

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 WHIDBEY ENVIRONMENTAL ACTION
4 NETWORK,

5 Petitioner,

6 v.

7 ISLAND COUNTY,

8 Respondent.
9
10

Case No. 06-2-0023

FINAL DECISION AND ORDER

11
12 **I. SYNOPSIS**

13 The petition for review in this case challenges the adoption of Island County Ordinance C-
14 61-06, which amends Island County Code §16.06.030 - exceptions to the subdivision and
15 short subdivision provisions of the Island County Code. Petitioner Whidbey Environmental
16 Action Network (WEAN) argues that the amendments allow unregulated subdivision of rural
17 and resource lands in violation of Growth Management Act (GMA) requirements for
18 reduction of sprawl in the rural areas (RCW 36.70A.070(5)(c)) and conservation of resource
19 lands (RCW 36.70A.060(1)(a)). The County counters that its amendments simply codify
20 existing exemptions and restrict future application of them.
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23 In this decision, the Board finds that the new exemption fails to comply with the Growth
24 Management Act. The exemption is expressly intended to create new, developable lots.
25 The maps and official Assessor's data show that the new lots thus created will include those
26 of sub-standard sizes for the agricultural and rural zones in which they are located.
27 Because these lots violate the County's minimum lot sizes, established to both protect and
28 conserve agricultural lands as well as to reflect a variety of rural densities in conformity with
29 the County's rural character, Ordinance C-61-06 fails to comply with RCW 36.70A.060(1)(a)
30 and RCW 36.70A.070(5)(c).
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1 The Board also finds that there is a substantial likelihood that incompatible development
2 would occur during the pendency of the compliance remand. Landowners would have a
3 significant incentive to apply for building permits so that the substandard lots could be
4 developed while Ordinance C-61-06 is still in effect. For that reason, the Board finds that
5 the continued validity of ICC 16.06.030(E) as adopted in Ordinance C-61-06, substantially
6 interferes with Goals 2 (reduce sprawl) and 8 (natural resource industries) of the GMA.
7 RCW 36.70A.020(2) and (8).
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9 10 **II. PROCEDURAL HISTORY**

11 Ordinance C-61-06 was adopted by the Island County Commissioners on June 5, 2006.
12 Notice of adoption was published on June 10, 2006. WEAN filed its petition for review in
13 this case on August 9, 2006. A prehearing conference was held on September 5, 2006
14 and an order entered establishing the schedule for the proceedings and setting the issues.¹
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17 WEAN filed two motions to supplement the record in this case². Island County objected to
18 the first motion to supplement on the grounds that it was a new “study” that had not been
19 given to the County Commissioners prior to adoption of Ordinance C-61-06 and was not an
20 official document.³ The Board agreed with the County and WEAN’s first motion to
21 supplement the record was denied.⁴ In response, WEAN filed a Request for Official Notice
22 on November 13, 2006. In that request, WEAN asked the Board to take official notice of
23 official Island County zoning maps and parcel information from the Island County Parcel
24 Data Base Information System. The County did not file an objection to the taking of official
25 notice within ten days of the motion and the Board agreed to take official notice.⁵
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31 ¹ Prehearing Order, September 6, 2006.

² WEAN’s Motion to Supplement the Record, October 2, 2006.

³ Response to Petitioner’s Motion to Supplement the Record, October 9, 2006.

⁴ Order on Motion to Supplement the Record, October 12, 2006.

⁵ Order Taking Official Notice, December 4, 2006.

1 WEAN then filed two more requests for official notice.⁶ In Petitioner's Second Request for
2 Official Notice, WEAN asked the Board to take official notice of provisions of the county
3 codes of 27 other counties in Washington. These code provisions were provided in
4 response to Island County's argument that every other county in Washington has the same
5 code provision.⁷ On those grounds, the Board agreed to take official notice of the offered
6 code provisions of other Washington counties.
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9 In Petitioner's Third Request for Official Notice, WEAN requested the Board take official
10 notice of the "material fact that the Island County Road Atlas maps listed below show which
11 roads are public for the corresponding zoning maps."⁸ The County objected that the maps
12 are not necessary or relevant.⁹ The Board reserved ruling on the third request for official
13 notice since it does not show why the request could not have been brought within the
14 deadline for motions to supplement the record or why the information would be relevant and
15 necessary to the Board's decision.¹⁰ The Board finds that the zoning maps are necessary
16 to show that the roads existing as of 1998 bisect many parcels in both the rural and
17 resource areas, such that lots smaller than the zoning for that area are created. The Board
18 further finds that the zoning maps and Assessor's data are offered in response to the
19 County's challenge to the sufficiency of the earlier maps to show public roads.
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23 WEAN also submitted a second motion to supplement the record.¹¹ In its second motion to
24 supplement the record, WEAN offered the minutes of Island County Board of County
25 Commissioner meetings in 2004, 2005 and 2006 to show that the adoption of Ordinance C-
26 61-06 was part of the County's periodic review of its plan and regulations required under
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28 ⁶ Petitioner's Second Request for Official Notice; Petitioner's Third Request for Official Notice; December 8,
29 2006.

