Schroader, Kathy

From: Orjiako, Oliver
Sent: Monday, August 31, 2015 8:26 AM
To: Euler, Gordon; Alvarez, Jose
Cc: Schroader, Kathy
Subject: FW: Hearings Board Remand 1996 - For the Public Record

Just FYI and Kathy for the index. More to come! Thanks.

Oliver

From: Carol Levanen [mailto:cnldental@yahoo.com]
Sent: Monday, August 31, 2015 12:25 AM
To: Stewart, Jeanne; Madore, David; Mielke, Tom; Orjiako, Oliver; McCauley, Mark
Subject: Fw: Hearings Board Remand 1996 - For the Public Record

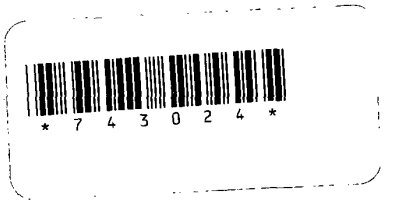
Dear Councilors,

This 1996 WWGM Hearing Board Remand demonstrates that all of Judge Edwin Poyfair's orders were not followed. Instead, the Board isolated the remand to just Agri-Forest and Rural Centers and ignored action on the other orders handed down by the Superior Court. They timed this remand decision to happen just after the Court of Appeals decision of 1999, counting on CCCU's attorney not being available to protest the remand action .CCCU believes that the Clark County 1994 Comprehensive Land use Plan was the most corrupt process of any county in the state, except perhaps Seattle. The Plan in place today, is the same plan that was adopted in the rural and resource land in 1994, It has never been changed and after over twenty years, legitimate changes must be made.

Sincerely, Carol Levanen, Ex. Secretary, CCCU, Inc.

----- Forwarded Message -----
From: Carol Levanen <cnldental@yahoo.com>
To: Carol Levanen <cnldental@yahoo.com>; Susan Rasmussen <sprazz@outlook.com>
Sent: Friday, August 28, 2015 6:03 PM
Subject: Hearings Board Remand 1996

http://www.gmhb.wa.gov/searchdocuments/wwgmhb/1995/95-67complianceorderandinvalidityremand.pdf



BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

ACHEN, et al.,	)	
	)	No. 95-2-0067
Petitioners,	)	
vs.	)	COMPLIANCE
	)	ORDER AND
CLARK COUNTY, et al.,	)	ORDER OF
	)	INVALIDITY
Respondents,	)	
	)	
and	)	
	)	
CLARK COUNTY SCHOOL DISTRICTS, et al.,	)	
	)	
Intervenors.	)	
	)	

On September 20, 1995, we issued our original final decision and order (FDO) in the above-entitled case. An order on reconsideration was issued on December 6, 1995. No appeal of that decision was filed by Clark County. After the time for compliance had expired, multiple hearings regarding compliance took place. We issued a compliance order on October 1, 1996. That order found certain areas of continued noncompliance. For the first time in Clark County, a finding of invalidity was made. After a hearing, an order on reconsideration was issued on November 20, 1996.

Clark County appealed certain aspects of the October 1, 1996, compliance/invalidity order as modified by the order on reconsideration. The County also appealed parts of the original FDO of September 20, 1995.

On December 31, 1997, Clark County Superior Court issued a judgment in the appeal. The Court held that we had improperly placed the burden of showing compliance upon the local government and remanded the case to assign the burden of proof to the petitioners to show lack of compliance. The Court further held that, in spite of our assignment of the burden of proof for invalidity to the petitioners, invalidity also had to be reconsidered. Additionally, the Court

determined that Clark County's appeal of issues determined in the original FDO of September 20, 1995, was untimely.

