BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Evergreen Islands, et al, Petitioner, v. Skagit County, Respondent, and Affiliated Health Services, et al. Intervenors.	Case No. 00-2-0046c **ORDER ON RECONSIDERATION**

This matter comes to the Board on Gerald Steel's Motion for Reconsideration of the Board's May 19, 2005 Compliance Order, an order which closed this case.[1] The Board agreed to reconsider the determination closing the case at this late date because Mr. Steel had not properly been served with the Compliance Order at the time it was issued. [2]

On reconsideration, the Board denies Mr. Steel's motion to re-open the case and holds that there are no outstanding compliance issues remaining in this case.

I. ISSUE TO BE DECIDED

Should the Board reconsider its May 19, 2005 Order closing this case and require the County to comply with the February 6, 2001 and January 31, 2002 Compliance Orders by (1) ordering the County to file a report 30 days from the date of this order on the progress for completing the Fidalgo Island Sub-area Plan and then progress reports

[1] Evergreen Islands' and Gerald Steel's Motion RE: Fidalgo Island Subarea Plan, July 12, 2006.
[2] Order Granting Steel's Motion for Reconsideration and Denying Motion of Evergreen Islands and the City of Anacortes: RE: Fidalgo Island Subarea Plan,, October 25, 2006.

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every 180 days until the sub-area plan is completed, and (2) ruling that no density increases be allowed in rural Fidalgo Island until the sub-area plan is found compliant by the Board?

II. PROCEDURAL HISTORY

This case originated from petitions filed between September 14, 2000 and September 25, 2000 by Friends of Skagit County (FOSC), the City of Anacortes, Evergreen Islands, Jim Bender and FOSC and Gerald Steel. All the petitions challenged Ordinance No. 17938. On October 4, 2000, these cases were consolidated. That order limited the parties to the issues raised in their petitions. On October 26, 2000, the Board issued Order Re: Motions to Intervene and an Amended Prehearing Order that limited parties' participation to only certain issues. However, on that day the Board issued an Amended Order of Consolidation that removed the provision set out in the October 4, 2000 Consolidation Order that limited the parties to arguing the issues set forth in their petitions. This order lists issues raised by Evergreen Islands and the City of Anacortes concerning a proposed Fidalgo Island Sub-area Plan. While Evergreen Islands and the City allege that proposed plan violates the Growth Management Act (GMA) neither entity states what specific provisions of the GMA, the proposed sub-area plan violates[3]. The Amended Prehearing Order did not list any issues from petitions filed by FOSC and FOSC and Gerald Steel that related to a Fidalgo Island Sub-area Plan. [4]

On February 6, 2001, the Board issued its Final Decision and Order (FDO). In that order, the Board required the following of the County in regard to a Fidalgo Island Sub-area Plan:

> Set a specific timetable for, and firm commitment to, the timely completion of the Fidalgo Sub-Area Plan. This plan must be completed and found to be compliant <u>before</u> the CaRD urban reserve development or any other increases in density are allowed to occur

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[3] Amended Prehearing Order at 3 and 7.
[4] Ibid at 8 – 14.

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on the Island. The specific timetable and scope of work must be developed and supplied to us within 90 days.[5]

In that order, the Board also made the following finding of facts:

- The County stated that one of the main purposes of a FI Sub-Area Plan is to assess the very best strategy for preserving rural character, protecting the environment and accommodating any future urban growth, if appropriate.
- The County removed aggregation requirements and reserved cluster remnant parcels for future urban growth without first doing a careful sub-area assessment to determine the Island's suitability for more intense development.
- The record shows no specific timetable for, nor firm commitment to, the timely completion of a FI Sub-Area Plan. [6]

The Board entered no conclusions of law.