30 ⁷ Respondent Island County's Hearing Brief at page 4.

31 ⁸ Petitioner's Third Request for Official Notice at 2.

32 ⁹ Response to Petitioner's Second Motion to Supplement the Record, and Second and Third Requests for
Official Notice, December 12, 2006.

¹⁰ Order on WEAN's Second and Third Requests for Official Notice, December 13, 2006.

¹¹ WEAN's Second Motion to Supplement the Record, December 11, 2006.

1 RCW 36.70A.130.¹² The County objected that the motion was untimely and the materials
2 offered irrelevant.¹³ The Board agreed with the County, finding that no challenge to RCW
3 36.70A.130 was raised in the petition for review, and denied WEAN's second motion to
4 supplement.¹⁴
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7 The hearing on the merits was held in Coupeville, Washington on December 19, 2006. Due
8 to a family emergency, Ms. Gadbaw was unable to attend but has reviewed the transcript of
9 the proceedings. Steve Erickson appeared for WEAN. Deputy Prosecuting Attorney David
10 L. Jamison represented Island County, assisted by Phil Bakke and Jeff Tate. Board
11 Members James McNamara and Margery Hite were present at the hearing on the merits. At
12 the hearing on the merits, Island County asked the Board to take official notice of its earlier
13 code provisions – ICC 16.04.020(5) in particular and ICC chapter 16.04A in its entirety (the
14 County's short subdivision code). WEAN did not object. Former Chapter 16.06A ICC was
15 admitted as Exhibit R-1.
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17 18 **III. BURDEN OF PROOF**

19 For purposes of board review of the comprehensive plans and development regulations
20 adopted by local government, the GMA establishes three major precepts: a presumption of
21 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
22 decisions of local government.
23

24 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
25 amendments to them are presumed valid upon adoption:
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27 Except as provided in subsection (5) of this section, comprehensive plans and
28 development regulations, and amendments thereto, adopted under this chapter are
29 presumed valid upon adoption.
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31 ¹² *Ibid* at 2.

32 ¹³ Response to Petitioner's Second Motion to Supplement the Record, and Second and Third Requests for
Official Notice, December 12, 2006

¹⁴ Order on Second Motion to Supplement the Record, December 14, 2006.

1 RCW 36.70A.320(1).

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3 The statute further provides that the standard of review shall be whether the challenged
4 enactments are clearly erroneous:

5 The board shall find compliance unless it determines that the action by the state
6 agency, county, or city is clearly erroneous in view of the entire record before the
7 board and in light of the goals and requirements of this chapter.

8 RCW 36.70A.320(3)

9 In order to find the County's action clearly erroneous, the Board must be "left with the firm
10 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
11 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
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13
14 Within the framework of state goals and requirements, the boards must grant deference to
15 local government in how they plan for growth:

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

26 RCW 36.70A.3201 (in part).

27 In sum, the burden is on the Petitioners to overcome the presumption of validity and
28 demonstrate that any action taken by the County is clearly erroneous in light of the goals
29 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
30 Where not clearly erroneous and thus within the framework of state goals and requirements,
31 the planning choices of local government must be granted deference.
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IV. ISSUES PRESENTED

1. By allowing unregulated subdivision of resource lands to urban and suburban densities, does C-61-06 fail to comply with GMA's requirements to conserve agricultural lands of long term commercial significance (RCW 36.70A.060(1)(a))?
2. By allowing unregulated subdivision of rural lands to urban and suburban densities, does C-61-06 fail to comply with GMA's requirements for reduction of sprawl (RCW 36.70A.070(5)(c))?
3. By allowing unregulated subdivision of Island County's rural and resource lands to urban and suburban densities does C-61-06 substantially interfere with the fulfillment of GMA's goals for sprawl and natural resource industries (RCW 36.70A.020(2) and (8))?

V. DISCUSSION

Issue No. 1: By allowing unregulated subdivision of resource lands to urban and suburban densities, does C-61-06 fail to comply with GMA's requirements to conserve agricultural lands of long term commercial significance (RCW 36.70A.060(1)(a))?

Positions of the Parties

WEAN argues that Ordinance C-61-06 allows the creation of new nonconforming substandard lots in agricultural resource land areas because it exempts lots created by public roads from standard lot size requirements in those lands.¹⁵ WEAN offers a number of zoning maps to show that substandard lots, i.e. lots smaller than 20 acres in size, would be created in agricultural zones by allowing new lots to be created when transected by a public road. This, WEAN argues, interferes with the agricultural use of the parcel. It also places development pressure on adjacent farming operations, WEAN claims, thereby failing to conserve resource lands as required by RCW 36.70A.060.

