

considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- 1) Snohomish County has **failed to carry its burden of proof** to justify a Board finding of compliance and rescission of invalidity. Snohomish County's adoption of Ordinance No. 04-057 **does not comply** with the requirements of RCW 36.70A.040, .060, .110, .170, and **was not guided by RCW 36.70A.020 (1), (2), (8) and (10)**; the County's action was **clearly erroneous**.
- 2) Because the continued validity of Ordinance No. 04-057 would substantially interfere with the fulfillment of RCW 36.70A.020 (1), (2), (8) and (10), the Board also enters a **determination of invalidity** for Ordinance No. 04-057.
- 3) A copy of this Order shall be transmitted to the Governor together with a letter recommending the imposition of financial sanctions pursuant to RCW 36.70A.340. The parties to this case shall be copied on the letter to the Governor.
- 4) At such time as the Governor so indicates or a court directs, the Board shall notify the parties to this case of a schedule for further compliance proceedings.

June 24, 2004, Order, at 25.

On July 6, 2004, the Board received "Snohomish County's Motion for Reconsideration and Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)" (**County Motion**). On this same day, the Board transmitted this motion, via fax, to the Governor's Office.

On July 9, 2004, the Board received "Petitioners' Response to County's Motion for Reconsideration and Determination of Invalidity" (**1000 Friends Answer**).

On July 12, 2004, the Board received: "CTED's Response to Snohomish County's Motion for Reconsideration and Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)" (**CTED Answer**); and "Flood District's Response to Snohomish County's Motion for Reconsideration and Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)" (**Flood Control District Answer**). On this same day, the Board transmitted all three Answers, via fax, to the Governor's Office.

On July 15, 2004, the Board informed the Governor's Office, via phone, that in order to finish the case, the Board intended to respond to the County Motions within the 20 day

time period for responding to motions for reconsideration; and that a copy of the Board's Order would be transmitted to the Governor's Office upon its issuance.

II. DISCUSSION OF MOTIONS

A. Motion to Reconsider Finding of Fact 17

Position of the parties:

The County argues that Finding of Fact (**FoF**) 17 is inaccurate, is based upon an inadmissible exhibit and should be deleted or corrected. County Motion, at 2. The County urges the Board to either delete FoF 17 or revise it to reflect that no crops are currently being grown at the Island Crossing location. *Id.*, at 3.

The Flood Control District argues that Exhibit 6 is in the record, since in its Response Brief, the District moved to supplement the record with the exhibit and there was no timely objection raised by the County. The District suggests that if the Board chooses to revise FoF 17, it should reflect the statement in the Exhibit that indicates "Twin City Foods could contract that land today if it were available." Flood Control District Answer, at 3. Nonetheless, the District argues that revising or modifying this FoF does not alter the Board's conclusions in the 6/24/04 Order. *Id.*

CTED argues that the County did not object to the attachment of Exhibit 6 to the Flood Control Districts Response Brief, and absent a timely objection, the Board was "entitled to make a such a determination [whether the exhibit would be necessary or of substantial assistance to the board in reaching its decision. – RCW 36.70A.290(4)] as to Exhibit 6 and to rely on that exhibit in reaching its decision." CTED Answer, at 2. CTED notes that there is no dispute as to whether Island Crossing has ever been farmed, it has; the Board has concluded that Island Crossing is devoted to agriculture. Therefore, CTED contends, "whether the Board revises Finding of Fact 17 has no bearing on any conclusions reached in the [6/24/04 Order]." *Id.*

Petitioners 1000 Friends of Washington "[O]ppose the County's Motion for Reconsideration and join in the brief and argument presented by the Washington State Department of Community, Trade and Economic Development and the Stillaquamish Flood Control District in opposing the County's motion." 1000 Friends Answer, at 1-2.

Board Discussion:

Finding of Fact 17, as stated in the Board's 6/24/04 Order states:

17. Lands in the “Island Crossing triangle” have historically and are currently being contracted to provide crops for processing by Twin City Foods. [*Citing* Stillaquamish Flood Control District Response, Ex. 6.¹]

First, the Board acknowledges that the Flood Control District moved to supplement the record with Ex. 6,² and that absent a timely objection from the County, the Board allowed the exhibit and considered it in its deliberations as permitted pursuant to RCW 36.70A.290(4). For clarification, the Board **affirms** its decision to consider the exhibit as a supplemental exhibit and for the record **grants** the Flood Control District’s motion to supplement the record with this exhibit.

