

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

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| DOROTHY AUSTIN MUDD, |) | |
| |) | No. 01-2-0006c |
| Petitioner, |) | |
| |) | FINAL |
| |) | DECISION |
| |) | AND ORDER |
| v. |) | |
| |) | |
| SAN JUAN COUNTY, |) | |
| |) | |
| Respondent, |) | |
| |) | |

On December 12, 2000, San Juan County adopted Ordinance 15-2000 as an emergency interim ordinance. The ordinance was adopted without public participation under the authority of RCW 36.70A.390. On January 4, 2001, we received a petition for review (PFR) from Dorothy Austin Mudd.

On January 31, 2001, after two public hearings, the Board of County Commissioners (BOCC) adopted a resolution affirming the adoption of Ordinance 15-2000. On February 20, 2001, Mudd filed a new PFR challenging that action.

On February 21, 2001, a telephonic prehearing conference was held. A prehearing order and a separate order consolidating the two cases were each entered March 5, 2001. The hearing on the merits (HOM) was held May 9, 2001, on Lopez Island.

Ordinance 15-2000 is titled, in part, an ordinance to “clarify the unified development code and comprehensive plan as they relate to concurrency with community water systems” in both the urban growth areas (UGAs) and limited areas of more intense rural develop (LAMIRDs). In spite of the ordinance’s title limitation for “community water systems”, its coverage also includes “community sewage treatment facilities”. The ordinance has a current expiration of June 12, 2001. The ordinance amends both the uniform development code (UDC), which are the County's development regulations (DRs), and the comprehensive plan (CP).

The adoption of the ordinance was precipitated by a ruling in Skagit County Superior Court reversing the County’s granting of a conditional use permit. The matter came before the Superior Court under a Land Use Petition Act challenge, not under a Growth Management Act (GMA, Act) challenge. The Skagit County Superior Court ruled that the County’s UDC requirement of denial of a finding of concurrency whenever a water system exceeded 85% of capacity, applied over a more generalized policy regarding concurrency found in the CP.

Based upon that ruling, the County determined an emergency existed since every community water and

community sewage system was operating at greater than 85% capacity. The ordinance amended Table 6.8 of the UDC to determine that an adequate level of service (LOS) F (5% or less of water distribution system capacity remaining) as sufficient for community water systems and community sewage treatment facilities concurrency.

Section 2 of the ordinance amended the definition of “planned capacity” to include more specific requirements for the type of financial commitment necessary to be considered to be a planned capacity analysis. Other provisions in the San Juan UDC allow a permit application to be approved if the applicant can demonstrate that the community system has adequately planned for expansion even if adequate, state-agency-approved hookups are not currently available. The code further provides, as a second step, that an existing approved hookup must be in place prior to the issuance of any building permit, even after approval of the initial permit application.

The ordinance was adopted under RCW 36.70A.390. That section of the GMA , provides that a county that adopts “a moratorium, interim zoning map, interim zoning ordinance, or interim official control” without a public hearing, must hold a public hearing within sixty days and enter findings of fact justifying the action either before, or immediately after, the public hearing.

RCW 36.70A.030(7) defines a DR as:

“The *controls* placed on development or land use activities by a county or city, including, but not limited to, *zoning ordinances*, critical areas ordinances, shoreline master programs, *official controls*, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto.”...(Emphasis supplied)

A CP is defined in RCW 36.70A.030(4) as a “generalized coordinated land use policy statement”.

The language of RCW 36.70A.390 that allows adoption of a moratorium, interim zoning map, interim zoning ordinance, or official control, falls squarely within the definition of DR in the Act. Use of .390 for amendments to the CP, as was done in sections 5 and 6 of the ordinance, does not comply with the Act.

