BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

ISLAND COUNTY CITIZENS' GROWTH MANAGEMENT COALITION, et al.,	)	No. 98-2-0023c
Petitioners,	)	COMPLIANCE HEARING ORDER ON FDO REMAND ISSUES 5, 7, 9, 13 AND 17
v.	)	
ISLAND COUNTY,	)	
Respondent,	)	
And	)	
RESOURCE GROUP, INC., et.al,	)	
Intervenors	)	

The June 2, 1999 Final Decision and Order (FDO) in this case set forth 23 remand issues. We have subsequently, in prior compliance determinations, found Island County (County) in compliance on the majority of those remand issues. The County has now requested compliance determinations for the remaining remand issues except for the portion of remand issue 13 pertaining to Audubon's nomination of species of local importance.

The remand issues before us include:

FDO Issue	Subject
5	Rural densities and protection of rural character
7	West Beach and Bayview RAIDs
9	Freeland and Clinton
10	Agricultural Best Management Practices (BMPs)
13	WEAN nomination of species of local importance
14	Wildlife functions and Category B Wetland Buffers
15	Type 5 Stream Buffers
17	Shoreline Buffer Reduction

A compliance hearing was held on August 24, 2000, at the Island County Courthouse,

Coupeville, Washington. Present for the Board were Nan Henriksen, Les Eldridge, and William H. Nielsen. Respondent Island County was represented by Keith Dearborn. Petitioner Whidbey Environmental Action Network (WEAN) was represented by Steve Erickson. Petitioner Island County Citizens Growth Management Coalition (Coalition) was represented by John Graham. Intervenors Island County Property Rights Alliance, et al., (ICPRA) were represented by Thomas Roehl. Participant Ray Gabelein represented himself.

Due to late briefing allowed on evidence affecting our decision on FDO remand issues 10, 14, and 15, we will deal with those issues in a later compliance order.

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 it determines 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).

FDO 5 Variety of Rural Densities and Protection of Rural Character

FDO order #5 stated:

> "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 NRLs (both current and future), CAs, and future expansion of UGAs……"

In the body of the FDO at pp 40-42 we further explained:

> "The County defended its 5-acre zoning throughout the rural zone with two main points: (1) not many people have divided their land under this zoning density in the past few years; and (2) it could find no logical reason for larger rural lot requirements. We can think of several logical reasons why the remaining 40 percent of Rural zone acreage should not all be allowed to divide to 5 acres and smaller.
>
> First, reacting to the statewide gobbling up of rural lands with sprawl, the Legislature said "Stop". GMA changed the land use pattern that counties may permit in rural areas. Pre-existing parcelization may not be able to be undone, but that is no reason to perpetuate the past with continued reliance on consumptive land use patterns.
>
> Second, an area wide pattern of 5-acre lots would conflict with the viability of resource lands and critical areas and would thwart the long term flexibility to expand the UGAs. In *Achen* (FDO 9-20-95) we said that rural lands have very necessary and important functions, including an important symbiotic relationship to provide necessary support of and buffering for NRLs. This record is replete with evidence that logging and farming are under siege in Island County from conflicting uses and unhappy neighbors. This County action would only exacerbate that situation.
>
> Third, we have found that the County must go back and reconsider its designation of agricultural lands under .170. Further, the County's record shows that it has not completed its designation process for mineral lands of long-term commercial significance. We have said in previous decisions that allowing new 2.5 and 5-acre lots adjacent to designated mineral sites is non-compliant. It is, therefore, illogical as well as non-compliant for the County to allow further division into 5-acre lots in the rural zone until the resource land designations are completed.
>
> Fourth, the County stated that a reason for not designating more agricultural lands was that "micro-farmers" could pick from a myriad of suitable lots in the rural zone. With the continuation of 5-acre rural zoning that scenario seems very unlikely. Further, this record shows that more and more of the "micro-farms" are organic and need buffering from neighboring developments' domestic pesticides, weed killers, etc.
>
> As to provisions that allow densities greater than 1 unit per 5 acres, we previously discussed the problems with the EDU program in the RF section. The PRDs need to have a limit on their total size and intensity not only to be compatible with rural character, but to ensure that urban services will not be needed in the future. We commend the County for the improvements it has made in the PRD ordinance to protect rural character. **However, as**

written the PRD's do not comply with the Act.

