BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

1000 FRIENDS OF WASHINGTON, EVERGREEN ISLANDS, and SKAGIT AUDUBON SOCIETY, Petitioners, v. CITY OF ANACORTES, Respondent.	No. 03-2-0017 **ORDER ON ISSUE FOR RECONSIDERATION**

This matter comes before the Board upon the City's motion for reconsideration of the Final Decision and Order (FDO) issued in this case. Anacortes' Motion for Reconsideration Or In the Alternative Stay of Compliance Process (February 20, 2004). The FDO found that the City's designation of Fish and Wildlife Habitat Conservation Areas (FWHCAs) and protections for FWHCAs and wetlands were not compliant with the Growth Management Act (GMA). The Board granted the City's motion to reconsider only as to the following issue: Were the wetlands protection provisions of Ch.17.65 AMC enacted in 1994? Order on Motion for Reconsideration, March 3, 2004.

The reconsideration hearing on this issue was held on March 25, 2004 in Mount Vernon. Mr. Tim Trihimovich and Mr. Charles Cottrell represented 1000 Friends of Washington and Mr. Ian Munce represented the City of Anacortes. Board members Margery Hite and Holly Gadbaw attended personally in Mount Vernon and Board Member Nan Henriksen attended telephonically. Mr. Tom Glade also attended on behalf of Evergreen Islands.

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Positions of the Parties

The City in its brief and at argument states that it adopted Chapter 17.65 AMC, as its wetlands protection measures pursuant to GMA requirements in 1994, and subsequently amended them in 1995 and 1998. When these wetlands protections measures were adopted and amended, the City points out that they were not challenged within the statutory deadlines. RCW 36.70A.290(2). Therefore, the present challenge to them is not timely. The City's brief states Ordinance 2623 simply provided that nontidal wetlands were protected by Chapter 17.65 AMC, incorporated the ordinance by reference in Ordinance 2198, but it did not change the ordinance in any way. Anacortes' Brief For Hearing On Reconsideration (March 12, 2004) at 2. The City maintains the purpose of incorporating Chapter 17.65 by reference into Ordinance 2198 was to organize all its critical areas protections into a single ordinance, to establish a chapter in the Anacortes Municipal Code for all critical areas protections, and to answer allegations that it had not adopted designations for FWHCAs and regulations to protect wetlands and FWHCAs. Because the City did not make any changes to an appropriately adopted and amended Chapter 17.65 AMC when it incorporated it in June 2003, the City contends that the Board does not have jurisdiction over the adequacy of those wetlands protections.

The City, as it did in its Response Brief for the Hearing on the Merits of this case, cites *Montlake Community Club v. Central Puget Sound Growth Management Hearings Board,* 110 Wn. App. 731, 740, P.3d 57 (2002) ("*Montlake*") and *Panesko v. Lewis County*, WWGMHB Case No. 98-2-0011c (Final Decision and Order, March 5, 2001) ("*Panekso*") to support its position. The City argues that its situation is similar to the City of Seattle's in *Montlake,* where Petitioners challenged certain aspects of the Montlake Community Plan, including Seattle's concurrency management system and its level of service standards. The Supreme Court upheld the Central Puget Sound Growth Management Hearings Board's decision that it did not have jurisdiction over the concurrency management program or the level of service standards because these

were adopted prior to the adoption of the community plan and were not changed by the community plan.

The City also argues that because its wetland protection measures are unchanged by Ordinance 2623 its circumstances are similar to Lewis County's in *Panesko*. In *Panesko*, the Board reviewed an ordinance adopted as part of its consistency review pursuant to RCW 36.70A.060(3), finding that Lewis County's unchanged critical areas regulations were consistent with the County's comprehensive plan and development regulations.

Petitioners view the cases cited above differently. In contrast to the City's argument, Petitioners contend that the circumstances in the City of Anacortes case are different from those of the City of Seattle in *Montlake.* Seattle, Petitioners argue, did not readopt its concurrency management system or its level of service standards. Anacortes' Ordinance 2623, on the other hand, did readopt Chapter 17.65 AMC. In contrast to Lewis County's circumstances, Petitioners argue, Anacortes did not readopt Chapter 17.65 AMC after a consistency review, when adopting their comprehensive plan and development regulations, but did so in order to moot the failure to act challenge brought by the same Petitioners in WWGMHB Case No. 03-2-0012.

