

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 CITIZENS PROTECTING CRITICAL AREAS
3 AND OLYMPIC STEWARDSHIP
4 FOUNDATION, *et al*,

5 Petitioner,

6 v.

7 JEFFERSON COUNTY,

8 Respondent.
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Case No. 08-2-0029c

ORDER ON COMPLIANCE

12 THIS MATTER came before the Board at a compliance hearing held on July 15, 2009,
13 following the submittal on June 1, 2009 of Jefferson County's (County) Statement of Actions
14 Taken (SATC). The SATC described the County's response to the Board's November 19,
15 2008 Final Decision and Order (FDO). Petitioner Olympic Stewardship Foundation (OSF)
16 filed a response on June 18, 2009.¹ The County filed its reply on July 6, 2009.² Futurewise,
17 the Port Gamble S'klallam and Jamestown S'klallam Tribes filed notice of their intent to
18 participate in the compliance hearing and also filed motions for *amici* status on June 30,
19 2009. The tribes were allowed to participate in the compliance proceedings, and
20 Futurewise and the tribes were granted *amici* status by order dated July 7, 2009.³ Their
21 response was filed on July 6, 2009.⁴
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24 Board members James McNamara, Nina Carter, and William Roehl took part in the
25 compliance hearing with Mr. Roehl presiding. Mark R. Johnsen represented Jefferson
26 County. Brian T. Hodges represented Olympic Stewardship Foundation. Robert A. Beatty
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30 ¹ Petitioner Olympic Stewardship Foundation's Response To Jefferson County's Statement of Actions Taken
31 to Comply.

32 ² Jefferson County's Reply to OSF's Objections.

³ Order on Notice of Intent to Participate; Order on Motion for Amicus Status.

⁴ Futurewise and Port Gamble S'klallam and Jamestown S'klallam Tribes Response to Olympic Stewardship
Foundation and Memorandum in Support of a Finding of Compliance.

1 represented Futurewise and Lauren Rasmussen represented the Port Gamble S'klallam and
2 Jamestown S'klallam Tribes.

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4 **I. SYNOPSIS OF DECISION**

5 The Board finds that the OSF has failed to sustain its burden of proof to establish that the
6 actions the County took to achieve compliance were clearly erroneous and that the County
7 has, in fact, come into compliance with the GMA..
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9 **II. PRELIMINARY MATTERS**

10 The County, in its reply, moved that an administrative code interpretation be made part of
11 the record.⁵ That document was attached to its reply.⁶ OSF had no objection and the
12 Board grants the motion.
13

14 OSF was questioned at the compliance hearing regarding three maps attached to its Reply
15 and which had not been previously made part of the record. OSF then asked that they be
16 added to the record and stated that they were similar to maps already admitted but that
17 additional information was overlaid. The County did not object if admitted for illustrative
18 purposes only. They will be added to the record for that purpose.
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21 Finally, OSF made numerous references in its Reply to the transcript of the HOM. OSF was
22 told the Board had not been provided with a copy of the transcript. In that the information in
23 the transcript is irrelevant to the Board's decision, no ruling is necessary.
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25 **III. BURDEN OF PROOF**

26 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
27 of time to enact legislation to achieve compliance. RCW 36.70A.300(3)(b).
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⁵ Jefferson County's Reply to OSF' Objections at 3.

⁶ Unified Development Code Interpretation dated August 22, 2008.

1 After the period for compliance has expired, the board is required to hold a hearing to
2 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and
3 (2).

4
5 For purposes of board review of the comprehensive plans and development regulations
6 adopted by local governments in response to a non-compliance finding, the presumption of
7 validity applies and the burden is on the challenger to establish that the new adoption is
8 clearly erroneous. RCW 36.70A.320(1),(2) and (3).

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

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

26
27 In sum, the burden is on the Petitioner 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 the GMA. Where not clearly erroneous and thus within the framework
30 of state goals and requirements, the planning choices of the local government must be
31 granted deference.

32 **IV. POSITIONS OF THE PARTIES**

The Board, in its FDO, found those portions of the Channel Migration Zones (CMZ) within
the 200 foot shoreline jurisdiction of the Shoreline Management Act were subject to review

1 and approval by the Department of Ecology. Consequently, at the time the matter came
2 before the Board, it only had jurisdiction to review the CMZ regulations applicable outside
3 the 200 foot shoreline jurisdiction. OSF argues that the County, with the adoption of
4 Ordinance 06-0511-09 (Ordinance), is continuing to regulate shoreline areas pursuant to the
5 GMA in violation of RCW 36.70A.480.

6
7 In the FDO, the Board found that the County had failed to comply with the Growth
8 Management Act (GMA) in two regards:
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10 1. It was unclear whether the County CMZ Hazard Maps reflected the best
11 available science (BAS) within the record as to risk assessment delineation. The
12 BAS in the record appeared to categorize high-risk areas based on the likelihood
13 of channel migration within a 50 year period while JCC 18.22.160(2)(d) defined
14 high-risk CMZs to be those areas where channel migration was likely within a 100
15 year period.

16 2. JCC 18.22.170 (4) precluded removal of vegetation on the entirety of a property
17 containing a designated geologically hazardous area or its buffer. The Board
18 found that the vegetation removal restriction as written did not correlate with the
19 CMZ's risk assessment and that such a blanket restriction on vegetation removal
20 did not comport with BAS.