The County stated that historically there have been spurts of intense land subdivision when landowners knew a more stringent set of ordinances were coming. We are very concerned about the potential "rush to the counter" that might occur after this decision and before the County can take remedial action. Since the threat to the imperiled natural resource lands is potentially so egregious from these 5 and 2.5 acre densities in the Rural zone, we feel invalidity is appropriate now. **However, we will give the County until August 10, 1999, to adopt an interim ordinance that would limit subdivision to 10-acre lots with 1 du per 5-acre allowed density in PRDs until the needed compliant analysis is done on the Rural zone. If this action is not taken, we will make a finding of invalidity."**

Facing this threat of invalidity, the County timely adopted an interim ordinance increasing the minimum lot size for the Rural Zone from 5 to 10 acres. During the current process the County has adopted Ordinance #C-29-00 to continue this interim regulation until replacement regulations are found to comply with the GMA.

In response to the FDO, the County formed a Rural Densities Remand Committee (Committee). The Committee reached consensus that a pattern of 5-acre lots did not pose a threat to the expansion of urban growth areas (UGAs). The Committee also agreed that resource lands were adequately protected from nuisance complaints and that this concern did not justify the retention of the interim 10-acre minimum lot size. The majority of the Committee concluded that a pattern of 5-acre lots did not pose a threat to resource lands or critical areas (CAs). A minority of the Committee disagreed. Several maps were prepared and reviewed by the Committee before the conclusions were reached.

In an effort to reach consensus, the Committee explored four options for a 10-acre Rural Zone. In the end, consensus could not be reached and the Committee passed the question of an R-10 zone to protect resource lands and CAs on to the Board of County Commissioners (BOCC). The Committee did agree the decision should be based on objective criteria that relied upon characteristics of the land, thereby providing a fair and equitable way to distinguish between properties that were allowed different densities.

The BOCC thereafter met with an informal committee, which included John Graham of the Coalition, and considered two options for rural zoning. One created a 10-acre zone based on proximity to Type 3 and 4 streams (there are no Type 1 or 2 streams in the County). The second option based 10-acre zoning on parcels that were over 20 acres in size and were adjacent to parcels 10 acres or larger in size. The County also met with WEAN on these and other options.

The County explained its conclusion at pp 7-8 of its August 9 brief:

> "The County's search for another large lot zone for the Rural Area was guided by the principle recommended by the Remand Committee – zoning classifications must treat landowners fairly and equitably. Other principles guided the County, too. For example, zoning classifications must be based on objective criteria that can be depicted on maps. Further, similarly situated property owners needed to be treated equally, and there must be a nexus between the proposed action and the reasons for the downzone. Neither R-10 zoning proposal met these standards.
>
> The map of parcels large enough to be capable of subdivision (R 5298 included as Exhibit 7) shows clearly why the County rejected a new zoning classification based on existing parcel size. The pattern of parcels that could be included in a new 10-acre zone is random, scattered across Whidbey and Camano with no discernable pattern. Finding 22, C-135-99. The County could identify no distinguishing site-specific characteristics that could be used to differentiate these parcels from others in the County. The County reached similar conclusions for a new zone based on presence of critical areas, such as streams."

The County argued that there is no absolute ban in the GMA on a pattern of 5-acre lots. Rather, the anti-sprawl goal (RCW 36.70A.020(2)) requires reduction of the inappropriate conversion of undeveloped land into low-density sprawl.

The County reminded us that 1997 GMA amendments instructed us to take into account unique local circumstances as factors when determining GMA compliance. The County provided us with many examples of local circumstances which bore on the County's decisions regarding rural

densities and that separate Island County's situation from other counties where allowing an extensive pattern of 5-acre lots in the rural area did not comply with the Act. Among these unique local circumstances presented by the County were:

(1) Today Island County looks like a rural area and yet is the fifth most densely populated County in Washington.

(2) Most residents live on small lots. The average lot size in the Rural Zone is 3 acres. The average in the Rural Residential Zone is 0.7 acres.

(3) In the Rural Zone, which covers 60% of the County, less than 6% of the land area is in parcels 40 acres or larger.

(4) While there are many acres of forested lands in Island County, there is no established forest industry like the industrial forest found in the mainland counties. There are no long-term commercially significant forest lands.

(5) While the island visitor can see farming activity from State highways, long-term commercially significant agricultural lands account for less than 4% of the County's land area. Retention of forest and farm uses has occurred by the stewardship choices of Island County farmers and foresters and not because of land use policy.

