

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 WHIDBEY ENVIRONMENTAL ACTIONS
4 NETWORK (WEAN),

Case No. 06-2-0023

5 Petitioners,

ORDER FINDING COMPLIANCE

6
7 v.

8 ISLAND COUNTY,

9
10 Respondent.

11 **SYNOPSIS**

12 In our decision of January 23, 2007, this Board found that the adoption of ICC 16.06.030(E)
13 failed to comply with RCW 36.70A.060(1) by not conserving agricultural lands; RCW
14 36.70A.070(5)(c) by failing to reduce low-density sprawl in rural areas; and substantially
15 interfered with fulfillment of Goals 2 and 8 of the Growth Management Act (GMA). (RCW
16 36.70A.020(2) and (8)). On June 4, 2007, the Island County Board of County
17 Commissioners repealed ICC 16.06.030(E) and thereby achieved compliance with the GMA
18 as to that development regulation.
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21 WEAN argues that the County has subsequently taken action indicating that the prior
22 exemption for lots created by rights-of-way was revived when ICC 16.06.030(E) was
23 invalidated. The County denies that this is the County's interpretation and the Board finds
24 no basis for further Board action in this case.
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26 **PROCEDURAL HISTORY**

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28 The petition for review in this case was filed on August 9, 2006. It appealed the adoption of
29 Ordinance C-61-06 on June 5, 2006 and published on June 10, 2006. After briefing and a
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1 hearing on the merits, the Board found three violations of the Growth Management Act
2 (GMA) (Ch. 36.70A RCW)¹:

- 3 1. Conclusions of Law D: ICC 16.06.030(E) as adopted in Ordinance C-61-06 fails to
4 comply with the Growth Management Act's requirements for the conservation of
5 agricultural lands by allowing unregulated subdivision for development of substandard
6 lots in agricultural areas. This fails to comply with RCW 36.70A.060(1).
7
- 8 2. Conclusion of Law E: ICC 16.06.030(E) as adopted in Ordinance C-61-06 fails to comply
9 with the Growth Management Act's requirements for reduction of low-density sprawling
10 development in the rural areas by allowing unregulated subdivision for development of
11 substandard lots in the rural areas. This fails to comply with RCW 36.70A.070(5)(c).
12
- 13 3. Conclusion of Law F: The continuing validity of the exemption codified as ICC
14 16.06.030(E) adopted by Ordinance C-61-06 substantially interferes with fulfillment of
15 GMA goals 2 and 8. RCW 36.70A.020(2) and (8). ICC 16.06.030(E), as adopted in
16 Ordinance C-61-06, is therefore invalid.
17

18 On May 25, 2007, Island County filed its compliance report and index to the record,
19 indicating that the County Commissioners had reviewed and set a proposed ordinance for
20 public hearing to repeal ICC 16.06.030(E) on June 4, 2007.² Thereafter, Island County
21 repealed ICC 16.06.030(E) through the adoption of Ordinance No. C-56-07 on June 4, 2007
22 and requested a finding of compliance.³
23

24 Initially, WEAN had no objection to a finding of compliance based upon the repeal of ICC
25 16.06.030(E).⁴ However, WEAN changed its position and requested that the Board reopen
26 the proceeding and "either review for determination of invalidity the previous Island County
27 regulation that was supplanted by the challenged (now invalidated) adoption or revise the
28
29

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31 ¹ Final Decision and Order, January 23, 2007.

² Respondent Island County's Compliance Progress Report and Index to Compliance Record, May 25, 2007.

³ Respondent Island County's Supplemental Compliance Progress Report, June 6, 2007.

⁴ Petitioner's Response to County's Compliance Request, June 18, 2007.

1 FDO to include a finding of law that the previous regulation was not revived by determining
2 invalid C-61-06.”⁵ The County objected that WEAN’s request was an untimely motion.⁶
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4 The compliance hearing was held telephonically on July 10, 2007. Island County was
5 represented by deputy prosecuting attorney Daniel Mitchell. WEAN was represented by
6 Steve Erickson. All three board members attended, Margery Hite presiding.
7

8 **BURDEN OF PROOF**

9 For purposes of board review of the comprehensive plans and development regulations
10 adopted by local government, the GMA establishes three major precepts: a presumption of
11 validity; a “clearly erroneous” standard of review; and a requirement of deference to the
12 decisions of local government.
13

14 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
15 amendments to them are presumed valid upon adoption:
16

17 Except as provided in subsection (5) of this section, comprehensive plans and
18 development regulations, and amendments thereto, adopted under this chapter are
19 presumed valid upon adoption.

