

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

WHATCOM ENVIRONMENTAL COUNCIL,)	
)	
Petitioner,)	No. 94-2-0009
)	
vs.)	THIRD COMPLIANCE
)	ORDER
WHATCOM COUNTY,)	
)	
Respondent.)	
_____)	

PROCEDURAL HISTORY

This case originated March 9, 1994. Petitioners in *Watershed Defense Fund, et.al. v. Whatcom County*, WWGMHB #94-2-0003, alleged that Whatcom County had not adopted an interim urban growth area (IUGA) by October 1, 1993, as required by RCW 36.70A.110(4). On May 24, 1994, Whatcom County adopted an IUGA ordinance. On July 19, 1994, we dismissed that petition on the basis that in failure to act challenges the taking of action by the local government rendered the petition moot. We rejected petitioners' attempt to challenge the merits of the then new IUGA ordinance (#94-033) through a compliance hearing process. We recently reaffirmed that method of proceeding in *Diehl, et.al. v. Mason County, et.al.*, WWGMHB, #95-2-0073 (finding of compliance 2/22/96).

The petition to challenge Ordinance #94-033 was filed July 25, 1994, in this action. Recently, we have been informed that Watershed Defense Fund was also intended to be a petitioner. We recognize their status as a petitioner, although since both groups are represented by the same attorney, we decline to change the heading of this case. We will refer to both Whatcom Environmental Council and Watershed Defense Fund as petitioner.

On November 9, 1994, we held that Ordinance #94-033 was not in compliance with the GMA and remanded it to Whatcom County. The basis of that order as to the establishment of the boundaries was the County's failure to engage in any land capacity analysis before establishing the IUGAs. Additionally, the County adopted "existing zoning" to prohibit urban growth outside

of IUGA boundaries to comply with RCW 36.70A.110(1). We held the “existing zoning” did not comply with the GMA.

At the compliance hearing Whatcom County acknowledged it had taken no action to achieve compliance, nor was any future action contemplated. Thus, we had no alternative but to again find noncompliance. We entered a non-compliance order on February 23, 1995, notified the Governor of our finding and forwarded a recommendation to impose sanctions.

On December 14, 1995, we held a second compliance hearing. Whatcom County and Lynden, Everson, Ferndale, Blaine, Bellingham and Sumas (Cities) participated, as did Lee and Barbara Denke, a representative of the Port of Bellingham and Petitioner. Our December 28, 1995, Order held that jurisdiction existed to make further rulings concerning noncompliance and invalidity even though the first compliance hearing was held prior to the effective date of the 1995 amendments to RCW 36.70A.330. We acceded to the County’s and Cities’ requests to provide more opportunity for preparation of the invalidity issue. We held that Whatcom County still had not achieved compliance with the Act since no action had yet been taken. A third compliance hearing was scheduled for January 30, 1996.

On January 23, 1996, Whatcom County adopted emergency Ordinance #96-004 and permanent Ordinance #96-006 (hereinafter referred to as Ordinance #96-004) relating to IUGAs. This was the first attempt of the County to comply with the November 9, 1994, Final Order. Ordinance #96-004 adopted various IUGAs throughout the County and further adopted findings and conclusions regarding compliance with RCW 36.70A.110. Findings 1-35 and conclusions 1-4 concerned the configuration of the IUGA boundaries, while findings 36-43 and conclusions 5 and 6 dealt with growth outside the boundary lines. After a telephonic conference with the parties and participants we determined that the compliance hearing would be continued until February 28, 1996. We limited the scope of the compliance hearing to issues concerning development regulations for areas outside the IUGA boundaries. We determined that challenges to the configuration of the IUGAs must come through new petitions. We invited further argument and briefing on those holdings at the February 28, 1996, hearing.

For the reasons set forth below, we make the following rulings in this case:

1. Any challenges to the establishment of the IUGAs by Ordinance #96-004 must be in

the form of a new petition;

2. Whatcom County's allowance of new urban growth outside the IUGA boundaries does not comply with the GMA;
3. Under the record in this case, Whatcom County's allowance of densities of 1 du/2 ac and higher (more intense) in areas outside properly established IUGAs substantially interferes with the goals of the GMA. Such densities are invalid under the provisions of RCW 36.70A.330 and .300(2).
4. The allowance of new urban commercial and new urban industrial growth outside properly established IUGAs substantially interferes with the goals of the Act and is invalid under the provisions of RCW 26.70A.330 and .300(2).

