

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 IRONDALE COMMUNITY ACTION
4 NEIGHBORS (ICAN) et al.,

5 Petitioners,

6 v.

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8
9 JEFFERSON COUNTY,

10 Respondent.
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Case No. 07-2-0012c

COMPLIANCE ORDER

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14 This matter comes before the Board following the submittal of a Compliance Report by
15 Jefferson County (the "County") relating to actions taken by the County in response to the
16 Board's August 12, 2009 Compliance Order (CO) and subsequent September 11, 2009
17 Order on Petitioners' Motion for Reconsideration.¹ In the August CO, the Board found that
18 the County's plan for the Hadlock/Irondale UGA was in compliance with the Growth
19 Management Act, RCW 36.70A (GMA), except that the County had failed to specify which
20 rural development standards applied within the UGA prior to sewer availability.²
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23 On January 5, 2010, the Board held a telephonic compliance hearing on the single
24 remaining compliance issue. ICAN was represented by Gerald Steel. Mark Johnsen
25 represented the County and was accompanied by Al Scaif, Director of Community
26 Development for Jefferson County. Board members Nina Carter, William Roehl and James
27 McNamara attended, with Mr. McNamara presiding.
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31 ¹ Jefferson County's Statement of Actions Taken (November 2009) and Request for Finding of Compliance,
filed November 24, 2009. [Jefferson County SATC]

32 ² August 12, 2009 Compliance Order at 15.

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2 **I. BURDEN OF PROOF**

3 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
4 of time to enact legislation to achieve compliance.³

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6 After the period for compliance has expired, the board is required to hold a hearing to
7 determine whether the local jurisdiction has achieved compliance.⁴ For purposes of board
8 review of the comprehensive plans and development regulations adopted by local
9 governments in response to a non-compliance finding, the presumption of validity applies
10 and the burden is on the challenger to establish that the new adoption is clearly erroneous.⁵
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12 In order to find the County’s action clearly erroneous, the Board must be “left with the firm
13 and definite conviction that a mistake has been made.”⁶ Within the framework of state
14 goals and requirements, the boards must grant deference to local governments in how they
15 plan for growth:⁷
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17 In recognition of the broad range of discretion that may be exercised by counties
18 and cities in how they plan for growth, consistent with the requirements and goals
19 of this chapter, the legislature intends for the boards to grant deference to the
20 counties and cities in how they plan for growth, consistent with the requirements
21 and goals of this chapter. Local comprehensive plans and development
22 regulations require counties and cities to balance priorities and options for action
23 in full consideration of local circumstances. The legislature finds that while this
24 chapter requires local planning to take place within a framework of state goals
25 and requirements, the ultimate burden and responsibility for planning,
26 harmonizing the planning goals of this chapter, and implementing a county’s or
27 County’s future rests with that community.

28 In sum, the burden is on ICAN to overcome the presumption of validity and
29 demonstrate that any action taken by the County is clearly erroneous in light of the goals
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31 ³ RCW 36.70A.300(3)(b).

32 ⁴ RCW 36.70A.330(1) and (2).

⁵ RCW 36.70A.320(1),(2) and (3).

⁶ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201 (1939).

⁷ RCW 36.70A.3201 (in part).

1 and requirements of Ch. 36.70A RCW (the Growth Management Act).⁸

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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 **II. DISCUSSION**

7 In this compliance proceeding, the Board must determine if the County has cured the area
8 of GMA non-compliance identified in the Board's August 12, 2009 CO. In that Order, the
9 Board found that "[U]ntil such time as the County clarifies which rural development
10 standards apply within the UGA prior to sewer availability, it remains out of compliance with
11 the requirements of RCW 36.70A.110 and RCW 36.70A.020(1) and (12)".⁹

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13 **A. Scope of Review during Compliance Proceedings**

14 Before considering the sufficiency of the County's compliance efforts and ICAN's objections
15 to a finding of compliance, it is important to clarify the nature and extent of the compliance
16 issue before the Board.

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18 As noted above, the Board concluded in the August 2009 CO that "[U]ntil such time as the
19 County clarifies which rural development standards apply within the UGA prior to sewer
20 availability, it remains out of compliance with the requirements of RCW 36.70A.110 and
21 RCW 36.70A.020(1) and (12)".¹⁰ Based on this, ICAN concludes that it may challenge any
22 aspect of Ordinance 09-1109-09's failure to comply with RCW 36.70A.110, RCW
23 36.70A.020(1), and RCW 36.70A.020 (12).

