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BEFORE THE WESTERN WASHINGTON GROWTH

MANAGEMENT HEARINGS BOARD

ADVOCATES FOR RESPONSIBLE DEVELOPMENT, MASON COUNTY COMMUNITY DEVELOPMENT COUNCIL, JANET DAWES, AND JOHN E. DIEHL)	
)	No. 01-2-0025
)	
Petitioners,)	FINAL DECISION AND ORDER
)	
v.)	
)	
)	
MASON COUNTY,)	
)	
Respondent)	
)	

Synopsis of the Order

The petition for review challenged adoption of Mason County Ordinance 112-01 regarding minor modifications to special use permits. Petitioners contended that the standards to be applied to applications for minor modification were inadequate and the decision criteria too vague to ensure the consistency and objectivity in permit decisions called for by the Growth Management Act (GMA, the Act).

In this order we find that Mason County must change the language of the ordinance so that decisions on permits comply with the comprehensive plan rather than the “intent” of the comprehensive plan. Special use permit decision criteria must be expanded and clearly defined. The County must make clear that permits must be consistent with compliant portions of the comprehensive plan (CP) and the critical areas ordinance (CAO) and do not rely on portions of the CP or CAO which have been found noncompliant, and have not yet been amended.

Hearing on the Merits

The hearing on the merits was held February 13, 2002, at the Mason County Courthouse. All three members of the Board were present. John E. Diehl represented petitioners and Darren Nienaber, Deputy Prosecuting Attorney, represented the County.

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

Ordinance amendments made in response to a finding of noncompliance are presumed valid. RCW 36.70A.320.

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

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

Summary of Issues

Parties argued the merits of the following issues:

1. Whether is it compliant with the Act that a County impose more stringent standards for minor amendments than the standards used for the granting of the initial special use permit.
2. Whether incorporation by reference of policies and regulations found noncompliant and invalid complies with the Act.
3. Whether the ordinance requirement that the amendments comply with the “intent of the

comprehensive plan” complies with the Act.

4. Whether the ordinance is consistent with the CP and DRs.

5. Whether the decision criteria are so vague as to preclude predictable outcomes for applications subject to the ordinance.

6. Whether or not the ordinance precluded additional environmental impacts as a result of minor modifications to special use permits.

Discussion of Issue 1 of the Petition for Review

In Issue 1, petitioners challenged Mason County’s compliance with GMA’s public participation requirements in Section .035 and .040. Petitioners did not brief this issue for the hearing on the merits. At the hearing, petitioners and the County agreed that they had reached settlement on the question of Issue 1 to each party’s satisfaction and that the issue was withdrawn.

Discussion of Issue 2 (Elements as Summarized in “Summary of Issues”)

Petitioners characterized the ordinance as poorly drafted and ambiguous. They cited, as an example, the question of a special use permit being consistent with the “intent” of the CP. They declared that the “intent” of the CP cannot be easily determined and is inherently subjective. They observed that the ordinance contains no requirement for minor amendments to be consistent with the CP or the DRs. Petitioners lamented the absence of a definition of “minor”, noting that there is no major use section and that the minor use section contains criteria so vague as to be of little use.

Petitioners maintained that the decision criteria should be expanded to address impact beyond merely adjacent lands to lands surrounding and/or downstream of the site of the special use permit. They declared that the “vague and nonspecific expression of purpose calling for harmony with surrounding land uses and in a manner consistent with the intent of the DRs and the CP were inadequate guidelines.”

Petitioners dismissed the question of imposing more stringent standards for minor amendments than for the special use permits themselves as “anomalous but compliant.” They claimed that it was the Board’s responsibility to find noncompliance, if it exists, regardless of how much of the remainder of the County CP and DRs are even more egregiously noncompliant, though unchallenged.

Petitioners contended that the incorporation by reference of policies and regulations found noncompliant, is itself noncompliant under GMA. They noted that we had addressed this question in Case #95-2-0073 where we found the County noncompliant for relying through reference on noncompliant sections of the County resource ordinance regarding habitat conservation areas and sections of the same ordinance relating to frequently flooded areas and geologically hazardous areas.

The County responded that more specific criteria than those in Section 1.05.044 of Mason County Ordinance 82-96 would be impossible to develop because of the varied nature of special uses. The County also contended that if it “only offers the bare conclusory statement as to consistency with the comprehensive plan, then the County is subject to serious litagative risk.” Further, “in light of the ease of contradicting the administrator’s determination and in light of the numerous ways in which a private party could sue to overturn the County’s decision, the ordinance is tailored to minor amendments so inconsequential as so as not to cause a stir in the community.” The County offered these comments on ways in which citizens could take issue with the Administrator’s decision as proof of compliance. The County also defended its referencing of policies and regulations found noncompliant and invalid.

