

Superior Court of the State of Washington
For Thurston County

FILED



APR - 2 2013

SUPERIOR COURT
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April 2, 2013

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Re: *WEAN v WWGMHB et al*
Thurston County Cause No. 06-2-02026-7

LETTER OPINION

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APR 04 2013

ISLAND COUNTY
PROSECUTING ATTORNEY

Dear Counsel:

The Court conducted a hearing on Plaintiff's Petition for Review on January 2, 2013. The decision follows.

Whidbey Environmental Action Network (WEAN) has challenged the Western Washington Growth Management Hearings Board (GMHB) approval of the Island County Critical Areas Ordinance. Plaintiff argues that the County has provided sufficient environmental protection for new agriculture but insufficient regulation of existing agriculture under the Growth Management Act (RCW 36.70A) and, in particular, RCW 36.70A.060(2).

Litigation over the Critical Area Ordinance of Island County is not new. This litigation has been pending before various boards and courts since 1998. Many issues have been resolved. The remaining issue raised in this proceeding is the County's regulation of existing and on-going agricultural activities within rural lands. Under Ordinance C-150-5, the County would exempt the landowner from the general Critical Area Ordinance if the landowner prepared a farm plan based on management practices developed by the Natural Resources Conservation Service (NRCS).

WEAN challenged this provision, but this case was stayed pending resolution of *Swinomish Indian Tribal Community v. W. Wash. Growth Mgmt. Hearings Board*, 161 Wn.2d 415 (2007). In that case, the Supreme Court approved the GMHB standard of "no-harm" to critical areas and did not require Skagit County to "enhance" degraded waterways.

Other stays have been entered by agreement but the final stay was lifted in 2012, allowing this Court to hear the Petition for Judicial Review.

The GMHB, in reviewing County ordinances, must determine that the action taken by local jurisdictions is "clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA. RCW 36.70A.320(3). The Board must be left with a firm and definite conviction that a mistake has been made. Judicial review of the Board's decisions is governed by the Administrative Procedure Act, RCW 34.05, which has specific bases for review that are allowed. The Court reviews issues of law *de novo*. Substantial weight is accorded to the Board's interpretation of the GMA, but the Court is not bound by the Board's interpretations. *Thurston County v. W. Wash. Growth Management Hearings Bd.*, 164 Wn.2d 329 (2008).

In this case, WEAN argues that the GMHB's decisions were an erroneous interpretation and/or application of the law and/or were not supported by substantial evidence.

Island County Ordinance C-150-05 allows farms in existence before 1998 to be exempt from the stricter sections of the Critical Areas Ordinance so long as the landowner adopts a standard or custom "farm plan." These plans are supposed to be based on Best Available Science in the form of Best Management Practices (BMPs) as determined by the National Resources Conservation Services (NRCS). The plans must also encourage farm practices that will minimize negative impacts on critical areas. These BMPs, however, were not expressly designed to "protect" the "function and values" of critical areas nor give "special consideration" to the presence of salmon. The Ordinance does not require that the BAS protocols in WAC 365-195 be followed.

Applying the standard set forth above, this Court finds that the actions of the County in exempting existing agricultural uses that adopt management plans "is clearly erroneous in view of the entire record before the board and in light of the goals and requirements" of the GMA. The use of the NRCS BMPs does not meet the requirement that BAS be included and considered substantively in the development of critical areas policies and regulations. *WEAN v. Island County*, 122 Wn. App. 156 (2004). Furthermore, the use of the farm plans developed by individual landowners does not provide a bench mark or base line to determine existing conditions until six or more years after implementation of the program. The list of parameters to be monitored, as noted by Plaintiff, is not adequate to fully assess the impact of agricultural practices on critical areas. The measures to be considered in monitoring pertain only to water quality, not other important parameters such as vegetation. There is, therefore, no meaningful determination of base line conditions and evaluation of impacts over time.

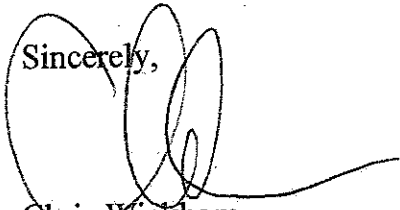
In permitting the farm plans, the Ordinance allows a landowner to select from a list of controls to modify or restrict agricultural practices with minimal oversight. There is no assurance that critical areas will be "protected" by this methodology. Plaintiff has also pointed out the delay in implementation sanctioned under the ordinance. This further allows degradation of existing conditions. In addition, the County failed to adequately fund any oversight of the program. Finally, the farm plans are exempt from public disclosure unless certain conditions are met.

It is clear to this Court that the methodology adopted by Island County to protect critical areas from agricultural uses on lands in agricultural use prior to 1998

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violates the Growth Management Act. Further, the approach adopted by the County regarding agricultural land does not satisfy the ruling in *Swinomish Indian Tribal Community*, that the County cannot manage its critical areas if the County "is unable to adequately detect changes to them." 161 Wn.2d 415, 437. The case is remanded to the GMHB to consider an alternative approach consistent with the statute.

Sincerely,



Chris Wickham
Superior Court Judge

C: Clerk for filing