AREAS INSIDE IUGAs

Petitioner argued that the 1995 amendments to RCW 36.70A.330 removed discretion from a Board to decide whether a new ordinance should be challenged by means of a new petition or through the compliance hearing process. Petitioner contended that the amendments demonstrated a legislative intent to remove discretion because the term "with the requirements of this chapter" was added to subsection .330(2), and standing to participate in the compliance hearing was expanded. Petitioner further argued that the amendment to subsection (1) eliminated the necessity for a written order within forty-five days, except as to a motion from a local government to remove an invalidity determination. Finally, petitioner argued that as a practical matter requiring a new petition to challenge the new action would allow a local government the unlimited opportunity to pass new ordinances immediately before issuance of a final order and force the entire process to begin anew.

We agree that the 45-day limitation only applies to local government motions to remove invalidity. We disagree that the amendments evidenced a clear legislative intent to remove the discretion a board has to direct the most efficient method of resolving cases. The addition of the language "with the requirements of this chapter" to subsection .330(2) is nothing more than making that sentence accord with the end of subsection (1). Likewise, the clarification of standing provides an opportunity for interested "persons" to participate in the compliance hearing process. It does not mandate that a compliance hearing is the only method available to challenge

a new ordinance. The language in section .330 is no more exclusive than the language found in section .290 that requires “all requests for review...shall be initiated by filing a petition....” Nothing in either the recent amendments or the original text of the Act indicates a legislative intent to mandate one type of hearing over the other.

In determining how best to exercise our discretion in making the choice, we start from a basic precept of the Act that a local government must first develop a comprehensive plan (CP) or development regulation (DR) and that such action is presumed valid. Thus, in failure to act situations, once an ordinance has been passed in response to a remand, the full panoply of procedures set forth in WAC 242-02 should come into play. A local government is normally entitled to have the merits of an ordinance adopted for the first time, viewed in the context of the petition process rather than a compliance hearing. Ordinarily, only after the substance of a CP or DR or other action has been subjected to scrutiny and remanded for noncompliance would we review the new action through the compliance hearing process.

In the instant case, we did not have an opportunity to substantively review the action taken in Ordinance #94-033 because it had none of the information and analysis which GMA requires to properly establish IUGAs. The new ordinance, #96-004, adopted findings and conclusions which relied upon documents and analysis. Thus the County, at least by the terms of the ordinance, has rectified the major problem of the prior ordinance as to configuration and location of the IUGAs. In our January 30, 1996, Order we stated that the new ordinance “appears on its face” to comply with the deficiencies found in the Final Order of November 9, 1994. That language was not intended in any way to preclude procedural or substantive challenges to the new ordinance, but merely to underscore that an analysis had apparently been conducted for the new ordinance whereas none had been conducted for Ordinance #94-033.

The complexity of a case is also a factor in determining which process to require. Here, the 35 findings and 4 conclusions, and the scope of the IUGAs, show that even if we continued the compliance hearing track, a *de facto* petition process would be necessary. In addition to the original parties, there are now 9 other “participants”. Without the use of the WAC 242-02 process for developing the record and issues, the compliance hearing could be chaotic. With the additional “participants”, the rather non-directional flurry of exhibits from all sides and the

routine request for continuances because of unexpected arguments, the prior history of this case demonstrates the need for and efficiency of the WAC 242-02 process.

None of those discretionary and/or policy determinations apply in this case with regard to the issue concerning growth outside the IUGAs. In the new ordinance, Whatcom County adopted the same “existing zoning” regulations as found in Ordinance #94-033. It was upon this basis that the February 28, 1996, compliance hearing was held, evidence presented and arguments heard.

COMPLIANCE

The fundamental statement of the anti-sprawl provisions of the GMA is found in RCW 36.70A.110. In subsection (1), the statute directs that urban growth areas be established by a county, “outside of which growth can occur *only* if it is *not urban* in nature” (italics supplied). While there are many goals found in RCW 36.70A.020 relating to the anti-sprawl concept, it is section .110(1) that provides the absolute prohibition of new urban growth in areas outside UGA or IUGA boundaries. While local governments have a wide variety of discretionary choices under the GMA, the language of .110(1) eliminates any discretion of local governments to allow new urban growth outside UGAs.

