

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

THE COOPER POINT ASSOCIATION, THE LEAGUE))	No. 00-2-0003
OF WOMEN VOTERS OF THURSTON COUNTY,))	
JOLENE UNSOELD, MICHAEL LYNCH, TOM))	
MUMFORD, LEA MITCHELL, and SYLVIANN))	FINAL DECISION
FRANKUS,))	AND ORDER
)	
Petitioners,))	
)	
v.))	
)	
THURSTON COUNTY,))	
)	
Respondent,))	
)	

In this case we are called upon to decide whether a comprehensive plan (CP) amendment that authorizes the extension of a four-inch sewer line into the Cooper Point rural area violates RCW 36.70A.110(4).

On December 20, 1999, Thurston County adopted an amendment to its CP incorporating the Cooper Point Wastewater Facilities General Plan (CPWFGP). The petitioners filed a petition for review on February 8, 2000, contending that the CPWFGP was adopted without compliance with the State Environmental Policy Act (SEPA) and also violated RCW 36.70A.110(4). A prehearing order was issued March 30, 2000. After a motions hearing, on May 19, 2000, we issued an order granting the portion of the County’s dispositive motion relating to SEPA compliance. We found the County had complied with SEPA, specifically with regard to the various alternatives that were considered. We declined to grant the dispositive motion with regard to the issue presented here. The hearing on the merits (HOM) was held June 13, 2000.

RCW 36.70A.110(4) provides:

“In general, cities are the units of local government most appropriate to provide urban governmental services. In general, it is not appropriate that urban governmental services be

extended to or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.”

In analyzing the statute, it is helpful to break it down into its component parts. Thus, .110(4) establishes that:

- (1) Cities are the most appropriate providers of urban governmental services;
- (2) It is generally not appropriate to extend or expand urban governmental services into rural areas;
- (3) Limited occasions to extend or expand are allowed that are:
- (4) Shown to be necessary to protect:
 - (a) basic public health and safety and
 - (b) the environment, but;
- (5) Only when the urban governmental services are financially supportable at rural densities; and
- (6) Only when extension or expansion does not allow urban development.

At the HOM and in their briefing, the parties asserted that the statute was not ambiguous. We agree. While both parties assert that the statute is not ambiguous, both have different views of component (4). Petitioners read that part of the Growth Management Act (GMA, Act) as requiring three subelements, i.e.: basic public health, basic public safety, and the environment. The County reads the phrase “basic public health and safety and the environment” as one component.

We read this section to provide for two sub-components. The term “basic public health and safety” is one that has been widely used in legislative enactments to encompass a variety of protections for human well-being. Distinct from that phrase is the concept of protection of the environment, which ordinarily relates to protections that are directly beneficial to flora and fauna, but usually only indirectly beneficial to human well-being. The lack of commas within the phrase “basic public health and safety and the environment” mitigates against the reading

proposed by petitioners. The inclusion of the phrase “the environment” mitigates against the reading proposed by Thurston County.

Thus, component (4) is actually two subcomponents (a) basic public health and safety and (b) the environment. Both must be “shown to be necessary to protect” to qualify as an exception to the general prohibition against urban services in rural areas.

Ex. 145, the 1995 CP, provides that individual septic systems are the methodology for handling residential sewage in rural areas. The CP provides that only in locations of “identified health hazards or water quality problems” would sewer systems be permitted. A second land use policy states that water and sewer facilities “should not” be extended into rural areas except to correct “existing health hazards.” In the capital facilities section of the CP, a policy provides that sewer systems in rural areas be allowed only to correct identified health hazards or water quality problems in “areas of existing development.” Many of the conclusions reached by Thurston County relate to its CP criteria and not necessarily the .110(4) GMA criteria.

Ex.140 is the CPWFGP that was adopted by Thurston County as an amendment to its CP. The genesis for the CPWFGP is reiterated throughout the record. Between 1992 and 1996, data for onsite septic systems was collected. Thurston County began its community involvement in 1997. A steering committee of ten members representing various neighborhoods in the Cooper Point peninsula area was established. The Committee reviewed a number of alternatives for the peninsula and narrowed the potential alternatives to ones that were later presented at four separate public hearings for comment. After the hearings had been concluded, the alternatives were narrowed to five and included in the draft CPWFGP.

The five conceptual alternatives described in the draft CPWFGP were:

1. Status quo;
2. Rebuild the Tamoshan plant and adopt an enhanced on-site septic system operation and maintenance program;
3. Separate sewer service areas, and an enhanced on-site septic system operation and maintenance program;
4. Limited capacity LOTT sewer line and enhanced on-site septic systems operations and

- maintenance program; and
- 5. Extensive sewer system.

