

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

FRIENDS OF SKAGIT COUNTY,	)	
BARBARA RUDGE, and ANDREA XAVER,	)	No. 95-2-0065 (IUGA)
	)	
Petitioners,	)	SECOND ORDER RE:
	)	MODIFYING OR
vs.	)	RESCINDING INVALIDITY
	)	& FINDING OF
SKAGIT COUNTY,	)	CONTINUED NON-
	)	COMPLIANCE
Respondent,	)	
	)	
and	)	
	)	
CITY OF ANACORTES and CITY OF	)	
MOUNT VERNON, municipal corporations,	)	
	)	
Intervenors.	)	
_____	)	

**SYNOPSIS OF THE ORDER**

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Skagit County has begun progress toward compliance with the Act throughout the process which culminated in the adoption of Ordinance #16211. We see a sincere effort to move the section regarding commercial and industrial development outside of IUGA's into compliance. We take particular note of the reduction of at-risk rural and potential natural resource land acreage from 60,000 to somewhere between 10,000 and 1,200. The County's work on the Neighborhood Business District section of the Code was particularly effective. Nonetheless, work remains to be done in order to accomplish a complete rescission of the finding of invalidity. Aspects of the Ordinance regarding commercial/industrial development and urban densities in rural areas still substantially interfere with the goals of the Act.

In this Order we decline to make recommendations to the Governor for sanctions regarding the PUD ordinance. We make a partial rescission of the finding of invalidity. We find the County to be in continued non-compliance with the Act. The opportunity for densities greater than 1

dwelling unit (du)/5 acres in the Rural Residential and proposed Rural Village designations under the record in this case still fails to comply with the Act. The County needs to provide language in the commercial/industrial (C/I) section allowing only commercial development in response to local neighborhood needs and industrial designation for uses related to resource lands.

Designation and conservation of natural resource lands in advance of an IUGA designation has not occurred. The adoption of this ordinance without ever presenting it at a public hearing for public comment fails to comply with the public participation goals and requirements of the Act.

### PROCEDURAL HISTORY

This case originated on March 6, 1995 when Friends of Skagit County, Barbara Rudge, and Andrea Xaver (Friends) filed petitions alleging Skagit County's noncompliance with the Growth Management Act (GMA or the Act). The petitions listed a variety of complaints including the allowance of new urban residential, new urban commercial, and new urban industrial development outside municipal boundaries. Subsequent to the Final Order dated August 30, 1995, an amended order was entered October 31, 1995, which required the County to "clarify the language of the ordinances to preclude new urban residential, commercial, or industrial development outside a properly designated IUGA within 60 days of the Order." It also required the County to "clarify the language of the ordinances to preclude extension of urban governmental services outside a properly designated IUGA." The order denied a request by Friends for a finding of invalidity regarding the County's aggregation ordinance. That ordinance did not comply with the Act because it allowed aggregation of contiguous lots to new lots as small as 8,400 square feet. It was not found to substantially interfere with the goals of the Act. We remanded the issue to the County to achieve compliance.

In late December, 1995, the County adopted Ordinance #16007. #16007 rescinded the 1 du/5 acre-Interim Control Ordinance, #15372, which had previously limited new urban residential development outside IUGAs. Later, the Board of County Commissioners determined that #15372 had already lapsed and so the objectives of #16007 had already been accomplished. Ordinance #15372, which precluded subdivision of lots under 5 acres (but allowed single ownership, noncontiguous vested lots under 5 acres to be built upon) had been passed in 1994 to "prevent undesirable sprawling and low-density growth patterns . . . and to preclude danger to

public or private property posing a threat to the environment.” Absent the provisions of #15372, noncontiguous vested lots below 5 acres in size could still be built upon, and additionally, new lots less than 5 acres could be created. Friends requested a hearing on compliance and invalidity, which was held in January, 1996. Our order, entered on February 7, 1996, invalidated several sections of the Skagit County Code. We found substantial interference by the allowance of new urban growth and extension of urban services in rural areas. At no time was building on single ownership, noncontiguous vested lots smaller than 5 acres in area precluded by any actions of this Board.

