

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

ADVOCATES FOR RESPONSIBLE DEVELOPMENT,)	
MASON COUNTY COMMUNITY DEVELOPMENT)	No. 01-2-0017
COUNCIL (MCCDC), JANET DAWES, AND)	
JOHN E. DIEHL)	ORDER RE:
)	MOTIONS
Petitioners,)	
)	
v.)	
)	
)	
MASON COUNTY,)	
)	
Respondent,)	
)	

On July 16, 2001, we received a petition for review from Advocates for Responsible Development, et al., alleging that three Mason County ordinances amending the County's resource ordinance failed to comply with the Growth Management Act (GMA, the Act). Petitioners contended that the County's ordinances failed to comply with public participation requirements, RCW 90.58 review requirements pertaining to shorelines, and GMA requirements for protection of critical areas. Petitioners also challenged provisions regarding minor amendments to special use permits.

On August 10, 2001, we received petitioners' dispositive motion asking that we find the County noncompliant and that we enter a finding of invalidity regarding the alleged failures to comply. On September 4, 2001, the Mason County Commissioners (BOCC) adopted Ordinance #95-01 which rescinded the three ordinances being challenged: #58-01, #59-01, and #66-01. No reasons for the rescision nor findings regarding the rescision were included with Ordinance #95-01. The same day, Mason County entered a motion to dismiss the case on the ground of mootness.

A motions hearing was held on September 27, 2001. Present for the County were Darren Nienaber, Deputy Prosecutor, as well as Ron Henrickson and Bob Fink of the County's Office of Community Development. Petitioner John Diehl appeared for petitioners. Petitioner Janet

Dawes was also present. Les Eldridge and William H. Nielsen were present for the Board. Board member Nan Henriksen, unable to attend, subsequently listened to the tape of the proceedings.

DISPOSITIVE MOTION

The County failed to respond to petitioners' dispositive motion within the ten-day time frame allowed under our rules (WAC 242-02-534(1)). The County presented a response at the motions hearing asking that the dispositive motion argument be postponed until we ruled on the motion to dismiss. As this response was untimely, we allowed petitioners to submit a post-hearing brief. We received their post-hearing brief October 4, 2001.

Petitioners maintained that the amendments in the three ordinances cited above were neither moratoria, interim zoning maps, interim zoning ordinances, nor interim official controls and therefore did not qualify under RCW 36.70A.390 as being exempt from the public participation requirements of the Act. Petitioners argued that exempting certain projects from controls did not constitute an "interim official control." Ordinance #66-01 exempts minor amendments to special use permits. Petitioners argued that because the exemptions are not interim controls, but rather a lifting of controls, the ordinance was not exempt from the public participation requirements of the Act.

The County failed to submit proposed Shoreline Master Program amendments to the Department of Ecology (DOE) for review and approval. Thus, petitioners claimed, the County failed to comply with RCW 90.58.090 and WAC 173-26-110 when it adopted Ordinance #59-01.

Next, petitioners argued that the ordinances were noncompliant because they were without guidelines to ensure that exempted projects are compatible with requirements for critical area protection. Petitioners further argued that Ordinance #66-01 was inconsistent with and failed to implement the comprehensive plan and therefore failed to comply with Sections .040 and .120 of the Act.

The County responded that the dispositive motion argument should not proceed because there had been no prior hearing on the merits, no motion argument of any kind, and no prior adversarial

proceedings of any sort. The County next contended that the ordinances were interim official controls and zoning ordinances. The County argued that the requirements for submitting ordinances to DOE did not apply to interim ordinances. The County maintained that the ordinances do protect critical areas (C/A). The County failed to specify how C/A were protected. The County noted that petitioners had failed to demonstrate how the minor amendment ordinances were inconsistent with the comprehensive plan.

In their post-hearing brief, petitioners reiterated their contention that ordinances which remove controls are not interim official control ordinances and as such, they require prior public participation.

Petitioners further pointed out that Section .480(2) of the Act does not relieve the County of its responsibilities under RCW 90.58 to receive DOE approval of amendments to the Shoreline Master Program. Petitioners contended that “what makes this case important is that the lack of public participation in adopting measures are part of a process antithetical to the purposes of the Act.” Petitioners complained that if the County is allowed to adopt such interim ordinances with no public participation, it could issue permits under unscrutinized exceptions before the Growth Management Hearings Board had the opportunity to review the ordinance. Petitioners maintained that, even though the ordinances have now been rescinded, the question of whether they qualified under the interim ordinance provision of the Act was critically important to prevent abuses of the Act through, what they termed, this “scheme.”

MOTION TO DISMISS

The County submitted no written argument with its motion to dismiss. At the hearing, the County submitted an argument which petitioners had not had an opportunity to review. We noted that this submission was untimely and afforded petitioners an opportunity for a post-hearing brief.

The County’s argument noted an exception to the mootness doctrine which allows continuing consideration if substantial public interests are involved but contended that the case did not “arise (sic) to substantial public interest.” The County cited several Washington appellate and growth management hearings board cases which it claimed supported its argument. It stated that because

these ordinances were “unusual and temporary” that this case was “not continuing” and therefore did not qualify for an exception to the mootness doctrine.

Petitioners countered that “without a decision, the County and other local jurisdictions might be encouraged to adopt similar interim regulations in the future and to use such regulations to exempt specific projects from adopted development regulations and so frustrate the purposes of the Act.” Petitioners argued that our authority to dismiss on the basis of mootness derives from the provisions of RCW 36.70A.293 that allows for dismissal of a petition if it is found to be frivolous. Petitioners acknowledged that there are occasions when it would be frivolous to give further consideration to a petition, but maintained that this instance was different because “some useful guidance will emerge from further consideration of the matter under review.” Petitioners cited *Sorenson v. Bellingham* 80 Wn.2d 547, 559, 496, P.2d 512 (1972) for the rule that “it is desirable that the question be determined for the future guidance of public officers.” Petitioners noted that even if we were to grant the County’s motion to dismiss, petitioners could raise this question in a request for a declaratory ruling. Petitioners were concerned that the County argued each of the issues presented in the original petition, made no admission of error, and in the absence of a ruling to the contrary, seemed prepared to take similar actions in the future.

CONCLUSION

We find that as a result of the rescission of the three ordinances, we lack jurisdiction to continue this case. There no longer are any development regulations in effect for which we could enter a finding of compliance or noncompliance or for which to issue a determination of invalidity.

Recently we held in *Butler v. Lewis County*, 99-2-0027c (*Butler*) (Order March 23, 2000) that jurisdiction exists to issue a determination when development regulations or comprehensive plan amendments “supersede” the ordinances and amendments that have been challenged. Two important distinctions separate that case from this one. First, the ordinances in *Butler* superseded rather than rescinded the actions at issue. The record in that case revealed the necessity for correlation between the new ordinances and the ones at issue. The County was in position to immediately request a compliance hearing regarding the new ordinances and amendments after issuance of the FDO.

Secondly, the *Butler* case also involved a long history of last minute adoptions by the County in order to avoid review of its actions. No such evidence is presented in this record or in previous cases involving Mason County.

We therefore do not reach the question of whether the County's actions failed to qualify under RCW 36.70A.390 as interim measures not requiring prior public participation. The County's motion to dismiss is granted. Case #01-2-0017 is dismissed.

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 12th day of October, 2001.

Les Eldridge
Board Member

William H. Nielsen
Board Member

Nan A. Henriksen
Board Member