A plurality of members of the steering committee supported alternative 4 while almost as many supported alternative 3. Staff supported alternative 4. The Board of County Commissioners (BOCC) ultimately adopted alternative 4 in the CPWFGP.

The alternatives addressed two separate and distinct problems existing on the peninsula. The first problem was shown from the data collection on individual septic systems. A total of 882 systems serving about 950 residences were surveyed. Approximately 11% of the systems were identified as failing. Within those failing systems the ones within 100-feet of the shoreline were failing at a rate of approximately 33%. However, as noted in Ex. 228, planning commission (PC) comments to the BOCC, “with few exceptions, septic systems found to be failing have been repaired. Most failing systems were over 20 years of age. Newer systems have more stringent requirements. New technologies have provided better solutions than were available decades ago.” (See also Ex. 146, p. 4).

The PC also made findings concerning the area served by septic systems. The PC found that no drinking water system failures due to septic systems had occurred. The likelihood of wells being polluted by septic system failures was found to be low. Additionally, the PC found that under present zoning, there was not a likelihood of increased septic problems “to any great degree.” The PC noted that the repair of identified failed septic systems minimized “the threat to the environment.” Somewhat inconsistently, the PC also found that septic system failures were likely to continue. Thus, pollution of Budd Inlet and/or Eld Inlet was a “likely result.” At page 4 the PC made the following finding:

“That a threat to public health or environment does not exist for that area of Cooper Point Peninsula served by septic systems.”

The CPWFGP at page 2-22 observed that the most significant factor for failing onsite systems was the setback distance from shorelines. The report also noted that a total of 325 systems in the Cooper Point peninsula had been installed more than 20 years before the survey and that 18% of those had failed. In contrast only 5% of the 503 systems installed within the past 20 years had

been identified as failing. The CPWFGP reported that nearly all the identified failing systems had been corrected though repairs accepted by the County, although some repairs were “non-standard as allowed by Table VI of the sanitary code.” At page 2-6 the CPWFGP noted that the failing septic systems within 100-feet of the shoreline constituted a threat for disease to shellfish. A June 23, 1999, staff report (Ex. 256) from the Environmental Health Department indicated that “failed septic systems is not a substantial threat to groundwater, the primary source of potable water for the peninsula.”

While the executive summary of the CPWFGP stated that rates of failure were expected to continue in the future, those failures only “*could* threaten public health, water quality, and local shellfish resources.” The executive summary and the findings adopted by the BOCC in adopting the CP amendment did not discuss the fact that nearly all of the existing failures had been repaired and came from systems that were more than 20 years old. Thurston County did want to avoid the very expensive Table VI repair options.

The BOCC found (Number 20) “septic system failures are likely in the future” that “*may* threaten the public health, water quality, and local shellfish resources.”

No documented health hazard to humans from future failing septic systems is contained in the CPWFGP or elsewhere in this record. This lack of evidence does not satisfy the requirements of component (4)(a). There is no evidence in the record that threats to the environment component (4)(b) from failing systems necessitates a sewer.

A second major waste management issue concerned two pre-GMA approved “urban density” communities located on the Cooper Point peninsula. These two “clusters of higher densities subdivisions,” are each connected to small 1970’s wastewater treatment plants which discharge into Budd Inlet. The two areas are the Tamoshan plant (owned by Thurston County) and the smaller Beverly Beach plant (owned by the homeowners connected to it).

The Tamoshan plant serves 89 existing homes and has been in place for approximately 25 years. The Beverly Beach plant serves a 22 home residential community. At some point in the near future the Tamoshan treatment plant will become obsolete and will need to be rebuilt to current standards. The Beverly Beach plant will eventually become obsolete. Both plants currently meet

water quality standards, but as noted in Chapter 2 of the CPWFGP, meeting those standards has proved to be “challenging” due to the age and limitations of the two facilities. They are both located in nonconforming areas.

The CPWFGP also noted that a third “small treatment” facility at Boston Harbor exists. Over the last 15 years, studies from the Washington State Department of Ecology to consider the effects of the discharges into Eld Inlet and Budd Inlet have shown that “these three plants are too small to have an appreciable affect on the receiving waters, when operated in conformance with their NPDES permits.” At page 2-17 the report noted that the marine waters surrounding Cooper Point (including Eld and Budd Inlets) are classified either as Class A or B (excellent or good).