On January 31, 2002 Compliance Order (CO) reaffirmed its conclusion in the FDO regarding the sub-area plan and found that the county remained in continuing noncompliance in regard to this remand. [7] The Board then stated:

> The County remains in noncompliance as to this remand. If the County has not acted within 90 days to prohibit use of the urban reserve CaRD and other mechanisms that could allow increased density within the study area, we declare the application of all such mechanisms within Fidalgo Island to be invalid. Further, within 90 days, the County must supply us with a more specific timetable for interim steps and completion of the Plan. Progress toward completion must also be reported to us every 180 days after that.[8]

The Board' s March 27, 2002 Order Re: Motions for Reconsideration, Request for a Stay, and Additions to the Record reiterated the noncompliance finding:

> The County remains in noncompliance as to this remand issue. If the County has not acted within 150 days to limit the use of SCC 14.18.310(5)(c) and

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[5] Final Decision and Order (February 6, 2001) at 47.
[6] Ibid at 52
[7] Compliance Order (January 31, 2002) at 17-18.
[8] Ibid at 19.

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> (5)(d) in rural lands throughout the County and specifically prohibited their use within the Fidalgo Island study area, we will find those subsections invalid…[9]

Mr. Steel appealed County Ordinance 17938 individually and as the attorney for FOSC. However, his name and address were placed on the Board's service list only once. When FOSC substituted David Bricklin as its attorney on April 15, 2003, Mr. Steel was removed from the service list.

On May 9, 2003, the County filed an update on its actions to comply with the GMA, the orders listed above. On May 12, 2003, it filed a supplement to its update regarding the adoption of a timetable for completing the Fidalgo Island Subarea Plan. The City of Anacortes filed a brief in which it supported a finding of compliance for adopting a timetable for adoption of the sub-area plan. FOSC filed a brief regarding the issues before the Board for compliance except for the sub-area plan. EI and Mr. Steel, as a party in his own right, did not file briefs on any of the issues, including the Fidalgo Island Sub-area Plan before the Board for July 1, 2003 hearing.

On September 11, 2003, the Board issued a Compliance Order that found compliance on the Conservation and Reserve Development (CaRD) regulations, the Big Lake Rural Village, and setting a work program and timetable for the Fidalgo Island Sub-area Plan. It set compliance schedules for bringing rural signage regulations into compliance and for replacing its lot aggregation ordinance. The Board did not set a compliance schedule for the FI Sub-area Plan or continue the requirement that progress reports for the sub-area plan be filed every 180 days.

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[9] Order Re: Motions for Reconsideration, Request for a Stay, and Additions to the Record (March 27, 2002) at 4.

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The County complied with the compliance schedules set by the Board for rural signage. After a compliance hearing was held on August 31, 2004, the Board rescinded invalidity for these regulations and later found compliance. [10]

On May 11, 2004, the Board held a compliance hearing on the County's lot aggregation requirements. Because the County had adopted the new lot aggregation regulations as an interim ordinance, the Board found continuing noncompliance and ordered the County to come into compliance in 90 days.[11] The County adopted a final ordinance to replace its lot aggregation requirements on October 19, 2004. The Board found these regulations complied with the Board's February 6, 2001 FDO and subsequent compliance orders on May 19, 2005, and determined that no other compliance issues in this case were outstanding, and closed this case.[12]

On July 12, 2006, Mr. Steel filed Evergreen Islands' and Gerald Steel's Motion RE: Fidalgo Island Subarea Plan asking the Board to clarify its order set out in the February 6, 2001 FDO regarding whether a FI Sub-area Plan requirement was still in effect. On July 13, 2006, the Board received the City of Anacortes' Joinder Motion. The County replied to these motions on July 18, 2006.[13] The Board issued an order taking action and tolling the time for a decision on the motions[14] and wrote the parties asking for further information regarding the case on July 28, 2006. Gerald Steel and Evergreen Islands filed a reply to the Board's letter on August 8, 2006. [15] The City of Anacortes replied on August 13, 2006.

