

**BEFORE THE WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD**

EVERGREEN ISLANDS et al.,

v.

SKAGIT COUNTY,

and,

AFFILIATED HEALTH SERVICES, et al.,

Petitioners,

Respondent,

Intervenors.

NO. 00-2-0046c

**COMPLIANCE  
ORDER**

**I. SUMMARY OF THE DECISION**

This matter comes to the Board pursuant to our September 11, 2003 Compliance Order. In that order, we gave Skagit County additional time to develop adequate protection from incompatible uses for agricultural lands of long-term commercial significance from the development of substandard lots in agricultural land and rural lands. These regulations also needed to ensure that the development of these lots would not cumulatively cause the need for urban services or fail to reduce low-density sprawl.

In this order we find that although the County has done extensive work on replacement regulations for its current lot aggregation ordinance, the Board can not rule at this time because the ordinance that the County adopted is interim, and the Board can not find compliance with interim ordinances. We find the County in continuing noncompliance and grant them an additional 120 days to adopt a permanent ordinance.

Our September 11, 2003 order continued noncompliance and invalidity for the sign ordinance and granted the County 180 days to complete its work. The Board, at the County's request, sets a compliance hearing on the County's sign ordinance that was originally found noncompliant and invalid in the February 6, 2001 Final Decision and Order in this case.

## II. PROCEDURAL HISTORY

In our February 6, 2001 Final Decision and Order (FDO) in this case, we stated that we would not have found Skagit County's (County) regulations for protecting agricultural lands of long-term commercial significance from incompatible uses compliant if it had not had a ordinance in place that required the aggregation of substandard lots.<sup>1</sup>

The Board's order held:

If the aggregation requirement is no longer in place, in order to achieve compliance, the County must adopt other measures that prevent incompatible development and uses from encroaching on resource lands and their long term viability. This includes not only the estimated 4,000 substandard lots within NRL lands, but also those in rural lands near designated NRL lands.

Further, the County must ensure by appropriate regulation that in allowing development of substandard lots it does not allow development which cumulatively requires urban services in rural areas and fails to reduce low-density sprawl.

*Evergreen Islands et al v. Skagit County*, Case No. 00-2-0046c (February 6, 2001)

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<sup>1</sup> "The aggregation ordinance required that substandard lots platted prior to the adoption of the County's subdivision ordinance in 1965 had to be combined with adjacent lots in the same ownership to satisfy the minimum lot size requirement." *Evergreen Islands et al v. Skagit County*, Case No. 00-2-0046c (February 6, 2001)

On February 16, 2001, Skagit County filed a motion for reconsideration for (1) additional time to adopt new development regulations regarding the lot aggregation issue; and, (2) to reconsider the ruling that requires development regulations to ensure “that in allowing development of substandard lots [Skagit County] does not allow development which cumulatively requires urban services in rural areas and *fails to reduce low-density sprawl.*” (Emphasis supplied). Skagit County’s motion to extend the time frame to 180 days was granted. The motion to reconsider the ruling in the Final Decision and Order was denied on March 5, 2001.

In October 2001, the Board held a hearing on the lot aggregation issue. During the remand period, the County had appealed the lot aggregation issue to the Skagit County Superior Court. The County had not adopted new lot aggregation measures and argued that upon more briefing and review, the Board would find the County’s current regulations compliant. Friends of Skagit County (FOSC) and the City of Anacortes (Anacortes, City) objected to the County’s attempt to reargue the case. These Petitioners argued that this issue was briefed, argued and decided by the Board and that the County was in effect arguing for reconsideration. The Board agreed with Petitioners that this was not the appropriate time to reconsider its previous decision and held the County in continuing noncompliance on this issue.