LOTT (Lacey, Olympia, Tumwater, and Thurston County Wastewater Alliance) is the agency agreed to by its participants to provide wastewater management on a regional basis for urban areas. The present LOTT treatment plant is described as an “advanced secondary treatment facility.” It would provide better treatment of the wastewater outflow from Tamoshan and Beverly Beach that eventually reach Budd inlet. (Ex. 140, p. 2-16).

On February 12, 1999, the LOTT advisory board adopted a resolution authorizing the extension of LOTT sewer lines for connection to the Tamoshan and Beverly Beach neighborhoods and for connection of up to 100 “failing existing on-site systems which cannot be repaired.” The resolution specifically refused to authorize connection of the sewer to new development on the Cooper Point peninsula.

Petitioners contended that the adopted CP amendment did not comply with any of the components of RCW 36.70A.110(4). The County, obviously, contended that the amendment complied with all of the components.

Because of the membership of LOTT and the February 26, 1999 resolution, the CP amendment complies with component 1 that, in general, cities are to provide urban services. We also find, under the record here, that extension of the LOTT 4-inch sewer line would be financially supportable at rural densities as required by component 5. The CP amendment specifically prohibits connection to this small sewer line by any new development occurring on the

peninsula. The size of the sewer line itself virtually excludes any possibility of permitting “urban development.” Component 6 was satisfied.

We attach the presumption of validity to the CP amendment. Petitioners must sustain the burden of proof under the clearly erroneous standard. We find that petitioners have sustained their burden of proof in showing that, as to components 3 and 4, Thurston County has not complied with the Act in allowing a 4-inch sewer to be extended into rural areas. The statute provides that extension is prohibited except where “shown to be necessary to protect basic public health and safety and the environment.” Those facts are not shown in this record.

With regard to replacing the soon-to-be obsolete Tamoshan plant the County, while commendably trying to improve the water quality of Budd inlet by use of the LOTT secondary plant, acknowledges in the CPWFGP that such improvements for protection of the environment could be achieved as readily by rebuilding the Tamoshan plant, either in its existing location or one further inland from the nonconforming shoreline site. Both options for rebuilding the Tamoshan plant included connection to Beverly Beach and abandonment of that plant.

The total estimated cost of the LOTT sewer line was \$1.8 million, for rebuilding the Tamoshan plant at a new site at approximately \$2.0 million, and for rebuilding the Tamoshan plant at its existing site \$1.7 million. All options are supportable at rural densities.

While we recognize and applaud in many respects Thurston County’s attempt to achieve sound (and Puget Sound) environmental quality actions, and recognize the County’s dedication to prohibiting urban growth or development in the Cooper Point peninsula, it is the Legislature that set forth the limited circumstances under which sewers can intrude into rural areas. No matter how laudable the County goals are for greater environmental protection and for greater potential public health and safety protection, those goals are not the test for .110(4) compliance.

The Legislature has recognized that intrusion or extension of urban services to rural areas inevitably creates pressure to urbanize. That is the reason that the strict “necessary to protect” test was adopted rather than a “betterment of health or environment” standard.

Thurston County did not comply with RCW 36.70.110(4) in adopting the CPWFGP. In order to comply Thurston County must within 120 days of this order, remove authorization to extend sewer into Cooper Point.

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and attached as Appendix I and incorporated herein by reference.

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 July, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

APPENDIX I
Findings of Fact

1. Thurston County adopted the CPWFGP as a CP amendment on December 20, 1999.
2. The CP amendment authorized extension of a LOTT 4-inch sewer line to portions of the Cooper Point peninsula.
3. The sewer was allowed as a solution to (a) future septic system failures and (b) replacement of the Tamoshan and Beverly Beach plants.
4. The LOTT authorizing resolution prohibits connection for new development.
5. LOTT would be the appropriate entity to construct and operate the sewer extension.
6. The sewer extension would be financially supportable at rural densities.
7. The sewer extension would provide environmental benefit to the waters of Budd Inlet as compared to the current Tamoshan and Beverly Beach plants. The record does not show that the sewer line is necessary to protect the environment. Rebuilding the Tamoshan plant provides similar protection. The record does not show a threat to public health and safety from the current Tamoshan or Beverly Beach plants.
8. Previous failing individual septic system failures have been repaired. The record does not reveal any threat to public health and safety or threat to the environment from potential septic system future failures.
9. Even with the presumption of validity for the CP amendment, the LOTT 4-inch sewer extension was not shown to be necessary to protect basic public health and safety and the environment