

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

CLEAN WATER ALLIANCE, et al.,)	
)	No. 02-2-0002
Petitioners,)	
)	FINAL DECISION
v.)	AND ORDER
)	
)	
WHATCOM COUNTY,)	
)	
)	
)	
Respondent,)	
)	
and)	
)	
SUDDEN VALLEY COMMUNITY ASSOCIATION)	
)	
Intervenor,)	
)	

SYNOPSIS OF THE ORDER

We find the County to be in compliance regarding SEPA. We are unable to achieve a quorum under RCW 36.70A.270(4) regarding a decision on whether the County, in adopting Ordinance #3001-071, has complied with the requirements of RCW 36.70A.110 regarding urban growth areas. We therefore do not address other issues of stormwater, transportation, and fisheries, owing to our inability to achieve a quorum under Section .270(4). The ordinance is presumed valid upon its adoption under RCW 36.70A.320(1).

Summary of Challenges to Ordinance #2001-071

The petitioners' PFR presented a broad array of challenges, many of which we deemed to be

beyond the scope of the changes wrought by the ordinance. Only amendments to the prior plan or development regulations (DRs) are reviewable for compliance and consistency. Unamended portions of the plan and DRs are valid and not subject to challenge. The ordinance did not amend its capital facilities element, its transportation element, its stormwater regulations, or critical areas regulations. Therefore, issues alleging noncompliance with these specific requirements of the Act may not be challenged in this proceeding.

The goals of the GMA clearly apply to the plan and development regulation so that challenges to compliance with the goals of the Act are questions within our jurisdiction. As the County changed rural lands to urban lands, challenges to the County's compliance with the UGA requirements of Section .110 are within the scope of this proceeding, as is the internal consistency of the amendments with the plan. Indeed, compliance with the requirements of Section .110 is the central question of this case.

As we have held that the Act does not allow us to impose more stringent standards for standing on SEPA issues than are present for other issues, SEPA actions are open to challenge under the same standard of review that applies to the rest of the Act.

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

Pursuant to RCW 36.70A.320(1), Ordinance #2001-071 is presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the action taken by Whatcom 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 [Whatcom 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).

Discussion and Conclusion

SEPA (State Environmental Policy Act) Issues

Petitioners argued that the County SEPA official's threshold determination (that an environmental impact statement (EIS) would not be required) was in violation of SEPA because information which should have been considered was overlooked by the official in reaching his decision. Petitioners asserted that a final EIS (FEIS) developed for a Water District #10 development project should have been reviewed.

The County responded that, under pertinent SEPA regulations, a SEPA official must consider the environmental checklist but not "extraneous information of the sort which petitioners now submit to the Board in their brief." The County pointed out that the statutorily-contemplative process for SEPA determinations includes a public comment period, which was provided. The County maintained that, aside from a letter from the Washington State Office of Community Development (CTED) which notified the SEPA official that CTED had forwarded his notice of the determination to other potentially-interested state officials, no comments were received.

We note that the determination became final after the comment period on July 5, 2001. We further point out that our June 5, 2002 Order Denying the Motion to Dismiss Claims Due to Lack of Standing Regarding Issues 3.19 and 3.20 (SEPA, MDNS issues) found the issues to be timely raised because of an email from Mr. Paxton on June 27, 2001, and June 28, 2001 testimony of Ms. Wells before the Planning Commission established standing under the GMA to challenge SEPA issues contrary to arguments of Intervenor. Obviously, the actions of petitioners in establishing standing to challenge the SEPA decision were made after the comment period, which provided no benefit to the SEPA official in his determination of the requirements for an FEIS or a mitigated declaration of non-significance (MDNS). It may be ironic that the establishment of standing by the petitioners to raise SEPA issues also demonstrates their failure to bring before the SEPA official the documents that they maintain should have been reviewed by him during the SEPA process.

Conclusion

We conclude that petitioners have failed to meet their burden of demonstrating clear error on the

part of the SEPA official for failing to consider documents which were not brought before him. We find the County in compliance with the requirements of SEPA.

We agree with the County's argument that the SEPA official did not receive any information which would have contradicted or undermined the veracity of any of the information contained in the environmental checklist. Therefore, nothing in the record indicated to the official that the provisional UGA designation would have any significant adverse environmental impacts. The density reduction which the new designation carries with it suggests that environmental impacts are not likely to happen. There is nothing in the record of this case which would lead to the conclusion that the official's decision was clearly erroneous. The County noted that Ordinance #2001-071 "maintains the regulatory status quo in respect to all development regulations." If and when Sudden Valley incorporates, it would adopt DRs which would be subject to SEPA scrutiny at that time.

ORDER

We find the County to be in compliance regarding SEPA. We are unable to achieve a quorum under RCW 36.70A.270(4) regarding a decision on whether the County, in adopting Ordinance #3001-071, has complied with the requirements of RCW 36.70A.110 regarding urban growth areas. We therefore do not address other issues of stormwater, transportation, and fisheries, owing to our inability to achieve a quorum under Section .270(4). The ordinance is presumed valid upon its adoption under RCW 36.70A.320(1).