20 RCW 36.70A.320(1).

21 This same presumption of validity applies when a local jurisdiction takes legislative action in
22 response to a noncompliance finding; that legislative action is presumed valid. The only
23 time that the burden of proof shifts to the County is when the County is subject to a
24 determination of invalidity.⁷ Here, the County is subject to a determination of invalidity and
25 therefore has the burden of showing that ICC 16.06.030(E) no longer substantially interferes
26 with the fulfillment of Goals 2 and 8 of the GMA (RCW 36.70A.020(2) and (8)).
27

28 The statute further provides that the standard of review is whether the challenged
29 enactments are clearly erroneous:
30

31 ⁵ Petitioner’s Withdrawal to Acquiescence with County’s Compliance Request, July 5, 2007.

32 ⁶ Oral argument at compliance hearing on July 10, 2007.

⁷ RCW 36.70A.320(2) and (4).

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

4 RCW 36.70A.320(3)

5 In order to find the County's action clearly erroneous, the Board must be "left with the firm
6 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
7 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

8
9 Within the framework of state goals and requirements, the boards must grant deference to
10 local governments in how they plan for growth:

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

21 RCW 36.70A.3201 (in part).

22 In challenging the sufficiency of compliance efforts as well as in an initial petition for review,
23 the burden is on Petitioners to overcome the presumption of validity and demonstrate that
24 any action taken by the County is clearly erroneous in light of the goals and requirements of
25 Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2). Where not clearly
26 erroneous, and thus within the framework of state goals and requirements, the planning
27 choices of local government must be granted deference.

28 ISSUES PRESENTED

29 Issue No. 1 Does ICC 16.06.030(E) continue to fail to comply with the Growth
30 Management Act's requirements for the conservation of agricultural lands by allowing
31 unregulated subdivision for development of substandard lots in agricultural areas in
32 violation of RCW 36.70A.060(1) (Conclusion of Law D)?

1 Issue No. 2: Does ICC 16.06.030(E) continue to fail to comply with the Growth
2 Management Act's requirements for reduction of low-density sprawling development in
3 the rural areas by allowing unregulated subdivision for development of substandard lots
4 in the rural areas in violation of RCW 36.70A.070(5)(c)(Conclusion of Law E)?

5 Issue No. 3: Does the continuing validity of the exemption codified as ICC 16.06.030(E)
6 substantially interfere with fulfillment of Goals 2 and 8 of the GMA (RCW 36.70A.020(2)
7 and (8)) and is it therefore invalid (Conclusion of Law F)?

8 **DISCUSSION**

9 All three of the Board's conclusions of law pertain to ICC 16.06.030(E). The County has
10 repealed this code provision and therefore has achieved compliance and removed invalidity.
11 WEAN argues that the County has repealed ICC 16.06.030(E) but revived the underlying
12 exemptions for lots created by rights-of-way.⁸ To support its position, WEAN offers
13 documents from an appeal in an administrative determination regarding creation of new
14 parcels.⁹ WEAN asks the Board to either determine that the prior regulation was also
15 invalid or amend the Final Decision and Order to find that the prior regulation was not
16 revived when the Board invalidated ICC 16.06.030(E).¹⁰

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19 The County correctly points out that a motion to amend the Final Decision and Order is not
20 timely now. Pursuant to the Board rules, a motion for reconsideration of a final decision
21 must be brought within 10 days of service of the decision.¹¹ Since the final decision in this
22 case was issued in January, a motion for reconsideration is not timely now.