The difficult question often becomes, as here, distinguishing “urban” growth from that which is not. RCW 36.70A.030(14) defines urban growth as that which:

“ . . . makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be *incompatible with the primary use* of such land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources. . .” (italics supplied).

The definition goes on to state that urban growth also involves the necessity for urban governmental services when allowed to spread over wide areas. Subsection .030(16) defines “urban governmental services” as those historically and typically delivered by cities which are associated with urban areas, and normally not associated with non-urban areas. A non-exclusive listing which includes storm and sanitary sewer systems, domestic water systems, fire and police protection services are set forth. Many of those listed are also featured as definitional aspects in subsection (12) “public facilities” and subsection (13) “public services”.

By expressing the definitions and the non-urban growth prohibition in such definitive terms, the legislature has removed the discretion of local governments. As noted by Petitioner, local

governments do not possess the authority to change the definition of urban growth. Simply because the County Council characterized this new growth as “rural” is unavailing. It is the legislative definitions that must control in determining compliance and invalidity. Many of the County’s arguments presented during the compliance hearing are more properly directed towards legislative changes.

The “existing zoning” adopted by Ordinance #96-004 is found in Whatcom County Code Title 20 (WCC). WCC provides for three species of “residential rural” designations involving 1 du/ac, 2 du/ac, and 3 du/ac (RR1, RR2, and RR3). According to Ex. 8 and Ex. 9, RR2 (2 du/ac) comprises almost 4600 acres in Whatcom County, while RR1 encompasses slightly over 2000 acres and RR3 over 500. A rural “residential-island” (RR-I) zoning for Lummi Island involves some 2600 acres.

Rural (R) designations include 1 du/2 ac (R2A), 1 du/5 ac (R5A), and 1 du/10 ac (R10A). The five acre zoning (R5A) encompasses more than 78,000 acres, approximately 2/3 of the total available non-resource land, non-IUGA acreage. R10A involves approximately 24% of the total. R2A covers some 5,300 acres.

In the residential rural (RR) district (WCC 20.32), permitted uses include a single family dwelling for each lot, along with attached dwellings of no more than 2 units; the raising of crops (fruits, berries, etc.); and home occupations. Conditional uses include police and fire stations, libraries, community centers, recreation facilities, schools, churches, retirement, boarding and convalescent homes, neighborhood grocery stores, accessory apartments, bed and breakfast lodgings, and cottage industries with no more than two people outside the family as employees. Clustering is allowed. Under WCC 20.32.252 a bonus schedule of up to 21 dwelling units exists for clustered subdivisions.

Maximum and minimum density sizes are found in WCC 20.32.253 for the RR-1, RR-2 and RR-3 categories. Without public sewer or water, each of the categories provides for 1 du/acre density. However with either public sewer or water, minimum lot size can be reduced as low as 8,000 sq. ft. and in a cluster subdivision the additional “bonus dwelling units” would also be awarded. In cluster subdivisions the reserve tract varies between 30 percent and 25 percent of the

total acreage. The reserve tract is available to be used for “agriculture, forestry, open space or *possible future development.*” (italics supplied).

The rural residential-island (RR-I) development regulations are found in WCC 20.34. Permitted uses, accessory uses and conditional uses are similar to the RR designations noted above. The clustering and reserve tract provisions are the same, although WCC 20.34.330 also provides for density transfers within the Island. Densities are restricted to 1 du/3 ac outside of aquifer recharge areas and 1 du/5 ac within previously established aquifer recharge areas. Bonus dwellings are not authorized.

The rural (R) district is found in WCC 20.36. Permitted uses include single family dwellings, agriculture, aqua-culture, small wood-lot management and tree farming. Marketing of those products is allowed as an accessory use. Conditional uses involve ones similar to the RR and RR-I zones but also allow animal hospitals, commercial kennels and stables, neighborhood grocery stores of 2,500 sq. ft. or less, cottage industries with no more than 4 people outside the family as employees and bed and breakfast lodgings. The clustering provisions found in subsection .250 are similar to the ones in the RR district.