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and attached as Appendix I and incorporated herein by reference. Sections on procedural history, day-of-hearing motions and additions, as well as *ex parte*, post-hearing communications are each adopted and attached as Appendix II 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 9th day of August, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

Nan A. Henriksen
Board Member

Appendix I
Findings of Fact
Pursuant to RCW 36.70A.270(6)

1. The County SEPA official ruled on the basis of information before him.
2. Any DR or plan changes regarding Sudden Valley made subsequent to this order will be subject to SEPA scrutiny.

Appendix II

PROCEDURAL HISTORY

From the beginning, this case was characterized by delay after delay owing to petitioners' failure to follow the rules of WAC 242-02 regarding submission of issue statements in the petition for review, proper filing of motions, *ex parte* communication, and timely responses. At the hearing on the merits, July 10, 2002, we received from petitioners a dispositive motion, a number of proposed exhibits not in the record, two declarations not in the record, a new table of authorities and another motion to take official notice. As these were submitted long after the March deadline for submitting motions, and as the other parties and the Board were not afforded the opportunity to review them before the hearing had commenced, we took them under advisement and informed the parties that we would rule on them subsequent to our review. Petitioner Wells insisted that Mr. Loeff's declaration be admitted to the record in support of her reply to the response brief. The presiding officer informed her that we would not admit Mr. Loeff's declaration at that time as we had not had an opportunity to examine it nor had the parties had such an opportunity. Their reply brief was accepted as per our briefing schedule.

Present for the Board at the Hearing on the Merits were Presiding Officer Les Eldridge and Hearing Examiner Edward G. McGuire. Owing to a medical emergency, Board Member Nan A. Henriksen was not present, but later listened to the tapes of the proceeding. Board Member William H. Nielsen had earlier recused himself. Petitioners Sherilyn Wells and Tim Paxton represented themselves and Clean Water Alliance. Mr. Phil Sharpe represented Intervenor Sudden Valley Community Association. Mr. David Grant, Deputy Prosecutor, represented Whatcom County.

The reply briefs were scheduled on the hearing day because Petitioner Wells had requested an extension of the briefing period as she claimed that she had not received documents from us or from the other parties in time to make a timely response. We had granted her request for extending time. This was the third occasion on which we had to alter the briefing schedule because of petitioners' actions. The initial petition for review (PFR) was so unspecific as to place the County at an unfair disadvantage in attempting to respond to her challenges. Petitioners' first amended PFR was likewise unspecific. It was not until their third PFR attempt that they reached the degree of specificity which allowed a fair challenge to the actions of the County. We cautioned all parties at the time that motions submitted at the last minute or on the day of the hearing have frequently been denied by this Board on the grounds that they interfered with the

prompt and orderly conduct of the proceedings. WAC 242-02.

Our declarations of service regarding this case demonstrate that not only were our orders mailed in a timely fashion but that they were also sent by facsimile the same day. The declaration of service for the order entered July 3, 2002, which Petitioner Wells claimed she received only days before the hearing demonstrates that it was sent by U.S. mail and facsimile on July 3, 2002.

Day-of-Hearing Motions and Additions, *Ex Parte*

Post-Hearing Communications

On the day of the hearing we received a number of additional proposed exhibits, declarations, a dispositive motion regarding SEPA, a motion for an opportunity to respond to our Order Re: Additions to the Record (July 3, 2002), and a motion to take official notice. We informed parties that as these motions were submitted at the hearing and opposing parties had had no opportunity to review and comment upon them, that we would take them under advisement and rule on them subsequent to the hearing. Respondent and Intervenor objected to the motions and potential exhibits. Having considered the motions we rule as follows:

We find the proposed exhibits and declarations not necessary nor of substantial assistance to the Board in reaching its decision and decline to admit them to the record. We deny the dispositive motion regarding SEPA procedural violations as untimely. We note that a principal aim of the motion, to preserve the right of all three petitioners to raise SEPA issues, has been ruled upon favorably in our order denying the County's motion to dismiss claims due to lack of standing regarding SEPA and MDNS issues (June 5, 2002).

We deny petitioners' motion for opportunity to respond to our order of July 3, 2002. Procedural orders regarding additions to the record are not subject to motions for reconsideration. WAC 424-02. We deny the motion to take official notice. We find the ordinances referenced in the motion not to be necessary nor of substantial assistance to the Board in reaching a decision.

On July 17, 2002, we admonished Petitioner Paxton for sending *ex parte* argument after the conclusion of a hearing. We noted that such *ex parte* communication can subject the sender to the provisions of WAC 242-02-120 and -720, allowing us to decline his

appearance in representative capacity at any current or any future proceeding, and allowing case dismissal by the Board on our own motion for failure by parties to comply with WAC 242-02, or any other orders of the Board.