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

WHIDBEY ENVIRONMENTAL ACTION NETWORK,)	
)	
Petitioner,)	No. 97-2-0064
)	
vs.)	ORDER ON
)	DISPOSITIVE
ISLAND COUNTY,)	MOTIONS
)	
Respondent.)	
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)	

On December 9, 1997, Whidbey Environmental Action Network (WEAN) filed a petition for review challenging Island County’s “failure to designate critical areas and adopt protective development regulations.”

Paragraph (4) of the petition contained the preceding quoted language and specifically cited RCW 36. 70A.060(2) and the September 1, 1991, deadline for adoption of designations and development regulations (DRs) that protect critical areas (CAs).

Paragraph (5) of the petition acknowledged that a series of hearings and meetings for adoption of a comprehensive plan (CP) were held that contained the “assumption that various pre-existing ordinances already met the GMA’s requirements.” The paragraph claimed that no “proper re-adoptions” of pre-Growth Management Act (GMA) ordinances were obtained.

Paragraph (6) alleged that the prior ordinances failed to meet the appropriate standards for adoption and publication. Paragraph (6) further alleged that “some provisions of the ordinances on which Island County does rely substantially interfere with the fulfillment of GMA’s goals”

and thus should be held invalid. In preparation for the prehearing conference of February 5, 1998, WEAN submitted a list of policies and DRs that were claimed to substantially interfere.

On December 23, 1997, Island County filed a dispositive motion with regard to its claim that the wetlands portion of the critical areas ordinances were properly adopted. After a response from WEAN and a further reply from Island County, a hearing was held on January 21, 1998. We issued a memo on January 23, 1998, deferring decision on Island County's motion until the hearing on the merits.

On January 20, 1998, WEAN filed a dispositive motion and a motion to supplement the record regarding the fish and wildlife habitat portion of the CA requirements. On January 30, 1998, Island County filed a motion for reconsideration of our decision deferring, a second dispositive motion concerning limitations of the petition to only wetlands issues and a motion to supplement the record. A telephonic hearing was held with regard to all motions on February 12, 1998. We will address the issues in the order that they were presented.

Island County submitted a number of exhibits in support of its original dispositive motion regarding adoption of the wetlands ordinance. Primary among those exhibits were the ordinance itself, PLG-006-92 (ex. 2) and the notice of adoption (ex. 3) that was published on 3 different occasions in March 1992, in 3 county newspapers.

Island County contended that the adoption of this ordinance, along with the statement that the "County's existing wetland regulations are deemed to otherwise satisfy the requirements of the Growth Management Act," sufficiently precluded WEAN or any other petitioner from challenging the failure to designate or adopt DRs some six years later.

We adhere to our earlier decision to defer this issue until the hearing on the merits. The exception is that we grant Island County's motion as to the adoption of the "reasonable use" amendment to the wetland ordinance. We defer our decision because the record as it exists raises as many questions as it answers. Therefore, we wish to review the entire record before making a determination.

As an example, the heading of Ordinance PLG-006-92 referenced 11 different sections of the Island County Code (ICC) that were proposed to be amended. It further referenced adoption of policies and procedures for fish and wildlife habitats and species “contained in the zoning ordinance ICC 17.02.” A review of the ordinance and the findings that are attached show that there was no amendment of fish and wildlife habitat, or the list of protected species and habitats. The ordinance does not appear to amend any of the other ICC sections, except as to the addition of the “reasonable use” amendment. The ordinance is ambiguous as to whether ICC 17.02.110.a.2 (f) is amended or simply “relocated.” The findings of the Island County Board of Commissioners (BOCC) stated that consideration of further amendments would be scheduled later. Finding 2 observed that recommended definitions (although it is unclear what definitions) were inadvertently left out of the text of the amendments to ICC 17.02. Finally, finding 4 stated that the BOCC believed that amendments to “section 17.02.a.2.(b)(4) and 17.02.110.2.(c)(2) ICC are redundant and unnecessary.”

The notice of adoption published in March 1992, stated that ICC 17.02.110 (the wetland overlay of the Island County zoning ordinance) was amended by ordinance PLG-006-92. Only the reasonable use amendment was set forth. The notice stated that “the County’s existing wetland regulations are deemed to otherwise satisfy the requirements of the Growth Management Act.” The problem we observed was that, while the planning commission specifically adopted such a statement, it did not appear in the Whereas and/or Ordained portion of ordinance PLG-006-92 adopted by the BOCC. This is particularly significant because a number of changes to the planning commission recommendation were made by the BOCC.

Island County’s second dispositive motion was that CA sections other than wetlands were not correctly challenged by WEAN’s petition for review. Citing to paragraph (3), Island County claimed that the petition, by its terms, limited the challenge to wetlands only.

We deny Island County’s motion based upon the specific language in paragraph (4) of the petition that challenged the County’s failure to designate and protect critical areas. Paragraph (3) of the petition merely references historical data, whereas paragraph (4) begins after the heading

“Detailed statement of issues raised by petitioner.” Some further confusion, perhaps, is the result of the issues statement submitted by WEAN for the January 5, 1998, prehearing which were limited to

wetland challenges. Those issues, however, related to invalidation and the substantial interference test and did not limit the challenges to the other sections of critical area requirements under RCW 36.70A.060.

WEAN’s dispositive motion on the failure to designate and to adopt DRs for fish and wildlife habitat areas was acknowledged by the County to be accurate. WEAN’s motion is granted.

Island County has expressed no small amount of frustration by having to address these issues during a time it is focused on completing its comprehensive plan. The County has committed to completion of the CP and implementing DRs by the end of April, 1998. The County feels that WEAN should participate in the public process that is occurring in the proposed adoption of the CP and DRs, rather than filing petitions and draining energy and resources from the CP adoption goal. WEAN believes that the County is not willing to address those issues concerning CAs in a substantive manner, but is simply proposing to review CAs for consistency with CP. Whoever may be right in that argument is irrelevant to this case. The GMA does now provide extensions of time if the parties are engaged in a settlement process, but does not allow us to suspend or otherwise dismiss this case, no matter how sympathetic we might be to Island County’s arguments. It is hoped that at this stage the parties will strongly consider engaging in meaningful settlement discussions.

Island County’s motion to supplement the record is granted. WEAN’s motion to supplement the record is granted.

ORDER

Island County has 120 days from the date of this order to complete the designation of and

adoption of DRs for protection of fish and wildlife habitat areas.

So ORDERED this 23rd day of February, 1998.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge
Board Member

Nan A. Henriksen
Board Member