

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

WHIDBEY ENVIRONMENTAL ACTION NETWORK	)	
	)	No. 00-2-0001
Petitioners,	)	
	)	FINAL DECISION
v.	)	AND ORDER
	)	
ISLAND COUNTY,	)	
	)	
Respondent,	)	
_____	)	

On January 28, 2000, we received a petition for review (PFR) from Whidbey Environmental Action Network (WEAN). On February 29, 2000, we received an amended PFR from WEAN. This petition challenged certain provisions of Ordinances C-97-99, C-128-99, C-131-99, C-133-99 and C-134-99 adopted by Island County in response to findings of noncompliance in our June 2, 1999 Final Decision and Order (FDO) in Case #98-2-0023. WEAN’s petition stated:

“ 2. This petition is contingent upon the Board’s decision resulting from the February 9, 2000, compliance hearing. Depending upon the Board’s decision, WEAN may withdraw all or part of this petition for review.”

On March 6, 2000, we issued “Compliance Order RE: RA, RF, PRDs and CAs” (CO), the decision to which WEAN referred above. Subsequently many of the issues were withdrawn. Three remaining issues were listed in the April 3, 2000, Amended Prehearing Order:

1. Has the County failed to use best available science (BAS) and protect critical areas in the action taken dealing with great blue heron?
2. Has the County failed to use BAS and protect critical areas in the action taken dealing with functionally isolated buffers?
3. Are the development regulations referred to in issues 1 and 2 consistent with the comprehensive plan?

On April 3, 2000, we received Respondent’s dispositive motion for dismissal of petition. The

motion asked for an order dismissing the petition based on the grounds that the issues identified by WEAN as stated in the prehearing order, had already been fully decided under Case #98-2-0023c. In the attached brief in support of the motion, the County emphatically complained:

“.....WEAN’s petition for review amounts to no more than a redundant rehash of issues it has already raised and the Board has already decided.....

.....Prior to the April, 1999 hearing on the merits in Case #98-2-0023c, WEAN thoroughly briefed both issues in the current petition. The Board, in its Final Decision and Order (FDO) in Case #98-2-0023c, noted that it had ‘carefully considered all the claims and responses’ related to critical areas. FDO at 55 (Exhibit D). The Board found the County’s treatment of functionally isolated buffers and its failure to designate the great blue heron and osprey as species of local importance did not comply with the GMA.

The county amended the non-compliant provisions and requested the Board to find compliance. WEAN thoroughly and intelligently discussed its position in its compliance hearing briefs. The Board however, found that the County had complied with the GMA. Compliance Order at 7, 8 (Exhibit J).

Understandably dissatisfied with the outcome, WEAN has attempted to get a second bite at the apple in this case. However, the substance of its new petition does not even suggest any issue that has not already been carefully examined by the Board, and decided in Case #98-2-0023c.”

WEAN responded with many arguments, some of which were:

- The legal basis presented by the County in support of its motion would render Growth Management Act’s (GMA, Act) statutory right to file a PFR of adoptions made in response to compliance orders a nullity.
- The FDO was for procedural noncompliance and the CO was ambiguous as to whether or not it ruled on substantive compliance as well as procedural.
- Anyone with standing to participate in a compliance hearing also has standing to file a new PFR of whatever adoptions occur as a result of that compliance process. There is no requirement in the GMA that these issues must be brought up at the compliance hearing, rather than in a new PFR.
- With respect to functionally isolated buffers, this Board only found that, given the arguments and record presented to it at the compliance hearing, the County was in compliance. With respect to heron protection, this Board simply found that WEAN had not met its burden of proof.