In response to a January 18, 2002 Court Order, the County adopted Ordinance 17523 on January 28, 2002 that, among other actions, restored the lot aggregation provisions of former SCC 14.04.190(5) everywhere in the County. The only difference was that the County was required to research lot ownership history back to July 1, 1990, rather than to March 1, 1965. On February 11, 2002, the Board received Skagit County’s Motion for Reconsideration, Request for Stay and to Add to the Record. On the same day, we received a motion for reconsideration from FOSC. In response to those motions, on March 27, 2002 the Board issued an order that changed the allowed

timelines for the lot aggregation issue, among others, from 90 to 150 days, as long as the County did not modify its interim ordinance. The County's due date for statement of actions taken was July 1, 2002 and a compliance hearing was scheduled for August 7, 2002.

On June 18, 2002, we received from Skagit County a Motion for Order Extending Time for Compliance to November 8, 2002. We received no objections to this motion and granted Skagit County's request for extension of the compliance date to November 8, 2002.

On January 24, 2003, we received from Skagit County a Motion for Order Extending Compliance Report Date to May 9, 2003, to coincide with the extended Superior Court trial date for these matters. We received no objections to this motion. We granted Skagit County's request for an extension for compliance until May 9, 2003.

On July 1, 2003 the Board held a compliance hearing and issued a Compliance Order on September 11, 2003 that addressed the lot aggregation issues among others. During the remand period, Skagit County entered into negotiations with Anacortes, FOOSC, Evergreen Islands, Gerald Steel, and owners of the Previs/Seavestco property. Negotiations with Previs/Seavestco were successful and that party was dismissed from the case. Negotiations were not successful with Evergreen Islands and FOOSC. These Petitioners repudiated the language to which their attorney Mr. Steel had agreed, dismissed Mr. Steel, and hired new counsel. As a result, the County held a public hearing on two versions of the ordinance, one containing language to which Evergreen Islands, FOOSC, and Mr. Steel had agreed, and one containing language that Mr. Steel had approved, but which Evergreen Islands, FOOSC, and some members of the public criticized. The Planning Commission directed staff to come back with a new proposal. The Board recognized that the County had been acting in good faith to settle the lot

aggregation issue. The Board found the County in continuing noncompliance and gave the County 180 days to bring itself into compliance.

On March 22, 2004 the County adopted Interim Ordinance 020040006 to address the lot aggregation issue. This ordinance also readopted Interim Ordinance 020030032 that had restored the County's lot aggregation provisions until Interim Ordinance 020040006 was found in compliance with the Growth Management Act (GMA).

The Board held a telephonic compliance hearing on May 11, 2004. Mr. Jay Derr represented the County. Mr. David Bricklin represented FOOSC. Mr. Gerald Steel represented Skagit County Growthwatch and himself. Board member Margery Hite recused herself due to her ownership of property in agricultural lands of long-term commercial significance in Skagit County. Board members Holly Gadbow and Nan Henriksen attended.

### **III. STANDARD OF REVIEW, PRESUMPTION OF VALIDITY, BURDEN OF PROOF**

Ordinances and Resolutions adopted in response to a finding of noncompliance are presumed valid. RCW 36.70A.320.

The burden is on petitioners to demonstrate that the action taken by Skagit County is not in compliance with the requirements of the Growth Management Act (GMA, Act). RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we “shall find compliance unless [we] determine that the action by [Skagit County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” In order to find the County's action clearly erroneous, we must be “left with the firm and definite

conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 19, 201 (1993).

#### **IV. ISSUE TO BE DISCUSSED**

**If the aggregation requirement is no longer in place, has the County achieved compliance by adopting other measures that prevent incompatible development and uses from encroaching on resource lands and their long term viability? This includes not only the estimated 4,000 substandard lots within natural resource lands (NRL), but also those in rural lands near designated NRL lands**

**Further, has the County ensured by appropriate regulation that in allowing development of substandard lots it does not allow development which cumulatively requires urban services in rural areas and fails to reduce low-density sprawl? *Evergreen Islands et al v. Skagit County*, Case No. 00-2-0046c (February 6, 2001)**

#### **V. DISCUSSION OF THE ISSUE**

##### **Petitioners’ Position**

FOSC argues that although the interim ordinance nominally precludes development on substandard lots, it creates a multitude of exceptions that destroy the intent of the ordinance. FOSC submitted a detailed letter critiquing the ordinance, but says the County made only a few changes in response to their comments.