¹⁵ Petitioner's Hearing Brief at 9.
Final Decision and Order
WWGMHB Case No. 06-2-0023
January 24, 2007
Page 6 of 23

1 Island County responds that Ordinance C-61-06 did not increase or expand the opportunity
2 for unregulated subdivisions of agricultural resource lands over what was allowed under the
3 pre-existing exemption.¹⁶ The County points to the subdivision exemption in ICC
4 16.06.030(E), in effect in 1998:

5 Public Right-of-Way Separation. Portions of tax lots physically separated by public
6 rights-of-way and having frontage on a public right-of-way.¹⁷
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8 The amendment to ICC 16.06.030(E), the County argues, restricts the impact of this
9 exemption. Therefore, according to the County, Ordinance C-61-06 makes the exemption
10 “more consistent with the GMA, not less consistent.”¹⁸
11

12 **Board Discussion**

13 Island County Ordinance C-61-06 amends ICC 16.06.030(E), exempting certain land
14 divisions from the requirements of the Subdivision and Short Subdivision provisions of the
15 County Code:
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17 Every division of land for the purpose of development, lease, sale, gift, transfer of
18 Ownership, or other conveyance and every adjustment of property lines shall
19 proceed in compliance with this Chapter. The Subdivision and Short Subdivision
20 provisions of this Chapter shall not apply to:

21 E. Tax Lots Created by Public Right-of-Way Separation. Tax Lots created
22 prior to June 5, 2006 as a result of a Public Right-of-Way Separation. In
23 addition, portions of tax Lots physically separated by public rights-of-way
24 and having frontage on a public right-of-way prior to December 1, 1998
25 are also permitted to create new tax Lots through Public Right of Way
26 Separation one time without otherwise complying with this Chapter. The
27 provisions of this Chapter do apply to any further separations or
28 boundary adjustments.

29 ICC 16.06.030(E).
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31 The amendments of Ordinance C-61-06 alter the existing exemption in ICC 16.06.030(E).
32 The first question presented for Board determination is whether C-61-06 merely codifies

¹⁶ Respondent Island County’s Hearing Brief at 3.

¹⁷ *Ibid* at 4.

¹⁸ *Ibid* at 6.

1 existing legal rights such that the exemption only restricts future application of an existing,
2 development regulation, as the County argues.

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4 The growth boards normally do not have jurisdiction to determine what property rights exist
5 under Washington law since the growth boards are only granted the authority to interpret
6 the Growth Management Act; the State Environmental Policy Act (as to plans and
7 development regulations); and the Shoreline Management Act (also as to plans and
8 development regulations). RCW 36.70A.280. However, here the Board is faced with an
9 argument that the County's action is consistent with the GMA because existing property
10 rights restrict the County from addressing the substandard lot creation that occurred under
11 prior ordinances.
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14 We will, therefore, consider the County's argument first. The County argues that a property
15 owner presently already has the right to an additional lot based on the division of his parcel
16 of land by a public road under two circumstances:
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- 18 1. If the road bisected the parcel and had frontage on a public right-of-way prior to
19 December of 1998; or
- 20 2. If a public road bisected the parcel between December 1998 and June 2006 *and* the
21 property owner had submitted an application for a new tax parcel number by June 5,
22 2006.
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25 To substantiate its claim, the County offers former ICC 16.04A.020 to show that divisions of
26 land by the creation of a public road across that land prior to December 1, 1998 were not
27 required to comply with the subdivision requirements of the Island County Code:
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29 B. The provisions of this chapter shall not apply to:

- 30 5. Division of land due to condemnation, or sale under threat thereof, by an agency
31 or division of government vested with the power of condemnation.

32 Former ICC 16.04A.020(B)(5).

1 The County argues that this code provision had the automatic effect of creating a new lot
2 when a parcel was divided by a public right-of-way. It was repealed effective December 1,
3 1998 and ICC 16.06.030(E) was adopted.
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6 In contrast to ICC 16.04A.020(B)(5), the County argues that ICC 16.06.030(E) (prior to
7 amendment through Ordinance C-61-06) created a new lot only if the property owner whose
8 property was transected filed an application for a new tax lot:

9 Every division of land for the purpose of development, lease, sale, gift, transfer of
10 Ownership, or other conveyance and every adjustment of property lines shall
11 proceed in compliance with this Chapter. The Subdivision and Short Subdivision
12 provisions of this Chapter shall not apply to:

13 E. Public Right-of-Way Separation. Portions of tax Lots [sic] physically separated by
14 public rights-of-way and having frontage on a public right-of-way.