(6) Island County does not fit the prototypical GMA model. It has three cities but these cities account for less than 4% of the land area and 30% of the population of the County. These cities, because of topographical and capital facility constraints and policy choices, plan to accommodate no more than 30% of the County's future growth. As a result, most of Island County's future population will need to be housed in the unincorporated portion of the County.

(7) Excluding lands located within UGAs, Island County has only 27,500 acres that can be divided into either 10-acre lots through tax lot segregation or 5-acre lots by subdivision or short subdivisions. Any potential to achieve a greater variety of rural densities is limited to these 27,500 acres. These lands have no site-specific characteristics that allow the County to distinguish them from adjacent properties and are in a random pattern.

(8) In 1985 Island County established zoning which downzoned 65% of the County and virtually all of what the County now refers to as the Rural Area. The 1998 zoning reduced by over 2/3 the old Residential Zone, the County's most intensive 1985 residential zone, thereby accounting for a reduction in population potential of over 170,000 people.

(9) For the last thirty years, land division has accounted for an inconsequentially small number of new lots. In the 80's and 90's, the County has created, on the average, 115 new lots each year. Most of those new lots were created in areas that are now called RAIDs.

(10) Requiring ten-acre minimums, instead of five, reduces the potential number of new lots by only 13% because most subdividable parcels can only be divided into 2 lots under either the 5-acre or 10-acre lot size scenario.

(11) The only basis for further downzoning identified by the County was to use either existing parcel size or adjacency to streams as criteria. All participants but WEAN judged the parcel size criterion as being unfairly arbitrary. This approach would have penalized those who chose not to subdivide their lands when, in fact, their stewardship was valued highly. The stream adjacency approach was judged unworkable for several reasons including an estimated mapping cost of $400,000.

(12) Island County took other actions to protect rural character, limit wildlife habitat fragmentation, and protect CAs in the rural zone. These actions included

amendments to Ordinance #C-03-00 to provide greater CA protection and Ordinance #C-30-00 to address visual compatibility, an important factor for rural character in Island County. In addition, Island County was the first small county in the state to adopt the Department of Ecology's (DOE) stormwater manual to govern rural development. Unlike many small counties, Island County has clearing and grading regulations. Further Island County imposes a 5% limit on building coverage and a 5,000 square foot threshold for storm drain management.

The County complained that WEAN waited until the final public hearing to present testimony regarding a pattern of large parcels where it was not appropriate to allow subdivision into 5-acre parcels. The County acknowledged that an example used by WEAN (an 800-acre block of predominately 40-acre lots zoned Rural) could, under this ordinance, be subdivided into 5-acre lots. However, the County explained that this is a unique example and is not repeatable elsewhere in the County.

The County further pointed out that, since its original petition in 1998, the Coalition challenged the compatibility of continuing to allow the creation of 5-acre lots with maintaining the County's rural character. However, after participating in the County's current process outlined above, Mr. Graham personally, and the Coalition as an organization, supported the County's decision to institute no further permanent downzoning in the rural area.

Finally, the County argued at pp. 17 and 18 of its August 9, 2000 brief that further downzoning is not permissible legally:

> "While the GMA may require that Island County's rural element provide for a variety of rural densities, the development regulations adopted by the County still must satisfy well recognized standards to be legally permissible. The GMA provides a restatement of basic constitutional principles that govern land use regulation through the Property Rights planning goal. RCW 36.70A.020(6). Guidance for the protection of private property has been published by the Attorney General pursuant to RCW 36.70A.370. The most recent guidance was published in March 1995. The County's action to downzone some or all of the remaining larger parcels in the Rural Zone must conform to these constitutional principles.
>
> The challenge faced by Island County is that the logical reasons described in the June 2

FDO for changing the Rural Zone's 5-acre minimum lot size are not applicable in Island County. Clearly, downzoning to allow UGA expansion or protect critical areas and resource lands may be justifiable in other counties. Island County's record provides no rational basis that justifies down zoning for these reasons. The same holds true for changing the 5-acre minimum lot size to protect rural character. While these reasons may be logical in other counties, they provide no nexus in Island County. WEAN suggests that avoiding habitat fragmentation is a rational basis for creating a 10-acre or larger minimum lot size zone or making PRDs mandatory. However, WEAN provides no Island County specific factual evidence to support this suggestion—other than to protect northern flying squirrels and pileated woodpeckers. There is no evidence in the County's record to support taking this measure or any measure to provide greater protection to these species. While down zoning to protect these species may be logical in other counties, there is no nexus in Island County's record that justifies this action.