23 However, the County also represents that there is no longer an exemption for lots created
24 by rights-of-way.¹² The repeal of ICC 16-06-030(E) did not revive the prior exemption,
25 according to the County's attorney.¹³ Therefore, even if the Board were to have jurisdiction
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29 ⁸ Petitioner's Withdrawal to Acquiescence with County's Compliance Request at 1.
30 ⁹ SHP 206/06 Appellants' Response to WEAN Comment; Appeal Decision C-07, Appeal of SHP 206.06 –
31 Aitonean PLG-017-07
32 ¹⁰ Petitioner's Withdrawal to Acquiescence with County's Compliance Request at 4.
¹¹ WAC 242-02-832.
¹² Representation made at compliance hearing, July 10, 2007.
¹³ *Ibid.*

1 at this date to reach the issue of the status of the underlying regulations, the County clearly
2 states that those underlying regulations are not now in effect.
3

4 **Conclusion:** The repeal of ICC 16.06.030(E) achieves compliance and removes invalidity
5 of that development regulation.
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7 **FINDINGS OF FACT**

- 8 1. Island County is located west of the crest of the Cascade Mountains and is required
9 to plan pursuant to RCW 36.70A.040.
- 10 2. The Final Decision and Order of January 23, 2007 found three violations of the GMA.
- 11 3. Conclusions of Law D found that ICC 16.06.030(E) as adopted in Ordinance C-61-06
12 failed to comply with the Growth Management Act's requirements for the
13 conservation of agricultural lands by allowing unregulated subdivision for
14 development of substandard lots in agricultural areas. This failed to comply with
15 RCW 36.70A.060(1).
- 16 4. Conclusion of Law E found that ICC 16.06.030(E) as adopted in Ordinance C-61-06
17 failed to comply with the Growth Management Act's requirements for reduction of
18 low-density sprawling development in the rural areas by allowing unregulated
19 subdivision for development of substandard lots in the rural areas. This failed to
20 comply with RCW 36.70A.070(5)(c).
- 21 5. Conclusion of Law F found that the continuing validity of the exemption codified as
22 ICC 16.06.030(E) adopted by Ordinance C-61-06 substantially interfered with
23 fulfillment of GMA goals 2 and 8. RCW 36.70A.020(2) and (8). ICC 16.06.030(E), as
24 adopted in Ordinance C-61-06, was therefore invalid.
- 25 6. WEAN filed the original petition for review in this case.
- 26 7. On June 4, 2007, Island County repealed ICC 16.06.030(E) through the adoption of
27 Ordinance No. C-56-07.
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1 8. The repeal of ICC 16.06.030(E) did not revive the underlying exemptions for lots
2 created by rights-of-way.
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4 **CONCLUSIONS OF LAW**

- 5 A. The Board has jurisdiction over the parties and subject matter of this case.
6 B. Petitioner WEAN has standing to challenge whether the adoption of Ordinance No.
7 C-56-07 achieved compliance in this case.
8 C. The repeal of ICC 16.06.030(E) complies with RCW 36.70A.060(1).
9 D. The repeal of ICC 16.06.030(E) complies with RCW 36.70A.070(5)(c).
10 E. The repeal of ICC 16.06.030(E) removes substantial interference with Goals 2 and 8
11 of the GMA (RCW 36.70A.020(2) and (8)).
12

13
14 **ORDER**

15 With the adoption of Ordinance No. C-56-07, ICC 16.06.030(E) has been repealed and
16 therefore invalidity of ICC 16.06.030(E) is hereby RESCINDED. Further, Ordinance C-61-
17 06 is now COMPLIANT with RCW 36.70A.060(1) and RCW 36.70A.070(5)(c) and this case
18 is CLOSED.
19

20 Entered this 29th day of August 2007.
21

22 _____
23 Margery Hite, Board Member

24 _____
25 Holly Gadbaw, Board Member

26 _____
27 James McNamara, Board Member
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1 Pursuant to RCW 36.70A.300 this is a final order of the Board.

2 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
3 mailing of this Order to file a petition for reconsideration. Petitions for
4 reconsideration shall follow the format set out in WAC 242-02-832. The original and
5 three copies of the petition for reconsideration, together with any argument in
6 support thereof, should be filed by mailing, faxing or delivering the document directly
7 to the Board, with a copy to all other parties of record and their representatives.

8 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6),
9 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
filing a petition for judicial review.

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

14 **Enforcement.** The petition for judicial review of this Order shall be filed with the
15 appropriate court and served on the Board, the Office of the Attorney General, and all
16 parties within thirty days after service of the final order, as provided in RCW
17 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
18 but service on the Board means **actual receipt of the document at the Board office**
within thirty days after service of the final order.

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