Petitioners concede in their brief and at argument that the City did adopt Chapter 17.65 in 1994 and that a challenge to it at this time would not be timely had the City not readopted it to moot Petitioners' earlier challenge. They also concede that if the City had not readopted the wetlands protection provisions of Chapter 17.65 AMC in Ordinance 2623 that this Board would not have jurisdiction over the City's wetlands protection provisions. However, Petitioners contend that because Ordinance 2623 does indeed reenact the wetlands protection provisions of Chapter 17.65 to ensure

compliance with the GMA and to moot a failure to act challenge, the Board has jurisdiction over this issue.

Discussion

This Board agreed to reconsider its Final Decision and Order in this case on one limited issue: Had the City adopted its wetlands protection provisions in 1994? The answer to that question is not, as it turns out, in dispute. The parties agree that the City enacted its wetlands protection provisions in 1994 and amended them in 1995 and 1998. Further, the parties agree that the newly adopted wetlands provisions in Ordinance 2623 are unchanged from those adopted in 1994.

However, the parties do not agree on the effect of the readoption. The City argues it cannot be reviewed substantively because there have been no changes to the prior adopted wetlands protections; Petitioners argue that readoption confers jurisdiction on the Board to review the sufficiency of the wetlands protections.

Petitioners point to the statute conferring jurisdiction on the boards to consider petitions for review. The boards have jurisdiction to consider only petitions alleging lack of compliance of comprehensive plans, development regulations and amendments to either of these with the Growth Management Act (Ch. 36.70A RCW), the State Environmental Policy Act (Ch. 43.21C RCW) or the Shorelines Management Act (Ch.90.58 RCW). RCW 36.70A.280(1). A petition must have been filed within 60 days of the date of publication by the legislative body of the city or the county. RCW 36.70A.290(2). There is, Petitioners point out, no statutory provision limiting review if it is a "readoption."

However, we believe that the critical distinction here is that the City's readoption of the wetlands protection provisions did not create a new development regulation for the Board to review; that development regulation was already in existence. Nor did the

City's readoption of that development regulation *amend* the development regulation in any way; the development regulation was unchanged as a result of the readoption.

This Board has jurisdiction over comprehensive plans, development regulations and amendments to them, when they are challenged within the time limits established by the GMA. RCW 36.70A.290. The City's wetlands protections are development regulations codified in Ch. 17.65 AMC. They were adopted in 1994. They were also amended in 1995 and 1998. They were not amended in the challenged ordinance here, Ordinance 2623.

The Petitioners ask us to hold that the readoption of the wetlands protections was effectively the adoption of a new development regulation. However, there is nothing new about the City's wetlands protections. The wetlands protection regulations are in place and unchanged from the 1995 and 1998 amendments.

Petitioners further argue that the City readopted the wetlands protections regulations to respond to a failure to act challenge brought by Petitioners in the prior case, therefore making the readoption a GMA action. The City, in fact, did readopt its wetlands protections regulations for the purpose, among others, of mooting the Petitioners' failure to act challenge in an earlier case. *1000 Friends of Washington, et al. v. City of Anacortes*, WWGMHB Case No. 03-2-0012 (Motion to Dismiss Petition for Review, June 16, 2003):

> Anacortes adopted an interim controls ordinance re-designating and protecting critical areas on June 16, 2003 (the Ordinance). This Ordinance, in part, addresses concerns raised by Petitioners that enforceable GMA critical areas protections are not in place. This Ordinance is now included in the Anacortes Municipal Code ("AMC"), and sets forth how critical areas are designated by the City, and how they are protected. Even, [sic] were there to be a question in the past regarding whether the City

> has "acted" to adopt critical areas regulations, the question of whether Anacortes "acted" is now moot. Because Anacortes has acted, the Board no longer has jurisdiction over this matter.
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> Motion to Dismiss Petition for Review at 1.