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[10] Order Lifting Invalidity (Sign Ordinance) (September 13, 2004) and Compliance Order (Sign Ordinance); WWGMHB (November 3, 2004).
[11] Compliance Order (June 23, 2004)
[12] Compliance Order (Lot Aggregation) (May 19, 2005)
[13] Skagit County's Response Opposing Motion: Re: Fidalgo Subarea Plan (Skagit County's Response)
[14] Order Taking Action on Motion of Evergreen Islands, Gerald Steel, and City of Anacortes
[15] Evergreen Islands and Gerald Steel's Reply in Support of Their Motion and Motion for Correction of the June 23, 2004 Order.

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Skagit County filed its reply on August 14, 2006.[16] On October 25, 2006 the Board issued an order that established a briefing schedule and a hearing to assist the Board in determining whether a compliance issue regarding the Fidalgo Island subarea plan remains in this case. [17] Later, at the request of Mr. Steel, the Board amended its briefing and hearing schedule and allowed Mr. Steel to file a Reply Brief.[18]

Gerald Steel filed his opening brief on December 22, 2006. The County filed its response on January 11, 2007, and Steel filed his reply on January 16, 2007.

The Board held a telephonic hearing on January 18, 2007. Deputy Prosecutor Arne Denny represented Skagit County and Gerald Steel represented himself. All three Board members attended.

At the hearing, Mr. Steel moved to supplement the record with the following items that he had originally proposed as additions to the record:

- Proposed Index # 1755 - 2005 Comprehensive Plan Amendment Request Number : SC05-10 described as a County-initiated comprehensive plan and from RRc-NRL (max 1 unit per 5acres) to RI (max 1 unit to 2 ½ acres)
- Proposed Index # 1756 – 2005 Comprehensive Plan Request Number SCO5 11 described as County-initiated comprehensive plan and zoning amendment to change designation for about 80 acres on Fidalgo Island from RRV(Max 1 unit per 5 acres) to RI (one unit per 2 ½ acres)
- Proposed Index # 1757 – November 9, 2006 Memo to Planning Commission from Planning Department.

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[16] Skagit County's Rebuttal Regarding Its Motion to Dismiss and Response to New Motion to Amend Order of June,23, 2004 (Skagit County's Rebuttal)

[17] Order Granting Steel's Motion for Reconsideration and Denying Motion of Evergreen Islands and the City of Anacortes: RE: Fidalgo Island Subarea Plan at 14-16.

[18] Order Changing the Briefing Schedule and Rescheduling Hearing on Steel's Motion for Reconsideration (November 2, 2006) and Order Allowing a Reply Brief (November 20, 2006).

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Skagit County objected on the grounds that these items were not before the Board during the original proceedings on this issue.

The Board grants Mr. Steel's motion to supplement the record with the above items with the Index numbers suggested because they could be of substantial assistance to the Board and will give them appropriate weight.

Mr. Steel also moved to correct the June 23, 2004 Compliance Order to correct a factual error which erroneously suggested that Mr. Steel had been the representative for Evergreen Islands. Mr. Steel says this is a timely motion because while he is a party to this case, he was not served with the June 23, 2004 Compliance Order.[19] Because Mr. Steel was not originally served with this order, he was not bound by the Board's deadlines for bringing a motion for reconsideration until he was served (in this case, October 24, 2006). WAC 242-02-832. The Board finds, therefore, that the August 8, 2006 motion to correct the June 23, 2004 order was timely filed. Therefore, pursuant to WAC 242-02-832(2)(c) , the Board grants Mr. Steel's motion to correct the June 23, 2004 Compliance Order. The following language in the June 23, 2004 order will be changed:

> Petitioners repudiated the language to which their attorney Mr. Steel had agreed, dismissed Mr. Steel, and hired new counsel.[20]

The new language in the order will be as follows:

> FOSC repudiated the language to which their attorney (Mr. Steel) agreed, dismissed Mr. Steel, and hired new counsel.

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[19] Evergreen Islands' and Gerald Steel's Reply in Support of Their Motion and Motion for Correction of the June 23, 2004 Order at 8 and 9.

[20] Compliance Order (June 23, 2004) at 4.

