

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

JOHN E. DIEHL, KERRY HOLM, GORDON)	
JACOBSON, and VERN RUTTER, individually, and as)	No. 95-2-0073
members of the MASON COUNTY COMMUNITY)	
DEVELOPMENT COUNCIL (MCCDC),)	COMPLIANCE
)	ORDER
Petitioners,)	(FOR
)	COMPLIANCE
v.)	HEARING #16)
)	
)	
MASON COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
PETER OVERTON, DONALD B. PAYNE,)	
McDONALD LAND COMPANY, HUNTER)	
CHRISTMAS TREES, HUNTER FARMS, SKOOKUM)	
LUMBER COMPANY, MANKE LUMBER COMPANY)	
and MASON COUNTY PRIVATE PROPERTY)	
ALLIANCE (MCPA),)	
)	
)	
Intervenors,)	
)	

Synopsis of the Order

Fish and Wildlife Habitat Conservation Areas (HCAs or F&WHCAs)

We find that the County has failed to respond to the requirements of the Growth Management Act (GMA, the Act) and has failed to demonstrate that the provisions of Ordinance #10-02, adopted in response to our previous finding of invalidity, will no longer substantially interfere with the fulfillment of the goals of the Act. Exemptions for agriculture are still noncompliant. HCA Buffers have not been

raised to best available science (BAS) ranges for saltwater shorelines and lakes 20 acres or greater. Buffer reduction guidelines for the administrator and a public hearing for such reductions, however, are now compliant. We decline to rescind our previous finding of invalidity.

Geologically Hazardous Areas (GHAs)

The County has achieved compliance by establishing compliant distances which trigger geological assessments and geotechnical reports and by providing for public participation regarding adoption of such.

Frequently Flooded Areas (FFAs)

The County's FFA mapping and FFA nomenclature and definitions are now in compliance with the Act. The County has failed to adopt dike monitoring processes and regulations which preclude individual homeowners from preventing inspections, has failed to preclude new construction in FFAs, has failed to designate a floodway under County code, and has failed to clearly delineate avulsion zones. We decline to rescind our previous finding of invalidity regarding FFAs.

Procedural History

On August 24, 2001, we entered an order denying a motion for consolidation of this case and #96-2-0023c, *Dawes, et al., v. Mason County (Dawes)* but granting a motion setting a common action date for compliance. That compliance due date was December 11, 2001. On November 29, 2001, we received a progress report on actions taken by Mason County for GMA compliance in these two cases regarding the general topics of rural areas, frequently flooded areas (FFA), geologically hazardous areas (GHA), and fish and wildlife habitat conservation areas (HCA). On the same day, we received a request for extension of the compliance date in these two cases. The County informed us that additional time was required for adequate

public review for the rural land issues in *Dawes* and the frequently flooded area ordinance changes in *Diehl*. The HCA and GHA portions of *Diehl* were to be completed by the December 11, 2001 due date. On December 11, 2001, we granted the motion requesting a new due date of February 26, 2002. Compliance was to be achieved in *Diehl* for FFAs by that date. In *Dawes*, compliance was to be achieved by the same date regarding issues generally concerning rural lands and including mapping noncompliance.

On January 24, 2002, we set a briefing and hearing schedule culminating in a compliance hearing May 16, 2002. On April 16, 2002, we granted a motion to supplement the index of documents from Mason County Community Development Council (MCCDC) by adding #3033, #3147, #3148, #3149, and #3150. On May 14, 2002, we denied a motion from Mason County to supplement the index with proposed #3035. We granted a motion to supplement the record from Mason County regarding proposed index #3236, #3237, #3238, and #3034 for the index of the record in both *Dawes* and *Diehl*. Because the indices in these cases contain so many duplications, we long ago combined them into one index.

Compliance Hearing

A compliance hearing was held May 16, 2002 at the Shelton Memorial Hall, 2110 West Franklin Street, Shelton, Washington. Present for the Board were Les Eldridge and William H. Nielsen. Board Member Nan Henriksen was unavailable. Deputy Prosecutor Darren Nienaber and Mr. Robert Fink represented Mason County. David Mann represented MCCDC. Petitioner John E. Diehl represented himself. Joe Christy, Jr. represented Participant Skokomish Indian Tribe (Tribe). We denied the May 13, 2002, motions from the County to supplement the index with proposed index #3036, #3037, #3240 for this case, and #3241 in the *Dawes* case. In our August 14, 2002 compliance order in *Dawes*, we granted the County's motion to add

Ordinance #47-02 (pertaining to *Dawes*) to the joint index of the record as Ex. #3241.

Standard of Review, Presumption of Validity, Burden of Proof

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 GMA. 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 19, 201 (1993).