15 ICC 16.06.030(E) (until amended by Ordinance C-61-06).
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17 Based on the two prior provisions of the County Code, Island County argues that its
18 adoption of Ordinance C-61-06 merely codifies the status of property parcels divided due to
19 public rights-of-way: those parcels divided prior to December 1, 1998 are lawful,
20 developable lots; those parcels divided between December 1, 1998 and June 5, 2006 for
21 which separate tax lots were created prior to June 5, 2006 are also lawful, developable lots,
22 but only if application was made to create the new tax lot.
23

24 WEAN disagrees that the amendments to ICC 16.06.030 merely reflect the existing status of
25 parcels transected by public rights-of-way. WEAN argues that ICC 16.04A.020(b) was
26 prospective and not automatic.¹⁹ Therefore, WEAN urges the GMA has the ability to require
27 a change in the rules applicable to the creation of lots. Where the prior rules resulted in the
28 creation of multiple, non-conforming lots, WEAN asserts, the GMA requires those rules to
29 be changed.
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¹⁹ WEAN argument at the hearing on the merits.

1 While we generally defer to the County on its interpretation of its own code, we cannot
2 agree with the County that its prior ordinances created new *developable* lots. Even
3 assuming the divisions of land for public rights-of-way under earlier County code provisions
4 were not subject to the County's subdivision laws, this does not mean that the lots so
5 created were developable. Dykstra v. Skagit County, 97 Wn. App. 670, 672 (Div. I, 1994).

6
7 The code provisions offered by the County show that divisions of land as a result of
8 condemnation were authorized by County ordinance, but does not show that those new lots
9 could be developed irrespective of zoning regulations. Therefore, the new exemption,
10 which makes the substandard lots developable, is more than mere codification of existing
11 County law.

12
13 The County argues that it was its prior practice to consider lots created by public rights-of-
14 way to be developable. However, in the course of the adoption of Ordinance C-61-06, the
15 Planning Department noted that this sometimes happened in the past because, without the
16 subdivision review process, the Planning Department would not necessarily know how the
17 new lot was created. According to the Planning Department:

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19 Historically, because of the exemption from the subdivision requirements, Planning
20 does not even realize that the parcel was created after the adoption of the CP (which
21 set baseline density minimums). If Planning knows that it was created through an
22 unregulated segregation process and that it doesn't meet base density technically,
23 they would not be able to issue a building permit.²⁰

24 Such building permits on substandard lots were not knowingly issued. Thus, we may
25 assume that prior to the enactment of Ordinance C-61-06 lots created through the
26 unregulated segregation process of a public right-of-way division were not developable
27 regardless of other County development regulations. They were still required to meet the
28 density requirements of the underlying zone. Further, under the *Dykstra* decision, the
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32 ²⁰ Index No. 8650

1 actions of County staff in approving building permits that did not meet County requirements
2 would be *ultra vires* and would not bind the County to do the same thing in the future.²¹
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4 Moreover, the record establishes that the Island County Prosecutor advised the County
5 Commissioners that this method of creating lots did not conform to state law:
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7 The Island County Prosecuting Attorney has informed Planning and Community
8 Development and the Board of Island County Commissioners that the County is not
9 authorized to create exemptions to the subdivision ordinance that are not also
10 established in the state statute.²²

11 The Planning Department also reported to the County Commissioners that land divisions as
12 a result of a public road right-of-way bisecting a parcel are not listed as a type of division
13 that is exempt from Chapter 58.17 RCW.²³ While this Board will not rule on the propriety of
14 the challenged exemption under Chapter 58.17 RCW, the Board will also not accept an
15 argument that County law already created an exemption where the County's own attorney
16 has advised that the exemption is not lawful.
17

18 The Board therefore finds that Ordinance C-61-06 did not merely codify existing property
19 rights and set a limit on those that would occur in the future, as the County argues.
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21
22 We then turn to WEAN's argument that Ordinance C-61-06 allows the creation of
23 substandard lots in agricultural zones, and that those lots will be developable even though
24 they do not meet the minimum densities set for the underlying zone. At the hearing on the
25 merits, the County argued that the division of property through public rights-of-way does not
26 make the substandard lots developable.
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31 ²¹ Dykstra v. Skagit County, 97 Wn. App. 670, 672 (Div. I, 1994)

32 ²² Memo of September 22, 2005 from Jeff Tate to the Island County Commissioners, Exhibit A to
Petitioner's Hearing Brief.

²³ *Ibid.*

1 WEAN relies upon Finding of Fact #7 in Ordinance C-61-06 to show that the lots will be
2 allowed to develop:

3 The Board of Island County Commissioners finds that modifying this provision is
4 necessary in order to make county code consistent with state statute. The Board
5 also finds that those lots lawfully created prior to the adoption of this ordinance and
6 those split by a right-of-way established prior to 1998 may be lawfully split and when
7 using the public road right-of-way segregation provision shall be considered "existing
8 lots" of record as defined in Chapter 17.03 ICC. Therefore, these lots may be
9 considered developable parcels with respect to all Comprehensive Plan policies and
10 zoning laws.