Maximum density for R2A district without public water is 1 du/2 ac for a conventional subdivision, but increases to 1 du/ac for a cluster subdivision. With public water the minimum lot size drops to 15,000 sq. ft. Sixty-five percent of the cluster subdivision must be established as the reserve tract but again that is available for “possible future development”.

R5A zones without public water require 1 du/5 ac which can increase to 1 du/ac for a cluster subdivision. A minimum lot size of 15,000 sq. ft. for a cluster subdivision with public water is allowed. The R10A district increases to 1 du/ac for cluster subdivisions without public water, but as low as 15,000 sq. ft. with public water. These minimum lot sizes are exclusive of the cluster bonus schedule.

Public water is defined in WCC 20.97.330 as including any system intended for domestic human consumption that is managed by either a municipality, a special purpose district, is a class one water system as set forth in WAC 248-54-560(1), or any class of water system “deemed appropriate” by the Bellingham-Whatcom County Health Department.

The cluster bonus concept is found both in the RR (WCC 20.32) and R (WCC 20.36) districts under subsection .252. There is no bonus schedule for the RR-I (Lummi-Island) district. The bonus is based on the parcel size to be subdivided in the particular district. In the RR district the bonus only applies to the RR1 zone while in the rural it applies to R2A, R5A and R10A. For example, in an RR1 zone with a 20-acre parcel to be subdivided, 6 bonus dwelling units are awarded. In a R2A zone for a 20-acre parcel to be subdivided 3 bonus units are awarded, but if the parcel size to be subdivided is in excess of 147.2 acres 25 bonus units are awarded. An R5A parcel size in excess of 148.5 acres is entitled to 11 bonus dwelling units.

WCC 20.85 is entitled Planned Unit Development (PUD). PUDs are allowed in any zone except the agricultural district. Presumably this means that a PUD is available in rural, forestry, commercial or industrial zones. Additionally, under subsection .053, a PUD in RR or R zones includes multi-family dwellings which are allowed to have units that “may be greater than would otherwise be allowed by the underlying zoning.” Under subsection .108 “the County may approve an increase of dwelling unit density for residential development, or floor area for commercial and industrial activities of not more than thirty-five percent (35%) greater than that permitted by the underlying zone...”

Commercial districts are found in WCC 20.62 General Commercial (GC), WCC 20.63 Tourist Commercial (TC), and WCC 20.64 Resort Commercial (RC). The GC district provides a variety of commercial uses to be drawn from “a relatively large trade area”. It allows, in subsection .065, multi-family dwellings of maximum 18-units/acre provided that “adequate public sewer, water and storm drainage” facilities, and “street improvements” are provided for.

The purpose of the TC district is to serve the traveling public. It is to be located near major transportation corridors to provide safe and convenient access that does not impact adjacent non-commercial activities. Permitted uses include restaurants, retail shops less than 2,500 square feet, service stations, laundry mats, banks, churches and hotels and motels. Conditional uses allow recreational vehicle parks with a maximum density of 15 units per acre. Recreational vehicle parks are defined in WCC 20.97.340 for “travel recreation or vacation uses”.

The resort commercial (RC) district of WCC 20.64 allows permitted uses of a single-family unit or a duplex for each lot, as well as the uses allowed in the other commercial districts. With neither public sewer nor public water 1 du/ac is allowed. Maximum densities with both public water and sewer are: for single-family and duplexes, 7 units per acre; for multi-family, including condominiums except timeshare, 22 units per acre; for mobile home parks, 7 units per acre; and for recreational vehicle parks, 15 units per acre. With either (but not both) public water or public sewer the maximum density is 2 du/ac except for clustering. The purpose of the resort commercial district is similar to that expressed in the GMA by RCW 36.70A.360 but contains few, if any, of the limitations set forth in that statute.

Industrial districts involve Gateway Industrial (GI) WCC 20.65, Light Impact Industrial (LII) WCC 20.66, General Manufacturing (GM) WCC 20.67 and Heavy Impact Industrial (HII) WCC 20.68. According to the map dated December 6, 1995, (Ex. 41) these industrial and commercial zones are located in areas that are not designated IUGAs. Urban commercial and urban industrial uses are permitted within the zones.

Development regulations which allow new urban commercial and urban industrial zones outside IUGAs, as these do, are not in compliance with the Act. Insofar as the commercial designations also allow residential densities between and 7 and 22 units per acre and permanent residents in mobile home parks, those densities are urban and their allowance in non-IUGA areas is not in compliance with the GMA.

