BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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

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 also denied a request by Friends for a finding of invalidity regarding the County's aggregation ordinance. That ordinance, found to be noncompliant because it allowed aggregation of contiguous lots to new lots as small as 8,400 square feet, was not found to substantially interfere with the goals of the Act. We

expected that the County would continue to work on an aggregation ordinance that would achieve compliance.

In late December, 1995, the County adopted Ordinance #16007. #16007 rescinded the 1 dwelling unit (du)/5 acre-Interim Control Ordinance, #15372, which had previously limited new urban residential development outside IUGAs.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 of Skagit 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. This was done to preclude new urban residential, new urban commercial, and new urban industrial development and the extension of urban services in the rural area until an ordinance could be passed that would bring Skagit County into compliance with the goals and requirements of the Act. At no time was the buildout of 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 an opportunity to explain why it felt adoption of this ordinance 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, at the Skagit County Courthouse. Present were all three members of the Board, Court Reporter Leslie Andres, Chief Civil Deputy Prosecutor John Moffat and Mr. Jay P. Derr of Buck and Gordon appearing for the County, and Petitioners Gerald Steel and Barbara Rudge. Motions to add to the record were heard from both sides and granted by the Board. The ruling added exhibits. We also took official notice of other documents.

Argument on Friends' motion to modify the order on invalidity in zoning districts R, RR, and RI was heard. Friends argued that this Board had the authority to modify its order on invalidity to more clearly specify the intended impact of that declaration and to limit its impact to those types of development which would substantially interfere with the fulfillment of goals of the Act. Friends stated its intent was to allow building permits to be granted to lots which had a lot certification prior to February 7, 1996 or could meet lot certification requirements under the current County Code.

The County argued that the Board had no authority to modify its order as requested by Friends because the zoning code in question was not adopted pursuant to GMA. Thus, such modification would constitute an amendment of the County's zoning ordinance. In response to a question from the Board, the County asserted that, beyond its concerns over Board authority, the relief proposed by Friends did not go far enough in protecting the rights of the citizens and in clearing up the confusion resulting from the Board's invalidity order.

DISCUSSION CONCERNING REQUEST TO RESCIND FINDING OF INVALIDITY

Friends contended that the Board was barred from rescinding the finding of invalidity in this case because the ordinance was adopted without a public hearing. That failure effectively precluded potential participants from participating and subsequently being allowed in this hearing. Friends also pointed out that the ordinance required State Environmental Policy Act (SEPA) review which was not done.

The County maintained that the RCW 36.70A.140 requirement for public participation "appropriate under the circumstances" allowed for a postponement of public hearing under RCW 36.70A.390. The County contended that the confusion over property rights allowed a waiver of even a SEPA checklist under WAC 197-11-880.

CONCLUSION

The procedural flaws in the adoption of Ordinance #16075 preclude our rescission of the finding

of invalidity at this time. A SEPA review pursuant to RCW 43.21C and WAC 197-11 must be carried out. The County did not properly declare an emergency under WAC 197-11-880. There was no imminent threat of harm justifying waiver of SEPA compliance.

A public hearing on the ordinance must be held and subsequent action taken under the requirements of RCW 36.70A.140, which states in part:

> ". . . In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order . . ."

Confusion or uncertainty arising from a finding of invalidity does not constitute grounds for failing to provide for any public participation whatsoever.

Subsequent to SEPA review and final action following public participation, we will schedule an additional hearing if requested, addressing the merits of a new ordinance. We remind the County that the findings of fact and conclusions of law which led to the declaration of invalidity included the following elements which the County must successfully address before modification or rescission can be accomplished.

- Preclusion of new urban residential, new urban commercial, and new urban industrial growth in areas outside IUGAs.
- Preclusion of the extension of urban services to areas outside IUGAs.
- Adjustment of aggregation ordinances so as to preclude new urban growth in areas outside IUGAs.

In response to questions from the Board, the County stated that, under Ordinance #15372, single ownership, noncontiguous, pre-existing platted lots under 5 acres in area, which otherwise complied with zoning ordinances, could be approved for buildout by the County. Subsequent to the lapsing of #15372, the County stated that the same lots were approveable and that, in addition, lots of less than 5 acres could be created. The County further responded that,

subsequent to the finding of invalidity on February 7, 1996, it was so confused as to the status of previously buildable, noncontiguous, substandard lots that it ceased approving them. In order to assist the County in assessing the status of such lots, we offer the following clarification and modification of the finding of invalidity. No finding of invalidity can preclude pre-existing, platted, noncontiguous lots of separate legal ownership from consideration of eligibility for buildout by a County.

This Board has the authority under RCW 36.70A.300(2) and .330(4) to modify its previous finding of invalidity to allow single family homes and accessory uses on existing lots of record while retaining invalidity on special uses and land divisions in the R, RR, and RI Zoning Districts.

In order to clarify the intent of our February 7th decision, it is hereby ordered that the finding of invalidity is modified in the following respects:

1. On lands zoned R, RR, and RI in Skagit County on February 7, 1996, the granting of building permits for single family homes and accessory uses on pre-existing legal lots meeting County certification requirements does not substantially interfere with the fulfillment of the goals of Chapter 36.70A RCW. The first Conclusion of Law issued by this Board on February 7, 1996 is modified to not preclude these certain uses on legal lots of record.

2. Legal lots of record are limited to those lots existing on February 7, 1996, that can meet lot certification requirements of the County and that are single ownership, noncontiguous previously platted lots.

3. The R, RR, and RI Zoning Districts for map areas outside IUGAs continue to be invalid for use with the subdivision and PUD ordinances of the County (Section 14.04.140, Chapters 14.08 and 14.12).

Dated this 4th day of April, 1996.

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Les Eldridge
Presiding Officer

Nan A. Henriksen
Board Member

Wm H. Nielsen
Board Member