On January 6, 1998, we issued a memorandum to all parties listing the six issues of remand from the Superior Court decision. The memorandum stated that we would review the record in light of the Court's order and that we intended to use the recent amendments adopted by ESB 6094 in reaching our decision. We established a January 20, 1998, deadline for submission of further written argument. We received an 8-page statement from petitioner Clark County Natural Resource Council (CCNRC), *et al.*, and a two-paragraph letter from Clark County. No party objected to our use of the ESB 6094 amendments.

The first paragraph of the County's letter requested that we take official notice of the appeal trial briefs concerning "the deference issue breached by Judge Nichols only in dicta." We decline that invitation. Even assuming that the briefing constitutes material which might be the subject of official notice under the standards provided by our rules and the Administrative Procedures Act, we do not find that the briefing would be of any assistance in this matter. As noted by the County in its letter, the deference issue was addressed only in dicta. More importantly, we are issuing this decision based upon the increased deference provided by ESB 6094. Specifically, under RCW 36.70A.320 we are placing the burden on the petitioners to show noncompliance under the clearly erroneous standard. We are also applying the increased deference directed by RCW 36.70A.3201. See *CCNRC, et al., v. Clark County*, #96-2-0017. We do not have any authority to select a greater deference standard.

The second paragraph of the January 20, 1998, Clark County letter noted that the record, as it existed at the time of appeal, "does not contain the additional work the County undertook regarding resource buffering." The County assumed that such material was not relevant to this Superior Court remand decision. We accept the County's characterization.

We thus turn to the five items of remand from Superior Court. We have reviewed the record and the written arguments that were presented for the hearing leading to the October 1, 1996, compliance order and the November 20, 1996, order on reconsideration. We have assigned the burden of proof to petitioners to establish that the actions of Clark County failed to comply with

the Growth Management Act (GMA) under the clearly erroneous standard of review. We have presumed that the legislative actions taken by the County in response to the compliance issues were valid under RCW 36.70A.320. We have incorporated the legislative direction of RCW 36.70A.3201 setting forth the deference due a local government in reviewing GMA decisions. As we have always done, we have reviewed this record to determine if Clark County is in compliance with the Act, not simply whether there is compliance with the order of September 20, 1995.

Non-Prime Industrial Designations Within Urban Reserve Areas (URAs)

Beginning at page 42 of the FDO, we discussed the confusion found in the record concerning industrial designations that were other than "prime." Those designations included some 5,000 acres within the urban growth area (UGA) of Vancouver and approximately 1,000 acres within the URA industrial designations. URAs were designed to incorporate quality planning for the post 20-year horizon. The industrial URAs were also designed to have in place designated areas for a large-scale industrial user who would be unable to find a suitable location within UGAs. In the FDO, we determined that a recalculation of the confusing figures was necessary and that those figures needed to show the amount of secondary or tertiary (non-prime) industrial designations. We held that inclusion of these non-prime designations in the URAs did not comply with the Act.

Beginning at page 16 of the compliance order of October 1996, we noted that recalculation and clarification of many of the industrial acreage figures had been done for areas within the Vancouver UGA. However, nothing in the record nor in the arguments presented by the County, addressed the issue of the 1,000 acres of non-prime industrial designation within the URA. At page 6 of the reconsideration order of November 20, 1996, we recognized that a clarification of the compliance order as to this issue was necessary and did so. We clarified that if the urban reserve designations of "non-prime" industrial in fact referred only to those areas that would be "prime" except for lack of access or utilities, the designation would likely comply with the Act. With that clarification, we nonetheless continued our finding that there was no evidence in the record that the County had taken any action in response to the original determination of

noncompliance or inclusion of non-prime industrial designations within the URA. We have not received information from the County as to clarification of this issue.

We specifically hold that the petitioners have sustained their burden of proof of showing noncompliance as to inclusion of non-prime industrial designations in URAs even under the increased deference accorded to Clark County. Since there was no legislative action by Clark County in response to the original order of noncompliance, there is no presumption of validity to apply.