11 Finding of Fact 7, Exhibit B to Ordinance C-61-06.

12 The record also shows that it was the intention of the County Commissioners to make lots
13 created by public rights-of-way developable:

14 This acknowledges the current public road right of way segregation process in the
15 code, **allows the parcels that have been created through public road right-of-**
16 **way segregation to be built upon and further developed**, and also allows parcels
17 that were originally divided by a public road right-of-way to use this process one time
18 to separate those two parcels that were originally split by as public road right-of-way
19 so that it is equitable to all. (emphasis added)²⁴

20 There is little question that allowing a new lot to be created when a parcel of agricultural
21 land is crossed by a public road will create a substandard lot in resource lands. The
22 evidence submitted by WEAN shows that this occurs. See Index P-4; P-10. The County
23 does not contest that the exception will create substandard lots in at least some
24 circumstances. Further, while the County does not agree that the number of substandard
25 lots that will be created is great, the County does not rest its defense of Ordinance C-61-06
26 on its having a minor impact. Rather, the County argues that Ordinance C-61-06 codifies
27 the existing rights of property owners based on prior County Code provisions.²⁵
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32 ²⁴ Island County Commissioners minutes of meeting June 5, 2006, Index No. 8807.(Exhibit 2 to County's Brief)

²⁵ *Ibid.*

1 RCW 36.70A.060(1) provides, in pertinent part:

2 Each county that is required or chooses to plan under CW 36.70A.040, and each city
3 within such county, shall adopt development regulations on or before September 1,
4 1991, to assure the conservation of agricultural, forest, and mineral resource lands
5 designated under RCW 36.70A.170. Regulations adopted under this subsection may
6 not prohibit uses legally existing on any parcel prior to their adoption and shall remain
7 in effect until the county or city adopts development regulations pursuant to RCW
8 36.70A.040. Such regulations shall ensure that the use of lands adjacent to
9 agricultural, forest, or mineral resource lands shall not interfere with the continued
10 use, in the accustomed manner and in accordance with best management practices,
11 of these designated lands for the production of food, agricultural products, or timber,
12 or for the extraction of minerals.

13 RCW 36.70A.060(1)(a) requires that the County's development regulations "assure the
14 conservation" of agricultural lands (among other natural resource lands). The amendment to
15 ICC 16.06.020(E) provides that substandard lots created by public rights-of-way prior to
16 June 5, 2006 become "existing lots of record". Creating additional substandard lots in
17 agricultural lands converts portions of those lands to residential uses rather than conserving
18 them for agriculture. The County has already determined that 20 acres is the minimum lot
19 size for agricultural lands of long term commercial significance. By further subdividing
20 agricultural lands, the County violates its own determinations about the conservation of
21 commercial agriculture. Further, the addition of non-agricultural uses in agricultural lands
22 converts agriculture land to other uses and creates potential conflicts with agriculture – the
23 very thing that designation of agricultural lands is designed to prevent. "The greatest threat
24 to long-term productive NRLs [natural resource lands] is nearby conflicting uses. [citation
25 omitted]" WEAN v. Island County, WWGMHB Case No. 95-2-0063 (Second Compliance
26 Hearing Order and Finding of Invalidity, April 10, 1996).

27
28 We wish to make it plain that the Board has no intention of interfering with the County's
29 determination of vested rights to develop on a project-by-project basis. The Board has no
30 authority to make those determinations and is not seeking to reach them here. See RCW
31 36.70A.030(7). The County is still free to determine that an individual property owner has a
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1 right to build upon a lot based upon the factual and legal determinations that the County
2 makes in reviewing building permit applications. However, it does not follow that a new
3 code provision which makes a blanket exemption from the subdivision requirements of
4 Chapter 16.04 ICC without regard to its impact upon agricultural lands complies with the
5 GMA requirements for conservation of agricultural resource lands.
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8 **Conclusion:** Ordinance C-61-05 authorizes property divisions created by public rights-of-
9 way in agricultural lands which may be developed without regard to the underlying densities
10 of the agricultural lands and the reasons for those densities, i.e. conservation of agricultural
11 lands of long-term commercial significance and protection of those lands from incompatible
12 uses. As a result, C-61-06 fails to comply with the GMA requirements for conservation of
13 resource lands (RCW 36.70A.060(1)(a)).
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16 **Issue No. 2:** By allowing unregulated subdivision of rural lands to urban and suburban
17 densities, does C-61-06 fail to comply with GMA's requirements for reduction of sprawl
18 (RCW 36.70A.070(5)(c))?
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20 **Positions of the Parties**

21 WEAN argues that Ordinance C-61-06 will also allow the creation of nonconforming
22 substandard lots in the Rural Forest and Rural zones.²⁶ WEAN refers to the official zoning
23 maps and Assessor's data to illustrate how parcels smaller than the 5 and 10 acre minimum
24 lot sizes will be created through the application of Ordinance C-61-06.²⁷ The creation of
25 such urban and suburban densities in the rural areas will constitute sprawl, WEAN argues.²⁸
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32 ²⁶ Petitioner's Hearing Brief at 13.

²⁷ *Ibid.*

²⁸ *Ibid* at 14.