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III. DISCUSSION

Petitioner's Position

Petitioner asserts that it was error for the Board to close this case when the County was not in compliance with the requirement, contained in the Board's February 6, 2001 Final Order that required Skagit County to prohibit any other increases in density on Fidalgo Island before the completion of the Fidalgo Island Sub-Area Plan. Petitioner submits that the Board does not have authority to find compliance with this requirement until that Sub-Area plan is completed and found compliant. He argues that, without this requirement in force, "the County is free to drag out the sub-area plan process as long as it wants while slowly implementing density increases whenever it wants without the benefit of a sub-area plan's guidance." [21] Although the County submitted a schedule for the completion of the sub-area plan, Petitioner notes that the proposed July 1, 2005 completion date is long past. Therefore, Petitioner requests that this Board rule that the County must finish the sub-area plan and be found in compliance before allowing increases in density. He also asks that the Board require the County to submit interim reports every 180 days on its progress.[22]

County's Position

In its response, the County notes that it adopted Resolution No. R20030152 acknowledging a firm commitment to the completion of the Fidalgo Island Sub-Area Plan. This commitment, the County suggests, was apparently sufficient for the Board since, at the time of the May 19, 2005 Final Order, it would have been obvious that the Sub-Area Plan was not completed. In any event, the County goes on, it has addressed the noncompliant ordinances affecting Fidalgo Island densities by revising its lot aggregation rules and by excluding Fidalgo Island from the CaRD Urban Reserve option until a subarea plan is

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[21] Petitioner's Opening Brief, at 7.

[22] Petitioner has withdrawn its request that the Board enter an automatic finding of invalidity on any Comprehensive Plan designation and zoning that the County adopts that increases density on Fidalgo Island prior to the sub-area plan being completed and found compliant. Petitioner's Reply Brief, at 9.

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adopted.[23] Furthermore, the County submits, the urban densities on Fidalgo Island have not been increased in the intervening years, demonstrating its intention to honor this commitment, even in the absence of an adopted sub-area plan.

Board Discussion

A motion for reconsideration, pursuant to WAC 242-02-832(2), shall be based on at least one of the following grounds:

> (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;
> (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or
> (c) Clerical mistakes in the final decision and order.

Petitioner argues that the Board made an error of fact when it found in the May 19, 2005 Compliance Order that there were no remaining issues of non-compliance and that the Board made an error of law when it ruled that the case was closed. Alternatively, he suggests the Board may find that it made a clerical error when it closed the case while there remained an issue of non-compliance.[24]

The specific directive contained in the Board's February 6, 2001 Final Order was:

> The County must set a specific timetable for, and a firm commitment to, the timely completion of this Plan. The Fidalgo Sub-Area Plan must be completed and found to be compliant before the CaRD urban reserve development or any other increase in density are allowed to occur on the Island.[25]

In our January 30, 2002 Compliance Order, that directive was reiterated.[26]

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[23] County's Response Brief, at 7.
[24] Petitioner's Reply Brief, at 3-4.
[25] " Evergreen Islands v. Skagit County, WWGMHB 00-2-0046c (Final Decision and Order, 2/6/01).
[26] Evergreen Islands v. Skagit County, WWGMHB 00-2-0046c (Compliance Order, 1/30/02).

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On April 29, 2003, the County adopted Resolution No. R20030152 which contained the following language:

> Now, Therefore Be it Resolved, that the Board of County Commissioners hereby acknowledges a firm commitment to completing the Fidalgo Island Subarea Plan by July 1, 2005, consistent with the planning process and tasks as defined in Ordinance #18375, absent any unforeseen circumstances beyond Skagit County's control, and to dedicate the necessary resources (staff and monies) to complete the task by such date.