FOSC notes that they appreciate the County’s decision to eliminate exceptions in agricultural lands as well as those lands that are enrolled in an open space tax reduction program. This Petitioner also complimented the County on not allowing development on substandard lots one acre or less within the Fidalgo Island Subarea Plan boundary and on Guemes Island until those subarea plans are adopted. FOSC

also heartily endorsed the interim ordinance direction to consider a transfer of development rights program.

FOSC raised concerns about the cumulative effect of exceptions, including: allowing development on all substandard lots created after March 1, 1965, except where plats indicated the lots were not for development purposes; certain exceptions for lots created before 1965, including lots that had the possibility of sewer service or provision of water, grandfathering in old lot certifications, and specific nonresidential uses in agricultural lands.

FOSC also charges that the Board of County Commissioners adopted certain amendments to Ordinance 02004006 after its public hearing without further public participation in violation of the public participation requirements of the GMA.

Mr. Steel supported FOSC's objections to the ordinance and also raised objections to lack of public participation in the lot certification process. At argument, Mr. Steel reminded the Board that it has not allowed cities and counties to achieve compliance on interim ordinances. He argued that to do so would constitute an advisory opinion by the Board.

### **County's Position**

The County reminds the Board of its previous observation in this case:

The GMA does not require local governments to unnecessarily make things more difficult for citizens. The least burdensome method of achieving a required GMA outcome is to be lauded, not criticized. There is a large body of evidence in the record that the aggregation ordinance, as implemented or the County's failure to implement it, was burdensome and arbitrary to land owners, ineffective in reaching the desired result, and needing to be fixed.

We agree with the County and Intervenors' argument that development should be triggered and governed by ascertainable criteria, consistent with public health considerations, not by blind adherence to arbitrary dates and ownership patterns. We are aware of the AG's opinion that the GMA does not require aggregation.

Evergreen Islands v. Skagit County, Case No. 00-2-0046c  
(Final Decision and Order, February 6, 2001) at 9.

The County says that its ordinance asks two questions: (1) Was the lot legally created pursuant to a subdivision ordinance, valid exemption to a subdivision ordinance, or before there was any subdivision ordinance? (2) Is the lot eligible for development?

If the answer to the first question is "yes", then the lot can be conveyed to anyone, including the adjacent landowner. To answer the second question in the affirmative, the lot must be the minimum lot size eligible for development in the zoning district or fall within the listed exemptions and must meet all other code requirements including critical areas, concurrency, on-site septic and drinking water system requirements, and critical area regulations. Skagit County's Responding Brief, April 21, 2004, at 6-7.

The County argues that the GMA obligates the County to protect private property rights as it adopts plans and development regulations. The County bases this argument on RCW 36.70A.020(6) and court cases that require the County's consideration of the owner's "investment-backed expectations".<sup>2</sup> The County maintains that the exemptions under which development is allowed on substandard lots is the County's best effort to balance the requirements of the GMA against

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<sup>2</sup> *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124, 98, S.Ct. 2646, 2659 (1978); *Lucas v. South Carolina Coastal Council*, 404 U.S. 1003, 1016, 112 S.Ct. 2886, 2894 § n.7 (1992); *Edmonds Shopping Cntr. Ass'n v. City of Edmonds*, 117 Wn. App. 344, 71 P.3d 233 (2003); *Guimont v. Clarke*, 121 Wn.2d 586, 604, 854 P.2d 1 (1993), *cert. denied*, 510 U.S. 1176, 114 S.Ct. 1216, 127 L.Ed.2d 563 (1994).

constitutional limitations that prohibit regulations to unduly interfere with property rights and investment-backed expectations.

