

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 WHIDBEY ENVIRONMENTAL ACTION  
4 NETWORK,

5 Petitioner,

6 v.  
7

8 ISLAND COUNTY,

9 Respondent.  
10  
11

CASE NO. 08-2-0032

**ORDER FINDING COMPLIANCE**

12  
13 THIS Matter came before the Board on November 5, 2009 following the submittal of Island  
14 County's Statement of Action Taken in response to the Board's May 15, 2009 Final Decision  
15 and Order (FDO) which found Island County Ordinance No. C-117-08 to be non-compliant  
16 with the Growth Management Act (GMA).  
17

18 The Board held a telephonic compliance hearing that day attended by Board members  
19 James McNamara, Nina Carter and William Roehl with Mr. McNamara presiding. Island  
20 County (County) was represented by Daniel Mitchell. Petitioner did not attend the  
21 compliance hearing and, after waiting a reasonable time for Petitioner's representative to  
22 join the conference call, the hearing proceeded without Petitioner.  
23

24  
25 **I. 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 adopt legislation to achieve compliance. RCW 36.70A.300(3)(b).  
28

29 After the period for compliance has expired, the board is required to hold a hearing to  
30 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and  
31 (2). For purposes of board review of the comprehensive plans and development regulations  
32 adopted by local governments in response to a non-compliance finding, the presumption of

1 validity applies and the burden is on the challenger to establish that the new adoption is  
2 clearly erroneous. RCW 36.70A.320(1), (2) and (3). If a finding of invalidity has been  
3 entered, the burden is on the local jurisdiction to demonstrate that the ordinance or  
4 resolution it has enacted in response to the finding of invalidity no longer substantially  
5 interferes with the goals of the GMA. RCW 36.70A.320(4).  
6

7 In order to find the County's action clearly erroneous, the Board must be "left with the firm  
8 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,  
9 121 Wn.2d 179, 201, 849 P.2d 646 (1993). Within the framework of state goals and  
10 requirements, the boards must grant deference to local governments in how they plan for  
11 growth:  
12

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

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

29 However, where a finding of invalidity has been entered the burden is on the local  
30 jurisdiction to demonstrate that the ordinance or resolution adopted in response to the  
31

1 finding of invalidity no longer substantially interferes with the goals of the GMA. RCW  
2 36.70A.320(4).

3  
4 In this case, the Board found that Ordinance C-117-08 substantially interfered with GMA  
5 Goals 2 and 8 and imposed invalidity. The County thus bears the burden of demonstrating  
6 that its ordinance no longer substantially interferes with those GMA goals.  
7

## 8 **II. ISSUE TO BE DISCUSSED**

9  
10 Whether Island County has achieved compliance with regard to the area found to be out of  
11 compliance with the Growth Management Act (GMA) in the Board's May 15, 2009 FDO?  
12

## 13 **III. DISCUSSION**

14 The Board found two areas of Ordinance C-117-08 that did not comply with the GMA:

- 15 (1) Conclusion of Law D found: "Ordinance C-117-08 fails to comply with the Growth  
16 Management Act's requirements for the conservation of agricultural lands by  
17 allowing unregulated subdivision for development of substandard lots in agricultural  
18 areas. This fails to comply with RCW 36.70A.060(1)."  
19 (2) Conclusion of Law E found: "Ordinance C-117-08 fails to comply with the Growth  
20 Management Act's requirements for reduction of low-density sprawling development  
21 in the rural areas by allowing unregulated subdivision for development of  
22 substandard lots in the rural areas. This fails to comply with RCW  
23 36.70A.070(5)(c)."<sup>1</sup>

24 The Board also found in Conclusion of Law I that :

25 "The continuing validity of the exemption codified by Ordinance C-117-08  
26 substantially interferes with the fulfillment of GMA goals 2 and 8. RCW  
27 36.70A.020(2) and (8). The provisions of Ordinance C-117-08 are therefore  
28 invalid."<sup>2</sup>

29 The County states that it has adopted Ordinance C-97-09 which essentially repeals  
30 Ordinance C-117-08 and removes from the Island County Comprehensive Plan and Island  
31

32 <sup>1</sup> May 15, 2009 FDO at 20.

<sup>2</sup> Id.

1 County Code all of the language that was included upon the adoption of Ordinance C-117-  
2 08.<sup>3</sup> As a result, the Island County Comprehensive Plan and Code no longer allow  
3 unregulated subdivision for development of substandard lots in agricultural or rural lands as  
4 was found noncompliant with the adoption of Ordinance C-117-08.  
5

6 The County having removed from its Plan and Code the language the Board found  
7 noncompliant with the GMA and invalid due to its substantial interference with GMA Goals 2  
8 and 8, there no longer exists a basis for finding the County out of compliance with GMA in  
9 that regard.  
10

#### 11 IV. ORDER

12 The Board finds that Island County has achieved compliance by its action. Therefore, the  
13 Board enters a finding of compliance and this case is closed.  
14

15 Dated this 9th day of November, 2009.  
16

17 \_\_\_\_\_  
18 James McNamara, Board Member  
19

20 \_\_\_\_\_  
21 William Roehl, Board Member  
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23 \_\_\_\_\_  
24 Nina Carter, Board Member  
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26 Pursuant to RCW 36.70A.300 this is a final order of the Board.

27 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the  
28 mailing of this Order to file a petition for reconsideration. Petitions for  
29 reconsideration shall follow the format set out in WAC 242-02-832. The original and  
30 three copies of the petition for reconsideration, together with any argument in  
31 support thereof, should be filed by mailing, faxing or delivering the document directly  
32

\_\_\_\_\_ <sup>3</sup> Island County's Statement of Actions Taken at 2.  
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1 to the Board, with a copy to all other parties of record and their representatives.  
2 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),  
3 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for  
4 filing a petition for judicial review.

5 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the  
6 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
7 judicial review may be instituted by filing a petition in superior court according to the  
8 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil  
9 Enforcement. The petition for judicial review of this Order shall be filed with the  
10 appropriate court and served on the Board, the Office of the Attorney General, and all  
11 parties within thirty days after service of the final order, as provided in RCW  
12 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,  
13 but service on the Board means actual receipt of the document at the Board office  
14 within thirty days after service of the final order.

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