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

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| MITCHELL, et al., and SWINOMISH INDIAN TRIBAL |) | |
| COMMUNITY, |) | No. 01-2-0004c |
| |) | |
| Petitioners, |) | FINAL DECISION |
| |) | AND ORDER |
| v. |) | |
| |) | |
| |) | |
| SKAGIT COUNTY |) | |
| |) | |
| Respondent, |) | |
| |) | |

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SYNOPSIS OF THE ORDER

Petitioners Mitchell, et al., argued that the County overburdened the non-delta farm community with a buffer plan which neither included nor provided best available science (BAS) but instead included science that would not work. They criticized the County for failing to be guided by natural laws or by certain studies which demonstrated conclusions regarding air and water temperature which are contrary to the assumptions of the County. They claimed the buffer plan constituted a taking of property rights.

Swinomish Indian Tribal Community (Tribe) maintained that the buffers were inadequate to preserve and enhance anadromous fish. The Tribe claimed that the ordinance was not based on BAS, did not give special consideration to anadromous fish, and was not supported by a reasoned analysis.

Both the Tribe and Mitchell criticized the County for inadequate funding.

The County responded that it had included BAS, that it was innovative in its approach, and that

its close monitoring of the adaptive management program was more than sufficient to correct any operational deficiencies which may later become evident.

We find that the County included BAS, considered property rights, gave special consideration to anadromous fish, and applied an innovative technique with provisions for close monitoring. We further find that Petitioners failed to sustain their burden to demonstrate clear error on the part of the County in its adoption of Ordinance #18069.

INTRODUCTION

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On December 27, 2000, and February 5, 2001, we received petitions for review from Swinomish Tribal Community and from Norm Mitchell and others challenging various aspects of Ordinance #18069 adopted on November 27 28, 2000. We entered an order consolidating the cases on February 13, 2001.

On July 12, 2001, the hearing on the merits was held at the Skagit County Courthouse Annex in Mount Vernon, Washington. Chief Civil Deputy John Moffat and Mr. Jay Derr represented the County. Ms. Alix Foster and Mr. David Bricklin represented the Swinomish Indian Tribal Community. Ms. Pat Larsen represented Petitioners Mitchell et al. Les Eldridge, Nan A. Henriksen, and William H. Nielsen were present for the Board.

The July 29, 2001 County motion to supplement the record with proposed Exhibits #55, #56, #57, and #58 was granted. The Tribe's Proposed Exhibit #59, augmenting Exhibit #58, was admitted (forest practice regulations). The declaration of Alix Foster was denied admission. We noted that illumination of her points of reference could take place in argument. The motion to admit proposed Exhibit #2115 (Tenneson affidavit) was denied.

PREVIOUS ORDERS IN CASES ASSOCIATED WITH CASE #01-2-0004c

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A number of issues in this case are associated with previous cases in which those issues have been the subject of our findings. Since the mid-1990s Skagit County has attempted to reconcile the often-competing requirements of the Growth Management Act (GMA, Act) regarding

conservation of agricultural lands, protection of critical areas and preservation of anadromous fisheries. Cases 96-2-0025 and 00-2-0033c, later consolidated, dealt with challenges of the County's consideration of the complex issues surrounding the above-noted goals by numerous parties.

The parties in those two cases represented many sets of interests regarding agriculture, fisheries and the environment. They included Friends of Skagit County, Skagit Audubon Society, several Skagit County Diking or Drainage Districts, Western Washington Farm Crops Association, Skagit County Farm Bureau, Skagitonians to Preserve Farmland, Skagit County Dairy Association, Agriculture for Skagit County, the Washington Environmental Council, The Washington State Department of Fish and Wildlife and the Swinomish Indian Tribal Community. Of these previous intervenors and petitioners, one is a party in the case before us: Swinomish Indian Tribal Community.

With the adoption of Ordinance #18069 in November 2000 we were able to rule on six distinct sets of issues still unresolved in the two cases cited above. We did so in a compliance order dated February 9, 2001. We had previously ruled on other issues in those two cases, including a January 3, 1997 final decision and order (FDO) in Case 96-2-0025 and an FDO and compliance order (CO) on August 9, 2000 for the two consolidated cases.