The minimum lot size in the RR1, RR2 and RR3 zones, and their maximum densities do not comply with the GMA. The cluster and the cluster bonus density provisions of these zones are urban densities under the definition provided in RCW 36.70A.030(14). The clustering and bonus density provisions of the R2A, R5A and R10A zones clearly result in urban growth and are not in compliance with the GMA. Allowances of PUDs in non-IUGA areas does not comply with the Act. All of these zoning densities and permitted uses violate RCW 36.70A.110 and the goals of the Act.

Under the record presented here, the R2A, RR-I and R5A zones, even without clustering, do not comply with the Act. Urban growth is use of the land for the location of buildings, structures and impermeable surfaces and as such is incompatible with the *primary* use of the land for food,

agriculture, fiber or minerals. While some agricultural and fishing uses are permitted in the R5A and RR-I zones, these densities, even without the options to increase the base density, do interfere with and are “incompatible with the primary use” of the land for food, etc.

The widespread area encompassed by R5A, RR-I, R2A and RR districts according to this record are even now requiring “typical urban governmental services” and certainly will in the future. For example, Ex. 12 identified that the RR1, RR2 and R2A districts in the Lake Whatcom area have sewer capacity problems. The Chuckanut and Governors Point RR2 and RR3 zones are noted to have inadequate fire and police protection, as well as inadequate roads.

At the January 23, 1996, public hearing the County Council spent a limited amount of time discussing whether or not the existing development regulations prohibited urban growth outside IUGAs. The staff presentation at that public hearing asserted that the 11 subarea plans, which constituted the prior CP and zoning code, were based on the same concepts as applied by the GMA and would therefore suffice. That same argument was strenuously urged at the compliance hearing.

Our review of the subarea plans does not substantiate the County’s claim. While some of the same anti-sprawl and rural concepts are contained in the subarea plans, there are, for example, no capital facility plans. There is no analysis of the projected costs to the taxpayer for increased public facilities and services nor sources of funding. The subarea plans include the Lummi Island plan, finished in April, 1979, which formed the entire basis for the RR-I district. The Lake Whatcom plan was completed September 1, 1982. The Lynden-Nooksak Valley subarea plan was adopted May 1986, but the background information was completed in December 1983. The Chuckanut area was based upon material completed in November 1984 and adopted May 1986. The Cherry Point-Ferndale subarea plan was based upon background material completed November 1979, with the plan adopted May 1981. The only recent subarea plan is the one for Eliza Island, published in May 1994 which involves a total of 136 acres out of the 123,026 acres of non- IUGA, non-resource land.

Ex. 8, the February 15, 1995 Draft Environmental Impact Statement (a Final Environmental Impact Statement has not yet been completed), stated at pages 24 and 25 that:

“Some of the subarea plans...are out of date and long overdue for review. The information and applicable regulations regarding environmental resources such as wetlands and geological hazards has (*sic*) changed since the adoption of the subarea plans...

The...subarea plans, and development regulations would have to be updated to include the minimum requirements of the Growth Management Act. This would include adding comprehensive plan elements such as housing, coordinated transportation planning, capital facilities planning, and siting of essential public facilities. These required elements could significantly alter the existing subarea plans.

Because of the abundance of rural lands available for residential development and the relative ease of developing these lands, the present subarea plans provide little incentive for growth to occur in the existing cities or urban areas of the County.” (Italics supplied)

Not only does our independent review of the subarea plans WCC Title 20 lead to the inescapable conclusion that the existing codes do not comply with the Growth Management Act, but the most recent Whatcom County publication on the issue says exactly the same thing.

The County also made strenuous arguments about the decision of the County Council to emphasize RCW 36.70A.020(6) as a goal to be achieved in the DRs to prohibit urban growth in non-urban areas. Under GMA a local government has the right to prioritize and emphasize any of the 13 goals that best suit local conditions. What a local government does not have the right to do is what Whatcom County did in this case, *viz.* disregard the other 12 goals and focus entirely on goal 6. That is particularly true when the GMA prohibition is one that is legislatively directed under the provisions of RCW 36.70A.110.