To rescind the Board’s previous finding of invalidity, respondent Mason County must demonstrate that the provisions of Ordinance #10-02 enacted in response to the finding of invalidity, “will no longer substantially interfere with fulfillment of the goals of [the Growth Management Act]...” RCW 36.70A.320(4).

Summary of Requirements and Issues

The requirements and issues in 95-2-0073 (*Diehl*) are summarized as follows:

HCAs

1. Bring Ordinance #89-00, 17.160.110.F, blanket exemptions for agriculture, into compliance (currently invalid and noncompliant).
2. Bring Ordinance #89-00, 17.160.110.D, establishment of buffers in FWHCAs, into compliance. Raise buffers to best available science (BAS) ranges for saltwater shorelines and lakes 20 acres or greater. Establish clear guidelines for the administrator regarding 25 percent reductions in buffers. Require a public hearing on such reductions (currently invalid and noncompliant).

GHAs – (Currently noncompliant but not invalid)

1. Establish compliant distances triggering geological assessments and geotechnical reports. Provide for public participation regarding adoption of such triggering distances.
2. Insure that BAS inclusion for protection of HCA functions and values within shoreline buffers in GHAs is referenced.

FFAs

1. Invalid sections:
Ordinance #5-01, Section 4.4-2, Sections 5.1 through 5.4-4, Section 5.4-5.
2. Invalid requirements and issues:
 - a. Adopt dike monitoring and regulations which will preclude individual homeowners from preventing inspections. Make provision for inspecting, monitoring and listing existing dikes.

- b. Preclude new construction in FFAs.
3. Noncompliant requirements and issues:
 - a. Provide clear FFA mapping.
 - b. Provide clear FFA nomenclature and definitions.
 - c. Clearly delineate avulsion zones.
 - d. Reference and apply HCA and Shoreline Master Program (SMP) ordinance provisions which include BAS to protect functions and values within FFAs.

Discussion and Conclusions

Discussion and Conclusion - FFAs

Participant Skokomish Indian Tribe (Tribe) contended that Mason County had failed to comply with our order to remedy issues of invalidity with regard to frequently flooded areas by failing to include BAS when adopting Ordinance #10-02, amendments to the Flood Damage Prevention Ordinance (FDPO). The Tribe maintained that the County, by failing to prohibit development in areas at risk for river avulsion, increased the potential that people will take extreme measures to protect their property and negatively impact the fishery resource while leading to increased flooding on the reservation. Further, the Tribe declared that the County, by failing to adequately address the environmental impacts and public safety risks associated with the existence of sub-standard dikes in the valley, placed the Tribe's and the valley's resources at risk. The Tribe contended that the FDPO continues to substantially interfere with fulfillment of GMA Goals #8, natural resources industries, #9, open space, and #10, protection of the environment.

The Tribe noted that BAS is designed to prevent "the unwise development of...areas susceptible to natural hazards". WAC 365-190-020. This WAC, promulgated by the

Washington State Department of Community, Trade, and Economic Development (CTED), advises that “in some cases the risk posed by user development of a critical area can be reduced or mitigated by engineering or design; in other cases that risk cannot be effectively reduced except by avoidance of the critical area”. The Tribe contended that BAS in this case had demonstrated that the Skokomish River Valley contains a significant risk of river avulsion. The reports of Skillings-Connelly constitute BAS in this case (July 24, 2000 order at 11, May 4, 1999 order at 6). The Tribe noted that Skillings-Connelly addressed the issue of avulsion risk with specificity. The Tribe noted that we had previously stated, based on the Skillings-Connelly report, that inclusion of BAS means that the County’s FFA regulations must contemplate the likelihood of river avulsion. We had noted that Skillings-Connelly was unequivocal in its warnings about public safety risks of major avulsion.

The Tribe went on to state that the County had attempted to circumvent BAS requirements by redefining BAS in this case. The County had claimed that the previous usage of the term “avulsion risk and overbank flow paths” was based on anecdotal information and not based on measurements made through scientific engineering studies. The Tribe contended that overbank setback requirements do not constitute a close parallel to prohibiting development in areas subject to the threat of river avulsion. The Tribe insisted that the County has failed to give special consideration to anadromous fisheries.

Petitioners MCCDC pointed out that Mason County’s reasonable use exception “purports not to pertain to residential development within designated floodways,” therefore precluding such development. Yet, MCCDC noted, the Skokomish River floodway is not a “designated floodway” under County code. Thus, stated MCCDC, the County still allows residential development within the Skokomish River

floodway through the reasonable use exception. MCCDC quoted County staff person Allan Borden, Ex. #3033, “the risk of avulsion could occur anywhere in the valley.” MCCDC claimed that, “rather than demonstrating that there are no areas at risk for avulsion, it appears that the County staff’s conclusion is that the entire river valley is vulnerable.”