The County says that Petitioners do not object to the following sections of the ordinance: SCC 14.16.850(4)(b) (testamentary provisions); SCC 14.16.850(4)(c)(ii) (Edison Subarea); SCC 14.850(4)(c)(iii) (Adopted LAMIRD); SCC 14.16.850(4)(c)(vi)(A) (Rural Village Residential and Rural Intermediate); SCC 14.16.850(4)(c)(vi)(B) (Rural Reserve), and SCC 14.16.850(4)(c)(vii) (Urban Reserve). Therefore, the County argues that these sections should be found in compliance according to *Achen v. Clark County*, Case No. 95-2-0067 (Compliance Order, November 16, 2001).

The County points out that the old system of lot aggregation, the one that the Board has required the County to operate under now, did not require the aggregation of lots properly platted after 1965 pursuant to the County's subdivision ordinance. In answer to other objections that Petitioners raised to certain exemptions, the County contends that Petitioners either have not met their burden of proof or have misinterpreted the provisions. The County emphasizes that it does not allow development on all lots created after 1965, as Petitioners contend, but only on properly platted lots. In regard to Petitioners' objections to exemptions allowed for nonresidential uses on substandard lots, the County notes that parks-specialized recreation facilities are not permitted in any of the natural resource zones.

The County asks the Board to reject the public participation objections of Petitioners. As for Mr. Steel's contention that the County should be obligated to provide public participation opportunities during the lot certification process, the County points out that it exempts notice proceedings from other types of permit decisions that are exempt from SEPA, and that it does not make sense to require a notice for lot

certification when the actual construction permit does not require notification. In regard to Petitioners' charges that the County adopted certain exemptions without further public participation, the County maintains that the changes were made in response to public comment and that the changes were within the scope of the alternatives available for public review. The County further points out that additional public input will be taken before the ordinance is made permanent.

### **Board Discussion**

We have reviewed the ordinance and briefs. We feel that the County has made considerable progress in addressing our September 11, 2003 order. Unfortunately, however, we cannot rule in this case until the County has adopted a permanent ordinance. In a prior decision in this case, when the County adopted an interim ordinance regarding boundaries of the Big Lake Rural Village, the Board lifted invalidity, but found continuing noncompliance because the County had adopted the ordinance as interim. *See Evergreen Islands v. Skagit County*, WWGMHB Case No. 00-2-0046c (Order on Motions for Reconsideration, Requested Stay, and Additions to the Record, March 27, 2002) at 3.

In *Island County Citizens Growth Management Coalition v. Island County*, WWGMHB Case No. 98-2-0023c (Compliance Order, ) stated:

The parties initially addressed the interim nature of the critical areas ordinance and previous findings of noncompliance regarding interim critical areas ordinances. *See North Cascades v. Whatcom County*, #94-2-0001, #95-2-0067, *Diehl v. Mason County*, # 95-2-0017, and *CCNRC v. Clark County*, #96-2-0017. The parties agreed that the County to be noncompliant so long as the interim label remains in effect.

*Island County Citizens Growth Management Coalition v. Island County*, WWGMHB Case No. 98-2-0023c (Compliance Order, April 2, 2001) at 1.

We also note that the County has given its planning commission additional direction to respond to Petitioners' suggestions of instituting a transfer of development rights program and a monitoring system at the public hearing on Ordinance 0200400006. That suggests to us that work on this ordinance is not finished. We find those suggestions to be a worthwhile endeavor and encourage County to complete this work during the remand period.

Therefore, due to the interim nature of Ordinance 02004006, we find the County in continuing noncompliance and give the County 120 days from the date of this order to adopt a permanent.

## **VI. SIGN ORDINANCE**

In its April 21, 2004 Brief, the County stated that it scheduled a public hearing on April 27, 2004 on its draft sign ordinance and planned to take action in late April or early May. The County suggested that the Board schedule a compliance hearing 90 days from the date of this order and issue a compliance schedule as well. This order does that.