Some counties have used the Property Rights planning goal to justify no action. For some, 'property right' became a mantra for non-compliance with the GMA. Island County's record is in stark contrast. All participants except WEAN have concluded that further down zoning of the Rural Zone has no rational purpose and cannot be justified."

The Coalition, in a June 23, 2000 letter to us, voiced its support of the County action regarding rural densities:

"In particular, regarding FDO Remand Issue No. 5 (Rural Densities), on November 23, 1999, in a formal session before the Island County Board of Commissioner, the Coalition spokesperson, John Graham, formally agreed to the County's actions on rural densities. In doing so, he confirmed a negotiated understanding between the Coalition and the County in which the County approved a stronger PRD ordinance, certain additional critical area protections, and an end to the "Opt Out on Demand" provision for the Rural Forest Zone—in return for the Coalition withdrawing its demands for additional down zoning in the Rural Zone."

Further, at the compliance hearing, John Graham explained why this negotiated settlement was so important to the Coalition:

"What the Coalition learned from all these experiences in 1998 and 1999 was that while we could win most of the legal battles, in the long term we couldn't reach the goal of long term GMA compliance that way. Any "solution" in which the county was divided into polarized camps, where we had to make the case for GMA over again with every election, where enforcement and monitoring was grudging and incomplete, where we had to run to the Growth Board or courts with every minor infraction—was no solution at all…

> We saw that we had to convince ordinary citizens that GMA compliance was the course of most benefit to them and their families….
>
> In our negotiations building respect and trust were key….
>
> We saw that an all-or-nothing strategy was the surest way to maintain a polarized climate that would insure permanent warfare. We saw that stepping over the bodies of our opponents in the County guaranteed that we could never trust them to willingly enforce the rules."

Amicus Curiae Waterman supported the County action by filing a brief which answered WEAN's allegation that lands zoned Rural Forest (RF) "can still be easily rezoned and the density increased" and therefore do not contribute to the required variety of rural densities.

Waterman pointed out that Ordinance #C-133-99 eliminated the automatic "opt out" provisions for reclassification from RF to R and replaced those provisions with a significantly more stringent test. Further, during the hearing process before the adoption of Ordinance #C-133-99, WEAN offered no testimony or argument regarding the "loophole" being raised before us. Once the County was made aware of the potential problems, it enacted Ordinance #C-44-00 on June 5, 2000. In that ordinance, Island County confirmed that designation criteria for the RF Zone must be verified as of December 1, 1998, eliminating any possibility that RF lands may be reclassified to the Rural zone without satisfying the reclassification standards established by ICC 17.03.220. D.1.

ICPRA supported the County's' position by providing additional detail about the work of the Remand Committee. ICPRA also supported the County's constitutional concerns, stating:

> "Given the highly scattered nature of those still divisible land parcels it is significantly difficult if not impossible to downzone more lands without creating arbitrary islands throughout the county."

ICPRA also stressed that WEAN has assumed that a proliferation of 5-acre tracts in the rural area would negatively impact rural character factors such as:

a. wildlife usage and habitat;
b. open spaces and natural landscapes;
c. conversion pressures; and,
d. natural surface water flows and groundwater recharge and discharge areas.

ICPRA further claimed that:

a. WEAN had failed its burden of proof that such impacts are in fact generated by 5-acre tracts;
b. Review Committee's review of existing 5-acre subdivisions showed that the built environment does not predominate;
c. Typical "sprawl" is pockets of 1-acre ranchettes strewn around the rural landscape totally fenced and converted to suburban ground cover;
d. Ten-acre tracts are more "sprawling" than 5-acre;
e. It is a total misnomer to include the 5-acre tract in the concept of "low-density sprawl;" and,
f. WEAN has asserted that 10-acre is better than 5 for wildlife but has provided no real evidence that rural character elements are actually enhanced more by 10 than 5-acre zoning.

To put this issue in perspective ICPRA concluded:

> "At issue here are about 1811 still divisible lots in the Rural Zone scattered throughout the landscape of the County."

Some of WEAN's key replies were:

(1) If the County's action is found in compliance, only 20% of rural lands will be required to remain greater than nine acres.
(2) According to the County's own data, 54% of the rural lands are currently in

parcels of over 9 acres.