Petitioner Diehl noted that the County mapped the bulk of the Skokomish River FFA as a “conditional build zone” allowing new construction subject to certain restrictions. He recalled that we had required the County to preclude construction in the FFA and maintained that the County had refused to comply. He pointed out that the County will use the reasonable use exemption to allow new construction even in its “no new footprint” zone because it has not established a floodway in the Skokomish River Valley. In other words, claimed Mr. Diehl, “there is no area in the valley where new construction is precluded, absolutely contrary to this Board’s order”.

Petitioner Diehl identified three problems regarding dikes: 1) learning exactly what diking has occurred, 2) monitoring to determine current condition, and 3) adopting and enforcing regulations to properly construct and maintain dikes. Mr. Diehl contended that the County’s regulations are inadequate to accomplish any of these purposes. He quoted the Corps of Engineers Exhibit #2850, “access to dikes #5, #6, portions of #8, #9, and #35, were denied and this has caused significant limitations to the work presented.” Mr. Diehl noted that the County cannot attempt an inspection without a determination by the Public Works Director of an “imminent flood threat to the public health safety and welfare such as rainfall within the last 48 hours in excess of 4 inches,” Exhibit #3000 at 29. The Public Works Director may recommend to the Board of County Commissioners (BOCC) that it declare an emergency, but no inspection is insured. He pointed out that nothing required the

Public Works Director to make a recommendation nor obliged the BOCC to accept such a recommendation. He observed that there are no provisions for quick action if landowners continue to deny access to would-be inspectors. Moreover, he said, emergency high water conditions severely limit the kinds of inspections it would be feasible to make, since the dikes would then likely to be at least partly submerged. Further, he noted, given that poorly constructed dikes give rise to the likelihood of sudden and unexpected dike failure at unpredictable locations, it is probably too late to address this problem if inspection occurs only after an emergency situation arises.

Petitioner Diehl maintained that the County lacks both the will and the basic development regulations it needs to prevent construction or reconstruction of dikes from interfering substantially with the protection of frequently flooded areas.

The County responded that it now has clearly mapped, defined, and regulated the substance of the maps. The County noted it had met with the Department of Ecology representatives and the Skokomish Tribe, and contended that there were no objections from the Tribe in front of the County Commissioners. The County noted that the avulsion risk zone was deleted and replaced by the overbank setback requirement and that the setback “treats the entire river as a potential avulsion risk.” The County further claimed that “asking an engineer where Skokomish avulsion risk areas are located is like asking a geologist where the next earthquake will be: it is nearly impossible to tell because there too many factors to consider.”

The County agreed with Petitioner Diehl that the long-term avulsion risk is “pervasive”. The County maintained that by using the overbank setback requirement instead, the County has not “conveniently forgotten to produce DRs appropriate to such risks,” in the words of Petitioner Diehl, because the County has DRs relating to the overbank setback requirement.

Conclusion

If the County believes, as it states, that it is treating the entire valley as a potential avulsion risk, then it has failed to produce DRs commensurate with that treatment by failing to prohibit development in areas at risk and by failing to provide mechanisms which preclude individual homeowners from preventing dike inspection. The County has failed to respond with the requirements of the GMA regarding construction in the designated floodway. As MCCDC noted, the Skokomish River floodway is not a designated floodway under County Code, so the County still allows residential development within the floodway through the reasonable use exception.

We find that the County's ability to inspect only with a determination by the public works director of an eminent flood threat to the public health, safety and welfare, precludes meaningful periodic inspection. The County has failed to demonstrate that Ordinance #10-02, adopted in response to our earlier finding of invalidity, no longer substantially interferes with the fulfillments of the goals of the Act. The FDPO remains under a determination of invalidity.

While the FFA maps, nomenclature and definitions are now clear, we note that Section 2 (definitions) of Ordinance #10-02 contains no definition of "Designated Floodway." Yet, Section 4.4-2(3) states:

"Variances shall not be issued within a *designated floodway* if any increase in flood levels during the base flood discharge would result."

Section 4.4-3 (reasonable use exception) states:

"The reasonable use exception is not intended to allow residential development in *designated floodways*." Emphasis supplied.

Discussion and Conclusion - HCAs

The County noted that it had spent an “extraordinary” amount of time working with the Washington Department of Fish and Wildlife (WDFW) to improve its fish and wildlife ordinance. They noted that, in its amicus brief, WDFW indicated that it would rather have a 100-foot buffer than a 75 foot buffer, with a 15 foot setback as the County had adopted in Ordinance #17-02. They noted that the WDFW said the County’s buffer “addresses its primary concerns and provides significant fish and wildlife protection.”

The County noted that WDFW “expressed some concern regarding the meaning of the agricultural exemption,” but noted that WDFW “no longer feels it necessary to participate in this compliance proceeding.”

