

Schroader, Kathy



From: Cook, Christine
Sent: Thursday, September 17, 2015 1:38 PM
To: Orjiako, Oliver; Schroader, Kathy
Subject: Second batch of appeal docs -- for the record
Attachments: 97.12.10.Nichols I-Ltr Opinion.pdf; 97.12.31.Nichols I Judgment.pdf

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SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY
DEPARTMENT NO. 3
P. O. BOX 5000
VANCOUVER, WASHINGTON 98666-5000



JOHN F. NICHOLS
JUDGE

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FILED
DEC 11 1997
JoAnne McBride, Clerk, Clark Co.

December 10, 1997

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Re: Clark County v. Western Washington Growth Management Hearings Board
Clark County Cause No. 96-2-05498-8

Dear Sirs/Madam:

50/18

In any review of an administrative determination, the Court is restricted to the perimeters set forth in RCW 34.05.070. Thus, relief from the WWGMHB's order will be granted only if it was:

- (a) Unconstitutional;
- (b) Outside the Board's statutory authority;
- (c) The result of an unlawful procedure;
- (d) an erroneous interpretation or application of the law;
- (e) Not supported by the evidence; or
- (i) Arbitrary or capricious.

The first issue which must be addressed is whether the WWGMHB followed the proper procedure in reaching its decision. The County alleges that WWGMHB improperly imposed the burden of showing compliance with the act on the County. RCW 36.70A.320 clearly establishes that the Board shall find that the County's comprehensive plan is in compliance with the GMA unless it finds by a preponderance of the evidence that the county erroneously interpreted or applied the law. This presumption is mirrored in WAC 242-02-630;632; and 634.

The rationale for granting the County this presumption of validity is a logical extension of the deference conferred upon the local legislative body throughout RCW 36.70A. The chapter is replete with references emphasizing the input necessitated from the local citizens, communities, governmental agencies and the private sector. In guiding compliance with the GMA the WWGMHB must give deference to "local circumstances"; "regional differences"; and "county-wide policies" as interpreted by the county.

From the record on review is abundantly clear that this cloak of validity was not bestowed on the county by the WWGMHB. The "Compliance Order and Order of Invalidation" states at page 2 as follows:

...The burden of proof to show compliance was placed on the local government. The burden of meeting the standard for a finding of invalidity remained with the petitioners.

Despite this pronouncement, the Board recognized that the standard of review remained the same whether at an original compliance hearing or on remand; stating again at page 2 of the above order:

We have previously held in Port Townsend v. Jefferson County, WWGMHB #94-2-0006 (Port Townsend) that the clear language of RCW 36.70A.330(1) directs that the ultimate question in a compliance hearing is whether there is compliance with the Act, not necessarily whether there is specific compliance with the remand order. As we noted in Port Townsend that holding was consistent with the overall concept of GMA to allow local governments discretion, within the confines of the Act, to make local decisions best suited to their individual situations.

The recent amendments to RCW 36.70A affirm the weight to be given to the county's decisions. Under these amendments there can be a finding of invalidity only under the clearly erroneous standard. The burden of proof shifts to the county only after a determination of invalidity had already been made. (Ch. 429, Sec. 20; Laws of 1997).

Council for CCNRC argues that the issue of burden of proof is a "red herring" and further, that under any standard, the County's violations are so substantial that this was in effect harmless error. This is not the proper standard of review. See, Cruz v. Grant County Sheriff's Office, 74 Wn. App. 490, 873 P.2d 1211 (1994); stating: "Because we conclude the court applied the wrong burden of proof at the forfeiture hearing, we vacate the order and remand." As that court went on to explain at page 496:

... To do so, this court must find that GCSO met its burden and Mr. Cruz failed to meet his. That would make this court a trier of fact, however, which it is not. Instead, the matter must be remanded for rehearing. See Tellevik v. 31641 W. Rutherford St., 120 Wn.2d 68, 838 P.2d 111, 845 P.2d 1325 (1992).

RCCPA's attorney argues that a different burden of proof applies to a Board's consideration on remand. This, as stated above, is contrary to WWGMHB's own interpretation. The Attorney General submits that the county waived or is estopped from now raising the issue on the standard of proof to be applied. While admitting that the WWGMHB placed the burden on the county; the county by failing to ask the Board for a ruling on the issue, thereby waived this argument. Waiver is essentially a matter of intention. Negligence, oversight or thoughtlessness does not create it. Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co., 4 Wn. App. 695, 700, 483 P.2d 880 (1971). Consequently, the county did not waive this right.