Second, as the Flood Control District suggests, “A more precise rewriting [of FoF 17 based on the June 7, 2004 letter – Ex. 6] would be, ‘Lands in the ‘Island Crossing triangle’ have been contracted in the past to provide *peas* for processing by Twin City Foods, *and Twin City Foods could contract that land if it were available.*’” Flood Control District Answer, at 3; (emphasis in original).

The Board agrees, FoF 17 inaccurately indicates that Twin City Foods currently has contracts for crops from the Island Crossing triangle. This is not the case.

Conclusion:

The Board has reviewed the Order, Exhibit 6 and the briefing of the parties and concludes that it will **grant** the County’s Motion to Reconsider and revise FoF 17 to more accurately reflect Ex. 6. FoF is hereby revised to read as follows:

17. Lands in the “Island Crossing triangle” have been historically ~~and are currently being~~ contracted to provide crops for processing by Twin City Foods. [*Citing* Stillaquamish Flood Control District Response, Ex. 6.]

The Board agrees with Petitioners, that this revision to FoF 17 does not alter the Board’s conclusions in the 6/24/04 Order. As the Supreme Court has indicated, neither land owner intent nor current use is conclusive in determining whether a particular parcel is devoted to agricultural use. *See City of Redmond v. CPSGMHB*, 136 Wn 2d 38, 959 P 2d 1091 (1998).

¹ Ex. 6 is a June 7, 2004 letter from Twin City Foods to Snohomish County.

² *See* Flood Control District Response brief, at 17; and Flood District Answer, at 3.

B. Motion for Determination of Validity Pursuant to RCW 36.70A.302(4)

Applicable Law

RCW 36.70A.302(4) provides:

If the ordinance that adopts a plan or development regulation under this chapter includes a savings clause intended to revive prior policies or regulations in the event the new plan or regulations are determined to be invalid, the board shall determine under subsection (1) of this section whether the prior policies or regulations are valid during the period of remand.

Position of the parties:

Citing to this provision of the GMA, the County argues that “when the Board invalidated [Emergency] Ordinance No. 04-057, the previously enacted land use designations were automatically revived by operation of law pursuant to the savings clause contained in the remanded ordinance.” County Motion, at 3-4. The County contends that,

The Board’s determination of invalidity revived the prior [Plan] land use designations of Riverway Commercial Farmland and Rural Freeway Service and the prior zoning of Agriculture-10 and Rural Freeway Service. The Board has already confirmed that these designations and zoning are valid. *See* Order Rescinding Findings of Noncompliance and Invalidity.³ Therefore, the Board should again find these designations and zoning valid pursuant to RCW 36.70A.302(4). There is absolutely no legal or practical justification for finding otherwise.

County Motion, at 4.

1000 Friends opposes the County’s motion based upon the language of the severability clause and concern that the County would repeat the recent history of this matter.⁴ 1000 Friends Answer, at 2. The basis for Petitioner’s objection to the savings, or severability, clause is that it does not repeal Ordinance No. 03-063. Therefore, 1000 Friends argues, that this clause by its own terms, revives provisions in effect before adoption of

³ The full citation to the referenced Board’s Order is, *1000 Friends of Washington, et al., v. Snohomish County*, CPSGMHB Case No. 03-3-0019c, Order Rescinding Finding of Noncompliance and Invalidity, (Apr. 9, 2004).

⁴ 1000 Friends recaps the sequence of Board Orders from the issuance of the March 22, 2004 Final Decision and Order (**FDO**) through the Board’s issuance of the June 24th Order. *See* 1000 Friends Answer, at 2.

Emergency Ordinance No. 04-057. Petitioner notes that the severability clause does not act to revive the Board's prior orders of invalidity. Petitioner suggests that the most recent provision in effect were those of Ordinance No. 03-063 which designated the Island Crossing area as being within the urban growth area and urban commercial. Therefore, 1000 Friends urges the Board to not rescind its present determination of invalidity. *Id.*, at 2-4.

In its answer, CTED states, "CTED does not oppose the new request for determination regarding the Agriculture-10 and Rural Freeway Service designations that applied to Island Crossing prior to the adoption of Ordinance 03-063, but CTED strongly opposes any attempt to use RCW 36.70A.302(4) to revive Ordinance 03-063." CTED Answer, at 3, (underlining in original).

The Flood Control District argues that the operation of Emergency Ordinance No. 04-057's severability clause would revive the provisions of Ordinance No. 03-063, and urges the Board to deny the County's motion. Flood Control District Answer, at 5.