The County next pointed out that the general exemption under Mason County Code (MCC) 17.01.130.B for agricultural activities on lands designated as resource was not part of our previous remand and therefore the County deleted the blanket exemption for agricultural referenced only in MCC 17.01.110.F.3. It noted that the exemption only applies to those agricultural activities within resource lands.

MCCDC responded that the previous versions of Mason County’s ordinance Section .110.F provided a blanket exemption for ongoing and existing agricultural uses within County HCAs or buffers. MCCDC noted that while the County removed one reference to the blanket exemption, there remained two more. One in Section 110.F.3 now reads “ongoing and existing activities (such as lawn and garden maintenance)”. MCCDC pointed out the amended ordinance now exempts all ongoing and existing actives. Section 100.F.9 exempts from HCA requirements “any of the general exemptions authorized by Section .130” and included when in those an exemption for existing and ongoing agricultural activities on lands

designated as resource. MCCDC supported Petitioner Diehl's arguments regarding shoreline buffers. Petitioner Diehl noted that WDFW has not endorsed the County shoreline buffers as "justifiable within the range of BAS." Rather, Diehl maintained, WDFW's scientists stated the "100-foot no touch buffers should be regarded as a minimum." The County's 75-foot buffers do not reach that minimum and so are not justifiable as within the range of BAS. Mr. Diehl maintained that there is not a single science-based recommendation in the record for any shoreline HCA buffers less than 100 feet in width. He also pointed out that the County's contention, that the remand asked only for removal of .F.3 in the agricultural practices general exemption, is not to be found in the language of our previous order.

Conclusion

The County has failed to meet its burden of demonstrating that the amended Mason County Code regarding agricultural exemptions and HCA shoreline buffers no longer substantially interferes with the goals of the Act.

Under this record, it is clear that WDFW and others consider 100 feet a minimum for HCA buffers. WDFW stated that the County had achieved "significant progress toward compliance." It did not state that the progress, in its view, constituted compliance. WDFW stated the "ordinance has addressed saltwater shoreline and larger lake buffers." It again did not state that, in its view, the buffers included BAS. It further stated it "remains concerned about how the General Exemption for ongoing and existing agriculture in MCC 17.01.130 will affect protection of F&WHCAs under MCC 17.01.110." The County has failed to demonstrate a 75-foot buffer constitutes inclusion of BAS and is sufficient to remove substantial interference with the fulfillment of the goals of the Act. We decline to rescind our previous findings of invalidity regarding buffers.

GHAs

The County noted that it had made specific corrections regarding triggering distances which we call for in our previous remand. Petitioner Diehl acknowledged that this had taken place. The County noted that Petitioner Diehl's concerns under MCC 170.01.100E7 regarding fish and wildlife HCAs are dealt with under the HCA section. Petitioner Diehl made the observation that the GHA section will become compliant when fish and wildlife habitat conservation areas become compliant. As compliance relating only to the GHA ordinance has been achieved, HCA compliance will be assessed in a future order during review of a response to our remand under this order for HCAs. We therefore find the GHA section of the ordinance compliant.

ORDER

Within 180 days, the County must bring the Mason County Flood Damage Prevention Ordinance into compliance and remove substantial interference with the fulfillment of the goals of the Act by:

1. Adopting dike monitoring procedures and regulations which will preclude individual homeowners from preventing inspections and which will make provision for inspecting, monitoring, and listing existing dikes.
2. Precluding new construction in the FFA.
3. Designating the FFA as a designated floodway under County code.
4. Declaring the designated floodway an avulsion zone.

Within 180 days of the day of this order the County must bring Ordinance #17-02 into compliance and remove substantial interference with the goals of the Act by:

1. Raising buffers to BAS ranges not less than 100 feet for saltwater shorelines and lakes 20 acres or greater.

2. Eliminating the MCC blanket buffer exemption for agriculture.

Findings of Fact and Conclusions of Law pursuant to RCW 36.70A.302(1)(b) 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 23rd day of August, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member

Appendix I

Findings of Fact and Conclusions of Law Pursuant to RCW 36.70A.302(1)(b)

Findings of Fact

1. The County set its saltwater shoreline and larger lake buffers at 75 feet.
2. BAS buffer minimums are 100 feet.
3. The County did not remove its blanket buffer exemption for agriculture.
4. The County has failed to adopt dike monitoring processes and regulations which preclude individual homeowners from preventing inspections.
5. The County has failed to preclude new construction in FFAs.
6. The County has failed to designate a floodway under County code.
7. The County has failed to clearly delineate avulsion zones.

Conclusions of Law

1. The FDPO substantially interferes with the fulfillment of Goals #8 (natural resource industries), #9 (open space and recreation, including conservation of fish and wildlife habitat), and #10 (environment) and is invalid.
2. Ordinance #17-02 substantially interferes with the fulfillment of Goals #8 (natural resource industries), #9 (open space and recreation, including conservation of fish and wildlife habitat), and #10 (environment) and is invalid.