The County’s reliance on RCW 36.70A.070(5) requiring a “variety of rural densities” as authorizing the various districts noted above is without merit because the densities in this ordinance are not rural. In any event, the cited provision applies to the rural element of a CP, which Whatcom County has not yet adopted. The purpose of DRs to prohibit urban growth outside IUGAs is to contain sprawl immediately. Greater discretion to balance competing interests comes with the adoption of a CP. That was required to be done July 1, 1994. It has not yet been accomplished.

In our December 30, 1995, Compliance Order, we stated that once noncompliance had been found a local government had the burden of proving compliance at the time of the hearing. In this case it mattered not who had the burden because even if we applied the presumption of validity to the DRs outside IUGAs and assigned petitioner the burden of proof, the evidence was so overwhelming as to lead to no other conclusion.

INVALIDITY

RCW 36.70A.330 provides that at a compliance hearing we must reconsider any previous decision concerning invalidity. RCW 36.70A.300(2) sets forth the standard for a finding of invalidity. Invalidity may be found only if a Board determines that continued validity of the regulation would substantially interfere with fulfillment of the goals of the Act. A Board must specify the particular parts of a regulation determined to be invalid and the reasons therefore. The findings of fact and conclusions of law required by section .300(2) are attached as Appendix I and incorporated herein.

Our January 30, 1996, Order directed that the compliance hearing would be held for the purposes of determining whether prohibition of urban growth outside the IUGA boundaries was established by the new ordinance. We stated that if the ordinance did not comply, we would then look to see if all or parts of it should be declared to be invalid.

Initially Whatcom County argued that our previous decisions establishing jurisdiction to allow invalidation of portions of a pre-existing zoning code in *Friends of Skagit County, et.al. v. Skagit County, et.al.*, WWGMHB #95-2-0065 (Order 2/7/96) and *Whidbey Environmental Action Network v. Island County*, WWGMHB #95-2-0063 (Order 12/19/95) were incorrect and should not be applied to the Whatcom County ordinance. We do not find Whatcom County's arguments to be different than the Skagit or Island County arguments and adhere to our rulings in those cases. The recently adjourned Legislature considered, but did not see fit to change, the interpretation. In any event, Whatcom County's argument is not pertinent to the situation here.

In the *Skagit* and the *Island County* cases there were no actions taken by either county to comply with the GMA with regard to DRs outside a properly established IUGA. Here a GMA action was

taken by the County Council on January 23, 1996, with the adoption of Ordinance #96-004. This action, although it adopted the “existing code” was nonetheless a GMA action subjecting it to review for compliance and invalidity. We have previously held that a local government could adopt existing regulations after appropriate public participation if those regulations complied with the Act. *Friends v. Skagit County, supra* (Order 5/22/95).

The goals of the Act relating to the prohibition of urban growth outside of properly established IUGA areas primarily involve RCW 36.70A.020(1), (2), (3), (8), (9), and (10). As noted in the compliance section of this order, incorporated herein by reference, WCC 20 density provisions allow urban growth in non-urban areas. Urban growth in non-urban areas discourage development where adequate public facilities and services exist, encourage sprawl, do not allow for efficient multi-modal transportation systems, interfere with the maintenance and enhancement of natural resource-based industries, and discourage the retention of open space, conservation of fish and wildlife habitat. Such new urban growth also decreases access to natural resource lands and water, and fails to protect the environment and our State’s high quality of life, including air and water quality and availability of water. The allowance in WCC 20 of additional residential densities in non-IUGA areas when public water and/or sewer are available discourages rather than encourages the efficient use of public facilities and services.

We agree with the County that goal 2 says that *reduction* of sprawl, rather than its complete elimination, is to be achieved. However, the regulations of WCC 20 encourage, promote and exacerbate the very problems that GMA is designed to eliminate. The subarea plans, most of which are more than 10 years old, do not in any manner deal with the estimated cost to taxpayers and funding sources for road improvements, police and fire protections, the increased need for more widely disbursed schools, etc. While the subarea plans contended that anti-sprawl was their hallmark, a review of the map shown in Ex. 40 demonstrates that sprawl has increased in Whatcom County since adoption of the subarea plans began.