- An issue at a compliance hearing may not be able to be reviewed at the same depth as it is reviewed at a hearing on the merits. The Board has the opportunity to review the issues raised in the appeal on a full record with the parties having more time to analyze the record to better present their evidence and argument to the Board. Just because it finds compliance or that invalidity should be lifted in the quicker compliance review does not preclude the Board from making a different decision when it is allowed the fuller review of the PFR process.
- The County has, in a roundabout fashion, requested the Board to apply the doctrines of *res judicate* and *collateral estoppel*. The Central Board has consistently held that the Hearings Boards do not have such authority. This Board should make the same holding.

The County replied:

“In response to Island County’s dispositive motion, WEAN has asserted that granting the County’s motion would nullify GMA’s statutory right to PFR of adoptions made in response to compliance orders. In fact, the County’s position has no such effect. The County only argues that, in this case, WEAN has already raised, argued and lost the identical substantive issues in an earlier proceeding, and that WEAN should not be permitted a double appeal in this case.

WEAN, in its response brief, again has interpreted the Board’s decisions in the FDO, its Order on Reconsideration, and the Compliance Order as either erroneously vague, or intentionally incomplete. The fact of the matter is that the Board has found the County in compliance with the GMA after fully considering the facts and arguments of the parties. WEAN devoted over twenty pages of its briefing before the compliance hearing to functionally isolated buffers, and seven pages to the heron issues. Rather than make explicit rulings on every specific legal issue that WEAN raised, or may have raised, the Board indicated that it had carefully considered all claims and responses in reaching its decisions.”

A few of the County’s points in support of the above reply were:

- The County did not object to WEAN fully litigating the substance of its claims at the compliance hearing. WEAN did so.
- The Board, in the CO, found that the County’s efforts resulted in provisions that complied with the GMA. This finding was more than mere procedural compliance.

- The CO ruling in regard to functionally isolated buffers clearly addressed WEAN's substantive objections.
- If WEAN thought the CO was ambiguous, it had an opportunity to make a motion for reconsideration or clarification. It failed to do so.
- WEAN's concern that allowing a party to only litigate issues one time would somehow trammel citizens rights to challenge GMA ordinances is unfounded.
- The Board has the authority to practically manage its caseload and refuse to waste everyone's time on frivolous and redundant appeals.

A hearing on this motion was held telephonically on April 24, 2000. On April 26, 2000, the presiding officer sent the parties a memo which stated:

“We believe we have already seen the entire record on these issues. WEAN and the County presented extensive exhibits and briefing on those issues in Case #98-2-0023c before the hearing on the merits, with the motion for reconsideration of the June 2, 1999 FDO, and before the February 9, 2000 compliance hearing. Since our March 6, 2000, compliance order dealt with the substantive as well as procedural arguments on these issues, we believe these issues should have been raised in a motion for reconsideration of that compliance order.

However, we will give WEAN one more opportunity to present new argument on these issues to ensure that we have, in fact, considered everything WEAN wishes to say about functionally isolated buffers and great blue heron protection. That brief will be due May 10, 2000.

If we are not persuaded by WEAN's brief that our previous findings of compliance were in error, we will issue a finding of compliance in this case with no further proceedings.

If we are convinced by WEAN's new argument that our previous findings of compliance for functionally isolated buffers and/or great blue heron designation and protection might have been in error, we will notify the County, give it ample time to respond to WEAN's new arguments and set a new schedule for the remainder of the proceedings in this case.”

On May 10, 2000, we received WEAN's brief and a motion to supplement the record. All three

Board members have carefully read the brief and supporting exhibits and were not persuaded that our previous findings of compliance were in error. After carefully considering all of WEAN's substantive arguments regarding functionally isolated buffers we reiterate our decision in the March 6, 2000, CO in Case #98-2-0023c:

**Even though this provision may not be one that we would chose to encourage, as modified and given the entire record, ICC 17.02.107 H complies with the GMA.**

As to great blue herons, we agree with WEAN that the County could have made choices that would better ensure their designation and protection. **However, WEAN has not convinced us that the choices the County did make regarding great blue herons fail to comply with the Act.**

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 26<sup>th</sup> day of June, 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