

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

SAN JUAN COUNTY and PHILIP J. and PEGGY YEAGER,	)	No. 97-2-0002
	)	
Petitioners,	)	FINAL DECISION
	)	AND ORDER
vs.	)	
	)	
WASHINGTON STATE DEPARTMENT OF ECOLOGY,	)	
	)	
Respondent.	)	
<hr style="width:100%; border: 0.5px solid black;"/>		

This is our first occasion to address the provisions of RCW 90.58.190(2)(b) in a context other than a decision regarding the State Environmental Policy Act (SEPA). *See Seaview v. Pacific County #96-2-0010*. The facts of this case are straightforward. Trump Island consists of 29.4 acres with approximately 19.4 acres located within the shoreline area. In 1976, San Juan County designated the island "Natural" under its initial Shoreline Master Program (SMP). The island still remains undeveloped and totally covered by trees, as it was in 1976. SMP 16.40.517 allows the construction of a residence and associated structures as well as access, in a "Natural" designation. Docks, however, are not allowed. SMP 16.40.508.

In 1995, the previous owner, Peterson, applied for a SMP amendment to change a portion of the island's designation from "Natural" to "Conservancy." The purported purpose of the proposed amendment was to allow construction of a dock in the redesignated area. Docks are allowed in Conservancy areas under certain conditions and upon approval of a substantial development permit. The County's Permit Center recommended the proposed amendment be rejected. At a June 21, 1996, public hearing, the County Planning Commission voted to approve the proposed amendment with certain conditions that limited the size and scope of the redesignated area. On July 9, 1996, the Board of County Commissioners accepted the recommendation of the Planning Commission and approved the proposed amendment. The County's decision was then forwarded to the Department of Ecology (DOE) on July 30, 1996. Shortly thereafter, Petitioners Yeager

purchased the island from Mr. Peterson.

On October 25, 1996, DOE denied the County's proposed amendment to its Master Program. Notice of the disapproval was published by the County on November 27, 1996. On January 21, 1997, San Juan County filed a petition challenging the decision of DOE and on January 24, 1997, Mr. and Mrs. Yeager filed a similar petition. A prehearing conference was held February 28, 1997, and a hearing on the merits occurred at the County Courthouse on May 1, 1997. Our record consisted of materials and hearing transcripts that were submitted to the County and/or to DOE. The Parties agreed at the prehearing conference that the area in dispute constituted "shorelines" and not "shorelines of statewide significance" under RCW 90.58.030(2). The issue set forth in the prehearing order of

March 5, 1997, was whether the "decision of DOE" was in compliance with the Shorelines Management Act (SMA), Growth Management Act (GMA), and/or was consistent with the SMP.

As part of the Regulatory Reform Act (Laws of 1995 ch. 349), RCW 36.70A.280 was amended to provide that for those cities and counties planning under the Act, jurisdiction for appeals concerning amendments to SMPs was transferred to Growth Management Hearings Boards (GMHB). The Legislature also adopted what is now codified as RCW 36.78.480(2), specifying that adoption of amendments to SMPs would continue to be processed under the provisions of the SMA.

RCW 90.58.090(2) provides that upon receipt of a proposed amendment, DOE must go through certain steps concluding with the entry of written findings and conclusions regarding "the consistency of the proposal with the policy of RCW 90.58.020 and the applicable guidelines". Section .090(3) provides that DOE "shall approve" the amendment unless it determines that the amendment is "not consistent with the policy of RCW 90.58.020 and the applicable guidelines." A proposed amendment does not become effective until it is approved by DOE, under RCW 90.58.090 (1).

The sticky-wicket in this case comes about from the language of RCW 90.58.190 relating to appeal of DOE's decision. Subsection (2)(a), invests jurisdiction of any appeal of that decision with a GMHB for GMA planning counties. Subsection (2)(b) and (c) provide two different standards of review for a GMHB, depending on whether the proposed amendment concerns "shorelines" or

"shorelines of statewide significance." In the latter instance, a GMHB must uphold the decision of DOE unless it is persuaded by clear and convincing evidence that the DOE decision is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines, set forth in WAC 173-16.

However, if the appeal concerns "shorelines", a GMHB must review the proposed amendment for compliance with:

- 1) the requirements of the SMA,
- 2) the requirements of the GMA,
- 3) the policy of RCW 90.58.020 and the applicable guidelines, and
- 4) SEPA compliance relating to adoption of a proposed amendment.

