

2000, the BOCC passed Ordinance #1-2000 readopting the WSAP as amended and determining that the new WSAP was consistent with the CP, GMA and Shoreline Management Act (SMA). This PFR followed on April 7, 2000. Intervention was granted, a prehearing order was entered and the hearing on the merits (HOM) was held in Friday Harbor on August 16, 2000.

Waldron Island has many characteristics which distinguish it from other islands in San Juan County which also have significant year-round communities. There is no ferry service, no public utilities, nor any organized firefighting force. Waldron contains only about six miles of road, none of which is paved or signed. There are no retail establishments or other public facilities. There are only two docks, one of which is public and the other, private. There is one privately-owned unpaved airstrip that is served by small commercial airlines. As noted in the County's brief:

“The limited opportunities for earning money are to a great extent offset by the limited opportunities for spending it, and by people's ability to meet their needs in creative, non-monetary ways.”

As part of its consistency review process the San Juan County Planning Department submitted a report to the Planning Commission and BOCC (Ex. 231112 et. seq.). A public meeting was held by the BOCC on October 27, 1999, to review the report. The Planning Commission held a public hearing on November 19, 1999, and submitted its findings and recommendations to the BOCC. The BOCC held additional public hearings on December 8, 1999, January 11 and 26, 2000.

-
-
-

Presumption of Validity, Burden of Proof, and Standard of Review

Pursuant to RCW 36.70A.320(1), Ordinance #1-2000 is presumed valid upon adoption.

The burden is on petitioners to demonstrate that the action taken by San Juan County is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we “shall find compliance unless [we] determine that the action by [San Juan 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).

As noted in WAC 365-195-070(7), the GMA directs “consistency” in a number of contexts. In the context of this appeal wherein the County reviewed the WSAP for consistency with the CP, the definition contained in WAC 365-195-070(7) emphasizing the phrase “not incompatible with” conveys the essential element of the consistency review. The CP and any subarea plan must fit together to be consistent, and no one feature of either plan may preclude the achievement of any other feature of either plan. *Berschauer v. Tumwater*, #94-2-0002, (FDO July 27, 1994).

Petitioners complained that WSAP requirements limiting new residential structures to 3,400 square feet in net use area and that contain no more than two toilets using potable water for flushing were inconsistent with the CP and the GMA. We note that being more restrictive in a subarea plan than in a CP does not equate with inconsistency. The County accurately pointed out that, given the unusual (dare we say unique) circumstances on Waldron Island as shown by the record, such increased restrictions were appropriate. Petitioners countered with a claim that the previously-adopted July 1976 Waldron Island groundwater report (Ex. 00231207) was recognized as outdated and was specifically directed by the new ordinance to be updated. Thus, petitioners concluded, the restrictions based on aquifer and groundwater concerns were not based upon best available science (BAS) required by RCW 36.70A.172.

One of the salient characteristics of BAS is “availability;” that is to say information that is contained in the record. Here there is no science in the record other than the 1976 water report. It is petitioners’ burden to prove noncompliance. While we recognize the difficulties and potential expense in establishing or in disputing BAS, the legislative direction with regard to our review of the record is clear. Here petitioners have failed to sustain their burden of showing that the County action relating to the WSAP building restrictions’ consistency review was clearly erroneous.

Petitioners also challenged the WSAP provision requiring that water availability must be satisfied within the boundaries of the parcel to which the proposed use would apply. This challenge was the same BAS challenge as noted above. We find that petitioners have failed their burden of proof on this issue as well.

The WSAP prohibits electric power easements on private lands, but authorizes them along County right of ways for purposes of serving abutting property. Currently there are no public utilities that serve Waldron Island. CP 8.2.C provides that location and siting of utility facilities will minimize negative impacts to rural character and the natural environment. Given the lack of public utilities and public facilities on or serving Waldron Island, we find that petitioners have failed in their burden of proof. We do not have jurisdiction to address the constitutional issue raised by petitioners.

Petitioners also attacked the WSAP prohibition on new private docks. The record reveals extensive support for the BOCC findings that the prohibition unique to Waldron Island was appropriate and consistent. Those findings included:

- “Unlike most other areas in the County, for many years Waldron Island has had only one County dock and one private dock. There is no existing pattern of moorage development on the Island.
- The Island’s shoreline is highly exposed to wind and wave action, and there are few, if any, locations where docks of small or moderate scale could withstand these conditions on a year-round basis.
- Use of the County dock by Island residents in lieu of having private docks is common and accepted practice of long standing. Mooring bouys may also be, and have been permitted in some locations.
- Generally, once a dock is approved in a given area, it is difficult to avoid further dock approvals and proliferation of the facilities in the same area over time.
- The marine and intertidal conditions on the shore of the island are almost completely unaffected by the physical and biological impacts of moorage development. Eelgrass is abundant along much of the island’s shorelines, and marine habitat quality is high.”