21 The County states that the Ordinance amended its Unified Development Code to clarify the
22 definition of CMZs (JCC 18.10.030) and identified areas excluded from that definition. In
23 the relevant portion of the amended code section, the County now defines "High Channel
24 Migration Hazard" (or High-Risk CMZ) to include those non-disconnected portions of the
25 river channels likely to migrate within a 50 year time frame.⁷
26

27 In regards to the blanket vegetation removal concern, the County states that it adopted the
28 following amendment:
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30 Within a high risk CMZ, vegetation removal shall not be allowed. Vegetation
31 removal outside of a high-risk CMZ shall not be reviewed under this article.⁸
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⁷ Statement of Actions Taken at 4

⁸ JCC 18.22.170 (4) (d).

1 The County states JCC 18.22.160(d) was amended to clarify that only those areas within
2 the designated high-risk CMZ are subject to regulation as Geologically Hazardous Areas.
3 Moderately high, moderate and low risk CMZs are no longer subject to review as
4 Geologically Hazardous Areas.⁹

5
6 OSF argues the County remains noncompliant. First, OSF argues the County's adoption of
7 a uniform standard (applicable to the Big Quilcene, Little Quilcene, Dosewallips, Duckabush,
8 and Lower Hoh rivers) for delineating "high risk" CMZ areas is not supported by BAS. It
9 suggests that different methodologies were employed for delineating risks applicable to
10 rivers on the East and West sides of the County and that the County ". . . failed to . . .
11 demonstrate that it undertook the required process of analyzing how the differences in the
12 CMZ studies affected the various CMZ delineations".¹⁰

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15 Secondly, OSF states that a 100% vegetation retention requirement on all private property
16 that contains a mapped "high-risk" CMZ area is not supported by BAS.¹¹ OSF further
17 suggests there is no support in the BAS record for a 100% natural vegetation retention
18 standard in all high-risk areas.¹² Finally, OSF argues the County failed to justify its 100%
19 vegetation retention mandate by linking that requirement to the functions and values of the
20 critical area.¹³

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23 The County responds to OSF's argument regarding use of "different methodologies" for
24 delineating high risk CMZs by stating that OSF is attempting to reword the issue on
25 compliance. It states the FDO did not question the scientific studies but rather the
26 discrepancy between the BAS in the record which referred to a 50 year channel migration
27 high risk area as opposed to the County CMZ hazard maps which used a 100 year time
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31 ⁹ Statement of Actions Taken at 5.

32 ¹⁰ Olympic Stewardship Foundation' s Response at 4.

¹¹ Id. at 6.

¹² Id. at 7.

¹³ Id. at 9.

1 period. They reiterate that the County addressed the Board's concern by redefining the
2 high-risk area time line from 100 years to 50 years.¹⁴

3
4 As to the vegetation retention requirement, the County again refers to the language of
5 amended JCC 18.22.170 (4)(d) which limits vegetation removal only within high risk
6 CMZs.¹⁵

8 V. DISCUSSION

9 OSF raises numerous objections which are beyond the scope of the County's compliance
10 requirements. Those requirements were relatively simple: (1) address the discrepancy
11 between the 100 year delineation of high-risk CMZs in JCC 18.22.160 (2)(d) and the 50-
12 year high-risk definition in the BAS, and (2) address the vegetation removal preclusion
13 applicable to entire parcels when such a parcel includes a designated geologically
14 hazardous area or its buffer.

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17 The County has accomplished compliance. By adopting the Ordinance, the County
18 amended its Unified Development Code. It redefined channel migration zones and the
19 levels of hazard risk were clarified. JCC 18.10.030 provides the needed clarity to the
20 definition of channel migration zones or hazards. High Risk CMZs are now defined to be
21 those areas along the described rivers, together with those non-disconnected portions of the
22 channel, which are likely to migrate within a 50 year time frame.

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24
25 The County also amended JCC 18.22.170 (4)(d) so that vegetation removal is only
26 disallowed within high risk CMZs; not on entire parcels affected by high-risk CMZs.

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28 The Board did not, as asserted by OSF, question the BAS supporting the definition of high-
29 risk CMZs. Thus, there is no basis for OSF's assertion that the County was required to
30 demonstrate that it analyzed the differences in the CMZ studies in regards CMZ delineation.

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¹⁴ Jefferson County's Reply to OSF's Objections at 4, 5.

¹⁵ Id. at 7.

1 Furthermore, the lack of BAS supporting the County's "adoption of a uniform standard for
2 delineating high risk CMZs" was not an issue on compliance.

3
4 OSF's assertion that the County's 100% vegetation requirement is not supported by BAS
5 was raised by OSF in its Petition for Review (Issue 6)¹⁶. The Board addressed the issue in
6 the FDO and concluded only that a blanket restriction on removal of vegetation that was not
7 linked to the functions and values it was intended to protect was not supported by BAS.

8 That blanket restriction applied to the entirety of a property containing a designated CMZ or
9 its buffer. The Board's concern was the retention requirement's applicability regardless of
10 the associated probability of risk, which would not be equal within the entire CMZ, let alone
11 on the entirety of a property only a portion of which was within the CMZ. There was no
12 question that the BAS in the record supported a vegetation removal limitation so long as it
13 was related to the probability of risk. The County has addressed the Board's concern by
14 limiting the requirement to high risk CMZs alone. OSF's contention is without merit.
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17 VI. ORDER

18 The Board finds that OSF has failed to sustain its burden of proof to establish Jefferson
19 County's actions on compliance were clearly erroneous and further finds that Jefferson
20 County has achieved compliance with the GMA. This case is closed.
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22 Dated this 20th day of July, 2009.
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25 _____
William Roehl, Board Member

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James McNamara, Board Member
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¹⁶ Issue 6: Did Jefferson County fail to comply with RCW 36.70A.172 (1) when it adopted JCC 18.22.170 (4), by imposing vegetation retentions standards on all development in a "channel migration zone"?

Nina Carter, 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 mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives.

Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition 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, by fax 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.

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

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