On March 6, 1996, the Skagit County Board of Commissioners passed an interim ordinance, #16075, in response to our declaration of invalidity. That same day the County requested a hearing to explain why adoption of ordinance #16075 warranted (1) the lifting of the declaration of invalidity and (2) a finding that the County was now in compliance with the Board’s Amended Order of October 31, 1995. That hearing was held March 29, 1996.

We declined to rescind the finding of invalidity as a result of that hearing. A State Environmental Policy Act (SEPA) review had not been done. Adequate public participation had not been provided for.

We continued the Compliance Hearing until June 4, 1996, and later received from Friends a motion for continuance of that hearing and a request for a recommendation for sanctions if no new ordinance was adopted by the new hearing date of June 26, 1996. A new Ordinance, #16211 was adopted June 25, 1996. At the June 26<sup>th</sup> hearing, a continuance was granted until July 31, 1996, which was later extended to August 21, 1996. On July 15, 1996, we received a motion from Skagit County requesting a hearing to determine whether the finding of invalidity should be lifted. That same day we received a motion for sanctions from Friends regarding Skagit County’s PUD ordinance. Present at the August 21st hearing were all three board members, Chief Civil Deputy John Moffat and Mr. Jay P. Derr of Buck and Gordon for the County, and Mr. Gerald Steel representing Friends of Skagit County and Ms. Barbara Rudge.

As the hearing opened the following exhibits were added to the Index: Exhibit 123, (Order in Skagit County Superior Court Case Friends of Conway Country v. Bertlesen), Exhibit 131, (August 7, 1996, letter to Gerald Steel from Stonewall Jackson Bird), Exhibit 132, (July 11, 1996,

legal notice announcing MDNS), Exhibit 133, (Fill in grade map), Exhibit 134, (PUD #1 Current Water System Map), Exhibit 135, (notice for DNS for waterline expansion), Exhibit 136, (draft natural resource lands map). Later in the proceedings, Exhibit 137, (acreage and lot totals for rural villages and RR) was added.

## DISCUSSION

### Invalidity

The County argued that the standard for modifying or rescinding a finding of invalidity was whether the ordinance adopted in response to the finding itself substantially interferes with the goals of the Act under RCW 36.70A.300(2)(a). The County argued that RCW 36.70A.330 requires that the standards of Section .300(2), which refers only to substantial interference with the fulfillment of the goals of the Act, is the sole factor to be considered. The County concluded that once a finding of invalidity was rescinded vesting would automatically occur.

Friends asserted that the requirements of GMA include compliance, and therefore the standard for modifying or rescinding invalidity must include compliance with the Act and not merely removal of substantial interference.

RCW 36.70A.330(2) requires a Board to conduct a hearing and issue a finding of compliance or non-compliance. RCW 36.70A.330(4) then requires addressing or re-addressing invalidity.

The standard for modifying or rescinding a finding of invalidity is substantial interference. RCW 36.70A.300(3)(b) states that a determination of invalidity shall subject any development application after the date of the original order to an ordinance enacted in response to that order that is also determined by a Board to “comply with the requirements of this chapter”. Therefore, a modification or rescission of invalidity without a finding of compliance does not allow "suspended vesting" to reinstate automatically. The new ordinance must also comply with the Act. However, whether a particular owner's property is or is not vested must be determined in a different forum.

### Rural Densities

The County argued that, in response to our original Order on this case, it had passed a critical areas ordinance, was in the final stages of passage of a natural resource lands ordinance (compliance hearing set October 8, 1996), and had passed Ordinance #16211 regarding IUGAs. The County maintained #16211 no longer substantially interfered with the goals of the Act because the new ordinance precluded new lots smaller than one acre, and allowed lots between 1 acre and 5 acres in size only in Rural Residential and Rural Village areas which have existing 1 and 2.5 acre lots. The County enumerated the 22 proposed Rural Village or Rural Residential areas and contrasted them to much larger areas where lots smaller than 5 acres had previously been allowed, but which were now limited to a 5 acre minimum.