(3) The County rejected two of the most obvious criteria for zoning: parcel size and proximity to similar large parcels. The County insisted on looking only at the characteristics of each individual parcel in isolation. By adopting a position that a zone based on parcel size and proximity to other large parcels would under no circumstances be used, the County chose a predetermined conclusion.

(4) The County never actually looked at impacts on CAs or wildlife function. The record shows that a member of the Review committee complained that the committee did not have this information or expertise. The maps that were used omitted Type 5 streams and wetlands.

(5) Using the map of the Maxwelton area as an example, the County is simply erroneous with the claim that the remaining larger parcels are scattered randomly.

(6) The record contains evidence of the negative impacts to water quality of runoff from increased impervious surface in formerly rural areas. The record is also full of evidence of the negative impacts of habitat isolation and fragmentation on wildlife function. The mitigation proposed by the County is simply inadequate to counteract the impacts of the increase in density at buildout proposed by the County.

(7) Since there is so little designated resource land in Island County, the County cannot point to the resource lands as providing a counterbalance providing larger parcels to its proposed rural density scheme.

(8) With the RAIDs included, over 1/3 of the rural lands are already at suburban or outright urban densities. These lands, though part of the rural lands, cannot count as contributing to a variety of rural densities because they simply are not rural densities. Because of this high percentage of non-rural density already existing, in order to protect rural character, wildlife functions and values, and CAs, the County should have to maintain more of the rural lands in contiguous blocks and corridors of larger parcels.

(9) It is the Coalitions' right to settle for less than legal compliance with the GMA now, relying on future local processes to achieve compliance. However, WEAN has chosen to pursue legal compliance with the goals and requirements of the GMA in the present. That is WEAN's right.

(10) This Board is charged with determining if, based on the record as a whole, the

County has failed to comply with the goals and requirements of the GMA. Those are the only issues before the Board.

(11) Rezones of RF are possible after converting the land from all of the designation criteria by conversion logging, unregulated subdivision, removal from the current tax program, and sale of alternate parcels so no 20-acre parcels are in contiguous ownership.

(12) With base densities decreased to 5 acres, PRD densities of 1 du/2. 4 and 2.9 acres are possible. These are not rural densities.

Board Discussion and Conclusion

The Coalition was the petitioner who convinced us last year that continuing to allow the creation of 5 acre or smaller lots over the great majority of the rural area presented an "undue threat" to natural resource lands (NRLs), CAs and rural character; failed to comply with the Act and warranted invalidity. Now, after participating in the review process and successfully convincing the County to take other actions to protect CAs and preserve rural character, the Coalition asks us to find compliance on this issue. This change of position, as well as unique local circumstances, has had considerable impact on our decision.

We agree with the Coalition that without citizen buy-in and willing enforcement by the local government, even the provisions most compliant on paper may well be doomed to failure. Workable and flexible solutions are best worked out at the local level. We fully advocate locally negotiated solutions to disagreements over compliance with the Act. However, since one of the petitioners, WEAN, is still contesting the compliance of the County's action, we must answer the question: "Does the solution enacted by the County comply with the Act?"

We share WEAN's concern that additional land division in the rural area will cause further fragmentation of wildlife habitat, break up of natural landscapes, further degradation of natural surface water flows and groundwater recharge and discharge areas, and conversion and other negative pressures on struggling Island County farmers.

If Petitioners have shown in the record that a pattern of significant blocks of large lots remains,

we have consistently found that the GMA requires those be protected from the inappropriate conversion of this undeveloped land into sprawling, low-density development. Pre-existing parcelization of surrounding lots may not be able to be undone, but that is no excuse to perpetuate the past with continued reliance on consumptive land use patterns. It may not seem "fair" to those who have not yet subdivided their land, but how is GMA ever going to thwart sprawl, preserve NRLs, protect CAs etc., if everyone must be allowed to do what others did before the Act's passage? This has been our previous interpretation of the Act and will continue to be.

However, after reviewing this record, we note that, except for one example in the Maxwelton area, WEAN only provided the County with generalized comments about the existence of blocks of rural zoned large parcels. Those general areas were discussed and responded to at the April 10, 2000 BOCC meeting (Ex. #9 pp. 387-388).

After reviewing this record we find most of the unique circumstances put forth by the County to be convincing. Unfortunately, Island County appears to be in the unique and sad situation where there are no longer blocks of rural lands to be saved from the onslaught of 5-acre development. At least we are heartened by the County's adoption of strong rural character protection regulations such as those which address visual compatibility, storm-water protection, 5% limit on building coverage and an excellent PRD ordinance.