However, the City was not compelled to readopt its wetlands protections regulations by any direction in the GMA or by this Board. Had the City not readopted its wetlands protections regulations, it could have asserted the same jurisdictional challenge that it raises here and the Petitioners would have had the same opportunity to respond to it. As Petitioners themselves concede, their challenge to the wetlands protections regulations codified in Ch. 17.65 AMC in *1000 Friends of Washington, et al. v. City of Anacortes*, WWGMHB Case No. 03-2-0012 was not timely. The challenge does not become timely because the City amended Ordinance 2198 (a 1991 ordinance) to incorporate those development regulations by reference. Under these circumstances, we find that the Petitioners' challenge to the readoption of Ch. 17.65 AMC in Ordinance 2623, amending Ordinance 2198, did not form the basis for the Board's jurisdiction to review those previously adopted (and unchanged) development regulations. Therefore, we rescind our previous finding that this Board has jurisdiction over Chapter 17.65, the City's wetland protection measures. We also rescind any findings we made in our February 10, 2004 Final Decision and Order in this case regarding noncompliance of the substance of Chapter 17.65.

However, we want to make it clear that while the readoption of Chapter 17.65 by Ordinance 2623 did not trigger a new basis for review of the already adopted wetlands protections regulations, this was not the case in the readoption of the Forest Plan as designation and protection measures of Fish and Wildlife Habitat Conservation Areas (FWHCAs). The Forest Plan was not adopted as the City's development regulations for the protection of fish and wildlife conservation areas ("FWCAs") prior to the adoption of Ordinance 2623. The City points to nothing in the record of this case,

previous to the adoption of Ordinance 2623 that contains specific language that the Forest Plan provides for designation or protection of FWHCAs. In the case of the designation and protection of FWHCAs in the City of Anacortes, Ordinance 2623 enacts the Forest Plan to designate and protect FWHCAs for the first time. For this reason, the Board found that it did have jurisdiction for substantive review of the FWHCA measures. We found that the City's designation and protection for FWHCAs were noncompliant and that the City should have considered the Minimum Guidelines and included best available science in the adoption of the Forest Plan as FWHCA designation and protection measures to comply with the Growth Management Act including RCW 36.70A.070, .060, .170(2), and .172.

Based on the record now presented to the Board by the City, we make the following revisions to our February 10, 2004 FDO in this case:

Amendment No. 1:

Finding of Fact 10 in the FDO read as follows:

10. Ordinance No. 2623 adopts protection for wetlands pursuant to RCW 36.70A.040 and RCW 36.70A.060(2).

We revise Finding of Fact 10 to read as follows:

10. *The* City originally *adopted Chapter 17.65 in 1994 to meet the requirements of RCW 36.70A.060(2) and RCW 36.70A.070. It amended Chapter 17.65 in 1995 and 1998. These measures were not challenged pursuant to RCW 36.70A.290(2). Ordinance No. 2623 readopts Chapter 17.65, protections for wetlands, in order to incorporate this chapter in a stand-alone critical areas ordinance and a separate chapter of the Anacortes Municipal Code, to clarify for the Board and the public that the City had enacted wetland protection measures, to ensure compliance with RCW 36.70A.060(2) and RCW 36.70A. 070 and to moot a failure of act challenge.*

Amendment No. 2:

In our February 10, 2004 FDO, Finding of Fact 12 read as follows:

12. The record for the adoption of Ordinance No. 2623 does not show that the City included best available science ("BAS") in the adoption of protection measures for FWHCAs and wetlands as required by RCW 36.70A.172(1) of the GMA.

Finding of Fact 12 is revised to read as follows:

12. *The record for the adoption of Ordinance No. 2623 does not show that the City included best available science ("BAS") in the adoption of protection measures for FWHCAs as required by RCW 36.70A.172(1) of the GMA.*

Amendment No. 3:

In our February 10, 2004 FDO, Conclusion of Law 1 read as follows:

1. The Western Washington Growth Management Hearings Board has jurisdiction over the parties and subject matter of this case.

We revise Conclusion of Law 1 to read as follows:

1. *The Western Washington Growth Management Hearings Board has jurisdiction over the parties and the issue of the adequacy of the City of Anacortes' designation of and development regulations protecting FWHCAs*.

