that Clallam County was faced with, these are appropriate choices to allow optional sources of income in order to conserve and encourage maintenance of the primary agricultural use. We have also reviewed the other contentions raised by petitioners. We do not have a definite and firm conviction that a mistake was made as to any portion of Ordinance 627.

At the hearing counsel for the County, in the opening part of his argument, observed that in many of our compliance cases, jurisdictions adopted a strategy of small incremental steps creeping towards compliance but did not go one inch more. Clallam County, he observed, disdained this approach and began its remand process by fully embracing the goals and requirements of the Act. Counsel was correct on both observations. We specifically find that the County no longer substantially interferes with fulfillment of the goals of the Act and rescind our prior order of invalidity. We further find that Ordinance 627 complies with the Act.

Our congratulations to Clallam County for a job well done.

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

So ORDERED this ____ day of December, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge
Board Member

Nan A. Henriksen
Board Member

