State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

SCOTT SIMMONS, Petitioner, v. STEVENS COUNTY, Respondent, LARSON BEACH NEIGHBORS and JEANIE WAGENMAN, Intervenors.	Case No. 04-1-0011 ORDER ON MOTIONS

I. PROCEDURAL HISTORY

On September 13, 2004, SCOTT SIMMONS, by and through his representative, Scott Simmons, filed a Petition for Review.

On October 4, 2004, Larson Beach Neighbors and Jeanie Wagenman filed a Motion to Intervene.

On October 8, 2004, the Board received a Notice of Appearance filed by Peter Scott.

On October 11, 2004, the Board held a telephonic Prehearing conference. Present were, John Roskelley, Presiding Officer, and Board Members Judy Wall and Dennis Dellwo. Present for Petitioner was Scott Simmons. Present for Respondent was Lloyd Nickel and Mr. Scott.

On October 12, 2004, the Board issued its Prehearing Order.

On October 18, 2004, the Board received Petitioner's and Respondent's Objection to Larson Beach Neighbors and Jeanie Wagenman's Motion to Intervene.

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On October 25, 2004, the Board received Intervenors' Response to Respondent and Petitioner's Objection to Larson Beach Neighbors and Jeanie Wagenman's Motion to Intervene.

On November 1, 2004, the Board issued its Order on Motion to Intervene.

On November 1, 2004, the Board received Petitioner's Motion to Supplement the Record. Also on November 1, 2004, the Board received Intervenors' Motion to Supplement Record Clarification of admitted exhibits.

On December 7, 2004, the Board held a telephonic Motion Hearing. Present were, John Roskelley, Presiding Officer, and Board Members Judy Wall and Dennis Dellwo. Present for Petitioner was Scott Simmons. Present for Respondent was Lloyd Nickel and Mr. Scott. Present for Intervenors was Jeanie Wagenman.

II. FINDINGS OF FACT

1. Stevens County published a notice of adoption of Title 13, Resolution 32-2003, the Stevens County Critical Ordinance, on March 4, 2003.
2. Stevens County published a notice of adoption of Amendments to Title 13, the Stevens County Critical Areas Ordinance, on July 15, 2004.
3. The public record used to develop Title 13, the Stevens County Critical Areas Ordinance, was used extensively to develop the Amendment to Title 13.
4. The Stevens County "NOTICE OF PUBLIC PARTICIPATION ON CRITICAL AREAS ORDINANCE", published June 10, 2004, specifically states that the Planning Division or the BOCC must receive all comments no later than 4:30 PM, June 25, 2004.
5. On June 29, 2004, the Planning Commission continued the public hearing. The public notice said they "will consider the written record on the CAO Title 13 Amendment revisions in order to form a recommendation for the BOCC." The Planning Commission's recommendation to the BOCC is based on the written record. The

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notice further stated that opportunities for the public to speak may be given.

6. The notice for the BOCC public hearing on July 6, 2004 also states that opportunities for the public to speak may be given. Nothing was mentioned about accepting written exhibits.

III. BURDEN OF PROOF

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act.

The Board will grant deference to counties and cities in how they plan under Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County,* and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Thurston County v. Cooper Point Association,* 108 Wn.App. 429, 444, 31 P.3d 28 (2001).

Pursuant to RCW 36.70A.320(3) we "shall find compliance unless [we] determine that the action by [Jefferson County] is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [the GMA]." In order to find the County's action clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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The Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

IV. DISCUSSION

The Petitioner, Mr. Scott Simmons, filed a Motion to Supplement the Record, requesting the following additions be added to the record:
(Petitioner's Items are referenced by the designation **A**., then the number.)

A.

1. The Respondent's Index of the Record be expanded to include the full Index of the record for Title 13.
2. The index to the record should be expanded to include all electronic recordings of the Planning Councils, Planning Commission, and BOCC hearings concerning Title 13.
3. The index should be expanded to include all handouts and meeting materials for above referenced meetings.

The Intervenors, Larson Beach Neighbors and Jeanie Wagenman, represented by Jeanie Wagenman, also filed a Motion To Supplement The Record and requested the Board to allow the following additions:
(The Intervenors' Items are referenced by the designation **B.**, then the number.)

B.

1. The Record should include all the minutes of the meetings and hearings regarding Amended Title 13 and be available to the public and Intervenors.
2. The Record should include drafts of proposed changes to the Amended Title 13, printed or submitted at meetings and hearings.
3. The Record should include a complete finished copy of Title 13 with Amended Changes.
4. The Record should include specific exhibits of the Record acquired during the process of writing Title 13 (as opposed to just the Amended

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13). Ms. Wagenman referenced exhibits (or portions thereof) 32, 59, 115, 128, 129, 140, 141, 142, 149, 167, 169, 177, 181 and 182.

5. Requested Water Resource Inventory Area (WRIA) 59 be included in the Record.

6. Requested two new submissions, which included a letter from Mr. Walter Davis to Stevens County Planning Department and an e-mail to Jeanie Wagenman from Brodhaus, with a reply from Jim Davies dated September 7, 2004.

7. Requested Exhibits 164, 165 and 166 be removed from the record.

Motion items **A**. 1 through 3 by the Petitioner were discussed during the teleconference first.

Respondent's response to Petitioner's Item #1:

In response to the Petitioner's Motion #1, the Respondent, represented by Mr. Scott, argued that Title 13 (the original Critical Areas Ordinance adopted by Stevens County) and Amended Title 13 should be considered separate actions, thus each should have separate records. Incorporating the entire record of Title 13 would make the process cumbersome. This Petition should be based only on the record submitted during the amendment process. Mr. Scott argued that since Stevens County only intended to address the non-compliant issues through a separate resolution, only the record accumulated during that process should be used.