Future Adjustments to UGAs

At page 40 of the FDO we held that the fluid nature of the Clark County UGAs was not in compliance with the Act. Specifically, we said that the County's "concept of incremental movement of the urban growth boundary to always have a 20-year planning horizon is not in compliance with the GMA." In response, Clark County adopted Ordinance 1995-12-19. That ordinance provided that a UGA would be expanded if 75% of the residential or commercial vacant land had been consumed or if only 50% of the industrial designated vacant land was consumed. We discussed that problem in the compliance order of October 1, 1996, beginning at page 11. We held that the amendment did not contain necessary requirements for when a change to UGA designations was appropriate and thus did not comply with the Act. We reach that same conclusion and finding when assigning the burden of proof to petitioners under the clearly erroneous standard. While we presumed that Ordinance 1995-12-19 was valid, a close review of it leads to the inescapable conclusion that it does not comply with the Act. The large UGAs with maximum market factors that were established in conjunction with the maximum possible population projections leads us to conclude under the test set forth in RCW 36.70A.302 that the ordinance substantially interferes with the goals of the Act.

We are mystified by the inclusion of this issue in the December 31, 1997, Superior Court remand. In the December 17, 1997, second compliance order we determined, at page 3, that the revised ordinance which provided for a minimum five-year period prior to revision of the UGAs and which also established criteria for the consideration of UGA movement, was in compliance with the Act. Under state law, we were not a participant in the Superior Court appeal except as to

jurisdictional and procedural issues. We can understand how the Superior Court would not be aware of the December 17, 1997, order finding compliance on what appears to be this exact issue. We are unable to find a reason why the County insisted on including that issue in the December 31, 1997, Superior Court order. The two-paragraph letter we received from the County on January 20, 1998, did not address why it was remanded, nor did the 8-page statement submitted by petitioner CCNRC *et al.*, who were also active participants in the Superior Court appeal. In what appears to be an unfortunate developing pattern, we will have to wait for the County's motion for reconsideration before understanding what issues the County wishes us to address. We would be amenable to a motion from Clark County to rescind the invalidity of CCC 18.610, a request that was not made at the compliance hearing that led to the December 17, 1997, order.

Minimum Density North of the Resource Line

Beginning at page 26 of the FDO, we set forth a full discussion of the need for minimum lot sizes larger than 5 acres north of the "rural resource line" (the east fork of the Lewis River). The original Farm Focus Group, Clark County planning staff, and the Planning Commission (PC) all noted that significantly less parcelization of rural lands had taken place north of that line. The Farm Focus Group concluded that a 10-acre minimum lot size north of that line would further the community framework plan (CFP) and comprehensive plan (CP) policies of "providing large minimum lot sizes for residential development in rural areas to maintain the rural character. (CFP 4.2.3) We observed that the final supplemental environmental impact statement recommended a preferred 15-acre minimum lot size north of that line. The planning department recommended a 10-acre minimum north of the line which was agreed to by the PC. The record contained significant evidence concerning the relationship of a larger than 5-acre minimum lot size to current resource activity and the necessity of buffering within that area. The Board of County Commissioners (BOCC), without support in the record, established a 5-acre minimum lot size for all rural areas that ignored the differences between the area north of the resource line and that to the south and west. In the FDO we noted that in order to comply with the Act, Clark County needed to "increase the minimum lot sizes of rural areas located north of the 'rural resource line'." We held that the larger than 5-acre minimum lot size was necessary to comply with the GMA requirement of a "variety of rural lands" and would have the added compliance effect of reducing increased urban and rural sprawl resulting from the high amounts of

preexisting lots less than 5 acres in size. Additionally, the larger than 5-acre minimum lot sizes within the area north of the rural resource line also provide needed buffering for that area's resource designations. As noted by the Superior Court in its December 31, 1997, order, the County did not timely appeal those holdings.

