



Board to determine that compliance has been achieved for Remand issues No. 4 and No. 6 and that, as modified, the RF and RA Zones contribute to a ‘variety of rural densities.’ Copies of C-133 and C-134 are included as Exhibit C. Ordinance C-105 has been submitted previously and is subject to the Growth Board’s November 23, 1999 Compliance Hearing Order.....

I have attached to this letter a Table that summarizes the County’s compliances actions on all remand matters. Compliance determination that are requested by this letter are shown in bold.”

In response we scheduled a compliance hearing for February 9, 2000. During the briefing leading up to the hearing, a plethora of motions, memos and responses were filed. We dealt with those in a Motions Order dated March 2, 2000. This order will address those issues for which the County sought a determination of compliance in its December 1, 1999 request and Whidbey Environmental Action Network (WEAN)’s opposition to compliance and request for invalidity on certain of those issues.

### **UNCONTESTED REMAND ISSUES**

WEAN did not contest the compliance of Final Decision and Order (FDO) remand numbers 4, 12, 16, 21 and the portion of 13 that stated “Adopt criteria for designation of species and habitats of local importance.” WEAN also did not object to a finding of compliance on certain “stipulated” amendments to Ordinance C-78-99 that addressed remand issues 18, 19, 20, 22 and 23. **We have reviewed the**

**County’s actions for compliance in those matters and find that the County is in compliance with the Growth Management Act (GMA, Act) regarding remand numbers 4, 12, 16, 18,19, 20, 21, 22, 23 and that portion of 13 regarding criteria adoption.**

### **BURDEN OF PROOF**

Ordinance amendments made in response to a finding of noncompliance are presumed valid. RCW 36.70A.320. Petitioners bear the burden of proving by the clearly erroneous standard, that

the County's action does not comply with the Act and the FDO.

### **CONTESTED REMAND ISSUES**

FDO Number 5: Reconsider the retention of the allowance of 5-acre lots throughout the rural zone. Ensure a variety of rural densities and preclude a pattern of 5-acre lots from presenting an undue threat to natural resource lands (both current and future), critical areas (CAs), and future expansion of urban growth areas. Since RA and RF can be readily rezoned to 5 acres, they do not meet the "variety" requirement.

The County did not ask us to find compliance with FDO issue 5. Rather, the County asked that we modify the last sentence to indicate that, as modified, the RA and RF zones do in fact contribute to a variety of rural densities.

WEAN responded that for a number of reasons it would be inappropriate for us to act now on the County's request. WEAN asked us to wait and consider the County's request at the same time we consider the County's full compliance with FDO Numbers 5, 10, 14, and 15 and the prospective invalidity we previously determined for the agricultural exemption from the CAs ordinance.

The County responded in its January 20, 2000, response brief at p. 3:

"WEAN offers no argument as to why the new rezone standards still allow for the ready rezone of properties to 5-acre lots.....These revisions were carefully crafted after extensive negotiations between the parties with an express interest in this issue. These changes either do or do not rectify the concern expressed by the Western Board in its FDO. The County believes they do. There is nothing premature about the County's request."

WEAN's February 3, 2000, reply at p. 8 answered:

"The purpose of this part of the compliance hearing is to determine compliance with FDO 5, not to issue findings when there really is no request for compliance yet. The County seeks to piecemeal the interconnected issue of whether the County has now provided an adequate variety of rural densities. This will require consideration of County's entire rural density scheme. Likewise, determining compliance

with the County's request is premature.”

During the compliance hearing the County stated that if we were reluctant to make the statement the County requested due to the potential for reading more into that statement than intended, simple deletion of that last sentence would be acceptable.

**We delete from FDO number 5 the sentence: “Since RA and RF can be readily rezoned to 5 acres, they do not meet the ‘variety’ requirement.” By taking this action we do not issue a finding that the county has provided an adequate variety of rural densities. That is left to be determined when compliance with FDO issue 5 is before us.**

FDO Number 6: Limit the overall size and intensity of development allowed in PRDs to ensure compatibility with rural character and preclude the future need for urban services.

