

PROSECUTING ATTORNEY
2012 MAR 23 PM 12:01

BEFORE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

SWINOMISH INDIAN TRIBAL COMMUNITY,
et al.,

Case No. 02-2-0012c

Petitioners,

v.

ORDER FINDING COMPLIANCE

SKAGIT COUNTY,

Respondent,

and

AGRICULTURE FOR SKAGIT COUNTY, et
al.,

Intervenors.

This matter came before the Board following the submittal of a Statement of Actions Taken by Skagit County.¹ No objections were filed by any of the parties. A telephonic compliance hearing was held on March 19, 2012 with Board members Nina Carter and William Roehl participating, Board member James McNamara having resigned from the Board as of the end of February, 2012. Although the County failed to appear due to a technical problem with the conference call, the following individuals did participate: Alix Foster (counsel for the Swinomish Tribal Community), Neil Wise (Assistant Attorney General representing the Washington Department of Fish and Wildlife), Gary T. Jones (representing numerous diking and drainage districts) and Ann Marie Lohman (representing the Skagit County Farm Bureau).

¹ Statement of Actions Taken filed January 17, 2012.

I. BURDEN OF PROOF

For purposes of Board review of the comprehensive plans and development regulations adopted by local government, the GMA establishes three major precepts: a presumption of validity; a "clearly erroneous" standard of review, and; a requirement of deference to the decisions of local government.

Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and amendments to them are presumed valid upon adoption:

Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

This same presumption of validity applies when a local jurisdiction takes legislative action in response to a noncompliance finding; that legislative action is presumed valid.

While Skagit County has the burden to demonstrate that it has taken actions to comply with the GMA, the burden then shifts to Petitioners to establish the County's compliance actions were clearly erroneous.

II. PROCEDURAL HISTORY AND ANALYSIS

This matter has a long and convoluted history which is detailed in the many prior orders of this Board as well as appellate court decisions, a history which will not be repeated here. Suffice it to say, the genesis of the most contentious issue in this matter was the sometimes conflicting mandates of RCW 36.70A.060 which requires jurisdictions to adopt development regulations to assure the conservation of designated agricultural resource lands as well as development regulations to protect designated critical areas combined with the RCW 36.70A.172(1) requirement to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries. Thus, the conflict between two major Skagit County interests: maintenance of the economic viability of the

1 agriculture industry and the maintenance/enhancement of anadromous fish runs, with the
2 necessity to protect fish and wildlife habitat critical areas (FWHCAs).

3
4 In December 2003, the Board found the County's adopted approach failed to protect
5 FWHCAs in ongoing agricultural lands because of the following: (1) the ordinance failed to
6 ensure that its critical areas regulations in ongoing agricultural lands indeed would be
7 enforced, and (2) the ordinance's monitoring and adaptive management program did
8 not adequately ensure the protection of these FWHCAs. Appeals followed and stays were
9 ordered by the Board and the Court of Appeals. In 2007 the Legislature passed SSB 5248
10 (codified as RCW 36.70A.560 and .5601) which precluded the County from amending its
11 critical area ordinances as they apply to agricultural activities. RCW 36.70A.560 was
12 amended in 2010 to extend the moratorium until December 1, 2012.

13
14
15 RCW 36.70A.5601 directed the William D. Ruckelshaus Center to "conduct an examination
16 of the conflicts between agricultural activities and critical area ordinances" and "issue a final
17 report of findings and legislative recommendations" on "changes or new approaches to
18 protecting critical areas...". The aforementioned and long-awaited report included a set of
19 recommendations that were adopted by the Legislature as ESHB 1886 during the 2011
20 legislative session. That bill is now codified at RCW 36.70A.700-760.

21
22
23 RCW 36.70A.710 establishes an alternative to critical areas protection under RCW
24 36.70A.060:

25 "As an alternative to protecting critical areas in areas used for agricultural
26 activities through development regulations adopted under RCW 36.70A.060, the
27 legislative authority of a County may elect to protect such critical areas through
28 the program²." RCW 36.70A.710(1)(a).