Based on this action, the County thereafter requested a finding of compliance from the Board. In its June 13, 2003 Responding Brief for Compliance Hearing, the County notified the Board of its adoption of Resolution No. R20030152. Further, the County made the following statement:

> The County acknowledges this Board's finding of noncompliance regarding any additional urban density on Fidalgo Island until the Subarea Plan is completed. This concern is addressed through the new CaRD regulations in Ordinance O20030016 at Skagit County Code (SCC) 14.18.310(5)(c), which provides in part:
>
> > (c) Open Space Urban Reserve (Os-UR). This designation is to retain areas of open space until such time that urban development is deemed appropriate for that area and then to continue to require a portion of that original space to be preserved. This open space may only be used within CaRDs on lands zoned Rural Village Residential, Rural Intermediate, or Rural Reserve, and only if these areas are located on a parcel of which 50% or greater is located within one-quarter mile of urban growth areas or Rural Villages excluding those areas subject to Subsections (5)(a) and (b) of this Section, and excluding Fidalgo Island until such time that a subarea plan which lows for this option has been completed in conjunction with any relevant amendments to the Comprehensive Plan for purposes of consistency.

In light of this submittal, it is significant that the Board's response was to state that "we find the County in compliance with the Act as to: (1) Setting a work program and timetable for the Fidalgo Island Subarea Plan"[27] The remainder of the Board's September 11, 2003 Compliance Order makes it clear that at that time, the Board found the County to remain out

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[27] *Evergreen Islands v. Skagit County*, WWGMHB 00-2-0046c (Compliance Order, 9/11/03).

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of compliance only as to its lot aggregation and rural sign issues.[28] Thus, when this Board issued its May 19, 2005 order, we found that the lot aggregation issue was the "last remaining issue in Case No. 00-2-0046c".[29]

Petitioner argues that since the Board ordered the County to complete the Fidalgo Sub-Area Plan, the Board may not now alter that requirement.[30] However, this argument mistakes the Board's role and the way in which the Board has always viewed its orders. The GMA specifies the authority of the boards in their final orders: to find compliance (RCW 36.70A.300(4)(a)), to find noncompliance (RCW 36.70A.300(4)(b)); to make a determination of invalidity (RCW 36.70A.302); and to recommend to the governor that sanctions be imposed (RCW 36.70A.330(3)). If noncompliance is found, the Board cannot order a local jurisdiction to take a particular action; it can find noncompliance and order that compliance be achieved. The way in which compliance is achieved is up to the local jurisdiction. As this Board said in Port Townsend et al v. Jefferson County, [31]"We remain committed to the fundamental concept of the Growth Management Act that local decision-makers are the proper persons to implement GMA as long as the parameters established by the Act are adhered to. The specific mechanism for achieving compliance rests solely with local government."

While the Board may include a way for achieving compliance in its order, the only question on compliance is whether compliance with the GMA has been achieved. On many occasions, this Board has emphasized the distinction between the Board's directives and actual compliance. See *WEC v. Whatcom County,* WWGMHB Case No. 94-2-0009 (Compliance Hearing Order, Feb. 23, 1995.("Once a finding of noncompliance has been

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[28] Ibid.
[29] *Evergreen Islands v. Skagit County*, WWGMHB 00-2-0046c (Compliance Order Lot Aggregation, 5/19/05), at 33..
[30] Gerald Steel's Opening Brief at 3.
[31] WWGMHB Case No. 94-2-0006 (Compliance Order, December 14, 1994)

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entered, a local government has an opportunity to take action that would achieve compliance, We see our role not as being directive but rather advisory in the method chosen; *ARD v. City of Shelton,* WWGMHB Case No. 98-2-0005 ("…we have said in many cases that the essence of GMA compliance is compliance with the Act, not necessarily compliance with the specific language of our orders.".)[32] Therefore, the question here is whether the directive regarding the Fidalgo Island SubArea Plan was a finding of noncompliance or guidance on the means to achieve compliance.