1 The County responds that the amended exemption will apply to fewer, not more, parcels of
2 land so that it actually reduces sprawl that might have been created under the pre-existing
3 exemption.²⁹ Therefore, the County urges, WEAN has not met its burden of proof.
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5 **Board Discussion**
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7 RCW 36.70A.070(5)(c) requires that the County adopt measures that reduce the conversion
8 of undeveloped land into “sprawling, low-density development in the rural area”:

9 Measures governing rural development. The rural element shall include measures
10 that apply to rural development and protect the rural character of the area, as
11 established by the county, by:

- 12 (i) Containing or otherwise controlling rural development;
- 13 (ii) Assuring visual compatibility of rural development with the surrounding rural
14 area;
- 15 (iii) Reducing the inappropriate conversion of undeveloped land into sprawling,
16 low-density development in the rural area;
- 17 (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water
18 and ground water resources; and
- 19 (v) Protecting against conflicts with the use of agricultural, forest, and mineral
20 resource lands designated under RCW 36.70A.170.

21 As was discussed under Issue No. 1 above, the Board does not find the County’s argument
22 that Ordinance C-61-06 merely codifies existing County law to be persuasive. The new
23 exemption provides that substandard lots in rural areas created by public rights-of-way can
24 be “existing lots of record” and developable without regard to the underlying zoning density
25 requirements. Some of the lots thus created are smaller than the lot sizes required for the
26 allowed densities in the rural zones in which they are located. The County established the
27 rural densities as part of the rural element of its comprehensive plan and in aid of protecting
28 Island County’s defined “rural character.” Under Ordinance C-61-06, the lots created by
29 public rights-of-way are not reviewed to assure conformance with either rural densities or
30 “rural character.”
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²⁹ Respondent Island County’s Hearing Brief at 6.

1 Rather than reduce inappropriate conversion of undeveloped land, Ordinance C-61-06
2 creates substandard low-density development in the rural area. The zoning maps and
3 Assessor's data show that this is not an isolated phenomenon but applies to a significant
4 number of parcels in the rural areas.
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7 **Conclusion:** Ordinance C-61-06 allows for the creation of new developable lots in the rural
8 area. Many of those lots are smaller than the lot sizes required for the allowed underlying
9 zoning densities. The underlying zoning densities were established by the County for rural
10 areas to preserve rural character and to achieve a variety of rural densities. Ordinance C-
11 61-06 allows a significant number of below-rural density lots to be developed, thus creating
12 rather than reducing "sprawling low-density development in the rural area." This fails to
13 comply with RCW 36.70A.070(5)(c).
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16 **Issue No. 3:** By allowing unregulated subdivision of Island County's rural and resource
17 lands to urban and suburban densities does C-61-06 substantially interfere with the
18 fulfillment of GMA's goals for sprawl and natural resource industries (RCW 36.70A.020(2)
19 and (8))?
20

21 **Positions of the Parties**

22 WEAN argues that the evidence showing non-compliance as to Issue Nos. 1 and 2 also
23 establishes that Ordinance C-61-06 substantially interferes with the fulfillment of the goals of
24 the GMA.³⁰ The goals are Goal 2 (reduce sprawl) and Goal 8 (natural resource industries).
25 RCW 36.70A.020(2) and (8).
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28 The County urges that the new exemption in Ordinance C-61-06 limits the application of an
29 existing exemption and therefore should be seen as reducing "sprawl and interference with
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³⁰ Petitioner's Hearing Brief at 19.

1 natural resource industries that might have been created under the pre-existing
2 exemption.”³¹

3
4 **Board Discussion**

5 Having found that Ordinance C-61-06 fails to comply with RCW 36.70A.060(1) and RCW
6 36.70A.070(5)(c), the Board will consider whether continued validity of the exemption would
7 substantially interfere with the fulfillment of Goals 2 and 8 of the GMA. RCW 36.70A.302.
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9
10 A finding of invalidity may be entered when a board makes a finding of noncompliance and
11 further includes a “determination, supported by findings of fact and conclusions of law that
12 the continued validity of part or parts of the plan or regulation would substantially interfere
13 with the fulfillment of the goals of this chapter.” RCW 36.70A.302(1) (in pertinent part).

14 We have held that invalidity should be imposed if continued validity of the noncompliant
15 comprehensive plan provisions or development regulations would substantially interfere with
16 the local jurisdiction’s ability to engage in GMA-compliant planning. See *Vinatieri v. Lewis*
17 *County*, WWGMHB Case No. 03-2-0020c and *Irondale Community Action Neighbors v.*
18 *Jefferson County*, WWGMHB Case No. 04-2-0011, as examples.
19

20
21 Here, the continued validity of the new exemption established in Ordinance C-61-06 would
22 allow landowners to create substandard but developable lots in both the agricultural and
23 rural areas during the compliance remand period. As we have found, allowing such new
24 substandard developable lots to be created fails to comply with RCW 36.70A.060(1)
25 because it fails to conserve natural resource lands; and with RCW 36.70A.070(5)(c)
26 because it promotes sprawling low-density development in the rural areas. Ordinance C-61-
27 06 also interferes with the fulfillment of two goals of the GMA related to the specific
28 requirements for agricultural lands and rural areas – Goal 2 and Goal 8. Goal 2 is :
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³¹ Respondent Island County’s Hearing Brief at 7.