The County has addressed the concerns we expressed in the FDO. WEAN has failed to meet its burden of showing noncompliance and is now asking us to go well beyond our noncompliance determination. **We find the County to be in compliance with the GMA as regards to FDO number 6.**

FDO Number 10: For exemptions ICC 17.02.107 E (1) (3) (4) (5) and (7) that rely on Best Management Practices (BMP), finish the BMP manual and enforce the requirement to use BMPs. Also, provide monitoring to ensure the effectiveness and implementation of BMPs.

The County has adopted Island County's Critical Areas Best Management Practices Comprehensive Manual (BMP Manual). The County has also hired a full-time staff person who is responsible for monitoring all critical area BMPs to assure compliance and effective application and maintenance of the BMPs. The County stipulated that it will update Appendices A and B to include amendments made in response to the FDO.

The County also determined that prenotification would be required for site investigative work and included that requirement in Appendix D. WEAN applauded that decision but challenged the adequacy of the County's provision since it requires only 24 hours advance notice. While

WEAN may believe that this time period is too short, it has not shown that it fails to comply with either the FDO or the GMA. The County acknowledged that it remains out of compliance as to Agricultural BMPs. **With the exception of Agricultural BMPs, the BMP manual and enforcement provisions comply with the GMA.**

FDO Number 11: Functionally Isolated Buffers: Either delete ICC 17.02.107H or reopen for full public process and reasoned analysis of agencies and WEAN's concerns.

The County chose to reopen this provision for full public process and then retained this provision. WEAN argued that ICC 17.02.107H remains out of compliance with GMA's requirements to include Best Available Science (BAS) to protect CAs' functions and values. WEAN also argued that this failure is so egregious that ICC 17.02.107H should be invalidated for substantial interference with Goals 9 and 10 of the GMA.

The County responded that it:

- (a) Reopened the public process, conducted public hearings, clarified the intent and provided examples of functionally isolated buffers.
- (b) Made amendments in response to comments from WEAN and State agencies.
- (c) Provided that the Director must find that the critical area is protected in order for the provision to be allowed.
- (d) Ensured that the CAs' functions would be evaluated case by case.

The County concluded that, with the above modifications, it had complied with the FDO and the Act. As to invalidity, the County responded at p.17 of its January 20, 2000 response brief:

“WEAN's Compliance Brief provides simply the bare assertion that ICC 17.02.107H substantially interferes with GMA goals. The Record demonstrates clearly that the County considered carefully all comments received and responded with reasoned amendments that addressed every issue. Just as clearly, every case-by-case decision determining that a buffer is both physically separated and functionally isolated will be based on site-specific scientific analysis documented in a BSA. In turn, this decision must be based on a determination that the separated portion of the buffer does not protect the critical area. Given these requirements, how can the Western Board find substantial interference?”

WEAN replied in part that the County:

- (a) Has not created a clear record explaining the circumstances in which the provision could be used.
- (b) Failed to recognize the value of riparian areas for their terrestrial habitat function.
- (c) Adopted amendments which do not remove the fundamental flaws of this provision:
  - (i) They fail to clarify what constitutes “physical” separation or the degree of isolation necessary to justify allowing development of the buffer.
  - (ii) Requiring preparation of a Biological Site Assessment (BSA), still fails to clarify the vagueness of the criteria for determining if “functional isolation” exists. Insufficient guidance is provided for a rational decision by the Planning Director, even with the BSA requirement.
- (d) Allowed reduction of buffers even when not necessary to allow reasonable use.
- (e) Disregarded the comments of the Department of Ecology (DOE) and the Department of Fish and Wildlife which urged the deletion of this provision.

The County has gone through a full public process as we required. A BSA is now required to show that functional isolation does exist. The obstruction must have been in place in October 1998, so a new road would not qualify for this provision. After the BSA is filed, the Planning Director must make a finding that this isolated portion of the buffer does not protect the critical area from adverse impacts.

Even though this provision may not be one that we would choose or encourage, the County has complied with the FDO. **As modified, and given this record, ICC 17.02.107H complies with the GMA.**

FDO Number 13: Adopt criteria for designation of species and habitats of local importance, adopt management plans for great blue heron and osprey and appropriately deal with nominations already submitted by WEAN and Audubon.