The issue in this subsection is whether the County took appropriate action to comply with the Act. Petitioners have shown under the clearly erroneous standard that the County is still not in compliance with the Act. In response to this non-appealed order, the County produced two maps illustrating rural parcels greater than 10 acres and segregations that had occurred prior to the moratorium imposed on April 19, 1993. Additionally, a table was developed (Ex. 20, Ex. 241) listing the parcels which were *adjacent to or within 100 feet* of resource lands. The table demonstrated that something around 8% of that very limited area would be affected by an increase to 10 acres. The table has very limited applicability to the issue of area-wide buffering (discussed later) and did not in any way address any of the issues that led to the original staff, Farm Focus Group, and PC recommendation to have a larger than 5-acre minimum lot size within the confines of the area north of the rural resource line. The FDO required an increase from 5 acres but did not mandate a 10-acre minimum.

The BOCC also adopted Section 35(9) of Ordinance 1996-5-01 that "confirms" the 5-acre minimum lot size north of the east fork of the Lewis River. While we question the logic of applying a presumption of validity to an ordinance that merely restates what we have already found to be noncompliant with the Act, in order to give every possible degree of deference to the County on this issue, in our reconsideration we presumed that the restated ordinance was valid.

We have a definite and firm conviction that the County has made a mistake in not changing the minimum lot size north of the resource line and that petitioners have sustained their burden of showing that the County is not in compliance with the Act. The additional analysis shown by the maps still leads us to the inescapable conclusion that a greater variety of rural densities, a decrease in urban and rural sprawl, and an increase in resource land conservation would be achieved by greater than 5-acre minimum lot sizes within this area and is necessary to comply with the Act. The table addresses a very limited aspect of our holding in the FDO and even within that limited aspect (resource buffering) only addresses lots that are adjacent to or within

100 feet of the resource designations. Clark County has not complied with the Act by its failure to increase the minimum lot size north of the resource line. We further find that the County's inaction substantially interferes with the goals of the Act.

Resource Buffering

In our FDO, we directed that in order to comply with the Act Clark County needed to:

> "3. Adopt techniques to buffer resource lands in accordance with the CFP and GMA. Strong consideration must be given to aggregation of non-conforming lot sizes as well as other techniques to reduce the impact of the parcelizations that occurred between 1991 and 1994. Adopt development regulations that prevent incompatible uses from encroaching on resource land areas;..."

We determined that inadequate buffering of resource lands by Clark County had not complied with the Act. At page 28 of the FDO we noted that:

> "One of the most symbiotic relationships is the one between rural and resource lands. Properly planned rural areas provide necessary support of and buffering for resource lands...."

Clark County did not appeal that determination.

In response to our finding of noncompliance as to this issue, Clark County adopted Section 35 (10) of Ordinance 1996-05-01 which stated that the County determined aggregation of nonconforming lots would be largely "ineffective." While we again have doubts as to whether this ordinance is one that is intended by the Legislature to be given a presumption of validity under RCW 36.70A.320, we will do so in an abundance of deference. The County also relied upon the conclusory statements from the then Planning Director, Mr. Greenleaf, that other techniques suggested by members of the public would be inappropriate for Clark County. As to those issues identified in the FDO, the County took no action whatsoever. Even placing the burden of proof on the petitioners under the clearly erroneous standard, we find that no action was taken by Clark County and that noncompliance remains.

The legislative action that was taken involved changes in three areas. First, the County changed

the provisions of CCC 18.302.095(B)(1)(6) to allow greater reconfiguration of existing nonconforming lots. The particular cited section actually allows more nonconforming lots because the standard was changed from "buildable lot" to "reasonable buildable lot." Additionally, under the amended provisions, the reconfiguration would allow smaller "urban-sized" lots.

Secondly, the County changed its requirements to reduce side and rear setbacks in resource zones from 200 feet to 50 feet. Thirdly, for "urban-sized lots" (single family and multiple family zones) that abut resource areas, staff recommended increasing buffer widths to 50 feet for the single family zones. The PC recommended that a 50-foot buffer also apply within multi-family zones. The BOCC did neither but instead adopted an ordinance that reduced the buffering (landscaping) areas for "urban-sized lots" abutting resource zones to as little as 5 feet. The GMA mandate to conserve resource lands and discourage incompatible uses (RCW 36.70A.060, RCW 36.70A.020 (8)) continues to be violated and exacerbated by these actions of Clark County.