We are unconvinced by WEAN that lands zoned RF can still be easily rezoned and the density increased. **We find that the RF and RA zones do contribute to a variety of rural densities.**

After reviewing the entire record and history of this case, we are not left with the firm and definite conviction that the County was clearly erroneous in choosing to adopt alternative regulations to protect rural character rather than downzoning additional lands in the rural area.

This record has presented a truly unique set of local circumstances. We sincerely hope that Island County officials and citizens live up to the Coalitions' expectations and work together to protect water quantity and quality, to retain significant corridors of wildlife habitat and protect other rural character attributes as the precious acreage left in the County's Rural Zone is developed.

FDO 7 West Beach and Bayview RAIDs

The County passed Ordinances C-44-00 and C-62-00 to make the map corrections needed to comply with the March 15, 2000, Order. No party has objected to the County's request. **We find that the County has brought itself into compliance as to FDO issue 7.**

FDO 9 Freeland and Clinton

Clinton

No objections have been presented by any party regarding the County's action modifying the RAID boundaries for Clinton. **We find that the Clinton RAID boundaries, as modified, comply with the Act.**

Freeland

Ordinance C-50-00 eliminated from the Freeland RAID all the areas found to be noncompliant in the March 22, 2000, compliance order. **We find that the Freeland RAID boundaries, as modified, comply with the Act.**

Holmes Harbor

Although Ordinance C-50-00 constricted the Freeland RAID to comply with our order, it also created a new RAID, Holmes Harbor, out of the northern portion of the old Freeland RAID. The County did leave the "Holly Farm" (a major source of contention previously) out of both RAIDs.

WEAN contended that the Holmes Harbor RAID failed to comply with RCW 36.70A.070(5)(d)(iv) and (v)(a) which require that boundaries be defined by the existing use as of July 1, 1990. WEAN provided evidence that little of the infrastructure and development at Holmes Harbor was present in 1990.

The County responded that the 295-acre Holmes Harbor RAID included three areas; the Holmes Harbor Golf and Yacht Club, a 10-acre parcel on the north border (Area A), and a 21-acre area

(Area B) forming the northeast corner of the Holmes Harbor RAID.

The County pointed out the following facts about the Holmes Harbor Golf and Yacht Club:

(1) Platted in 1965;
(2) Includes 458 lots;
(3) As of July 1990, 32 homes had been constructed;
(4) New homes have been built on 109 lots since then;
(5) Has one of the two non-municipal sewer systems in the entire county;
(6) DOE approved the sewer system for 550 connections; and,
(7) Has its own water system.

The County further pointed out that Area A and B are the only areas outside the plat included in the Holmes Harbor water and sewer service area. Area A is approved for three water connections. Area B contains seven lots. All but three are developed with single-family homes.

The County concluded:

> "Yes, the water and sewer systems servicing this area have been expanded and/or improved since 1990. Yes, the area was not fully developed in 1990. Nevertheless, the area meets the designation criteria established by the County for a RAID and also the requirements of RCW 36.70A.070(5). It is no different than the other residential RAIDS that the Western Board has confirmed comply with the GMA. There is no evidence in the record that continued infill of Holmes Harbor threatens the Planning Goals of the GMA. None is offered by WEAN."

Board Discussion and Conclusion

If the County chooses to label a fully platted, 35-year-old, sewer and water served, Holmes Harbor Golf and Yacht Club as a RAID, we see no reason to find noncompliance. However, in order to include Areas A and B as compliant with RCW 36.70A.080(5)(d) the County must include DRs to preclude any further subdivision of the shoreline lots.

WEAN also asked for a finding of invalidity. **There was no evidence of substantial interference with the goals of the Act in the designation of the Holmes Harbor RAID.**

FDO 13 WEAN Nomination of Species of Local Importance

The portion of FDO 13 we are dealing with here is "…appropriately deal with nomination already submitted by WEAN…..."

We will not go into detail on the long history of WEAN's attempts to get the County to designate (as species of local importance) and protect certain plant species threatened with extirpation in Island County. We are concerned about the County's continued failure to take substantive action one way or another on WEAN's nomination. The planning commission held two meetings and a hearing on this issue. With no quorum present, the planning commission decided not to forward any recommendation to the BOCC thereby exercising a "pocket veto."