The county invites the court, following its determination on the issue of validity, to address the issue of whether the Board exceed its jurisdiction by depriving the county of its local discretion. For the reasons stated in Cruz v. Grant County Sheriff's Office, supra., this would be beyond the scope of the court's authority. However as a result of the voluminous time allocated to this case, the parties should be mindful of the impressions the court has formed with regard to the remaining aspects of the appeal.

As all parties agree RCW 36.70A serves at best, the vaguest of frameworks for the implementation of a growth management plan. The statute states emphatically that local deference must be given in those gray areas of compliance. The Board's role is to guide and in the case of invalidity, to precisely direct the county on the steps to be taken in order to comply with the act. The Board shall not substitute its own perceptions or those of another region in contradiction to those adopted by the lawful representatives of the county so long as there is compliance with the act.

It is the court's impression especially in the area of rural minimum lot size, that must give full credence to the county's determinations. The county is presumed to have taken into consideration the regional preferences and historical development and practices in formulating its CP. It is the courts hope that full deference along with the requisite presumption of compliance will be given the county upon remand.



John F. Nichols
Judge Superior Court

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F I L L E D
DEC 31 1997
JoAnne McBride, Clerk, Clark Co.

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**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY**

CLARK COUNTY, a municipal
corporation,

Petitioner,

v.

WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,

Respondent.

Case No. 96-2-05498-8

JUDGMENT

THIS MATTER came on before the Honorable John F. Nichols on October 29, 1997 for hearing based on the administrative record produced by the Western Washington Growth Management Hearings Board, the parties being represented by counsel, and the court having considered the oral argument of counsel and having reviewed the administrative record, pleadings and papers filed herein and having considered the following documents:

1. Clark County's Motion for Stay of Western Washington Growth Management Hearings Board Orders, dated April 8, 1997;
2. Declaration of Richard S. Lowry in Support of Clark County's Motion for Stay, dated April 8, 1997;
3. Clark County's Proposed Order Granting Clark County's Motion for Stay of Western Washington Growth Management Hearings Board Orders;
4. RCCPA's Memorandum in Opposition of Motion for Stay of WWGMHB Orders, dated August 8, 1997;

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JUDGMENT - 1

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- 1 5. RCCPA's Motion to Dismiss, dated August 8, 1997;
- 2 6. CCNRC, et al.'s, Memorandum in Opposition to Request for Stay, dated August
- 3 8, 1997;
- 4 7. CCNRC's Motion to Dismiss 1995 Claims - Statute of Limitations, dated August
- 5 8, 1997;
- 6 8. Second Declaration of Richard S. Lowry with Exhibits in Support of Petitioner
- 7 Clark County's Reply Memorandum in Support of its Motion for Stay of Western
- 8 GMA Board Orders and Response to Respondent's Motion to Dismiss, dated
- 9 August 21, 1997;
- 10 9. Petitioner Clark County's Reply Memorandum in Support of its Stay of Western
- 11 GMA Board Orders and Responses to Respondents' Motion to Dismiss, dated
- 12 August 21, 1997;
- 13 10. CCNRC's Motion and Declaration to Dismiss all Claims - Failure to Serve all
- 14 Parties, dated August 21, 1997;
- 15 11. CCNRC's Memorandum in Support of Motion to Dismiss, dated August 21, 1997;
- 16 12. Memorandum of Respondent Western Washington Growth Management
- 17 Hearings Board in Response to Motion to Dismiss, dated August 25, 1997;
- 18 13. Clark County's Response to CCNRC's Motion to Dismiss, dated August 27,
- 19 1997;
- 20 14. Affidavit of Susan Rasmussen, dated August 27, 1997;
- 21 15. Affidavit of Glenn J. Amster, dated August 27, 1997;
- 22 16. RCCPA's Supplemental Memorandum in Opposition of Motion for Stay of
- 23 WWGMHB Orders, dated August 28, 1997;
- 24 17. Petitioner Clark County's Order Denying Motion to Dismiss by Judge Nichols;
18. Petitioner Clark County's Prehearing Opening Brief, dated September, 1997;

JUDGMENT - 2

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- 1 19. Response Memorandum of Western Washington Growth Management Hearings
2 Board, dated October 17, 1997;
3 20. RCCPA's Memorandum in Opposition of Motion for Stay of WWGMHB Orders,
4 dated October 20, 1997;
5 21. CCNRC, et. al.'s, Response Trial Brief, dated October 20, 1997;
6 22. Memorandum of Clark County Citizens United, Inc., dated October 22, 1997;
7 23. Petitioner Clark County's Reply Brief, dated October 27, 1997; and
8 24. Letter Ruling by Court, dated December 10, 1997.