In our most recent CO of February 9, 2001, we ruled that the Managed Agricultural Riparian Plan (MARF) framework was in compliance with the Act. In order for the MARF to work, we ruled that the science advisory panel (SAP) must carry out baseline monitoring, revegetation, plant plans and an adaptive management program.

We also found farm plan exemptions in compliance. Next, we found that protection for Type 4 and 5 streams was in compliance so long as monitoring and responses to monitoring took place. Further, we found the County's "15% of parcel" limitation in section .095(4)(b) and its bank armoring exemption to be in compliance. Finally, we ruled that the inclusion of buffer eligibility in the Rural Resource-NRL Zone (RRc) under SCC 14.24.120 was in compliance.

We noted that other issues emerging from the adoption of Ordinance #18069 would be addressed in subsequent cases. Two petitions for review were filed regarding new issues emerging from

that adoption. They were consolidated into this case.

PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(1), Ordinance #18069 is presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the action taken by Skagit 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 it determines that the action by [Skagit 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).

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ISSUES PREVIOUSLY RULED UPON

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The County argued that the doctrines of *res judicata* and *collateral estoppel* should be applied to a number of issues which the County maintained we have previously ruled upon in the cases cited above. We do not reach the question of whether the doctrines of *res judicata* and *collateral estoppel* might apply here. We have considered all issues and adhere to our February 9, 2001 CO rulings as to the matters contained therein.

SUMMARY OF CHALLENGES

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A summary of the challenges of the two petitioners follows.

Mitchell claimed:

1. The County failed to comply with the requirements of RCW 36.70A.020(6), property rights.
2. The County failed to comply with RCW 36.70A.070(5)(a) by introducing a large rural element into agricultural areas by default.
3. The County failed to comply with RCW 36.70A.070(5)(c)(v) and Section .020(8) by

failing to protect against conflicts with the use of agricultural lands.

4. The County failed to comply with the requirements of RCW 36.70A.080 and .090 regarding optional elements and innovative techniques.
5. The County failed to comply with RCW 36.70A.120, capital budget decisions.
6. The County failed to include BAS as required by RCW 36.70A.172.

The Tribe contended that:

1. The County's ordinance was inconsistent with and did not implement the County's Comprehensive Plan (CP), the county-wide planning policies (CPPs), or GMA goals.
2. The ordinance was not based on BAS, nor did it give special consideration to anadromous fish.
3. The ordinance was inadequately funded.
4. The County improperly exempted lands in ongoing agriculture designated "Rural Resource NRL" from the standard riparian buffer requirement.
5. The ordinance failed to protect critical areas.

Both petitioners claimed:

The ordinance substantially interfered with the goals of the Act and was invalid.

CONTENTIONS

Best Available Science and Analysis

Mitchell, et al., contended that BAS was neither included nor "provided". They claimed that single quotes from science were not BAS, and that simply citing science did not constitute inclusion. They contended that studies on the effects of buffers on both air and water temperature are inconclusive regarding the effect of logging of buffers on water temperature. Ex. 0073. They insisted that the County had failed to follow CTED criteria for determining which information constituted BAS. WAC 365-195-900 through -925.

Conversely, the Tribe maintained that the ordinance was not based upon BAS because it failed to give special consideration to anadromous fish and was not supported by a reasoned analysis. The Tribe complained that the County had relied on ESA standards which were not equivalent to GMA standards. The Tribe criticized the County for failing to measure riparian buffers from the

edge of the channel migration zone. The Tribe also faulted the County for relying on its agricultural master map as a definitive tool rather than for informational purposes.

The County responded that the GMA did not impose an onerous burden on agriculture in favor of the fisheries industry. The County noted that Goal 9 requires conservation of fish and wildlife habitat but not enhancement. Goal 10, noted the County, used the term “enhanced” but referred only to water quality. The County claimed that the MARP option provided a significant water quality filtering function where none currently existed and therefore constituted enhancement of existing water quality. The County went on to point out that Section .040(3) required protection of designated critical areas but did not mention “enhance”. The County maintained that its reliance, in part, on potential ESA requirements was a reasonable standard upon which to rely.