Board discussion:

A brief recap of the Board's 2004 Orders⁵ is in order prior to addressing this question.

- On March 22, 2004 the Board issued its "Final Decision and Order" in this matter. The FDO found that portions of Ordinance No. 03-063 related to specific designations⁶ in the Island Crossing area did not comply with the GMA; substantially interfered with fulfillment of the goals of the Act and the Board entered a determination of invalidity. [De-designation of agricultural resource land and expansion of the Arlington UGA were the major issues that have been involved in this matter.]
- On April 9, 2004, the Board issued its "Order Rescinding Finding of Noncompliance and Invalidity. In its FDO, the Board had found Ordinance

⁵ See the Board's 3/22/04 FDO, at 2-4, for a recap of the history of prior Board and Court cases involving the Island Crossing area.

⁶ The Board found Ordinance No. 03-063 noncompliant and invalid for approximately 110.5 acres in Island Crossing; approximately 75.5 acres was changed from Riverway Commercial Farmland (Plan) to Urban Commercial (Plan) and the zoning for this area was changed from Agriculture-10 to General Commercial; also, approximately 35 acres was changed from Rural Freeway Service (Plan) to Urban Commercial (Plan) and the zoning was changed from Rural Freeway Service to General Commercial. All 110.5 acres were also included within the Arlington UGA. See, 3/22/04 FDO, at 40. Note that a "Corrected FDO" was issued on March 31, 2004 correcting format and typographical errors, but none affected the substance of the 3/22/04 FDO. See also, *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Compliance, (Apr. 23, 1999) [The Island Crossing area was removed from the Arlington UGA and designated as Riverway Commercial Farmland.]

No. 03-063 noncompliant and invalid. Pursuant to RCW 36.70A.302(4), and a savings clause in Ordinance No. 03-063, the County moved to revive the prior Plan designations of Riverway Commercial Farmland and Rural Freeway Service and the implementing zoning designations of Agriculture-10 and Rural Freeway Service. The Board's Order concluded that these prior designations complied with the Act and the Board consequently granted the County's motion.

- On June 1, 2004, the Board issued its "Order Rescinding the April 9, 2004 Order Rescinding Findings of Noncompliance and Invalidity." This Order was based upon the County's adoption of Emergency Ordinance No. 04-057, which removed the basis for the Board's April 9, 2004 Order Rescinding Finding of Noncompliance and Invalidity. Emergency Ordinance No. 04-057⁷ adopted the same Plan and zoning designations that were found noncompliant and invalid in Ordinance No. 03-063.
- On June 24, 2004, the Board issued its "Order Finding Continuing Noncompliance and Continuing Invalidity and Recommendation for Gubernatorial Sanctions." Ordinance No. 04-057 was the subject of this Board Order.

The savings, or severability, clause in question provides:

If any provision of this ordinance is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remainder of this ordinance. Provided however, that if any provision of this ordinance is held invalid or unconstitutional, then the provision in effect prior to the effective date of this ordinance shall be in full force and effect for that individual provision as if this ordinance had never been adopted.

Emergency Ordinance No. 04-057, Section 6.

The Board notes that the County has not initiated any legislative action to redesignate the affected lands to comply with the GMA, as interpreted in the Board's March 22, 2004 FDO; instead, the County merely took additional testimony and accepted new documents

⁷ The Board notes that the maps accompanying Emergency Ordinance No. 04-057 (adopted May 24, 2004) state: Proposed Plan Amendment – Dwayne Lane: Redesignate Riverway Commercial Farmland and Rural Freeway Service to Urban Commercial [Map 7]; and Proposed Rezone – Dwayne Lane: Rezone from Rural Freeway Service and Agriculture -10 acre to General Commercial [Map 7a]. The Board also notes that that the WHEREAS's refer to the Board's March 22, 2004 FDO and the severability clause in Section 6 of Ordinance No. 03-063, but do not reference the Board's April 9, 2004 Order. Also, the Board's Order reinstating Invalidity was issued on June 1, 2004, after adoption of Emergency Ordinance No. 04-057.

to supplement its record and then adopted essentially the same designations the Board found noncompliant and invalid in the FDO.

In its current motion, the County suggests that the Board's June 24, 2004 Order with its determination of invalidity, and operation of the Ordinance's severability clause, revives the prior Plan and zoning designations⁸ that existed for the Island Crossing area. But again, the County expresses no intent to take legislative action to designate the noncompliant lands to comply with the GMA as interpreted in the Board's June 24, 2004 Order. If, as the County contends, these are the prior Plan and zoning designations that have been found to comply with the GMA,⁹ then the County should take legislative action to adopt these designations and repeal the conflicting provisions of Ordinance Nos. 03-063 and 04-057.