9 And having reviewed the record and pleadings and papers herein, the Court hereby makes the
10 following findings of fact and conclusions of law.

11 **FINDINGS OF FACT**

- 12 1. After conducting several years of planning and involvement of the public, Clark
13 County issued its comprehensive plan on December 20, 1994.
14 2. On September 20, 1995, following several appeals of the County Plan, the
15 Western Washington Growth Management Hearings Board (hereinafter "Western Board")
16 issued a final decision, finding portions of the County Plan out of compliance with GMA. Clark
17 County did not timely appeal this decision.
18 3. Following additional public process and collection of new evidence, and review of
19 its existing Plan, the Board of County Commissioners (hereinafter "BOCC"), after
20 approximately a dozen hearings were conducted by the County Planning Commission,
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JUDGMENT - 3

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adopted its amended Plan ~~Dis~~ (including resubmittals without changes) (hereinafter "Plan") on May 3, 1996.

4. After a compliance hearing on the amended Plan, the Western Board issued its Compliance Order and Order of Invalidation (collectively referred to herein as "Compliance Order") on October 1, 1996. The Compliance Order found the County's Plan, as amended, to be in violation of GMA for many of the same reasons contained in the 1995 Order. The Compliance Order also included an Order of Invalidation based on this noncompliance.

5. At page 2 of the Compliance Order, the Western Board stated "the burden of proof to show compliance was placed on the local government [Clark County]."

6. Clark County subsequently moved for reconsideration of the Compliance Order and on November 20, 1996, the Western Board issued an "Order on Reconsideration," reaffirming in large part its Compliance Order and keeping in place its Declaration of Invalidation. The County did not request reconsideration on the burden of proof issues.

7. This appeal was filed on December 19, 1996 by Clark County ("County Petition") alleging various errors under the Administrative Procedures Act, RCW 34.05, with the Compliance Order and related Declaration of Invalidation for both the 1995 and 1996 decisions.

8. The County Petition appealed the following components of the "Compliance Order and Order of Invalidation" entered by the Western Board on October 1, 1996 and the "Order on Reconsideration" entered by the Board on November 20, 1996;

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- a. Its order finding that the County policies and development regulations relating to future adjustments to the County's Urban Growth Areas fail to comply with GMA;
- b. Its order finding that the County's designation of policies and development regulations designed to buffer resource lands and limit development in rural and resource areas, including County provisions for lot reconfiguration and lack of provisions requiring aggregation of nonconforming lots fail to comply with GMA;
- c. Its order finding that the County's establishment of a residential density of 1 unit per 5 acres in rural areas north of the East Fork of the Lewis River fails to comply with GMA;
- d. Its order finding that the County's designation of "non-prime" industrial lands in the designated urban reserve areas fails to comply with GMA; and
- e. Its order and declaration of invalidity finding that the following County development regulations and corresponding comprehensive plan policies failed to comply with and were invalid under GMA: CCC 18.610, CCC 18.302, and CCC 18.305.

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CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. The review of the County's Petition is conducted under RCW 34.05.570(3).

Relief from the Western Board Order is granted only if it is:

- a. Unconstitutional;
- b. Outside the Board's statutory authority;
- c. The result of an unlawful procedure;
- d. Erroneous interpretation or application of the law;
- e. Not supported by the evidence; or
- f. Arbitrary or capricious.

2. Clark County's challenge to the 1995 decision is dismissed as untimely.

3. Under RCW 36.70A.320, the County Plan, as amended and presented to the Board at the compliance hearing, is to be found in compliance with the GMA unless the Western Board determines, based on a preponderance of the evidence, that the County erroneously interpreted or applied the law. This presumption of validity is further supported by WAC 242-02-630, 242-02-632, and 242-02-634. The legal standard before the Board at the compliance hearing was whether or not the County Plan, as amended, complied with the GMA, and not whether it complied with the earlier Board Order issued after the Final Decision and Order on the original County Comprehensive Plan appeal.

