

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

ISLAND COUNTY CITIZENS' GROWTH MANAGEMENT COALITION, et al.,)	
)	No. 98-2-0023c
)	
Petitioners,)	COMPLIANCE ORDER RE:
)	A PORTION OF FDO 13-
v.)	WEAN'S NOMINATION OF
)	SPECIES OF LOCAL
)	IMPORTANCE
ISLAND COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
RESOURCE GROUP, INC., et.al)	
)	
Intervenors)	
)	

In our October 12, 2000 compliance order we expressed impatience and concern because Island County (County) and Whidbey Environmental Action Network (WEAN) had been sparring for so long over WEAN's proposal to designate and protect many plant species as species of local importance in Island County. At pp. 22 and 23 of that decision we stated:

“It appears from the discussions at the PC meetings that the County may not have the will or the finances to designate individual plant species that may be close to extirpation in Island County. The April 8, 1999 staff report recommended that rather than facing the unpredictability, red tape and prohibitive expense of that approach, the County could go forward with designation of certain habitats such as specific glacial outwash prairie remnants where these species are currently found. WEAN complained that that approach was not good enough since ‘occupation of any patch will be periodic and moving.’

The record shows that WEAN supplied the County with an immense amount of information on the nominated species over the past eight years. It is hard to imagine that the County could expect much more information from WEAN to be able to make a formal substantive decision

on this matter.

The County may have greater discretion than with other CAs in determining which species and/or their habitats actually have sufficient local importance to warrant designation and protection. However, with the huge body of scientific information on the species in the record and the years of effort WEAN has put into its proposals for nomination and protection, the County can not now claim that due to a failure to meet criteria developed years after such proposals were submitted, WEAN's nominations can now be procedurally rejected.

As WEAN has said: "If protection is delayed for much longer, the issue will be moot – these species will have been completely extirpated from Whidbey Island." Time is of the essence. **In order to achieve compliance, the County must make a reasoned analysis, on the record, including best available science and other local factors, and take official substantive action on WEAN's nominations by January 31, 2001. If the County fails to meet that deadline, we will request that the Governor impose sanctions."**

Presumption of Validity, Burden of Proof, and Standard of Review

Ordinance amendments made in response to a finding of noncompliance are presumed valid. RCW 36.70A.320.

The burden is on Petitioners to demonstrate that the action taken by Island County is not in compliance with the requirements of the Growth Management Act (GMA, Act). RCW 36.70A.320 (2).

Pursuant to RCW 36.70A.320(3), we "shall find compliance unless [we] determine that the action by [Island County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." In order to find the County's action clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

We will not regurgitate whether the County's past delays and treatment of WEAN's proposal were "a mistake." Our role is to determine if the County process and substantive action taken since our October 12, 2000, compliance order are clearly erroneous.

WEAN's Objections to Finding of Compliance

In its 52-page opening brief, WEAN raised innumerable objections to a finding of compliance. We

will briefly summarize some of WEAN's main contentions:

1. Pursuant to GMA, the County is required to designate the proposed species of local importance. WAC 365-190-030(9) defines "species of local importance" as "those species that are of local concern due to their population status or their sensitivity to habitat manipulation..." Since WEAN has shown that the proposed plant species are in danger of extirpation and are in peril due to impacts of growth, the County has no choice but to designate and protect them.
2. Even if the GMA did not require designation, WEAN's proposal meets the qualifying criteria in Island County Code (ICC) for designation and therefore must be designated.
3. Adoption of "clarifying interpretations" of two of the ICC criteria violated GMA's requirements for public participation and Best Available Science (BAS). (i.e. "sensitive to habitat manipulation" and "of special value").
4. The County's reliance on future compliance fails GMA's requirements to protect critical areas.

"The County's entire approach to protection of *Iris missouriensis* and the other proposed species of local importance is to rely entirely on prospective future actions rather than to undertake regulatory action now. Instead of immediate designation and protection, the County relies on an easement and habitat management plan for the iris that currently does not exist; cooperation of other entities based on vague e-mails rather than formal agreements detailing respective responsibilities; BMPs for protecting rare plants along roadsides which have not been even developed, much less implemented, and for which there are no plans. The County has refused to make any financial commitment in support of any of these activities. These are at best uncertain proposed activities that may or may not come to pass in the future. In essence the County is relying on uncertain future actions to achieve compliance with GMA's critical area protection requirements today. The Board should reject this abject failure to comply." p. 28 WEAN 9/4/01 opening brief.

5. The County's claim of protection for the proposed species under its current critical area ordinance (CAO) is illusory.
6. The County's failure and refusal to participate in or conduct any field surveys or monitoring when it disputes with no supporting evidence the Frosty Hollow report, was not reasoned and did not include the BAS.
7. The County's action in determining local rarity was not reasoned and did not include BAS.
8. The County's refusal to consider designation and protection based on "lack of taxonomic

verification” fails GMA’s BAS requirements, was not the result of a reasoned analysis, and was factually erroneous even under its own terms.