The allowance and encouragement of "urban sized lots" abutting a resource zone is not in compliance with the Act. If there is nothing a County can do to eliminate those kinds of lots because of prior vesting, some action to effectively buffer, and keep the conversion pressure away from, the resource lands is required under the GMA.

Assigning the burden of proof to petitioners under the clearly erroneous standard, applying the increased deference as a result of ESB 6094, and presuming the legislative changes are valid, we have, nonetheless, reached the inescapable conclusion that Clark County has failed to comply with the GMA.

Invalidity

In the December 31, 1997, order the Superior Court determined that since the burden of proof as to compliance had incorrectly been assigned to the County, the order on invalidity would also be set aside. The Court did not address the merits of the order of invalidity and made its determination in spite of our assignment of the burden of proof on invalidity to petitioners. We consider the burden of substantial interference to be one that is even higher than the clearly

erroneous standard. The Court directed that we reconsider our determination of invalidity with regard to CCC 18.610, 18.302, and 18.305.

At page 28 of the October 1, 1996, compliance order we said that:

> "Specifically, CCC 18.302, 18.303, and those sections of Ordinance 1996-05-01 relating to resource lands, rural lands, and urban reserve areas are declared to be invalid...."

While the Superior Court order does not specifically identify reconsideration of CCC 18.303, we have done so. Once again, Clark County's two-paragraph letter of January 20, 1998, did not address why that particular section previously declared to be invalid was omitted from the Court order, nor did the 8-page memorandum of petitioners CCNRC, *et al.*

The CCNRC, *et al.*, memorandum requested that the noncompliance and order of invalidity be left in place. With regard to the order of invalidity at many different portions of the memo, CCNRC, *et al.*, requested that the invalidity be "supported by detailed findings of fact and conclusions of law." Unfortunately, the memo did not specify what "detailed" findings petitioners felt should be included in this remand decision, nor did they suggest the areas wherein additional findings or conclusions would be of assistance to the Court, and, as usual, did not specifically set forth proposed findings or conclusions. Any specificity by CCNRC *et al.*, would have provided some clue why, and which, detailed findings were felt to be necessary.

We decline to review this record in more detail than has already been done during this remand consideration. We readopt the portions of the October 1, 1996, order, and the findings and conclusions in the appendix, dealing with invalidity as the ones appropriate to this remand compliance order. Specifically, we determine that a finding of invalidity under the standard set forth in RCW 36.70A.302 as to CCC 18.302, 18.303, 18.305, and those sections of Ordinance 1996-05-01 relating to resource lands and rural lands substantially interferes with goals 1, 8, 9, and 10 of the Act. Additionally, we reaffirm the invalidity as to CCC 18.610, although as noted above, a motion from the County for recision of that finding would seem appropriate.

ORDER

We remand this matter to the County to comply with the GMA within 150 days for the following areas:

1. Policies and development regulations (DRs) relating to future adjustments to UGAs (if different issue than the December 17, 1997, order);

2. Policies and DRs to eliminate non-prime industrial designations in urban reserve areas as set forth in the November 22, 1996, order on reconsideration;

3. Increase of the minimum density in rural areas north of the east fork of the Lewis River to an appropriate size that is greater than 5 acres;

4. Develop policies and DRs designed to buffer resource lands and limit encroaching development in rural and resource areas.

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

Pursuant to WAC 242-02-830(2), a motion for reconsideration may be filed within ten days of issuance of this decision.

So ORDERED this 5th day of February, 1998.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

William H. Nielsen
Board Member

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Les Eldridge
Board Member

Nan A. Henriksen
Board Member