During the questioning phase of the HOM, the County argued that the ordinance was also adopted pursuant to RCW 36.70A.130(b) and thus the CP amendments were compliant. The fallacy of that argument is twofold. First, nothing in the record indicates that any consideration of .130(b) was made by the County, including the sole reference to .390 in the ordinance itself. Secondly, the exemption allowing for consideration of CP amendments more frequently than once per year applies only to the resolution of an “appeal of a comprehensive plan filed” with a court. That section also requires “appropriate public participation” prior to the adoption of the ordinance. No public participation occurred in this case prior to the initial adoption of the ordinance. The Superior Court decision, which precipitated adoption of the ordinance, did not involve an appeal of a comprehensive plan. The December 12, 2000, adoption also occurred prior to the entry of findings and conclusions and remand order by the Skagit County Superior Court.

The procedurally noncompliant CP amendment provisions reduced the LOS to F, struck the 85% capacity requirement and substituted “sufficient existing capacity or planned capacity” as the standard. Existing provisions of the CP require a water or sewage service provider to develop formal plans once the system reaches 85%

of capacity. The CP provisions refer only to “activity centers” (LAMIRDs) and not to designated UGAs.

Petitioner’s major challenge was that the resulting reduction in LOS in UGAs and LAMIRDs was an attempt to “evade” concurrency in violation of the GMA, citing *Butler v. Lewis County* #99-2-0027c (FDO 6-30-00). Petitioner accurately pointed out that the current county process did not require any monitoring of these water or sewage treatment systems, did not involve any allocation procedures, and with the December 12, 2000, amendments did not make adequate provision for reserving capacity.

Regulations concerning the need for such an approach are found in WAC 365-195-835 (Office of Community Development, procedural criteria). Petitioner cited evidence from the record that she claimed showed an attitude by County officials to disregard the concept of concurrency and to merely continue “business as usual”. Petitioner contended that ordinance 15-2000 substantially interfered with goal 12 of the Act.

San Juan County contended that the ordinance “clarified” that community water and sewage treatment systems were not required to maintain 15% excess capacity. That change did not change the County’s concurrency requirements. Under SJCC 8.060.140.A and UDC §6.3, actual acquisition of the right to service must be shown before building can commence. Thus, as the County pointed out, it does “approve a land use application” if the LOS requirements are met, “which includes consideration of the community system’s planned capacity”. However, for determining concurrency, the sole criterion is whether the applicant has “acquired an existing right to service”. Planned capacity is not used to determine concurrency.

RCW 36.70A.020(12) provides as follows:

“Public facilities and services. Ensure that those public facilities and services necessary to support development shall be *adequate* to serve the development at the time the development is available for *occupancy and use* without decreasing current service levels below locally established minimum standards.” (Emphasis supplied)

RCW 36.70A.070(6)(b) requires local jurisdictions to “adopt and enforce ordinances which prohibit development approval” that would cause the LOS to decline below the locally established levels. It is these two provisions of the Act that establish the concurrency requirement.

Many of Petitioner’s complaints, concerning her perceived attitude of the County towards ignoring concurrency or considering the concept to be an obstacle, have recently been addressed in *Durland v. San Juan County*, #00-2-0062c (FDO 5-7-01). The County’s remaining work, to use concurrency as a planning tool and complete its GMA duty to take a more active role in concurrency planning, are better tracked through the issues developed in that case. Petitioner’s observation that the amended LOS standards adopted in the ordinance result in a lower LOS for UGAs and LAMIRDs than those for rural areas is not necessarily a failure to comply with the Act.

Petitioner has failed in her burden of showing noncompliance as to the claim that the County has attempted to evade its concurrency duties. Certainly, the County has work to do in reaching an appropriate level of LOS planning, particularly for UGAs and LAMIRDs. Nonetheless, the County does not authorize any building to occur on property unless approved water and sewage hookups are “in place” at the time “development occurs”. That is what the GMA requires for a DR to use as its concurrency criterion.

Petitioner also failed in sustaining her burden of proof of showing substantial interference with the goals of the Act.

In order to comply with the Act, San Juan County must place its CP amendments on a proper docketing provision to be adopted only after appropriate public participation.

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 30th day of May, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Presiding Officer

Nan A. Henriksen
Board Member

Les Eldridge
Board Member