9. The County’s refusal to recognize obvious threats to the proposed species was not reasoned and did not include BAS.

10. The County’s reliance on only voluntary protection is not the result of a reasoned analysis.

11. The County’s denial of some species on the grounds that they were “widespread”, “common”, or “abundant” was not reasoned and failed to include BAS.

12. The County’s reliance on conservation of only a few occurrences with no formal protection is based on factually erroneous assumptions, not reasoned, and failed to include the BAS.

13. The County’s vague commitment to BMPs to protect species of concern along roadsides does not necessarily constitute protection or include BAS.

County Response

In its September 14, 2001 brief the County responded:

“Action on WEAN’s proposals for species of local importance is the County’s last GMA compliance subject. In its October 12, 2000 Compliance Order, the Western Board directed the County to ‘...make a reasoned analysis and take official substantive action...’ CO at pages 22-23. More time has been devoted by the County, WEAN and the Western Board to this issue than to any other compliance question. The County has struggled with many difficult challenges in its effort to comply with the GMA. None have been more difficult than action on WEAN’s request.

Simply stated, there has never been sufficient information to make a reasoned decision that all of WEAN’s candidate species should be considered of local importance. In many cases, no or vague location information was available. Several are one plant type in a family of plants that look very similar. In some cases genetic testing is needed to be absolutely sure which plant is to be protected. Even WEAN has been confused in its identifications. Virtually all of the nominated plants are found in broad geographic ranges in Washington, Oregon, British Columbia and Northern California. They are not considered threatened or endangered by the State or Federal government. They are not considered candidate or monitor species. Many are readily available in seed or plant form to home gardeners. Almost all are located on public or quasi-public lands with commitments by management agencies to protect them. For most, there is very little scientific literature on identity, location or appropriate strategies for protection. In fact, data gaps are acknowledged by WEAN. Often the threats to these plants identified by WEAN are beyond the reach of County regulation and to be addressed, require willing voluntary actions of a continuing nature by property owners.

The County's prior efforts to address WEAN's nominations have failed because of lack of information. Yes, WEAN has provided many submittals but critical data gaps have been encountered and WEAN's requests and supporting information have changed from submittal to submittal.

Recognizing those problems in November 2000, the County tackled the subject again. Outside experts were hired to supplement the WEAN submittal with critical information; potentially affected property owners were notified; and State and Federal agencies and organizations with expertise were consulted. All of this was done to attempt to generate information that would allow the Commissioners to reach an informed and defensible decision that could be implemented. Six public hearings were completed. Special meetings were scheduled with affected property owners and public and quasi-public agencies. The result is a multi-faceted program to protect native plants in Island County.

After completing a new public review process, the County has taken several actions to address WEAN's proposal. These actions include:

- a. Adoption of programs relating to the Blue Flag Iris and the preparation of a Management Plan to protect the species (Ordinance C-14-01, included at Exhibit 8 and C-51-00, included with the County's Compliance Request; and R 7043 included at Exhibit 13).
- b. Implementation of a propagation and monitoring program for the Blue Flag Iris (summarized in R 6521, included at Exhibit 9).
- c. Implementation of BMPs for County Rights of Way (see R 6520, included at Exhibit 9).
- d. Approval of AuSable's request for open space tax classification for the WSWF Game Farm contingent on protection of 31 native prairie plants including 8 identified by WEAN. See Resolution C-96-00 included at Exhibit 10.
- e. Amendment of the County's PBRS to encourage protection of native plant species. Again see Ordinance C-14-01 (Exhibit 8).
- f. Secured/verified commitments from public and quasi-public landowners to protect native plants including those identified by WEAN. See for example R 6165 included at Exhibit 11."

The County further responded:

1. The Board directed that the County complete a reasoned analysis. The County's public review process reflects clearly that the County's process was founded on BAS, relied on evidence from consultants and agencies with expertise, and proactively searched for management strategies that could be implemented in a realistic, effective, and practical

manner.

2. It was not a mistake to apply the County's nomination and designation criteria to WEAN's proposal. The 1998/1999 reviews demonstrated that criteria and standards were needed to ensure a reasoned decision. It was not a mistake to wait to act on WEAN's proposal until the Board found that the adopted criteria and standards complied with GMA. It was not a mistake to then rely on these criteria to judge WEAN's proposal.

3. The County's nomination standards and its interpretation of those standards were reasonable. The BOCC's discussion was rational. Its interpretations were reasonable and corresponded with the guidance offered by the consultants. Furthermore, the Commissioners' interpretations reflected common sense. No mistake was made by the County in its interpretations of the criteria.