Amendment No. 4:

Conclusion of Law 4 in our February 10, 2004 FDO read as follows:

4. Because the record does not show that the City included the best available science (BAS) in the adoption of development regulations to protect fish and wildlife habitat conservation areas or wetlands areas as required by RCW 36.70A.172(1), Ordinance No. 2623 does not comply with the Growth Management Act.

We revise Conclusion of Law 4 to read as follows:

4. *Because the record does not show that the City included the best available science (BAS) in the adoption of development regulations to protect FWHCAs as required by RCW 36.70A.172(1), the City of Anacortes' FWHCAs do not comply with the Growth Management Act.*

Amendment No. 5:

In our February 10, 2004 FDO, Finding of Fact 5 read as follows:

5. Because the record does not show that the City included the best available science (BAS) in the adoption of development regulations to protect fish and wildlife habitat conservation areas or wetlands areas as required by RCW 36.70A.172(1), Ordinance No. 2623 does not comply with the Growth Management Act.

Finding of Fact 5 is revised to read as follows:

5. *Because the record does not show that the City included the best available science as required by RCW 36.70A.172(1), in the designation and protection of FWHCAs, the City of Anacortes' FWHCA designation and protection measures do not comply with RCW 36.70A.060(2), RCW 36.70A.040(3)(b), and RCW 36.70A.020(10).*

Amendment No. 6:

The Order section of our February 10, 2004 FDO read as follows:

VIII. ORDER

Ordinance No. 2623 is remanded to the City for the purpose of bringing its designations and protections for FWHCAs and wetland protection measures into compliance with the GMA requirements for designation and protection of critical areas, including RCW 36.70A.060 (2), RCW 36.70A.170(1)(d), RCW 36.70A.170(2), RCW 36.70A.172(1) and RCW 36.70A.040. The City must complete this work

within 180 days from the date of this order. The City must submit a compliance report to the Board and copies of the compliance report to the Petitioners no later than August 28, 2004, showing its compliance efforts in response to this remand order.

A compliance hearing is scheduled in this case for October 27, 2004. The briefing schedule for that hearing is as follows: Parties will follow the following briefing schedule:

August 28, 2004 – Compliance Report and Index Submission Deadline.

September 9, 2004 – Deadlines for motions to participate, additions to the Index, and motions to supplement the record.

September 24, 2004 – Deadline for Petitioners' Opening Briefs setting forth objections (if any) to a finding that the City is now in compliance.

October 15, 2004 – Deadline for City's Response Brief.

October 22, 2004 – Deadline for Petitioners' Reply (Optional).

October 27, 2004 – Compliance Hearing.

We revise the Order Section of our February 10, 2004 FDO to read as follows:

VIII. ORDER

Ordinance 2623 is remanded to the City for the purpose of bringing its designations and protections for FWHCAs into compliance with the GMA requirements for designation and protection of critical areas, including RCW 36.70A.060(2), RCW 36.70A.170(1)(d), RCW 36.70A.170(2), RCW 36.70A.172(1) and RCW 36.70A.040. The City must complete this work within 180 days from the date of this order. If the City determines that an extension of this order is necessary due to the scope and complexity of this remand work, the City must submit a progress report showing its

progress in response to this remand order, a proposed schedule for completion of the work remaining to achieve compliance, and a request for extension to the Board and Petitioners no later than August 28, 2004.

A compliance hearing is scheduled in this case for January 15, 2005. Parties will adhere to the following briefing schedule:

November 4, 2004 – Compliance Report and Index due.

November 16, 2004 – Deadlines for motions to participate, additions to the Index, and motions to supplement the record

December 2, 2004 – Petitioners' Opening Briefs setting forth objections (if any) to a finding that the City is now in compliance.

December 23, 2004 – Deadline for City's Response Brief.

January 6, 2005 – Deadline for Petitioner Reply Brief (optional).

January 15, 2005 – Compliance Hearing.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(4), this decision constitutes a final decision and order for purposes of judicial review.

SO ORDERED this 20th day of April 2004.

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Holly Gadbaw, Board Member

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Nan Henriksen, Board Member

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Margery Hite, Board Member