The County only asked us to deal with the first two parts of remand #13. WEAN did **not** contest the first part. **The County has adopted criteria for designation of species and habitats of local importance and is in compliance in that regard.**

As to the great blue heron, the FDO required the County to adopt a standard management plan for this species because Ordinance C-62-98 did not make its designation effective until the date the County adopted such a plan. After research, the County concluded that it could not develop a standard management plan for the great blue heron. The County then deleted the footnote in the Ordinance which had made the designation effective upon adoption of a standard management plan. In its January 20 brief the County stated:

“The effect of this amendment is twofold: (1) it officially designates the great blue heron as a species of local importance; and (2) requires the applicant to prepare an individual HMP (and a BSA). The first effect fully addresses the Western Board’s order. Therefore, the Western Board must find compliance.”

WEAN contested the County’s decision to establish a “trigger” distance of 300 feet between a heron colony and a proposed residential development. Only if a proposed development was within 300 feet would a BSA be required. WEAN gave many reasons for the inadequacy of the 300 foot “trigger.”

The County responded that WEAN expressly abandoned challenges to BSA requirements during briefing before the Hearing on the Merits in this case. Further, even if we allowed WEAN’s arguments that this provision does not comply with GMA’s requirement to include BAS, WEAN has failed to meet its burden of proof.

We required the County to complete the designation of the great blue heron as a species of local importance. The County has done so. WEAN has failed to show that the County was clearly erroneous in taking the action it chose to take.

**We find that the County is in compliance with the GMA as to the designation of the great blue heron as a species of local importance.**

FDO Number 17: Delete 17.02.110.C.4.b.i. (a) and (b) dealing with reduction of shoreline setbacks.

The County modified, but did not delete, 17.02.110.C.4.b.i. (a) and (b). The provision is now designed to provide views for preexisting, narrow, low bank shoreline lots.

WEAN Challenged this action for many reasons, including:

- (a) The County's standard buffer for these CAs is only 75 feet, minimal in itself.
- (b) This provision fails to protect CAs and include BAS.
- (c) The DOE adamantly opposed this provision and the additional bulkheading that would follow such a provision. DOE stated that a geotechnical report should be required and, based on the geotechnical report, the building should be set back far enough so shoreline armoring would not be required during its lifetime.
- (d) The allowance for shoreline armoring of end lots when there is bulkhead on the adjacent lot simply shifts the impacts to the adjacent shoreline.
- (e) This provision simply allows infill development to continue the pattern of impinging on CAs, which we have found to be noncompliant in this and other cases.
- (f) The problem is exacerbated still more by failing to require maintenance of native vegetation when present, unless also present on both adjacent lots.
- (g) The Board should find substantial interference with the fulfillment of GMA's goals and determine invalid the regulations allowing reduction of buffers for marine Fish and Wildlife Conservation Areas.

The County responded:

- (a) The County strongly disagrees with the finding at p. 64 of the FDO:  
"Neither the Act's requirements for use of BAS nor the protection of CAs are met with this provision to allow infill development to continue the pattern of impinging on critical areas."
- (b) The buffer averaging provision for "infill" lots only applies to narrow, low bank, shoreline lots created on or after October 1, 1998, to reduce the buffer to the average of immediately adjacent lots, but no less than the required shoreline setback (50 feet for Conservancy and Natural environments and 25 feet for Rural and Urban environments).
- (c) In order to use these buffer-averaging provisions, the applicant must comply with BMPs which:
  - Require retention of native vegetation if native vegetation exists on the adjacent waterfront lots [Note that, even if there is no native vegetation, a buffer of

25-50 must still be maintained];

- Require location of the septic drainfield landward of the principal residence;
- Require a septic maintenance program approved by the County Health Department;
- Prohibit use of copper as an exterior finish material;
- Require infiltration of stormwater except where this practice could be injurious to groundwater;
- Prohibit “hard-armored” bulkheads unless they existed on both adjacent waterfront lots on December 1, 1998. The applicant must record an acknowledgement of this limitation.