Under subsection .190(3), for those counties and cities not planning under the Act, the Shorelines Hearings Board (SHB) has jurisdiction. With regard to "shorelines of statewide significance" the SHB is required to uphold the decision of DOE unless the SHB determines the decision is inconsistent with the policy and guidelines of the SMA by clear and convincing evidence. For an appeal relating to "shorelines" the SHB determines whether the proposed amendment is valid in light of the policy of RCW 90.58.020 and the applicable guidelines. For "shorelines" the SHB holds a hearing in which neither DOE nor the local government has an edge, RCW 90.58.190(3) (b). In a GMHB hearing, the Legislature has determined an appellant has the burden of proof, RCW 90.58.190(2)(d).

Thus, as relates to appeals concerning "shorelines of statewide significance" the standards of review of a GMHB and a SHB are essentially the same, given the difference in GMHB record reviews and SHB *de novo* proceedings. With regard to "shorelines", the scope of a SHB review is limited to the SMA policies and guidelines, whereas the scope of a GMHB review is expanded to also include "requirements" of the SMA and the GMA, as well as SEPA compliance. Section .190 (2)(b) does not specifically state whether a GMHB is to review the DOE decision, or the decision of the local government.

Because RCW 36.70A.480 mandates that the policies of the SMA become one of the goals of the GMA, and the goals and policies of the local SMP become an element of the county or city comprehensive plan, a city or county in acting upon a proposed amendment to the SMP must consider consistency with the goals and requirements of the GMA. DOE does not, nor it is

authorized to, include the provisions of GMA or SEPA in its decision. The decision of DOE must solely be based upon reviewing the proposed amendment for consistency with the SMA policies and guidelines.

In this case, the parties, either explicitly or implicitly, believed that our review was of the County's decision to approve the amendment. We disagree with that view. An amendment cannot go into effect unless and until it is approved by DOE. Thus, it does not seem logical for us to limit our review to only the County's decision. Additionally, the appellant (in this case, the County) has the burden of proof. The fact our review is more expansive in scope than that authorized to DOE does present an excellent argument for a contrary holding. We conclude, on balance, that RCW 90.58.190 requires us to uphold the decision of DOE unless an appellant sustains the burden of proving that the DOE decision does not comply with the requirements of the SMA including the policies of RCW 90.58.020 and applicable guidelines, the requirements of the GMA, and the SEPA requirements for adoption of amendments under RCW 90.58. Under the record in this case, appellants have not sustained their burden.

Contrary to the assertions made by Petitioners, this case is not about whether a dock is the only "reasonable access" available to Mr. and Mrs. Yeager. This case is not about whether a dock should or should not be built for Trump Island. This case is not about, nor do we have any jurisdiction to determine, whether the action of DOE constitutes a "taking" of the Yeagers' property. This case is not about whether the action of DOE is arbitrary and capricious. Rather, this case is only about whether the decision of DOE complies with the SMA, GMA, and/or is consistent with the SMP. That was the issue set forth in the prehearing order, to which no party made an objection in writing within seven days. Under the provisions of WAC 242-02-558, the issue set forth in the prehearing order controls the ensuing proceedings.

Exs. 14 and 15 formed the basis for DOE's decision to reject the proposed amendment. Those exhibits pointed out that the "environmental quality" that would be lost by the redesignation was the natural character of the island, which was the goal of the original designation in 1976. DOE noted that there was a significant distinction between the approval of a similar request for Barnes Island and the instant request. That distinction related to the fact that on Barnes Island a dock was in existence at the time the original designation was made. Additionally, a mooring buoy would not have been an effective alternative because of the large mud flat exposure during low tide on

Barnes Island. The situation for Trump Island was the reverse.

Finally, DOE pointed out that the public preference as expressed in the SMP and the Resolution approving the proposed amendment was for retention for undeveloped shorelines. The County's argument that the public preference was best expressed by the decision of the Planning Commission and the lack of opposition to the proposed amendment, is not persuasive.

Neither the County nor the Yeagers provided us with any persuasive evidence or arguments that the decision of DOE was not in compliance with the SMA, the GMA, and/or inconsistent with the San Juan County Shoreline Master Program. If we were reviewing the County's decision, we may have found compliance. The Legislature in RCW 90.58.190 determined that the "last word" belongs to DOE.

The appeal is denied.

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

So ORDERED this 19th day of June, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

---

William H. Nielsen  
Board Member

---

Les Eldridge  
Board Member

---

Nan A. Henriksen  
Board Member