

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 KIP DUNLAP

4
5 Petitioners,

Case No. 06-2-0001

6 v.

ORDER FINDING COMPLIANCE

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8 CITY OF NOOKSACK,

9 Respondent

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12 This matter comes before the Board following the submittal of the City of Nooksack's (City)
13 Compliance Report. The Board's July 7, 2006 Final Decision and Order (FDO) found that
14 the failure of the City to properly extend the comment period to allow comment on the
15 significantly revised draft of Ordinance 595 (adopting a critical areas ordinance) prior to
16 adoption was clearly erroneous and in violation of RCW 36.70A.035(2)(a) and RCW
17 36.70A.020(11). The Compliance Report describes that the City of Nooksack provided
18 additional public notification and hearings regarding the changes to the City's critical areas
19 ordinance. No objection to a finding of compliance was filed by Petitioner Kip Dunlap or any
20 other participant in the compliance proceedings.
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24 **I. SYNOPSIS OF DECISION**

25 The Board finds that the City has achieved compliance by providing proper public notice
26 and an opportunity for public comment on revisions to Chapter 16.08 of the Nooksack
27 Municipal Code, amending its critical areas ordinance (CAO).
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29 **II. PERTINENT PROCEDURAL HISTORY**

30 Mr. Dunlap's first Petition for Review was filed in early 2005 and was captioned WWGMHB
31 case 05-2-0001. However, after settlement discussions, the parties agreed to dismiss the
32 petition pending the City's adoption of a new critical areas ordinance (CAO) in 2005. The

1 City adopted the final version of that ordinance (Ordinance 595) on December 19, 2005.
2 Petitioner Kip Dunlap filed the instant case on January 13, 2006. Three challenges were
3 brought:

- 4 1. a challenge to the requirements of RCW 36.70A.060(1) and 36.70A.040(3) to
5 conserve and protect agricultural resource lands;
- 6 2. a challenge to the public participation and notice provisions of the GMA; and
- 7 3. a challenge to the consistency of the City's CAO with the policies of adjacent
8 jurisdictions under RCW 36.70A.100.
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10 In its final decision on the merits, the Board found that Ordinance 595 complies with the
11 requirements of RCW 36.70A.060(1) and 36.70A.040(3) to conserve and protect agricultural
12 resource lands (Issue No.1); and the consistency requirements of RCW 36.70A.100 (Issue
13 No. 3). However, the Board also found that significant changes to the original language
14 proposed for Ordinance 595 had been made without providing the public an opportunity to
15 review and comment upon those changes and violated RCW 36.70A.035(2)(a) and RCW
16 36.70A.020 (11).¹ The Board remanded Ordinance 595 to the City for compliance with
17 RCW 36.70A.035(2) and 36.70A.020(11).
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20 On October 4, 2006, the City filed its Compliance Report describing the City of Nooksack's
21 compliance efforts in providing additional public notification and hearings regarding the
22 changes to the City's critical areas ordinance. No objection to a finding of compliance was
23 filed. On October 27, 2006, the Board held a telephonic compliance hearing. Mr. Thomas
24 Fryer, City Attorney, represented the City and was accompanied by Rollin Harper, Planner
25 for the City of Nooksack. Mr. Dunlap, the Petitioner did not attend. All three Board members
26 attended.
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¹ Final Decision and Order, July 7, 2006.

1 **III. BURDEN OF PROOF**

2 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
3 of time to adopt a legislative enactment to achieve compliance. RCW 36.70A.300(3)(b).

4 After the period for compliance has expired, the board is required to hold a hearing to
5 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and
6 (2). For purposes of board review of any comprehensive plan amendments and
7 development regulations adopted by local governments in response to a non-compliance
8 finding, the presumption of validity applies and the burden is on the challenger to establish
9 that the new adoption is clearly erroneous. RCW 36.70A.320(1), (2) and (3).²

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13 In order to find the City's action clearly erroneous, the Board must be "left with the firm
14 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
15 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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18 Within the framework of state goals and requirements, the boards must grant deference to
19 local governments in how they plan for growth:

20 In recognition of the broad range of discretion that may be exercised by counties and
21 cities in how they plan for growth, consistent with the requirements and goals of this
22 chapter, the legislature intends for the boards to grant deference to the counties and
23 cities in how they plan for growth, consistent with the requirements and goals of this
24 chapter. Local comprehensive plans and development regulations require counties
25 and cities to balance priorities and options for action in full consideration of local
26 circumstances. The legislature finds that while this chapter requires local planning to
27 take place within a framework of state goals and requirements, the ultimate burden
28 and responsibility for planning, harmonizing the planning goals of this chapter, and
29 implementing a county's or city's future rests with that community.
30 RCW 36.70A.3201 (in part).

31 In sum, the burden is on the Petitioner to overcome the presumption of validity and
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² If a finding of invalidity has been entered, the burden is on the local jurisdiction to demonstrate that the ordinance or resolution it has enacted in response to the finding of invalidity no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4).