29
30
31 ² The "program" is the voluntary stewardship program referenced in RCW 36.70A.700 (1): The purpose of
32 chapter 360, Laws of 2011 is to establish the voluntary stewardship program as recommended in the report
submitted by the William D. Ruckelshaus Center to the legislature as required by chapter 353, Laws of 2007
and chapter 203, Laws of 2010

1 RCW 36.70A.710 establishes specific requirements for counties if they desire to pursue the
2 voluntary stewardship program (VSP). In order to do so, counties are required to, among
3 other things, adopt legislation electing to participate in the program, identify the watersheds
4 that will participate in the program and nominate watersheds for consideration as state
5 priority watersheds.³
6

7 The County states it adopted Resolution R20110239 on August 9, 2011 which indicated an
8 intent to consider enrolling in the VSP.⁴ It then conducted an extensive public process
9 involving its Planning Commission, the County Agricultural Advisory Board, notification to
10 interested parties, local tribes and environmental and agricultural interests.⁵ The process
11 culminated with the County's adoption of Ordinance No. O20110013 which enrolled the
12 entire County in the VSP, thus covering all watersheds within the County.⁶ Consequently,
13 all County critical areas will either be subject to the VSP or the standard critical areas
14 ordinance.
15

16
17 The County has presented a prima facie case for compliance. All procedural steps for
18 election to pursue the VSP appear to have been met. Ordinance No. O20110013 represents
19 the final necessary step to bring this long running matter to a conclusion.
20

21 **III. CONCLUSION**

22 Protection of critical areas in areas used for agricultural activities may be achieved either
23 through adoption of development regulations enacted in compliance with RCW 36.70A.060
24 or through the voluntary stewardship program established under RCW 36.70A.700-.760.
25 Skagit County has elected to pursue the latter option. No party has objected and the Board
26 finds compliance has been achieved.
27
28
29

30
31 ³ RCW 36.70A.710(1)(b)

32 ⁴ Statement of Actions Taken, pg. 3

⁵ Id.

⁶ Id., pgs. 3, 4

1
2 IV. ORDER

3 The Board enters a finding of compliance and this case is closed.
4

5 Entered this 22nd day of March, 2012.
6

7 

8 William Roehl, Board Member
9

10 

11 Nina Carter, Board Member
12
13

14 Pursuant to RCW 36.70A.300 this is a final order of the Board.⁷
15
16
17
18
19
20

21 ⁷ Pursuant to RCW 36.70A.300 this is a final order of the Board.

22 Reconsideration. Pursuant to WAC 242-03-830, you have ten (10) days from the date of mailing of this Order to
23 file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any
24 argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original
25 and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of
26 record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-03-240(1).
27 The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

28 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as
29 provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior
30 court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.
31 The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the
32 Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW
34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means
actual receipt of the document at the Board office within thirty days after service of the final order. A petition for
judicial review may not be served on the Board by fax or by electronic mail.

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

1 **BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD**
2 **WESTERN WASHINGTON REGION**

3
4 Case No. 02-2-0012c

5 Swinomish Indian Tribal Community, et al v. Skagit County, et al

6
7 **DECLARATION OF SERVICE**

8
9 I, VANESSA SMITH, under penalty of perjury under the laws of the State of
10 Washington, declare as follows:

11 I am the Administrative Assistant for the Growth Management Hearings Board. On
12 the date indicated below the ORDER FINDING COMPLIANCE in the above-captioned case
13 was sent to the following by United States postal mail:
14

15 Alix Foster, Director
16 Swinomish Indian Tribal Community
17 11404 Moorage Way
18 LaConner, WA 98257

Michael L. Shelby
Western Washington Agricultural
Association
2017 Continental Place #6
Mount Vernon, WA 98273

19 Neil Wise
20 Assistant Attorney General
21 1125 Washington Street SE
22 P.O. Box 40100
23 Olympia, WA 98504-0100

Ann Marie Lohman
Skagit County Farm Bureau
15283 Sunset Road
Bow, WA 98232

24 Director of the Washington State
25 Department of Fish and Wildlife
26 600 Capitol Way North
27 Olympia, WA 98501-1091

Jay P. Derr
Tadas Kisielius
Van Ness Feldman GordonDerr
2025 First Ave. Ste. 500
Seattle, WA 98121-3140

28 Allen Rozema
29 Skagitonians to Preserve Farmland
30 PO Box 2405
31 Mount Vernon, WA 98273
32

Gary T. Jones
415 Pine Street
Mount Vernon, WA 98273

1 Ryan Walters
2 Civil Deputy Prosecuting Attorney
3 Skagit County Prosecuting Attorney
4 605 S. 3rd Street - Courthouse Annex
5 Mount Vernon, WA 98273

David Bricklin
Bricklin & Newman, LLP
1001 4th Avenue, Suite 3303
Seattle, WA 98154

6 DATED this 22nd day of March, 2012.
7
8
9


Vanessa Smith, Administrative Assistant