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26 ICAN stated at oral argument that because the August 2009 CO found noncompliance with
27 RCW 36.70A.110, during the compliance proceedings it is not limited to the issue of whether
28 the County has clarified where its rural development standards apply. Instead, ICAN argues
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31 ⁸ RCW 36.70A.320(2).

32 ⁹ Id.

¹⁰ August 12, 2009 CO at 13.

1 that because the County's obligation was to come into compliance with that GMA provision,
2 it could argue that the County is now non-complaint with the cited RCW provisions in ways
3 other than those considered in the recent CO. The Board disagrees with ICAN's position.
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5 The August 2009 CO was clear as to the nature of the County's failure to comply with RCW
6 36.70A.110 and RCW 36.70A.020(1) and (12). The County's error was its failure to specify
7 what development standards would apply in those areas of the Hadlock/Irondale UGA prior
8 to sewer availability. Therefore, the scope of the Board's inquiry in this proceeding is
9 whether Ordinance 09-1109-09 provided the needed clarification.
10

11 In addition, ICAN bases objections to compliance on allegations that the County has
12 violated two additional GMA provisions - RCW 36.70A.040(3) and RCW 36.70A.130(1)(d).¹¹
13 The August 12, 2009 CO did not find the County out of compliance with those sections of
14 the GMA and, therefore, it is beyond the scope of this proceeding to challenge Ordinance
15 09-1109-09 on that basis and the Board will not address such a challenge.
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18 B. Compliance with the GMA, as set forth in the August 2009 CO

19 In response to the August 2009 CO, the County adopted Ordinance No. 09-1109-09 which
20 sought to clarify the "Transitional Rural Zoning" which will apply within the Hadlock/Irondale
21 UGA prior to sewer availability, and the applicable rural development regulations. The
22 County made changes to Chapters 18.15 and 18.18 and adopted a new chapter 18.19 in
23 the Jefferson County Code (JCC) to specify the rural zoning designations and rural
24 development regulations that would apply in the UGA prior to sewer availability. The
25 Jefferson County Comprehensive Plan was also amended by incorporating Figure 2-1a
26 "Transitional Rural Zoning" into Chapter 2 of the Plan.¹²
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32 ¹¹ ICAN's Objections at 9, 11 and 13.

¹² See *generally*, Jefferson County's SATC.

1 ICAN argues the County adopted Figure 2-1a, a new zoning map entitled “Irondale & Port
2 Hadlock UGA Transitional Rural Zoning,” as an amendment to the County Comprehensive
3 Plan, but the County failed to change the descriptive text of the Plan to acknowledge the
4 existence and relevance of Figure 2-1a.¹³ ICAN argues this violates the principle that new
5 provisions of a Comprehensive Plan and development regulations intended to bring the
6 County into compliance with the GMA must be clear.¹⁴
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8 However, in contrast, the Board finds that the existence and relevance of Figure 2-1a to be
9 abundantly clear. JCC 18.18.110, the “Applicability” section of the Transitional Rural
10 Development standards for the Irondale/Port Hadlock UGA states, in relevant part:
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12 The transitional rural zoning is depicted on the map **Irondale and Port**
13 **Hadlock UGA Transitional Rural Zoning**, found in the UGA Element, Figure
14 2-1a, Jefferson County Comprehensive Plan.

15 Furthermore, the Comprehensive Plan text, at 2-9 provides:

16 Zoning designations for the UGA are shown in Table 2-1, parts (a) and (b) and
17 are illustrated in the Irondale & Port Hadlock UGA Future Land Use Map
18 (Figure 2-1). Land use districts correspond to the CP general urban land use
19 designations and zoning districts illustrate the site-specific designations.
20 * * *

21 The Comprehensive Plan Land Use Map should act as a guide for: subsequent
22 Zoning Map designations; the adoption of development regulations; and
23 implementation of future land use decisions. The Growth Management Act
24 requires that implementing development regulations be consistent with the
25 Comprehensive Plan. This requirement will be met by Jefferson County with the
26 adoption of this element and the *Irondale & Port Hadlock Implementing*
27 *Regulations* of the UDC.

28 It is clear that Figure 2-1a is a part of the Figure 2-1, referenced in the Plan. The title of the
29 map, its placement in the Comprehensive Plan, and relevant plan text make Figure 2-1a’s
30 relevance apparent.
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32 ¹³ ICAN’s Objections at 3.

¹⁴ Id.