1 Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into
2 sprawling, low-density development.
3 RCW 36.70A.020(2)

4 Goal 8 is:

5 Natural resource industries. Maintain and enhance natural resource-based
6 industries, including productive timber, agricultural, and fisheries industries,
7 Encourage the conservation of productive forest lands and productive agricultural
8 lands, and discourage incompatible uses.

8 RCW 36.70A.020(8)

9 As we have found, unregulated creation of substandard lots in the rural area allowed by
10 Ordinance C-61-06 promotes low-density sprawl. This fails to comply with the requirements
11 of RCW 36.70A.070(5)(c) and it also substantially interferes with the fulfillment of Goal 2.
12 Unregulated development of substandard lots in agricultural lands converts those lands to
13 residential uses. This creates the potential for conflict with agricultural uses. It also puts
14 pressure on adjacent agricultural lands to convert to more intense uses. In this way, ICC
15 16.06.030(E) fails to comply with the requirements of RCW 36.70A.060(1) to conserve
16 resource lands and it also substantially interferes with the fulfillment of Goal 8, which calls
17 for planning actions to encourage the conservation of productive agricultural lands..
18

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20
21 The County must be granted a period of time in which to bring Ordinance C-61-06 into
22 compliance. In the meantime, however, property owners would have substantial motivation
23 to take action to vest building applications during the compliance period, thus effecting the
24 ability of the County to cure the impacts of the noncompliant ordinance. For those reasons,
25 the Board finds that ICC 16.06.030(E) as adopted by Ordinance C-61-06 substantially
26 interferes with the fulfillment of Goals 2 and 8 of the GMA and is invalid.
27

28 VI. FINDINGS OF FACT

- 29
30 1. Island County is located west of the crest of the Cascade Mountains and is required
31 to plan according to RCW 36.70A.040.
32

- 1 2. WEAN has participated orally and in writing in the process to adopt Ordinance C-61-
2 06.
- 3 3. Ordinance C-61-06 was adopted by the Island County Commissioners on June 5,
4 2006. Notice of adoption was published on June 10, 2006. WEAN filed its petition
5 for review in this case on August 9, 2006.
- 6 4. Island County Ordinance C-61-06 amends ICC 16.06.030(E), exempting certain land
7 divisions from the requirements of the Subdivision and Short Subdivision provisions
8 of the County Code.
- 9 5. Prior to the enactment of Ordinance C-61-06, lots created through the unregulated
10 segregation process of a public right-of-way division were not developable without
11 regard to other County development regulations.
- 12 6. Finding of Fact #7 in Ordinance C-61-06 shows that the lots will be allowed to
13 develop:
14
15 The Board of Island County Commissioners finds that modifying this provision is
16 necessary in order to make county code consistent with state statute. The Board
17 also finds that those lots lawfully created prior to the adoption of this ordinance and
18 those split by a right-of-way established prior to 1998 may be lawfully split and when
19 using the public road right-of-way segregation provision shall be considered “existing
20 lots” of record as defined in Chapter 17.03 ICC. Therefore, these lots may be
21 considered developable parcels with respect to all Comprehensive Plan policies and
22 zoning laws.
- 23 7. It was the intention of the County Commissioners in adopting Ordinance C-61-06 to
24 make lots created by public rights-of-way developable regardless of the density
25 established by the underlying zoning.
- 26 8. The new exemption, ICC 16.06.030(E), established in Ordinance C-61-06 provides
27 that substandard lots in agricultural areas created by public rights-of-way can be
28 “existing lots of record” and developable without regard to the underlying zoning
29 density requirements.
- 30 9. Allowing a new lot to be created when a parcel of agricultural land is crossed by a
31 public road will create new substandard, developable lots in resource lands.
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10. Creating additional substandard lots in agricultural lands converts portions of those lands to residential uses rather than conserving them for agriculture.

11. The County has already determined that 20 acres is the minimum lot size for agricultural lands of long term commercial significance. By further subdividing agricultural lands, the County violates its own determinations about the conservation of commercial agriculture.

12. The addition of non-agricultural uses in agricultural lands in Island County will put pressure on adjacent agricultural lands to convert to more intense uses.

13. ICC 16.06.030(E) as adopted in Ordinance C-61-06 authorizes property divisions created by public rights-of-way in agricultural lands which may be developed without regard to the underlying densities of the agricultural lands and the reasons for those densities, i.e. conservation of agricultural lands of long-term commercial significance and protection of those lands from incompatible uses.