1 demonstrate that any action taken by the City is clearly erroneous in light of the goals
2 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
3 Where not clearly erroneous and thus within the framework of state goals and requirements,
4 the planning choices of the local government must be granted deference.
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6 **IV. ISSUE PRESENTED**

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8 Does the City's most recent adoption of Ordinance 595³ comply with RCW 36.70A.035(2)
9 and RCW 36.70A.020(11)?
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11 **V. DISCUSSION**

12 The Board's July 7, 2006 Final Decision and Order (FDO) remanded Ordinance 595
13 (Chapter 16.08, Nooksack City Code) to the City for compliance with RCW 36.70A.035(2)
14 and RCW 36.70A.020(11). On remand, the City took a number of steps to comply with RCW
15 36.70A.035(2) and RCW 36.70A.020(11), specifically:
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- 17 • On July 26th and August 2nd, 2006 the City provided public notification in the
18 Lynden Tribune regarding the extension of the public comment period within
19 which to provide comments on proposed changes to Chapter 16.08 of the
20 Nooksack City Code.
- 21 • Notification regarding the extended comment period and public hearings was
22 provided by posting notices at the Nooksack City Hall, the Nooksack Post
23 Office and the Everson Public Library.
- 24 • Public hearings regarding the proposed revisions to Chapter 16.08 were re-
25 opened on August 7, 2006 and continued through August 21, 2006.
- 26 • At the August 21, 2006 hearing, the City Council decided to keep the public
27 hearing open through September 5, 2006 and directed City staff to incorporate
28 the staff recommended changes into the final draft revisions to Chapter 16.08
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32 ³ The City has most recently amended Chapter 16.08 of the Nooksack Municipal Code by adopting Ordinance No. 607. Section 1 of that ordinance repeals Ordinance No. 595.

1 and to notify the public regarding the availability of those revisions, the
2 extended public comment period, and the holding of the September 5, 2006
3 public hearing.

- 4 • Public notification of the availability of the final version of Chapter 16.08, the
5 extended comment period and the additional public hearing was provided
6 through publication in the Lynden Tribune and through public posting of
7 notices.
- 8 • On September 5, 2006, the public hearing regarding proposed revisions to
9 Chapter 16.08 was re-opened and additional opportunity for public testimony
10 was provided.
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14 The City presented the details of this adoption process to the Board in its Compliance
15 Report and there was no objection from the Petitioner.
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17 Conclusion: The City has properly provided notice and an opportunity for public comment on
18 the revisions to its critical areas ordinance in compliance with RCW 36.70A.035(2) and
19 RCW 36.70A.020(11).
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21 22 **VI. FINDINGS OF FACT**

23 A. The City of Nooksack is a city in Whatcom County, which is located west of the crest
24 of the Cascade Mountains, and is required to plan under the terms of RCW
25 36.70A.040.

26 B. The Petition for Review in this case challenged the City's adoption of the final version of
27 Ordinance 595 describing and regulating critical areas in that City on December 19, 2005.

28 C. On July 7, 2006 this Board found that the City's adoption of Ordinance 595 failed to
29 comply with RCW 36.70A.035(2) and RCW 36.70A.020(11) because the City failed to
30 properly provide the public with the revisions to the critical areas ordinance and an
31 opportunity to comment prior to its adoption.
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1 F. In response, on July 26th and August 2nd, 2006 the City provided public access to copies
2 of the proposed revisions to its critical areas ordinance and notification in the Lynden
3 Tribune regarding the extension of the public comment period within which to provide
4 comments on proposed revisions to the Nooksack Municipal Code, Chapter 16.08, and
5 dates for additional public hearings at which time additional public testimony regarding
6 proposed revisions to Chapter 16.08 would be received.
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8 G. The City conducted additional public hearings on amendments to Chapter 16.08 on
9 August 7, 2006, August 21, 2006 and September 5, 2006.

10 H. Public notification of the availability of the final version of Chapter 16.08, the extended
11 comment period and the additional public hearing was provided prior to the August and
12 September 2006 public hearings through publication in the Lynden Tribune and through
13 public posting of notices.
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15 VII. CONCLUSIONS OF LAW

16 A. The Board has jurisdiction over this compliance proceeding.

17 B. The City has now cured its defective adoption process for Ordinance 595. Its notice and
18 comment opportunities, including several public hearings fully comply with RCW
19 36.70A.035(2)(a) and RCW 36.70A.020 (11).
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22 VIII. ORDER

23 The City's adoption process for Ordinance 595 (now repealed and replaced by Ordinance
24 607), following remand fully **COMPLIES** with RCW 36.70A.035(2)(a) and RCW 36.70A.020
25 (11) and with the July 7, 2006 remand from this Board. Accordingly this case is **CLOSED**.
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28 Entered this 15th day of November 2006.
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James McNamara, Board Member

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Margery Hite, Board Member

Holly Gadbaw, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means **actual receipt of the document at the Board office** within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)