## **VII. FINDINGS OF FACT**

- (1) Skagit County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.70A.040.
- (2) The County had lot aggregation requirements in place when the Board found the County had adequate provisions to protect Natural Resource Lands from incompatible uses.
- (3) When the County eliminated its lot aggregation requirements, the Board found in its February 6, 2001 order that in order to achieve compliance, the County must adopt other measures that prevent incompatible development and uses from encroaching on resource lands and their long-term viability.

- (4) The Board also found in its February 6, 2001 order that the County must ensure by appropriate regulation allowing the development of substandard lots, it does not allow development that cumulatively requires urban services in rural areas and fails to prevent low-density sprawl.
- (5) The County adopted Ordinance 17523 on January 28, 2002 that, among other actions, restored the lot aggregation provisions of former SCC 14.04.190(5) everywhere in the County.
- (6) On March 27, 2002, the Board issued an order that changed the allowed timelines for the lot aggregation issue (among others) from 90 to 150 days, as long as the County did not modify its interim ordinance.
- (7) The Board granted Skagit County's request for an extension for compliance until May 9, 2003.
- (8) Skagit County and Friends of Skagit County entered into negotiations over lot aggregation provisions after our March 27, 2002 order.
- (9) On September 11, 2003, the Board granted Skagit County an additional 180 days to complete the remand work on lot aggregation based on the County's good-faith efforts to negotiate and the failure of those negotiations.
- (10) On March 22, 2004 the County adopted Interim Ordinance 020040006 to address the lot aggregation issue. This ordinance also readopted Interim Ordinance 020030032 that had restored the County's lot aggregation provisions until Interim Ordinance 020040006 was found in compliance with the Growth Management Act.
- (11) *In North Cascades v. Whatcom County*, #94-2-0001, #95-2-0067; *Diehl v. Mason County*, # 95-2-0017; *CCNRC v. Clark County*, #96-2-0017; and *Island County Citizens Growth Management Coalition v. Island County*, #98-2-0023c Compliance Order, and the Order on Motions for Reconsideration, Requested Stay, and Additions to the Record (March 27, 2002), this Board found that

counties' and cities' planning under the GMA cannot achieve compliance with interim ordinances.

- (12) The County has done extensive work on the County's measures to protect agricultural lands from incompatible uses on substandard lots in agricultural resource and rural lands.
- (13) The County has requested we schedule a compliance hearing on its sign ordinance.

### **VIII. CONCLUSION OF LAW**

Due to the interim nature of Interim Ordinance 020040006, the County's measures to protect agricultural lands from incompatible uses on substandard and lots in agricultural resource and rural lands continue to be noncompliant with the GMA.

### **IX. ORDER**

The County shall adopt development regulations in compliance with the GMA within 120 days of the date of this order. These development regulations must ensure that if the aggregation requirement is no longer in place, the County must adopt other measures that prevent incompatible development and uses from encroaching on resource lands and their long-term viability. This includes not only the estimated 4,000 substandard lots within NRL lands, but also those in rural lands near designated NRL lands.

These regulations must ensure by appropriate regulation that in allowing development of substandard lots it does not allow development which cumulatively requires urban services in rural areas and fails to reduce low-density sprawl.

We are concerned that the resolution of this issue has taken several years. We are also aware that the work that the County has directed the planning commission to do is complex. If the County determines that it needs more time to develop a transfer of

development rights program and a monitoring system, the Board would favorably consider a request for an extension of time to complete its work, if the County makes the request by September 20, 2004 and includes with the request a timeline for the completion of the work and identification of resources that would be devoted to this work.

Also, at the County's suggestion, this order schedules a compliance hearing within 90 days of the date of this order on its sign ordinance and sets a briefing schedule for that hearing.