New commercial and new industrial growth is not only available under WCC 20 but is encouraged in non-urban areas (see pages 10-11). While there are provisions available under GMA for resource-based commercial and reserve areas for industrial land under certain limitations, none of those restrictions are found in this ordinance. In the General Commercial

District, WCC 20.62, a variety of commercial purposes that are intended to “attract clientele from a relatively large trade area” are permitted in addition to the various multi-family designations. The Tourist Commercial District also encourages urban growth, but to a lesser scale than that presented in the GC district. The Resort Commercial District is totally inconsistent with RCW 36.70A.360 - master plan resorts. New industrial growth in the Gateway Industrial, Light Impact Industrial, Heavy Impact Industrial and General Manufacturing districts are inconsistent with RCW 36.70A.365 - major industrial developments.

These commercial and industrial districts’ inconsistencies and noncompliance with the Act demonstrate the fallacy of simply re-adopting prior DRs without any serious analysis. These “business as usual” zones and districts in non-urban areas encourages development where adequate public facilities and services do not exist and interferes with the resource land and environmental goals of the Act. Under this record the interference with those goals is substantial.

While we recognize that the commercial and industrial zones were not directly part of the arguments of petitioner, the subjects are adequately covered within the purview of our January 30, 1996, Order. We acknowledge the point made by the dissent. However, we note that RCW 36.70A.290 requires petitions to include a “detailed statement of issues” and section .320 establishes the presumption and burden of proof. No such requirements are found in section .330 for compliance hearings.

Additionally, the record (upon which we base our decision under subsection .290(4)) in this case was supplied by Whatcom County. The County’s purpose in supplying these documents was to counter the claim of noncompliance and invalidity. We review the record thoroughly. We will not ignore obvious non-compliant or invalid portions of the record. *Loomis v. Jefferson County*, WWGMHB #95-2-0066. We are not inclined to have a local government supply information in support of an action, then demand we ignore portions of the record that are unfavorable.

The changes that the Legislature made in the 1995 amendments to RCW 36.70A.330 shows a legislative intent to ensure that any portions of DRs that substantially interfere with the goals of the Act are to be examined. We are not unmindful of the fact that since the very first time these issues came about in case #94-2-0003 on March 9, 1994, Whatcom County has refused to take any action for DRs outside the IUGAs except readoption of prior plans and regulations.

We also find, without question, that the density provisions which were the main portion of petitioner's argument substantially interfere with the goals of the Act except those DRs which maintain densities no more intense than 1 du/3 ac (RR-I), 1 du/5 ac (R5A) and 1 du/10 ac (R10A).

All the provisions of WCC 20.85 (PUD) that apply to areas outside properly established IUGAs are invalid under this substantial interference test. All the provisions in WCC 20 that allow clustering and/or clustering bonuses that apply to areas outside properly established IUGAs are invalid because they substantially interfere with the goals of the Act since they encourage rather than reduce the inappropriate conversion of undeveloped land into sprawling, low density development. The allowance of greater or more intense densities when public water and/or public sewer are available substantially interferes with the goals of the Act particularly because it fails to encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. The allowance of 1 du/ac (RR1) and 1 du/2 ac (R2A) zones within the rural district substantially interferes with the goals of the Act. In responding to a question about whether R2A, RR1, RR2 and RR3 densities were either urban or rural, the County responded "neither". That is exactly the point. The GMA no longer allows "neither" (i.e., suburbanization). Urban growth is to be placed within UGAs and areas outside UGAs are to have rural growth.

We are not holding that all these types of zoning are never allowed under the GMA. Under the record here these zones and density provisions are clearly outside the goals and requirements of the Act.

Dated this 29th day of March, 1996.

William H. Nielsen
Presiding Officer

Les Eldridge

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DISSENTING OPINION(in part). I concur with the majority that Whatcom County is clearly out of compliance with the Act and that RR1, RR2, RR3 and R2A districts outside properly established IUGAs should be found invalid.

I also agree that most of the other elements of the zoning code invalidated by the majority appear, on their face, to be out of compliance with the GMA. However, petitioner has the burden to prove that continued implementation of sections challenged would substantially interfere with the fulfillment of the goals of the Act and therefore warrant a declaration of invalidity.

I do not understand how this Board can invalidate sections of the zoning code that were not challenged by the petitioner. The County was given no opportunity to defend those sections nor should any defense be necessary since the required burden was not met by the petitioner.