Petitioner and Intervenor's response to Respondent:

The Petitioner and Intervenors' disagreed. They argued that the two actions, Title 13 and the subsequent Amendment to Title 13, are inseparable. The record for the Amendment was an accumulative process. According to the Petitioner, there's no requirement to submit all new material every time there's a new amendment. The Amendment was an extension of the record produced for the adoption of the original Title 13.

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The Intervenor expressed concern about having to duplicate the record of an action every time an amendment is considered. It would be overly burdensome to the Petitioner.

Respondent's response to Petitioner's Items #2 & #3:

The Respondent agreed to items #2 and #3 submitted by the Petitioner, so there was no further discussion on these items.

Respondent's response to Intervenors' Items #1 & #2:

The Respondent, in reference to items #1 and #2, said the minutes of the meetings and drafts of Title 13 were available in the Planning Department in various formats and could be seen or copied there.

Intervenors' response to Respondent's argument:

Intervenors' requested the documents be available where the rest of the record is located. Copies of all documents, not just a selection offered by the County, should be available and citizens shouldn't have to search in a variety of venues to inspect the record.

Respondent's response to Intervenors' Item #3:

The Respondent, regarding item #3, agreed to distribute an "engrossed" version of the Amended Title 13 to all parties.

Respondent's response to Intervenors' Item #4:

The Respondent, regarding item #4, argued that it was too late to introduce new items and those exhibits requested by the Intervenor should be excluded.

Intervenors' response to Respondent's argument:

The Intervenor argued that exhibits from the Title 13 record should be included in the record for the Amended version. This is the same issue as Petitioner's #1.

Respondent's response to Intervenors' #5:

Regarding item #5, Respondent pointed out that the document requested, the WRIA 59 study, was already included in the record. Further investigation by Ms. Wagenman proved this was the case.

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Respondent's response to Intervenors' Items #6:

The Respondent argued that item #6 was the introduction of new material to the record and shouldn't be allowed.

Intervenors' response to Respondent's arguments:

Ms. Wagenman agreed with Mr. Scott that the letter and e-mail in item #6 were new, but are important additions to the record to supplement the Intervenor's case.

Respondent's response to Intervenors' Item #7:

Item #7, the three written exhibits presented at the July 6, 2004, Board of County Commissioners meeting, were accepted at a public hearing where public testimony was to be allowed. Mr. Scott said he didn't see a difference in accepting written testimony from oral testimony and putting it in the record.

Petitioner's and Intervenors' response to Respondent's arguments:

Mr. Simmons agreed with Mr. Scott. The Board of County Commissioners allowed the documents in support of his testimony and should be part of the record.

Ms. Wagenman disagreed with the Respondent on item #7, arguing that Stevens County sent out a notice saying the deadline for submitting written material is at 4:30 PM on June 25, 2004. Written material submitted after that date and time should not be allowed in the record.

Board discussion:

In regards to Petitioner's Item #1, the Board believes the record should incorporate, not only the exhibits presented during the Amendment process, but also the exhibits presented during the initial adoption of Title 13, which is the foundation for the Amendment. Those who wish to Petition or Intervene should not have to submit duplicative documents during an amendment process that were already submitted as part of an extensive record of the original ordinance. Title 13 and the Amendment to Title 13 are synonymous. The Respondent agreed to Petitioner's Items #2 and #3 without argument and they are therefore granted.

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Regarding Item **B**. #1, the Board requests the Respondent gather all documents pertaining to 04-01-0011 in one central location (i.e. Stevens County Clerk's Office and/or office of Peter Scott, Preston Gates & Ellis). Regarding Item **B.** #2, all public drafts of the Amendment are relevant to the proceedings and shall be made available. Item **B.** #3 has been agreed to by the Respondent. Item **B.** #4 pertains to the complete record and the exhibits are allowed. Item **B.** #5, concerning WRIA 59, is already in the record, therefore no longer at issue. Item **B**. #6, a request to supplement the record with new documents, is denied. The entry of new documents to an already established record is inappropriate without a clear showing that they will aid the Board in reaching a decision in this matter. Concerning Item **B.** #7, the Board finds the Interveners have fulfilled the burden of proof. The three documents presented to the Board of County Commissioners on July 6, 2004, shall not be allowed. According to the record, written documents were to be in June 25, 2004, by 4:30 PM. The public hearing held on July 6, 2004, by the BOCC was for public testimony only. There is a difference between written and oral testimony. Clarity is paramount in government instructions. If the Board of County Commissioners had intended to allow additional written documents on July 6, 2004, they should have indicated as such. Other citizens may have taken the directive given on June 25, 2004, as final and decided not to submit additional exhibits. Allowing these three exhibits is unfair to the citizens who followed the rules given on June 25, 2004.

V. ORDER

Based upon the **Findings** and **Discussion** it is hereby ordered as follows:

1. The Petitioner's request for items **A.** #1, #2 and #3 to supplement the record is granted.
2. The Intervenors' request for Items **B.** #1, #2, #3 and #4 to supplement the record and consolidate exhibits is granted.
3. Item #5 is already in the record.
4. The inclusion of Item #6 is denied.

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5. Item #7, a request to disallow the inclusion of exhibits #164, #165 and #166, is granted.

SO ORDERED this 10th day of December 2004.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
John Roskelley, Board Member

_____
Judy Wall, Board Member

_____
Dennis Dellwo, Board Member

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