Petitioners have failed in their burden of proof to show that determination of consistency by the County fails to comply with the GMA and the SMA.

Petitioners challenged the establishment of a Waldron Island standing committee to consider submission of annual amendments and to initiate and review an updating of the WSAP at least

once every five years. Petitioners have failed to demonstrate that this provision violates the goals and requirements of the GMA or is in any way inconsistent with the CP.

A regulation contained in the WSAP provides that:

“Authorization for special use of land through a County land use permit shall apply only to the original applicant and shall expire in 15 years from the date of issuance. Application for a new permit shall be required to continue the use for each 15-year period thereafter. Such applications shall be approved if the scope, scale and nature of the activity remains in compliance with the original permit.”

There is no corresponding restriction anywhere else in San Juan County. As noted in the October 4, 1999, staff report:

“Other than on Waldron, the activities authorized by Conditional, Discretionary, and Provisional permits are usually allowed indefinitely in the County, with the permit running with the property.”

The staff report noted that such permit provisions placed additional burdens on permitting staff to implement and track the time limited permits, process renewals and “insure that only original applicants exercise the permits.” Staff concluded that for any applicant or permittee dealing with Waldron Island there were additional burdens not applicable to any other portion of San Juan County to renew the permits every 15 years as well as keeping track of the passage of the time period and “if the activity is to be transferred to another person a completely new permit must be granted.” The staff report concluded that the “procedural or monetary concerns” for the County or potential permittees were not a consistency issue.

Justification for the difference between the Waldron Island permit system and the remainder of San Juan County is found at page 44 of the staff report as follows:

“As part of the approach of the Waldron Subarea Plan to maintenance and protection of the rural character of the island and the environment, the subarea plan provides both a term limit to the uses and activities allowed by the permits, and limits to the original applicant (non-transferable). These limitations are consistent with Comp Plan policies for the preservation of the environment, control land uses and with the use of subarea plans to address local issues and concerns.”

There are no findings contained in Ordinance #1-2000 as to the limits imposed only on Waldron Island permittees. There are no other portions of the record which address this issue.

In challenging this Waldron provision for consistency with the CP, petitioners in their brief and argument query:

“This means if a husband who is the original applicant dies, so does his business. ... What is the legitimate goal to be achieved by negating a CUP after 15 years or after the applicant dies? How is Waldron different in this respect from San Juan Island?”

Intervenors support the limitation, at p. 9 of their brief, by concluding that the expiration period “is a rational method of monitoring compliance for the conditional use permit.” Intervenors did not address why such an approach would not be a rational means of permit monitoring for the balance of San Juan County.

The County’s brief and argument pointed to other types of permits which have time period limitations. The County argued that the regulation “attempts to insure predictability” by providing that reapplications would be approved if the scope, scale and nature of the activity remains “in compliance with the original permit.” The County contended that the hypothetical presented by petitioners of a husband dying leaving the family at the mercy of a new conditional use permit application process was “extremely unlikely.”

As noted by the breadth of the arguments presented by the parties in this case, the regulation is inherently ambiguous. It does not define who is “the original applicant” nor establish under what circumstance the permit might be transferable or non-transferable. There is nothing in the record that provides any clarity for this very unusual restriction.

Nor does the record contain any thorough analysis for why only Waldron Island permittees are confined to a 15-year time limit. The record contains conclusions that such a limitation would protect the “rural character and environment” of Waldron Island. The record does not provide any analysis of why such a restriction would not protect rural character and the environment of the rest of San Juan County, or at least some, if not all, of the individual islands.

The record does not reveal any analysis that resolves the inconsistency between the permittee

restrictions for Waldron Island and the lack of any similar restrictions for any other island within San Juan County. As such, this provision of the WSAP is inconsistent with the CP and does not comply with the GMA.

We find the County consistency review of the WSAP compliant with the GMA except for the regulation that limits permit applicants and time limitations for Waldron Island. This regulation is inconsistent with the rest of the CP. There is no similar policy in the CP for any other area. Nor is there an appropriate analysis for the difference.

There is no evidence in the record that would support a finding of invalidity as to the WSAP regulations.

IN ORDER TO COMPLY with the Act, San Juan County must resolve this inconsistency by eliminating the WSAP regulation, providing an analysis of why the special restriction applies only to Waldron Island and clarify the ambiguities contained in the regulation, or impose a similar restriction on permits throughout the County or portions thereof, or otherwise comply with the GMA requirements for consistency between the CP and the WSAP. Action must be taken within 120 days of the date of this order.

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 15th day of September, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Nan A. Henriksen
Board Member

Les Eldridge
Board Member