14. The new exemption provides that substandard lots in rural areas created by public rights-of-way can be “existing lots of record” and developable without regard to the underlying zoning density requirements.

15. ICC 16.06.030(E) as adopted in C-61-06 allows for the creation of new developable lots in the rural area. Many of those lots are smaller than the lot sizes required for the allowed density in the underlying zoning.

16. The County established densities for rural areas to preserve rural character and to achieve a variety of rural densities.

17. ICC 16.06.030(E) as adopted in Ordinance C-61-06 allows a significant number of below-rural density lots to be developed, thus creating rather than reducing “sprawling low-density development in the rural area.”

1 **FINDINGS OF FACT RELATED TO INVALIDITY**

2 18. The continued validity of the new exemption, ICC 16.06.030(E) as adopted in
3 Ordinance C-61-06. would allow landowners to create substandard but developable
4 lots in both the agricultural and rural areas during the compliance remand period.

5 19. The unregulated creation of substandard lots in the rural area allowed by ICC
6 16.06.030(E) as adopted in Ordinance C-61-06 promotes low-density sprawl.

7 20. The unregulated development of substandard lots in agricultural lands allowed by
8 ICC 16.06.030(E) as adopted in Ordinance C-61-06 converts those lands to non-
9 agricultural uses. It also creates the potential for conflict with agricultural uses and
10 puts pressure on adjacent agricultural lands to convert to more intense uses.

11 21. Property owners have substantial motivation to take action to vest building
12 applications on lots created pursuant to ICC 16.06.030(E) as adopted in Ordinance
13 C-61-06 during the compliance period, thus effecting the ability of the County to cure
14 the impacts of the noncompliant ordinance.

15 22. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby
16 adopted as such.

17 **VII. CONCLUSIONS OF LAW**

18 A. The Board has jurisdiction over the parties and subject-matter of this action.

19 B. WEAN has standing to bring its challenges to Island County Ordinance C-61-06.

20 C. The petition for review in this case was timely filed.

21 D. ICC 16.06.030(E) as adopted in Ordinance C-61-06 fails to comply with the Growth
22 Management Act's requirements for the conservation of agricultural lands by allowing
23 unregulated subdivision for development of substandard lots in agricultural areas. This fails
24 to comply with RCW 36.70A.060(1).

25 E. ICC 16.06.030(E) as adopted in Ordinance C-61-06 fails to comply with the Growth
26 Management Act's requirements for reduction of low-density sprawling development in the
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1 rural areas by allowing unregulated subdivision for development of substandard lots in the
2 rural areas. This fails to comply with RCW 36.70A.070(5)(c).

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4 **CONCLUSIONS OF LAW RELATED TO INVALIDITY**

5 F. The continuing validity of the exemption codified as ICC 16.06.030(E) adopted by
6 Ordinance C-61-06 substantially interferes with fulfillment of GMA goals 2 and 8. RCW
7 36.70A.020(2) and (8). ICC 16.06.030(E), as adopted in Ordinance C-61-06, is therefore
8 invalid.
9

10 G. Any Conclusion of Law hereafter determined to be a Finding of Fact is hereby
11 adopted as such.
12

13 **VIII. ORDER**

14 Island County is ordered to bring ICC 16.06.030(E) into compliance with the GMA in
15 accordance with this decision within 120 days. **Compliance shall be due no later than**
16 **May 22, 2007.** The following schedule shall apply:
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20 Compliance Due	May 22, 2007
21 Compliance Report and Index to 22 Compliance Record (County to file and serve on all parties)	May 29, 2007
23 Any Objections to a Finding of 24 Compliance and Record Additions/Supplements Due	June 12, 2007
25 County's Response Due	June 26, 2007
26 Compliance Hearing (location to 27 be determined)	July 10, 2007

28

29 Any requests for an extension of the period for compliance must substantiate that
30 compliance could not reasonably be achieved within the time period set herein and must be
31 filed with the Board no later than **May 1, 2007.**
32

1 Entered this 24th day of January 2007.

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4 _____
Margery Hite, Board Member

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Holly Gadbow, Board Member

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10 _____
James McNamara, Board Member

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

14 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
15 mailing of this Order to file a petition for reconsideration. Petitions for
16 reconsideration shall follow the format set out in WAC 242-02-832. The original and
17 three copies of the petition for reconsideration, together with any argument in
18 support thereof, should be filed by mailing, faxing or delivering the document directly
19 to the Board, with a copy to all other parties of record and their representatives.
20 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6),
21 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
filing a petition for judicial review.

22 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
23 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
24 judicial review may be instituted by filing a petition in superior court according to the
25 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

26 **Enforcement.** The petition for judicial review of this Order shall be filed with the
27 appropriate court and served on the Board, the Office of the Attorney General, and all
28 parties within thirty days after service of the final order, as provided in RCW
29 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
30 but service on the Board means **actual receipt of the document at the Board office**
within thirty days after service of the final order.

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