Buffers

Mitchell claimed that with the expansion of the riparian buffer zone (RBZ) from 25 to 50 feet, homes and existing structures were placed at risk along with people’s livelihoods. Mitchell maintained that the County failed to provide any science in the record to justify buffer size. Mitchell asserted that the County had not used the criteria of WAC 365-195-900 through -925. Mitchell argued that the imposition of buffers in the agricultural zone constituted an insertion of “a large rural element” subject to the requirements of RCW 36.70A.070.

The Tribe contended that the buffers were “significantly diminished” and did not adequately protect anadromous fish. It criticized the County for allowing these “diminished” buffers in the RRc-NRL Zone.

The County responded that it was regulating existing ongoing agriculture where no buffer had existed, and that any buffer therefore provided enhancement.

Funding

The Tribe maintained that the ordinance could not be implemented with the approximately \$2 million now allocated because the County estimated the total cost of implementation at \$54 million. Mitchell contended that there were no funds in the budget for mitigation of a net loss of farmland and further that there were no funds in the budget to ensure the long-term stability of

agriculture.

The County countered that it had made an appropriate level of funding commitment to initiate the program. It cited over \$2 million in the salmon recovery fund, and underscored its commitment to acquisition and restoration of important habitat areas. The County pointed out that much of the projected \$54 million cost could be attributed to the 13 enhancement projects which needed further evaluation before selection and prioritization. Ex. 50. The County further noted that the GMA does not require multi-year project implementation to be fully funded in the first year. While the capital facilities funding plan under Section .070(3)(d) requires specific identified sources, this applies to only capital facilities and not to operational funding. The County claimed that there was no similar requirement for demonstrating total funding for regulatory implementation.

Property Rights

Mitchell maintained that mandatory buffer zones in existing agricultural land are a physical taking. They cited Goal 6 of the Act calling for the protection of property rights from arbitrary and discriminatory actions. The County responded that the entire process in the evolution of the farm buffer ordinance displayed a concern for property interests of the farmers. The County cited the August 9, 2000 FDO and CO in which we recognized the County's efforts to consider the private property interests of farmers and the difficult choices the County faced in balancing the GMA goals of conserving agriculture and preserving and enhancing the fisheries industry.

CONCLUSIONS

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We conclude from the record in this case that our previous finding in the February 9, 2001 CO that “the County has done an exhaustive job of evaluating BAS in the record and determining its local applicability to existing, ongoing agriculture NRL lands in Skagit County” is correct. The County has evaluated the scientific evidence contained in the record, and its decision is within the range of discretion afforded by the GMA. As we said in *CCNRC v. Clark County* 96-2-0017 “the wider the extent of the scientific evidence, the broader the range of discretion allowed to local governments.”

The establishment of buffers within agricultural zones does not constitute a “large rural element” under RCW 36.70A.070.

We conclude that the MARP process, including its implementation, in part, through the efforts of the SAP, provides a managed and well-monitored program designed to meet the agricultural and critical area goals set forth in the Act. We conclude that the issue of property rights has been adequately considered by the County, a consideration which satisfies the taking provisions of Goal 6. *Beckstrom v. San Juan County* 95-2-0081 (FDO 1-3-96). We find that the County has provided an appropriate level of funding to initiate this program and that the ordinance is consistent with the comprehensive plan and CPPs.

ORDER

Petitioners have not met their burden of showing clear error on the part of the County in adopting Ordinance #18069. We do not have a firm and definite conviction that the County has erred. Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and appended as Appendix I.

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 6th day of August, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member

Nan A. Henriksen
Board Member

Appendix I

Findings of Fact pursuant to RCW 36.70A.270(6)

1. The MARP program is an optional element and innovative technique used to balance GMA Goals 6, 8, 9, and 10.
2. The record demonstrates County consideration of property rights.
3. The record shows inclusion of a wide range of science, including the Wild Salmonid Policy.
4. The County has funded the initial stages of the MARP program with more than \$2 million.
5. The deadline for design and development of the buffer revegetation and management program is July 1, 2001.
6. The deadline for development of an effective monitoring strategy and adoption of performance standards is July 1, 2001.
7. The deadline for commencement of baseline monitoring is October 1, 2001.
8. The deadline for completion of the MARP adaptive management program is March 1, 2002.
9. The County has included BAS within Ordinance #18069.