**Compliance and Briefing Schedule for the Adoption of Regulations to Protect Agricultural Lands from Incompatible Uses on Substandard Lots**

October 21, 2004	Compliance Deadline
November 1, 2004	County's Report on Compliance Report Due
November 22, 2004	Written Objections to a Finding of Compliance Due
December 13, 2004	County's Response to Objections Due
December 22, 2004	Petitioners' Reply Due (Optional)
<b>January 6, 2005</b>	<b>Compliance Hearing</b>

**Briefing Schedule for Sign Ordinance**

July 1, 2004	Deadline for Statement of Actions Taken
July 22, 2004	Written Objections to a Finding of Compliance Due
August 13, 2004	County's Response to Objections Due
August 23, 2004	Petitioners' Reply Due(Optional)
<b>August 31, 2004</b>	<b>Compliance Hearing</b>

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

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 23rd day of June 2004.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Nan A. Henriksen, Board Member

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Holly Gadbow, Board Member

**Gadbow, Concurring:**

I concur in the majority opinion. I am writing separately to acknowledge the work of the County in Ordinance 02004006 and encourage the County to finish the work that the Board of County Commissioners directed the planning commission to do on a transfer of development rights program and the development of a monitoring system.

I agree with the Board's earlier observation that is cited in this decision:

The GMA does not require local governments to unnecessarily make things more difficult for citizens. The least burdensome method of achieving a required GMA outcome is to be lauded, not criticized. There is a large body of evidence in the record that the aggregation ordinance, as implemented or the County's failure to implement it, was burdensome and arbitrary to land owners, ineffective in reaching the desired result, and needing to be fixed.

We agree with the County and Intervenors' argument that development should be triggered and governed by ascertainable criteria, consistent with public health considerations, not by blind adherence to arbitrary dates and ownership patterns. We are aware of the AG's opinion that the GMA does not require aggregation.

*Evergreen Islands v. Skagit County*, Case No. 00-2-0046c  
(Final Decision and Order, February 6, 2001) at 9.

Therefore, I believe that the County is moving in the right direction. The County has shown that the current lot aggregation ordinance, for a multitude of reasons, is ineffective in reducing the number of developable substandard lots in agricultural resource lands and rural lands. Friends of Skagit County (FOSC) cites changes in the interim ordinance that it considers commendable. These include eliminating the exemptions for development of substandard lots in agricultural resource lands and for lots that are enrolled in an open space tax reduction program. Also, the County has responsibly disallowed the development of substandard lots of less than an acre on Fidalgo Island and Guemes Island until subarea plans for those areas are completed.

Petitioners assert that the County is exempting all lots created after 1965. The County answers that the lots qualifying for the exemption are only lots properly platted pursuant to the County's subdivision ordinance. I would remind Petitioners, as the County has, that properly platted lots created after 1965 are not now subject to the County's current lot aggregation ordinance. This is the regulation which the Board has ordered the County to enforce while it develops new regulations to replace it and which prevented noncompliance of the County's measures to protect agriculture lands of long-term commercial significance in the past.

Petitioners argue that the investments that lot owners have made, such as participation in limited improvement districts, obtaining septic approvals, or drilling wells, are not significant enough "investment-backed expectations" to merit an exemption. The County argues that these lot owners have spent considerable time and/or money on these improvements. Petitioners contend that the cumulative effects of all the exemptions interfere with protection of agricultural lands of long-term commercial significance and do not reduce sprawl.

On their face, the number of exemptions seems potentially problematic. However, the Board, in its last compliance order, told the County that it hoped it would not invest

time in more studies, and would just adopt a ordinance that worked. To date, there is a lack of good information on where the substandard lots are, and what lots would be affected by the exemptions. Therefore, the monitoring system that the County has directed the Planning Commission to consider would give the County and citizens information that could be acted upon in the future if the Petitioners are correct about the cumulative effects. Likewise, the direction to consider a transfer of development rights program could help owners of substandard lots recover their investment. These two additions to the ordinance would strengthen the ordinance and would put in place tools to measure the ordinance's effectiveness and actually reduce development on substandard lots.

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Holly Gadbow, Board Member