The County tells us that no substantive action was taken because the nomination application was incomplete, lacking adequate management strategies. However,
Ex. #3377 demonstrates that WEAN was told in an August 1998 open public meeting that it did not need to supply a highly detailed management plan, only general management strategies. The record provides no indication that WEAN was notified that what it had supplied was insufficient until much later when it was basically informed that what had been provided years before and in subsequent additions as a nomination must meet the application standards set years later by the County.

Further, in a more recent gravel mine development case, a County official told the hearings examiner that designation of many of these plants as Species of Local Importance was considered and rejected by the County. "The County has concluded that impacts of these species is not environmentally significant enough to merit protection on County-wide basis……." The County now claims that the County official was in error and that WEAN's nominations were abandoned due to application inadequacies and not on substantive grounds.

The County hired Adolphson and Associates to review WEAN's proposal. In its February 1999 report, Adolphson recommended that the County proceed with the designation of 19 of the nominated species and expressed a need for development of follow up measures. WEAN supplied additional information in March of 1999.

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.**

FDO 17 Shoreline Buffer Reduction

In the March 6, 2000, compliance order we applauded the County's efforts to limit the use of this provision and require the use of excellent BMPs. We concluded that the portion of Chapter 17.02

ICC governing shoreline buffer reductions was much improved. However, we shared DOE's concerns regarding hard armoring, the need for a geotechnical study, and native vegetation retention. The County has amended this section to address these concerns and is now supported by DOE.

WEAN believes that the County's language is ambiguous and should explicitly prohibit armoring as a condition of reducing the setback. The County now requires a geotechnical study to ensure that the home will be set back far enough to preclude the need for hard armoring for the lifetime of the home. However, the County is reluctant to add the absolute prohibitions to the Ordinance.

Although WEAN's solution may be more protective, WEAN has failed to convince us that the County was clearly erroneous in its choice of wording in 17.02 ICC.

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 12th day of October, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Nan A. Henriksen
Board Member

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William H. Nielsen
Board Member

Dissenting Opinion

While I concur with the majority in seven of the eight findings in our compliance order, I dissent from the majority conclusion regarding FDO #5, "rural densities and the protection of rural character." I believe the County was clearly erroneous in choosing to adopt a uniform 1 to 5 density in the rural area.

On page 20 the majority is correct in stating: "after reviewing the record we find that, except for one example in the Maxwelton area, WEAN only provided the County with generalized comments about the existence of blocks of rural zoned large parcels."

After a review of the record, however, it also appears that there are 9 other large blocks of parcels in addition to the Maxwelton example cited by WEAN. Ex. #26 (N.B.: 3 of these largely disappear in Ex. #7. I do not know why.). These parcels range in area from 250 acres to 750 acres, and in total, comprise almost 4,000 acres of parcels zoned rural from 9 to 99 acres. With one exception, all are contiguous to RF or commercial and rural agriculture. These blocks of parcels are located in proximity to Ault Field, Saratoga Passage, Holmes Harbor, the U.S. Navy Emergency Airfield, San de Fuca, Admiralty Inlet, Cornet Bay, Useless Bay, and Freeland. The predominant parcel size in each, according to Ex. 26, is 20-99.99 acres. If Ex. #26, a county map, is accurate, the County did not avail itself of the opportunity to provide at least some variety of rural densities. RCW 36.70A.070(5)(b) requires that counties shall provide a variety of rural densities. The statute does not say the variety shall be provided unless, as the County argued, "constitutional principles," preclude varieties. Nor does the Act require petitioners to "provide factual evidence to support habitat fragmentation as a basis for creating a 10-acre or larger minimum lot size zone." The Act does not place the burden of proof for providing a variety of rural densities on petitioners. It simply states that counties shall provide a variety of rural

densities. The burden of proof on petitioners is to demonstrate that the County has failed to do so. We so found in our FDO (#5). I would so find here.

The Coalition's rationale that they could not reach a goal of long-term GMA compliance by demanding additional varieties of rural density does not constitute a reason for the County's failure to comply. The Act does not provide for polarization of public opinion as a reason to fail to comply with the requirement for variegated rural densities. Nor does ICPRA's claim that the petitioners are required to justify variegated rural density before it can occur hold water in the face of the requirement for variety in the Act.

I believe that the absence of argument from WEAN to this effect to the BOCC does not remove our responsibility, in light of the entire record, to ensure compliance with the Act.

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Les Eldridge
Board Member