

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

ISLAND COUNTY CITIZENS' GROWTH)	
MANAGEMENT COALITION, et al.,)	No. 98-2-0023c
)	
Petitioners,)	ORDER ON
)	DISPOSITIVE
v.)	MOTIONS
)	
ISLAND COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
RESOURCE GROUP, INC., et al.,)	
)	
Intervenors.)	
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Motion Regarding Alleged Noncompliance with Growth Management Act's Public Participation Requirements

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On January 29, 1999, Island County Citizens' Growth Management Coalition (Coalition) and Whidbey Environmental Action Network (WEAN) (collectively, Petitioners) filed a dispositive motion regarding alleged noncompliance with the Growth Management Act's (GMA, Act) requirements for public participation. On February 11, 1999, we received responses from Island County (County) and Intervenors Roehl, et al., (Roehl). On February 16, 1999, we received a reply from Petitioners. We held a motions hearing on February 16, 1999, in the Commissioners Hearing Room at the Island County Courthouse Annex in Coupeville, Washington.

The dispositive motion presented three issues for resolution:

1. Is the alleged noncompliance as presented appropriately resolved by dispositive motion?
2. Does the procedure which is the proximate cause of the alleged noncompliance fail to comply with the GMA's goals and requirements for public participation?
3. Does the continued validity of the language adopted under the noncompliance procedure rise to the standard of substantial interference with the fulfillment of the GMA's goals and therefore merit imposition of invalidity?

Issue 1

Is the alleged noncompliance as presented appropriately resolved by dispositive motion?

Petitioners claimed that this issue is appropriate for resolution by dispositive motion. They stated in their motion:
Dispositive motions are appropriate when a legal question is presented with no factual dispute underlying the question. In this matter, the facts are straightforward and beyond dispute. After public input was closed, new

language addressing an issue that had not previously been the subject of proposed language or even publicly discussed was proposed by a County Commissioner and subsequently adopted without any opportunity for public participation. Hence, unless the County can produce countervailing evidence, the issue of whether this procedure fails to comply with the GMA's goals and requirements for public participation is a straightforward question of law. As such, it is appropriate for resolution by dispositive motion.

Intervenors Roehl responded that past decisions by the three Growth Management Hearings Boards indicated that at least three basic criteria must be met for decision by dispositive motion to be appropriate:

1. Dispositive Motions must be grounded on a review of the complete record yet be supportable and verifiable from only a limited record;
2. Dispositive motions must not involve issues of significant complexity nor issues that go to the "heart" of the overall case; and
3. Dispositive motions must be based on material facts undisputed by any of the parties to the action.

Roehl contended that the motion was not based on a review of the entire record and that the issue of hydrological connectivity was raised by Intervenors Roehl both orally and in writing during the County's public participation process.

As to criterion #3 Roehl stated in its response brief:

In this case many significant material facts are in dispute, including, but not limited, to the following:

1. Whether there was opportunity to comment on the edited section of the code. As stated above both intervenors ROEHL, a citizen, and ICPRA an organization, had no difficulty in understanding that the subject code section was available for comment and did so comment on several occasions proposing specific changes to the code section at issue in this motion. (proposing to eliminate the phrase "or shallow groundwater").
2. Whether the amendment made by the BOCC was indeed a "significant" change requiring the re-opening of the proceedings by another round of Public comment of testimony" Petitioners have provided no credible evidence that this is in fact the case. They have merely alleged that it is.
3. The statement "Neither had this or any other language regarding this issue been publicly broached earlier." is untrue.

The County responded to Petitioners motion:

Island County does not dispute the fact the GMA requires public participation. On the contrary, the County met its responsibility by providing numerous opportunities for public participation throughout its development and adoption of Ordinance C-62-98, not only in public workshops, meetings and hearings, but also through its web site. WEAN attended the vast majority of the County's workshops, meetings, and hearings. Indeed, WEAN attended the final hearing at which the BOCC identified the need to include more detailed language to clarify the reference in the County's definition of wetlands to "shallow ground water." Record 4736. Although that minor clarification was made late in the planning process, this Board has held that such minor clarifying rewrites that do not involve any substantive changes do not violate the GMA's public participation requirements, even if they are made after the public hearing has concluded. Hudson v. Clallam County, WWGMHB No. 96-2-0031, Rescission of Invalidity and Finding of Compliance, 2745, 2746, (1997).

In its reply Petitioners reiterated that there was never any opportunity for the public to comment on any ordinance language proposed by the BOCC regarding changing the definition of wetlands in this regard. Petitioners further stated that the challenged amendment is not simply clarifying language, but a major change to the facial meaning of ordinance provisions that had been in place for a decade and that were intended to protect smaller wetlands.

At the motions hearing the Coalition announced that it was withdrawing from the public participation challenge because it wanted us to reach a substantive decision on the issues and not simply remand for a procedural flaw.

We are in doubt as to whether the challenged amendment is substantive or merely clarifying. We previously stated: "...we will deny a motion if there is doubt as to whether it should be granted. A denial of a dispositive motion simply means that the issue will be decided after a review of the entire record and a complete hearing." *Reading v. Thurston County*, #94-2-0019 (Order 12-22-94).

Having determined that the alleged noncompliance is not appropriately resolved by dispositive motion, we will not proceed to Petitioners' issues 2 and 3.

We deny WEAN's dispositive motion regarding noncompliance with GMA's requirements for public participation. The issue is reserved for the hearing on the merits.

Coalition's Dispositive Motion Regarding Issues 12 and 25, in Part

On January 29, 1999, the Coalition filed a dispositive motion raising the following issues:

Whether the residential and mixed-use RAIDs should be found not in compliance with RCW 36.70A.070(5)(d) and invalid when the record shows that these areas are extensive but:

A. The record does not include any evidence showing the location on July 1, 1990 of the buildings and structures that comprise the built environment when the RAID boundaries are required to be "delineated predominately by the built environment" as it existed on "July 1, 1990" (RCW 36.70A.070(5)(d))?

B. The County failed to utilize 20-year OFM Growth forecasts and allocate population growth to the RAIDs and encompassed or excessive supply of land within the RAIDs?

The County and Roehl presented many reasons why this issue is not appropriately resolved by dispositive motion.

We stated in a previous dispositive motion order that we will:

reach our decision on a dispositive motion by reviewing an inter-related combination of criteria as to the size of the limited record in conjunction with time availability, the nature of the motion, the complexity of the issue including whether it is one of first impression, and the reasonableness of the claims. *Reading v. Thurston County*, #94-2-0019 (Order 12-22-94).

Rather than discuss the parties' extensive arguments as to why or why not this issue should be handled dispositively, we will simply state that we find this issue to be complex and requires review of an extensive record. We do not have time to adequately review this major issue before briefing is due for the hearing on the merits. Further, this issue does

not lend itself to simple, statewide bright lines of what constitutes “built environment.”

We therefore deny Coalition’s dispositive motion regarding issues 12 and 25. The issues are reserved for the hearing on the merits.

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

So ORDERED this 2nd day of March, 1999.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

William H. Nielsen
Board Member

Les Eldridge
Board Member