1 4. The conclusion by the Western Board at page 2 of its "Compliance Order and
2 Order of Invalidation" that the burden of proof was on the County was an erroneous interpretation
3 of GMA.

4 5. Because the Western Board's Declaration of Invalidation was based upon this
5 fundamental flaw in assigning the burden of proof, the Declaration of Invalidation was issued
6 based upon an erroneous interpretation of the law and must at this time be set aside, effective
7 immediately. After applying the correct standard of review and giving proper deference to the
8 actions taken by the County on compliance, the Western Board is free to find compliance or
9 noncompliance, as authorized by the Act.
10

11 6. Clark County did not waive its right to raise the issue of the burden of proof.
12 Waiver is essentially a matter of intention. Negligence, oversight or thoughtlessness does not
13 create it. Reynolds Metal Company v. Electric Smith Construction & Equipment Company, 4
14 Wn. App. 695, 700, 483 P.2d 880 (1971). Under the facts of this case, there was no waiver.
15

16 7. Under GMA, the Board must grant deference to the GMA determinations of any
17 city or county. A county is presumed to have taken into consideration the regional preferences
18 and historical development and practices in formulating its comprehensive plan.
19

20 8. Under the facts of this case, the importance of this deference is reflected
21 especially in the area of rural minimum lot size. ~~In hopes of providing constructive guidance~~
22 ~~and avoiding unnecessary future litigation, the Court encourages the Western Board to give~~
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JUDGMENT - 7

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~~full deference to the County determinations, along with the requisite presumption of compliance, upon remand.~~

ORDER OF JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, and the Court having considered the arguments of counsel, and being duly advised in the premises, it is hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. The Western Board's October 1, 1996 and November 20, 1996 Orders are set aside in the following areas:
 - a. Its order finding that the County policies and development regulations relating to future adjustments to the County's Urban Growth Areas fail to comply with GMA;
 - b. Its order finding that the County's designation of policies and development regulations designed to buffer resource lands and limit development in rural and resource areas, including County provisions for lot reconfiguration and lack of provisions requiring aggregation of nonconforming lots fail to comply with GMA;
 - c. Its order finding that the County's establishment of a residential density of 1 unit per 5 acres in rural areas north of the East Fork of the Lewis River fails to comply with GMA;

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d. Its order finding that the County's designation of "non-prime" industrial lands in the designated urban reserve areas fails to comply with GMA; and

e. Its order and declaration of invalidity finding that the County's declaration that the following development regulations and corresponding comprehensive plan policies were deemed invalid under GMA: CCC 18.610, CCC 18.302 and CCC 18.305 fails to comply with GMA.

2. The Western Board's Declaration of Invalidity is set aside, effective immediately.


3. Judgment is entered in favor of Clark County setting aside the Western Board's decision and remanding to the Western Board in the areas included in the County Petition, based on its incorrect assignment of the burden of proof at the compliance hearing.

4. This matter is remanded to the Western Board with directions to apply the correct burden of proof and accord the County Plan, as amended, appropriate discretion and local deference. The Board is directed not to substitute its own perceptions or those of another region in contradiction to those adopted by the lawful representatives of the County, so long as there is compliance with the Act. In the event the Board determines at some future date to reinstate a Declaration of Invalidity, it is directed to precisely identify the GMA errors.

5. Finally, the Board is directed to give full credence to the County's determinations, especially in the area of rural minimum lot size, as the County is presumed to have taken into

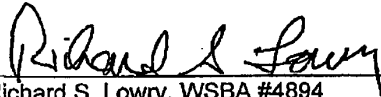
1 consideration the regional preferences and historical development and practices in formulating
2 its comprehensive plan. The Court expects and instructs that ^{JPN}significant deference be given,
3 along with the requisite presumption of compliance, to the County Plan upon remand.

4 ENTERED this 31ST day of December, 1997.

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7 _____
8 Judge John Nichols
9 Clark County Superior Court

9 Presented by:

10 CLARK COUNTY PROSECUTING ATTORNEY

11
12 By 
13 _____
14 Richard S. Lowry, WSBA #4894
15 Chief Civil Deputy

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