(d) These BMP provisions respond to the great majority of DOE’s concerns.

(e) WEAN had agreed to accept this provision until the County added a similar provision for 14 “end lots.”

(f) The County’s decision reflects balancing of GMA goals. The County supported this contention with the following comments in its January 20, 2000 response brief at p. 25 & 26:

“ The agencies and the Coalition recognized the need to adjust buffers in these circumstances. *See* R 4994, p. 41 (Goldsmith testimony) and p. 42 (Meyer testimony recognizing need for adjustment); R 4946 (Meyer describing buffers as “equitable”). WEAN alone argues that such considerations are forbidden by the GMA. The County strongly disagrees.

The County concern regarding public understanding and acceptance of its regulations goes to the heart of its ability to adopt and enforce lasting GMA regulations. Where the County cannot explain the purpose of a regulation, its regulatory regime is undermined. Relevant GMA goals include Goal 6 (property rights); Goal 7 (permits); Goal 11 (citizen participation) and Goal 14 (shorelines) (incorporated into the GMA by RCW 36.70A.480). Its concern regarding the environmental consequences of construction on these few infill and end lots addresses goals (8), (9) and (10). Thus, the County did, within the parameters of RCW 36.70A.3201, consider local circumstance and balance GMA goals.”

(g) The required buffers and BMPs are supported by BAS.

(h) There is no justification for an invalidity determination.

WEAN's reply reiterated many of the points we listed earlier. In addition, WEAN:

(a) Refuted the arguments the County had given in strongly disagreeing with our original decision.

(b) Challenged the County's claim of reliance on BAS with the following:

- The County's consultant that the County relied on so heavily for BAS is a soil scientist, not a marine or vegetation ecologist, zoologist or wildlife biologist.
- Heavy reliance on graphs which have not been published or subject to peer review and do not pertain to nearshore environment do not constitute the use of BAS.

(c) Defended its right to challenge this provision even though at one point, in the discussion at the local level, WEAN had agreed to "infill" provisions in the context of broader discussions involving other CA and density provisions and before end lots were added.

(d) Criticized the County for not properly considering the goals and policies of the Shoreline Management Act:

"Instead of protecting the public interest and 'protecting against adverse impacts..... the waters of the state and their aquatic life' the County proposes to allow automatic reduction of already minimal buffers and automatic armoring of the shoreline with its well known adverse environmental impacts, even when there is no demonstrated need. The County gives precedence to increasing property values over protecting the environment and the public interest. The County has failed to properly balance GMA's goals."

We applaud the County's efforts to limit the use of this provision and require the use of excellent BMPs. However, even as improved, this provision does not conform with GMA requirements for protection of CAs and use of BAS. We share DOE's contention in the record that given BAS, there should be no additional hard armoring allowed. To reach this end, a geotechnical study would need to be required to assure that the reduced buffer is adequate for the expected life of the structure without requiring armoring. Further, failure to require maintenance of native vegetation when present, unless also present on both adjacent lots, fails the CAs' protection and BAS requirements.

Under *HEAL v. Central Puget Sound Growth Management Hearings Board*, Washington Court of Appeals, Cause #40939-1-1 (June 21, 1999), the County cannot choose its own science over all other science and cannot use outdated science to support its choice.

We understand the County's concern for its credibility with its citizens in being able to explain the purpose of a regulation and what will actually be accomplished by enacting and enforcing it. In this case, today's science is very clear that providing for the potential of allowing new bulkheads and denuding of the natural vegetation to thousands of additional feet of Island County coastline in marine Fish and Wildlife Conservation Areas would be very harmful to those CAs.

WEAN has met its burden of showing that 17.02.110.C.4.b.i. (a) & (b) as modified, dealing with reduction of shoreline setbacks, continues in noncompliance with the GMA.

We do not reach a finding of invalidity at this time.

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 6<sup>th</sup> day of March, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Nan A. Henriksen  
Board Member

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Les Eldridge  
Board Member

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William H. Nielsen  
Board Member