Undertaking such legislative action would remove any ambiguity or doubt regarding the County's Plan and zoning designations for the Island Crossing area. Specific legislative action to clearly establish the designations is important to provide clarity and certainty to the citizens of Snohomish County, since the maps and designations shown in an Ordinance are more readily apparent and relied upon than a severability clause which negates those same designations. Additionally, interested citizens would have to look beyond the face of the Ordinance to determine whether any of its provisions had been invalidated by this Board or a Court to determine whether the facial provisions of the Ordinance were, or were not, still effective. While severability clauses are certainly legal, their practical effect in the land use context is dubious without follow-up legislation to provide clarity and certainty.

As to the legal effect of the severability clause involved in the present situation, the County cites to no case law supporting its position (*i.e.* The designations prior to Ordinance No. 03-063 are revived; not the designations in Ordinance No. 03-063 which preceded 04-057.). Nor does the County cite to any case law construing a severability clause for a fact pattern as presented in this situation: 1) where ordinance designations have been found invalid; 2) where the invalidity of the designations have been rescinded pursuant to a severability clause and official action, thereby reviving prior designations; 3) where the invalidity of the designations have been reinstated due to adoption of a new ordinance adopting the same designations as were originally invalidated; 4) where the (same) designations in the new ordinance have been determined to be invalid; and 5) where the jurisdiction now seeks operation of a severability clause to revive "prior provisions."

⁸ The County indicates that these designations are: Riverway Commercial Farmland and Rural Freeway Service (Plan designations) and A – 10 and Rural Freeway Service (zoning designations).

⁹ The Board does not dispute that the Riverway Commercial Farmland and Rural Freeway Service Plan designations and the A-10 and Rural Freeway Service zoning designations comply with the GMA. See the *Sky Valley* Order, noted in footnote 7, *supra*.

Likewise, 1000 Friends, CTED and the Flood Control District cite to no case law supporting their positions (i.e. the designations in Ordinance No. 03-063 are revived) and construing a severability clause for the fact pattern noted, *supra*.

The Board concludes that the effect of the operation of the severability clause is ambiguous and in doubt. Does the initial determination of invalidity, its rescission, its reinstatement act as an impediment to reviving the land use designations prior to the adoption of Ordinance No. 06-063? The Board has been cited to no authority conclusively answering this question. However, as discussed *supra*, to remove this ambiguity and doubt, and reflect the County's intent as indicated in its motion, its should take legislative action to reinstate prior GMA compliant designations and repeal provisions of Ordinance Nos. 03-063 and 04-057 that contradict and conflict with those designations. Such action would remove any ambiguity and doubt arising from the operation of the severability clause. Affirmative action such as this seems especially appropriate to provide certainty and clarity to the citizens of Snohomish County and where the County is facing a recommendation of Gubernatorial sanctions. Therefore, the Board **denies** the County's Motion for a Determination of Validity, pursuant to RCW 36.70A.302(4).

III. ORDER

Having reviewed the Board's June 24, 2004, June 1, 2004, April 9, 2004 and March 22, 2004 Orders, the Motions of the County, the Answers of Petitioners, the GMA, and having considered the arguments of the parties and deliberated on the matter, the Board ORDERS:

1. The County's Motion to Reconsider Finding of Fact 17 is **granted**, and is revised as set forth *supra*.
2. The County's Motion for a Determination of Validity pursuant to RCW 36.70A.302(4) is **denied**.
3. If it is the County's desire to have a Finding of Compliance entered, the Determination of Invalidity rescinded and the recommendation of Gubernatorial Sanctions withdrawn, the County should take legislative action to repeal the noncompliant and invalid Plan and zoning designations adopted in Ordinance Nos. 03-063 and 04-057 and adopt Plan and zoning designations that comply with the goals and requirements of the GMA, as interpreted in the noted Boards Orders.
4. A copy of this Order will be transmitted to the Governor, and the Board will take no further action on this matter until such time as the Governor or a court

directs, that the Board should notify the parties to this case and schedule further compliance proceedings.

So ORDERED this 22nd day of July 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD¹⁰

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300.

¹⁰ Having not participated with the Board in the Board's prior Orders in this matter, Board Member Pageler did not participate in this decision.