DATED this 29th day of March, 1996.

Nan A. Henriksen
Board Member

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APPENDIX I

Findings of Fact and Conclusions of Law

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Findings of Fact

1. On May 24, 1994, Whatcom County adopted an IUGA Ordinance. The deadline provided for by the GMA for adoption of the IUGA was October 1, 1993.
2. By Final Order dated November 9, 1994, we held that Ordinance #94-033 was not in compliance with the GMA. Part of the ordinance found not in compliance was the County's adoption of "existing zoning" to fulfill the GMA requirement to prohibit urban growth outside of properly established IUGA boundaries.
3. By Order dated February 23, 1995, we held the County continued not to be in compliance

with the Act. The County had taken no action since the original order to achieve compliance.

4. A second compliance hearing was held December 14, 1995. A finding of continued noncompliance was entered by Order dated December 28, 1995.

5. On January 23, 1996, the County adopted Ordinance #96-004 relating to IUGAs. The previously scheduled compliance hearing was continued until February 28, 1996. The following findings are a result of that hearing.

6. Under the record presented here Title 20 of WCC allows urban growth outside of IUGA boundaries.

7. RR1 zoning in Whatcom County comprises approximately 2,000 acres. RR2 zoning comprises approximately 4,600 acres. RR3 zoning comprises over 500 acres. RR-I zoning comprises 2,600 acres. R2A covers approximately 5,300 acres. R5A covers in excess of 78,000 acres. R10A comprises approximately 25,000 acres. The total acres involved in non-IUGA, non-resource land area is approximately 123,000 acres. There were no figures available for the amount of acreage covered by the various commercial and industrial zones. The location of the commercial and industrial zones as of 12/6/95 is shown on Ex. 41.

8. Clustering subdivisions and bonus density categories are allowed throughout the zoning classifications except for the agricultural district. Additional densities are allowed based upon the availability of public water and/or public sewer. Multi-family dwellings are allowed within some commercial districts. High density mobile home parks are also allowed in certain commercial districts.

9. The subarea plans are out of date. They do not contain current information nor do they comply with the various requirements of the GMA. They cannot be used as the sole basis for compliance. A draft environmental impact statement recognizes the deficiencies of the subarea plans.

10. The "existing zoning" and subarea plans combined with the abundance of rural lands for residential development does not direct urban growth to properly established urban areas.

11. In adopting existing zoning as compliance with the GMA, the County did not adequately consider all the goals of the GMA.

12. The assignment of the burden of proof in this case is unimportant because the evidence is clear.

13. The appropriate goals to review for assessment of whether the prohibition against urban growth in non-urban areas under RCW 36.70A.110(1) is being followed are the ones found in

RCW 36.70A.020(1), (2), (3), (8), (9), and (10).

14. The provisions of WCC 20.85 (PUD) in its entirety substantially interferes with the goals listed in finding 13.

15. The clustering and clustering density provisions of the RR district, RR-I district, R district and RC district substantially interfere with the enumerated goals of finding 13.

16. The allowance in WCC 20 for more intense densities when public water and/or public sewer are available substantially interferes with the goals listed in finding 13. The multi-family provisions found in the GC district (WCC 20.62.065) and the densities found in the RC district (WCC 20.64.051, .052, and .060) substantially interfere with the goals of the Act.

17. WCC 20.62 (General Commercial District) in its entirety substantially interferes with the goals of the Act except as it allows siting of essential public facilities under the provisions of RCW 36.70A.200.

18. WCC 20.64 (Resort Commercial District) substantially interferes with the goals of the Act, some of which are more particularly set forth in RCW 36.70A.360 except as it allows siting of essential public facilities under the provisions of RCW 36.70A.200.

19. WCC 20.65 (Gateway Industrial), 20.66 (Light Impact Industrial), 20.67 (General Manufacturing), and 20.68 (Heavy Impact Industrial) substantially interfere with the goals of the Act, particularly established in RCW 36.70A.365, except as to the siting of essential public facilities under the provisions of RCW 36.70A.200.

Conclusions of Law

1. The Board has jurisdiction over this matter under the provisions of RCW 36.70A.300(2) and .330.
 2. The provisions of WCC Title 20 noted in the findings of fact are invalid because they substantially interfere with the goals of the Growth Management Act.
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