4. It was not unreasonable or inconsistent with BAS to require location information and taxonomic verification. The County's consultants advised that location and taxonomic information was required to be able to reliably and scientifically review WEAN's proposal. In at least one case, WEAN had admittedly misidentified a species.

5. WEAN's proposal has been, in effect, a moving target.

6. WEAN's April 1998 proposal contained no evaluation or verification of its information. In fact, WEAN's report states "...there are many holes in this report, especially when it comes to detailed population census information." Between 1998 and 2001, WEAN did nothing to fill these acknowledged holes.

7. Under GMA, the County has no obligation to perform its own field surveys. With its nomination process the County offers a special and unique opportunity. It did not expect this option would create a significant new financial burden on the County.

8. The BOCC reviewed WEAN's proposals on December 11, 2000, and again on December 18, species by species. Through this process, the BOCC considered the science in the record, the reports of its consultants and staff, and public testimony.

9. The County consultants advised that the great majority of species on WEAN's list could only grow in remnant prairies. WEAN also stated that saving remnant prairies was critical. However, a map prepared by the County of prairie soils shows that WEAN's location information and prairie soils do not match.

10. All but two of the species identified by WEAN were said by WEAN to be located on lands owned and managed by State Parks, the Nature Conservancy, the County, the U.S. Navy, the AuSable Institute or Pacific University. All of these agencies have expressed commitments to

protect WEAN's species. The County has and is taking a proactive role to ensure that these agencies follow through on expressed commitments, including development of BMPs for County road maintenance.

11. A number of plants listed by WEAN are available commercially.

12. Island County's actions regarding the protection of native plants go far beyond those of other counties.

WEAN's Reply

In its September 21, 2001 reply, WEAN reiterated many points made in its opening brief. In addition, WEAN refuted the County's claim that it had taken six compliance actions, pointing out:

1. There is still no conservation easement protecting *Iris missouriensis*, the management plan is still at the earliest stages of development, and the County's commitment of resources is doubtful.
2. There have been no steps taken toward creating, let alone implementing, an Iris monitoring and propagation program, or BMPs for County rights-of-way.
3. Providing tax relief does not assure adequate protection.
4. There are no secured/verified commitments from public and quasi-public landowners.

WEAN also challenged the admissibility and accuracy of County map 7042 (The County map which claimed to show inconsistency between prairie soils and WEAN's nominations). WEAN was not sure whether the County's intent was to show that the candidate species occurred outside of prairie soils or that petitioners' locational information was wrong. Either way, contended WEAN, map 7042 did not stand up to scientific scrutiny.

Lastly, WEAN challenged the County's argument that some of the candidate species are not locally rare because plants or seeds are commercially available. The County's failure to designate wild populations of the candidate species because they are commercially available fails GMA's BAS requirements. The County had ample testimony and submissions as to the likely genetic uniqueness of the candidate species on Whidbey Island and the need to maintain that unique diversity.

In addition, at the compliance hearing WEAN stressed that:

1. The County should have used WAC criteria, not the County ordinance criteria, which were adopted well after WEAN submitted its proposal.

2. If a proposed plant meets the WAC criteria, it must be designated. Designation is not voluntary. Those who present nominations for species of local significance can never know what information is required, since the County keeps changing the requirements.
3. Some of those “clarifications” and requirements were sprung on petitioners at the December 18, 2000 hearing with no prior notice.
4. GMA requires use of BAS, not best possible science. Frosty Hollow’s reports are BAS regarding status of these species since there is no counterbalancing science in the record. If uncertainty, a county should use caution and adaptive management, which the County has not done.
5. Over 90% of Island County prairies have been destroyed. Therefore, the proposed prairie plants are very sensitive to habitat manipulation.

At the hearing the County stressed:

1. The remand order said the County must conduct a reasoned analysis and take substantive action. The County has done this. The order did not say that in order to comply, the County must adopt WEAN’s list.
2. The County’s action has the presumption of validity. WEAN has failed to prove that the County’s action was clearly erroneous.
3. WEAN’s proposal has been a “moving target.” Further WEAN has provided no field surveys. WEAN has said these are the locations it has found, not all locations. If the County does not know where these plants are, how can it be expected to regulate them? Under WEAN’s scheme, every permit in the County would require a biological site assessment. Mowing lawns, planting gardens, controlling noxious weeds, and unknowingly allowing trees and other vegetation to intrude into where these plants might be growing would all require regulation throughout the County.
4. Island County was the first in the State to protect all endangered and threatened species in 1984.
5. The BOCC has determined that carrots will work much better than sticks in protecting WEAN’s species.
6. The County did not codify its ordinance language clarification without public process. Its interpretation of “sensitive to habitat manipulation” and “of special value” were very reasonable and well within the County’s discretion.