Friends asserted that the record was inconclusive as to the amount of acreage still subject to expansion of 1 and 2.5 acre lots in the rural areas. Friends estimated somewhere between 2,000 and 10,000 acres in the proposed Rural Village and Rural Residential areas was still able to be developed at densities greater than 1 du/5 acres. They further pointed out that the concept of allowing 1 du/ acre or 1 du/2.5 acres in areas where those densities already existed was a concept not presented at the May 20<sup>th</sup> hearing. They argued that the concept and locations were first formed by the Board of County Commissioners after the hearing, and had never been presented for public comment.

Friends pointed out as an example that in the Marblemount Rural Village, 80% of the approximate 140 acres was characterized by parcels greater than 5 acres and was merely adjacent to 2.5 acre zoning. Friends maintained that the allowance of additional lots of sizes smaller than 1 du/5 acres was in direct violation of County Wide Planning Policy (CPP) 1.8 and RCW 36.70A.110, and was not needed for accommodation of population projections. Friends argued that the minimum in rural lands should be 1 du/10 acres rather than 1 du/5.

In rebuttal, the County offered Exhibit 137 which listed the total acreage in Rural Villages as 2,062 acres, of which only 261 acres were listed as unbuilt and available for lots of 1 du/acre. Friends countered that they believed the potential new lot figure to be grossly understated. The Exhibit also listed 6220 acres of Rural Residential zoning in the County as including 362 potential new lots of 2.5 acres each. If these contested figures are correct, approximately 1,200 rural county acres are subject to densities greater than 1 du/5 acres from a total of 60,000 acres

previously cited in this case as at-risk from urban development in the rural area.

During the Board's question period, members posed a question regarding the necessity of passing #16211 at this time when the Natural Resource Lands (NRL), Ordinance, which ought to have preceded the IUGA Ordinance, was now due to be passed in mid September. The County responded in part by observing that it had felt pressure from Petitioners and their calls for sanctions and further invalidity.

We note that the next compliance hearing regarding IUGAs is scheduled to take place after the intended date of passage of the NRL Ordinance. The proper sequencing of NRLs and IUGAs may serve to answer some hitherto unanswered questions. The NRL Ordinance must be adopted before we once again address compliance and invalidity for growth of less than 1 du/5 acres outside IUGAs.

#### CONCLUSION: Rural Densities

The County has made substantial strides in reducing the acreage at risk from urban development in rural areas from 60,000 to approximately 1,200 by County estimate. Nonetheless, in those 1,200 acres, there is an opportunity for subdivision of lots to densities lower than 1 du/5 acres. Such action before adoption of resource land designation and conservation, and which allow additional expansion of 1 and 2.5 acre lots before an overdue comprehensive plan is completed, substantially interferes with the goals of the Act.

#### Commercial/Industrial and Extension of Public Services

The County pointed out that Section 1(4) of the new ordinance precludes approval of any plat or planned unit development outside an IUGA that requires extension of, or increase in, existing capacity of water/sewer service from a city or special purpose district. Section 2 precludes rezones, and Section 1(5) precludes commercial uses in PUDs. Section 4 allows commercial/ industrial development only if there is no need to increase the size of existing lines or extension of trunk or lateral utility lines.

Friends lamented the ability of private ownerships in proximity to the existing lines to hook up

with what Friends described as “spaghetti lines”. Friends also expressed concern that Section 3, which reduced the size of commercial enterprises in Neighborhood Business Zoning from 10,000 sq. ft. to 3,000 sq. ft. did not preclude the clustering of those enterprises. Friends also complained that the County had done nothing to limit the types of Commercial/Industrial uses allowed to those serving the needs of rural residents and which are rural in character as required by the Act.