The Order section of the Final Decision and Order required the County to:

> Set a specific timetable for, and firm commitment to, the timely completion of the Fidalgo Sub-Area Plan. This plan must be completed and found to be compliant before the CaRD [Conservation and Rural Development] urban reserve development or any other increase in density are allowed to occur on the Island.[33]

There is no requirement under the GMA that subarea plans be adopted, but if a subarea plan is adopted, it must be consistent with the comprehensive plan:

> A comprehensive plan may include, where appropriate, subarea plans, each of which is consistent with the comprehensive plan.

RCW 36.70A.080(2).

In this case, the County did not adopt a subarea plan for Fidalgo Island so the Board was not determining the compliance of the subarea plan with the GMA. Also, since the GMA does not require adoption of a subarea plan, the Board did not determine that the failure to adopt a subarea plan was noncompliant with the GMA requirements for subarea plans – RCW 36.70A.080(2). Instead, the Board directed a subarea plan be adopted to address

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[32] Because this distinction is sometimes confusing for litigants, the Board has more recently left guidance on the means of compliance out of Board orders. However, at the time of this decision, the Board often did include such guidance in its orders. See also *ARD, Dawes and Diehl v. Mason County*, WWGMHB Case No. 01-2-0025 (Final Decision and Order, April 11, 2002); *Klein, et al. v. San Juan Islands,* WWGMHB Case No. 02-2-0009 (Final Decision and Order, October 15, 2002) as examples.

[33] Ibid at 47, Order, Paragraph 3

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noncompliant provisions of Ordinance #17938. In fact, the Board couched the directive for a subarea plan as arising from its agreement with the County and the City of Anacortes "that a careful sub-area assessment of topography and environmental constraints to development should be done".[34] Therefore, the Board's direction to adopt a subarea plan for Fidalgo Island must be seen as "advisory as to the method chosen" and not the only way that the County could achieve compliance.

To decide whether the County has achieved compliance on the underlying issues as to Fidalgo Island, the Board must look to the decision to determine what provisions of the challenged ordinance, Ordinance #17938, failed to comply with the GMA. Only those provisions that were found noncompliant are properly issues before this Board on compliance.

The Board has carefully reviewed the February 6, 2001 Final Decision and Order in this case to determine what provisions of Ordinance #17398 relative to the Fidalgo Island SubArea Plan were found noncompliant. There were three findings of fact entered on this subject:

1. The County stated that one of the main purposes of a Fidalgo Sub-Area Plan is to assess the very best strategy for preserving rural character, protecting the environment and accommodating any future urban growth, if appropriate.
2. The County removed aggregation requirements and reserved cluster remnant parcels for future urban growth without first doing a careful sub-area assessment to determine the Island's suitability for more intense development.
3. The record shows no specific timetable for, nor firm commitment to, the timely completion of a Fidalgo Island Sub-Area Plan.[35]

These findings demonstrate that the adoptions at issue were the removal of aggregation requirements and "reserved cluster remnant parcels for future urban growth". While a subarea plan was discussed, it was not adopted and therefore not challenged. Instead, the

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[34] Final Decision and Order at 10.
[35] *Evergreen Islands v. Skagit County*, WWGMHB))-2-0046c (Final Decision and Order, February 1, 2001) at 52.

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changes to the development regulations had been adopted and they were the subject of the noncompliance determination.

Mr. Steel argues that the Board was concerned about "preserving rural character [and] protecting the environment."[36] However, these findings, while referencing the County's interest in preserving rural character, do not state that Ordinance #17938 fails to comply with the GMA requirements for preservation of rural character. Mr. Steel argues that the Board found that CP Policy 4A-7.15 and the provisions of Chapter 14.08 SCC failed to comply with the GMA because "there was not sufficient language to properly guide density increases on Fidalgo Island prior to the adoption of a compliant Sub-Area Plan."[37] However, in contrast to the Fidalgo Island Sub-Area Plan discussion, the Board expressly found rural character violations on two other issues in the case - the rural sign regulations[38] and the uses and dimensional standards allowed in buildings.[39] These, the Board found, were the two "most convincing" rural character challenges argued by Friends of Skagit County.[40] The Fidalgo Island Sub-Area Plan was not among the "most convincing" rural character challenges.