The County claimed its use of the term “intent” of the comprehensive plan enabled the County to turn to intent where the CP’s language is ambiguous. The County observed that a checklist for environmental amendments does not itself establish quantitative thresholds for objective criteria.

Conclusion

We have a firm and definite conviction that the County erred in adopting Ordinance 112-01. The decision criteria referenced in the provision for minor amendments to special use permits are not specific enough to comply with RCW 36.70A.040(3), requiring consistency with CP and DRs, with Section .060, requiring protection of critical areas, and with Section .172, requiring the inclusion of best available science.

We reject the County’s claim that the opportunity for citizens to sue the County in the absence of specific guidelines constitutes a means of complying with GMA requirements.

Mason DR, Section 1.05.044, Decision Criteria (B), calling for consistency and compatibility with the intent of the comprehensive plan, is before us because it is referenced in the ordinance, Section 1.05.048, Minor Amendment. Tying consistency to the “intent” of the plan, other than to the plain words of the plan

itself, invites a series of decisions by different Administrators or Boards of County Commissioners that precludes consistency. It therefore is noncompliant. The absence of any definition of “minor” amendments precludes certainty and is noncompliant. The criteria of “no significant change” and “uses inconsistent with the decision criteria” are too vague to afford the administrator an “anchor of consistency” for his decisions.

Decision criteria must be expanded to address impact beyond merely adjacent lands to lands surrounding and/or downstream of the site of the special use permit in order to comply with Section .060 and .172 of the Act.

The County must clarify that reliance by reference on the CAO and the CP for guidance in determining approval for minor amendments to special use permits refers only to the compliant portions of the CP or CAO.

In Exhibit 1, September 27, 2001 Staff Report, the Planning Department noted that the “current development regulations ordinance has no standards set forth to address the possible revision or amendment to a land use previously approved by a special use permit. A set of procedures for the revision of an approved shoreline permit is detailed in the Mason County Shoreline Master Program, Chapter 7.13.080.” The vagueness of the Minor Amendments Section (1.05.048) is, in its language, analogous to the vagueness that we find in Section 7.13.080 of the Shoreline Master Program (SMP). The SMP section requires the Administrator to determine if the revision is “within the scope of intent of the original permit set forth.” But the Shoreline Master Program’s original permit is approved under Shoreline Management Act guidelines. Unlike their counterpart DR Section 1.05.044, the SMP guidelines and requirements are very specific and quantitative, requiring delineated setbacks and other measures. In contrast, the Minor Amendments section merely refers back to the Decision Criteria section under Special Uses (1.05.044), which is vague, subjective, and not quantitative.

We find that petitioners have not met their burden of proof regarding substantial interference with the fulfillment of the goals of the Act and so decline to enter a finding of invalidity.

ORDER

Within 180 days, the County must remove the phrase ‘intent of the comprehensive plan’ regarding compliance of minor amendments. The County must develop decision criteria that identify thresholds by

which “detriment to public health, safety and welfare,” “mitigation of hazardous conditions,” and “impacts on existing uses” in nearby lands can be measured. The County must make clear that permits must be consistent with compliant portions of the CP and the CAO and do not rely on portions of the CP or CAO which have been found noncompliant, and have not yet been amended.

Impacts must be assessed in areas beyond adjacent lands that are significantly affected.

We note that in response to questions, Petitioner Diehl had indicated that he had submitted recommendations for more specific criteria to the County Office of Community Development, but that, according to Mr. Diehl, the County did not apparently consider them.

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 11th day of April, 2002.

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. Section 1.05.044, Decision Criteria, of Ordinance 82-96 is referenced in Ordinance 112-01, Section 1.05.048, Minor Amendments, Ordinance 112-01.
2. The ordinance includes by reference other ordinances or plan portions previously found noncompliant. Some noncompliant portions of the plan and its implementing ordinances serve as guidance for actions under the Minor Amendment section.
3. Decision criteria require consideration of impact on only adjacent lands. The ordinance fails to require critical area protection in non-adjacent lands materially affected by the permit amendment.
4. The ordinance fails to define “minor” amendments.
5. Section 1.05.044 guidelines do not provide specific decision criteria.