### CONCLUSION - Commercial/Industrial

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The Ordinance has made positive steps to limit commercial/industrial development outside IUGAs. It lacks language which limits industrial development to resource-based industry and limits commercial development to rural neighborhood needs. Thus, those sections still do not comply with the Act. The substantial interference with the goals of the Act noted in our Order regarding section 14.04.065, Neighborhood Business Zoning, is no longer present. That section of the finding of invalidity is rescinded assuming that the ordinance becomes effective independently of the non-rescinded sections.

### Planned Unit Developments

Friends asked for a recommendation of sanctions and a finding of invalidity regarding the Skagit County PUD ordinance. The County responded to a Board question by declaring that its PUD ordinance precludes densities higher than those found in the underlying zoning. The County is also, by its own declaration, close to passage of a clustering cap ordinance which would apply to PUDs. Petitioners have failed to show substantial interference with the goals of the Act or an absence of good faith on the part of the County regarding the Planned Unit Development Ordinance. Their motion is denied.

### Public Participation

Friends argued that Ordinance #16211 was never presented to the public for comment. They stated that the most recent public hearing regarding IUGA's was held May 20th, and the notice of that meeting referenced only Ordinances #16075 and #16093. No staff report was provided. Ordinance #16211, according to Friends, contained substantial changes from #16075 and #16093,

which were never presented to the public for comment. Friends asserted that no opportunity was given for written comment.

The County contended that Exhibit 23 (Draft Environmental Impact Statement - Land Use Designation Element, Comprehensive Plan) first offered the "rural vision" embodied in Ordinance #16211 more than a year ago.

### CONCLUSION - Public Participation

The public did not have a reasonable opportunity to comment on Ordinance #16211. They must be afforded that opportunity. This ordinance suffers from the same lack of public participation as the one in our preceding order. The Ordinance does not comply with RCW 36.70A.140

### Aggregation

Friends argued that the change in the aggregation ordinance, which allowed aggregation to lots as small as one acre instead of the prior 8,400 sq. ft., still did not bring the ordinance into compliance. They maintained that 1 acre lots are not rural. They also argued that aggregation to 5 acre lots should apply to any contiguous lots "ever held in a single ownership since March 1, 1965". The County responded that Friends' assertion was untenable.

### CONCLUSION - Aggregation

We decline to require all lots "held in a single ownership since March 1, 1965" to aggregate to a new standard. The aggregation ordinance will remain noncompliant until the underlying zoning upon which it depends comes into compliance.

## CONCLUSION

We commend the County for vastly reducing the number of rural acres subject to lot creation smaller than 5 acres. However, considerable acreage is still subject to an expansion of non-rural development in the rural area. Such an expansion is clearly not in compliance with the Act while IUGAs are in effect.

The County itself has said in Ordinance #16211 at page five, section 1, subsection (6) “These map boundaries are intended to serve only for the interim period until the full comprehensive plan analysis of existing conditions is completed and until a final decision regarding where one and 2.5 acre zoning may be appropriate (is made)”. We encourage the County to look closely at the appropriateness of any expansion of 1 and 2.5 acre lots in the rural area even at the comprehensive plan stage.

### ORDER

We find Ordinance #16211 fails to comply with the Act. The County has made progress toward compliance and the section on Neighborhood Business Zoning (14.04.065) is no longer in substantial interference with the goals of the Act. Invalidity is rescinded for that section if that section of the Ordinance becomes effective. We decline to recommend sanctions and decline to make a determination of invalidity regarding Skagit’s PUD Ordinance. The next compliance hearing will be scheduled subsequent to the adoption of the Natural Resource Lands Ordinance and the cluster cap ordinance, but in any event, no later than end of November, 1996. The County should provide adequate notice and afford the public opportunity to comment on the next iteration of the Ordinance.

Findings of Fact and Conclusions of Law entered February 7, 1996, are included in this Order by reference and are appended. If Ordinance #16211 becomes effective, SCC Section 14.04.065(2) (a) will be stricken from Conclusion #1.

SO ORDERED this 28th day of August, 1996.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Les Eldridge  
Board Member

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William H. Nielsen  
Board Member

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Nan A. Henriksen  
Board Member