Board Discussion and Conclusion

We commend Mr. Erickson and WEAN for the incredible amount of work they have done over the past many years to identify and encourage protection of many plant species on Whidbey Island. In the best of all worlds, all the plant species proposed by WEAN would be protected everywhere they occur in Island County. However, that is not the judgment we are allowed to make under the GMA. We are here to answer the question: “Has the action taken by the County in response to our finding of noncompliance brought the County into compliance with the Act?” Further, since the burden is on WEAN, we must ask: “Are we left with the firm and definite conviction that the County made a mistake in its actions regarding WEAN’s nomination of plant species?”

As we stated in the October 12, 2000 compliance order, the County elected officials may well have greater discretion than with other CAs in determining which species and/or their habitats actually have sufficient local importance to warrant designation and protection as species of local importance. We previously determined that the County’s adopted criteria for making that determination were reasonable and not clearly erroneous.

The County set up a three-tiered process to help them objectively decide which species would qualify as species of local importance. First, the County makes three threshold considerations:

1. Is the species native to Island County?
2. Has location information been provided?
3. Can the existence of the species be verified?

Second, nominations must include answers to the following questions:

1. Is the species in danger of extirpation based on trends since 1985?
2. Is the species sensitive to habitat manipulation?
3. Does the species have special value?
4. Have specific habitat features to be protected been identified?
5. Have management strategies been identified?
6. Are management strategies supported by BAS?

Finally, the County answers the following designation criteria questions in order to determine appropriateness of designation and protection as species of local importance:

1. Does the species meet the nomination criteria?

2. Is the designation based on BAS?
3. Are existing regulations inadequate?
4. Are management strategies practicable?
5. Is protection needed for the species to maintain and reproduce?

The above process may seem very rigorous. However, WEAN and Mr. Erickson played an important role in designing the process. Further, since citizens would be required to face red tape and make sacrifices if the proposed species were designated and protection required throughout the County, the BOCC was not unreasonable in utilizing this process. Finally, we have previously determined that the BOCC was not clearly erroneous in requiring proposals to meet the above process.

We again note that in 1999 County staff recommended that rather than facing the unpredictability, red tape and prohibitive expense of designating and requiring protection of individual plant species, the County could go forward with designation of certain habitats such as specific glacial outwash prairie remnants where many of these species are currently found. However, WEAN complained that that approach was not good enough. Given this record, the County's ongoing requirement that locations be specified in order to protect those specific locations is not clearly erroneous.

Given this record, we find that the County's clarifying interpretations of two of the ICC criteria were not clearly erroneous. Although it would have been desirable that the County give WEAN earlier notice of its clarifying interpretations, the overall public process provided by the County was not clearly erroneous. In fact, the process the County went through in response to the noncompliance finding on this issue was exhaustive.

The County stressed that voluntary protection in this situation was more effective than regulated protection and that almost all of the nominated species occurred on properties controlled by agencies who were willing to commit to protection agreements voluntarily. These public and quasi-public landowner commitments, however, are under negotiation and are not yet in place. We encourage the prompt completion of verified commitments from public landowners regarding the proposed species.

We commend the County for having been the first in the state to protect all endangered and

threatened species in 1984. We encourage the County and WEAN to identify specific locations of the proposed species and designate those locations, especially prairie remnants.

Further, we expect the County to follow through on its commitments such as conservation easements and monitoring and propagation programs for *Iris missouriensis* and BMPs for County rights-of-way.

We note that the County has stipulated that as to the chocolate lily, blue eyed grass, clustered brodiaea and orange lily, its record and actions are not complete and that it will reopen its public hearing process and consider whether these four plants should be nominated and designated species of local importance.

Motions ruled on at the October 3, 2001 compliance hearing:

1. WEAN's September 4, 2001 request for retention of scientific expertise
- Denied
2. WEAN's September 4, 2001 motion to correct and supplement the record
- Granted but not considered a correction.
3. WEAN's September 4, 2001 request for official notice
- Granted, official noticing a complete copy of Sky Meadows Weed Control Management Plan.
4. WEAN's September 21, 2001 motion to supplement
- Granted
5. WEAN's September 4, 2001 motion for invalidity
- Taken under review. We now deny that motion.

Finding of Compliance

Based on review of the entire record, including information and reasoning provided by County staff, consultants, outside agencies, the public, the Planning Commission and the Board of County Commissioners, we are not left with the firm and definite conviction that the County was clearly erroneous in the actions taken in response to the Remand Issue 13 – WEAN's nominations of species of local importance. This finding of compliance does not apply to the four species still being considered by the County.

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

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 26th day of November, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

William H. Nielsen
Board Member