We have also looked carefully at the basis for the Final Decision and Order from the arguments the parties made in the Board's decision. According to the February 6. 2001 Final Decision and Order, Evergreen Islands contended that a proposed study was part of the "County's plan to urbanize the fragile island environment." Anacortes, the order recites, argued that "the County has jumped directly into a set of development regulations that will inevitably lead to urbanization of South Fidalgo Island."[41] Anacortes argued further that "removal of aggregation requirements and reserving cluster remnant parcels for future

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[36] Gerald Steel's Reply Brief at 2.
[37] Gerald Steel's Opening Brief at 5.
[38] Final Decision and Order at 17.
[39] *Ibid* at 20.
[40] *Ibid* at 17.
[41] Final Decision and Order at 13.

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urban growth, as adopted in Ordinance #17938, were two giant steps in that urbanization process."[42] The Board discussion echoed this concern stating:

> It is unfortunate that the County may have increased landowners' expectations of future urban development in rural areas by applying the CaRD urban reserve designation and removing aggregation requirements on the Island before this study has been done. [43]

These arguments show that the issue before the Board was the compliance of development regulations that allowed increased densities on Fidalgo Island. We conclude that the portion of Ordinance #17938 that was found to be noncompliant on this issue was that portion adopting development regulations allowing urban (or at least non-rural) levels of development on Fidalgo Island. The development regulations identified were the CaRD urban reserve designation and the removal of lot aggregation requirements in rural and agricultural lands, including those lands on Fidalgo Island. Both of those issues were addressed in subsequent compliance proceedings and have been found compliant. Compliance Order, September 11, 2003 (CaRD regulations); Compliance Order, May 19, 2005 (lot aggregation regulations).

Petitioner does not point to any other development regulation which allowed an "increase in density" nor does the Final Decision and Order specify any other development regulation adopted in 2000 which is noncompliant because it allows an increase in density on Fidalgo Island. While it is true that the Final Decision and Order could have been clearer on the basis for the Fidalgo Island Subarea Plan directive, the burden to ensure that the order properly reflects the determinations sought is on the parties at the time. We cannot re-write the decision now to reflect findings the parties now wish had been made.

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[42] Ibid at 13.
[43] Ibid at 14.

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It is the responsibility of the parties to ensure that the Board's order addresses the provisions that it asserts are noncompliant. Here, the Board specifically found that "except as to the categories of issues set forth in the remainder of this order, Petitioners have failed to sustain their burden of showing that Skagit County has failed to comply with the Act."[44] The two identified noncompliant provisions of Ordinance #17938 applicable to Fidalgo Island (lot aggregation and CaRD regulations) were found compliant in subsequent decisions in this case. No other GMA violation was found by the Board in the Final Decision and Order as the basis for the directive for adopting a Fidalgo Island Sub Area Plan. Therefore, there are no remaining compliance issues.

In the future, if the County adopts development regulations applicable to Fidalgo Island that increase densities in violation of the GMA, a new petition may be brought. However, the Board has no authority to declare a future enactment noncompliant before it is adopted. RCW 36.70A.320(1) requires the Board to presume that comprehensive plans, development regulations, and amendments to them are valid upon adoption.[45]

IV. ORDER

For the foregoing reasons, Petitioner's motion to reopen the case is DENIED.

Entered this 1st day of March 2007.

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Holly Gadbaw, Board Member

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Margery Hite, Board Member

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[44] Final Decision and Order at 2.

[45] If an invalidity determination has been entered, the local jurisdiction has the burden of demonstrating that the ordinance it enacted in response to the determination of invalidity will no longer substantially interfere with the goals of the GMA, before land use applications will vest to the new regulations. RCW 36.70A.320(4). However, there has been no invalidity determination here.

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James McNamara, Board Member

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

<u>Judicial Review</u>. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the 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 <u>means actual receipt of the document at the Board office</u> 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)

Western Washington
Growth Management Hearings Board
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