1 ICAN also argues that the County's definition of when sewer is "available" is ambiguous.

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3 JCC 18.10.010 provides:

4 "Available capital facilities (available capacity)" means capital facilities or
5 services that are in place ("existing capacity"), or for which a financial
6 commitment is in place to provide the facilities or services within a
7 specified time ("planned capacity"). "Available capacity" consists of
8 existing plus planned capacity. (See also "Adequate capacity (adequate
capital or public facilities)," "Concurrency," and "Level of service (LOS).")

9 ICAN contends that under this definition, sewer service becomes "available" in a service
10 area when there is a financial commitment in place to provide services within a specified
11 time.¹⁵ In this case, the critical issue is when sewer (as opposed to the more general
12 "capital facilities") becomes available. Both JCC 18.18.060(4)(a) and JCC 18.19.120(2)
13 address when sewer is considered available with some specificity.
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16 JCC 18.18.060(4)(a) provides:

17 Sewers will be considered to be available to the phased implementation area
18 when sewer infrastructure enters a sewer phase area, according to the phased
19 areas outlined in the *Port Hadlock Sewer Facility Plan*, September 2008.

20 JCC 18.19.120(2), on the other hand, provides that sewer availability is "defined as when
21 the sewer extension is within 200 feet of the closest property line."
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23 ICAN argues that this difference in sewer availability between JCC 18.18.060(4)(a) and JCC
24 18.19.120(2) demonstrates an internal inconsistency. In fact, the Board finds that these
25 sections can be read in harmony. The former section provides when sewer will be
26 considered available to a phased sewer area, i.e. when the sewer infrastructure enters a
27 sewer phase area. JCC 18.18.060(4)(b) makes clear that until that point, when sewer is not
28 yet available, the transitional rural development standards apply, as its states:
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¹⁵ Id. at 12.
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1 Areas with sewer not yet available – Interim On-Site Septic Systems. If the
2 proposed use or major modification is located outside of a phased sewer
3 service area where sewers are available, then transitional rural development
4 standards in Chapter 18.19 apply.

5 Under JCC 18.19 development can occur in an area without sewer service, subject to the
6 standards of that chapter, but provides the needed clarity as to those standards. This is
7 made clear by the provision of this JCC section. Specifically, Chapter 18.19 provides:

8 18.19.100 Purpose. The purpose of Chapter 18.19 is to provide clarity to
9 which zoning designation and development standards are applied during the
10 transitional period of providing sewer facilities to the Irondale and Port Hadlock
11 UGA. Sewer service availability is the determinative factor of whether urban
12 development standards or transitional rural development standards will apply.

13 In addition, this chapter makes clear its applicability: (Emphasis in original)

14 18.19.110 Applicability. Effective as of the date of adoption ... March 23,
15 2009, Jefferson County will apply transitional zoning in the Irondale/Port
16 Hadlock Urban Growth Area for parcels that do not yet have sewer available.
17 The transitional rural zoning is depicted on the map ***Irondale and Port***
18 ***Hadlock UGA Transitional Rural Zoning***, found in the UGA Element, Figure
19 2-1a, Jefferson County Comprehensive Plan ...

20 Once sewer becomes available within the sewer service area, on-site septic systems
21 allowed for interim use *prior to sewer availability* must be decommissioned and the property
22 connected to the sewer system within one year of when the sewer extension is within 200
23 feet of the closest property line.¹⁶

24 While ICAN has challenged this alleged conflict as a violation of RCW 36.70A.040(3) and
25 .130, allegations of violations of those statutes are not properly before the Board. Instead,
26 as to the question of whether the County has now specified which rural development
27 standards apply with the UGA prior to sewer availability, the Board finds that the County's
28 amendments to JCC 18.18.060(4)(b) and the adoption of JCC 18.19 provide that specificity.
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¹⁶ See, JCC 18.19.120(2).
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III. ORDER

Based on the foregoing, the Board determines that the County's adoption of Ordinance 09-1109-09 complies with the Growth Management Act, and the County has provided the needed degree of clarity as to which rural development standards apply within the UGA prior to sewer availability. This being the sole remaining issue in this appeal, the case of *ICAN, et al v. Jefferson County*, Case No. 07-2-0012c, is CLOSED.

Entered this 27th day of January, 2010.

James McNamara, Board Member

William Roehl, Board Member

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 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

1 34.05.542. Service on the Board may be accomplished in person or by mail, but
2 service on the Board means actual receipt of the document at the Board office within
3 thirty days after service of the final order. A petition for judicial review may not be
4 served on the Board by fax or by electronic mail.

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