BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

FRIENDS OF SKAGIT COUNTY, Petitioner,	)	No. 95-2-0075
vs.	)	FINAL DECISION AND ORDER
SKAGIT COUNTY, Respondent.	)	

INTRODUCTION

On July 28, 1995, the Western Washington Growth Management Hearings Board (Board) received a Petition for Review from Friends of Skagit County (Friends). The petition alleged that Ordinance #15841 regarding Natural Resource Lands (NRL), adopted July 25, 1995, failed to comply with the goals and requirements of the Growth Management Act (GMA or the Act) because of deficiencies in public participation, definitions of agricultural and forest lands, timely and adequate protection of NRL, and consistency and adequate environmental documentation. Friends also charged that the County failed to comply with the GMA because it did not designate and protect NRL prior to designating Interim Urban Growth Areas (IUGAs) without good reasons for varying from the normal planning sequence. Friends also alleged that no protection for mineral resource areas was provided. Ordinance #15841 was adopted in response to our Order in *Friends, et. al. v. Skagit County*, #95-2-0065, requiring the County to adopt an NRL Ordinance by July 24, 1995.

PROCEDURAL HISTORY

A prehearing conference was held in Skagit County on August 29, 1995, and a motions hearing on October 10, 1995. We reserved ruling on the question of the adequacy of development regulations for mineral resource lands and agricultural and forest designations within interim urban growth areas until the Hearing on the Merits. The Hearing on the Merits was held November 16, 1995, at

the Port of Skagit County's Board Room in Burlington Washington. All three members of the Board were present. The Court Reporter was Suzanne Navone. Representing Friends of Skagit County was Mr. Gerald Steel. Representing Skagit County were Mr. John Moffat, Chief Civil Deputy and Mr. David Hough, Director of Planning.

DISCUSSION AND CONCLUSIONS

ISSUE 1: Did Skagit County fail to comply with RCW 36.70A.020(11) by allegedly failing to ensure adequate public participation in the adoption of Ordinance #15841?

Friends charged that public notice given by the County on July 6, 1995, for the July 17, 1995, hearing, did not specify readoption of Resolution #12663, nor readoptions of the portions of the Skagit County Code relating to the Shoreline Management Master Program (SMP), agricultural practices, forest management and mining. Friends asserted that the draft ordinance was released two business days before the public hearing. It then became evident, noted Friends, that pre-existing ordinances would be part of the consideration. Friends alleged that the County's offer of complete information available at that time was an "empty promise" and that the packet of information was not available until July 10, 1995 (Ex. 35). The packet did not identify portions of the SMP considered for readoption nor did it include Resolution #12663. The staff report (Ex. 7) was not provided to the public until the day of the hearing. Friends received a faxed copy of the proposed ordinance on July 13, 1995, but alleged that major changes to the staff proposal for designation criteria were made between that time and the July 17, 1995, hearing.

Friends asserted the County had failed to comply with the public participation requirements of the Act because it had failed to meet the minimum requirements set forth in our Order under case #95-2-0065. In that case, we quoted from *Friends of the Law v. King County*, CPSGMHB, #94-3-0003, regarding the need to notify the public when pre-existing ordinances are being relied upon for natural resource land protection:

> "Therefore, if the County elects to use such ordinances or other regulations to comply with the GMA, the County shall provide public notice clearly indicating its intention to do so, specify which pre-existing regulations or ordinance it is relying upon...."

Friends further alleged that public participation was also denied because "staff made major changes

to the staff proposal for designation criteria between July 10, 1995 and July 17, 1995 and did not release those changes to the public until after the July 17, 1995 hearing." Friends further noted that no planning commission hearing preceded the single public hearing before the Board of County Commissioners on July 17, 1995.

The County argued that the public participation process in the adoption of Ordinance #15841 began long before the date of adoption and cited citizen advisory committees established as early as 1992. The County noted that members of Friends were on the Forestry Citizens Advisory Committee. The County asserted that it was unfair to ignore public participation done in developing the designation criteria for NRL over a two-year period and focus only on the limited time period in July prior to the adoption of the Ordinance. The County observed that the changes in density policy, which Friends identified as major, were minor. It argued that the industrial forest designation density of 1 dwelling unit per 640 acres (removed from the draft) was not a designation criterion for natural resource lands, but a density policy appropriately considered in connection with the adoption of the Comprehensive Plan. The County noted that the designation criteria had been published in the draft comprehensive plan in May of 1995 and were well known to the citizens of the County. The County suggested that to the extent that oral testimony and written submittals were limited, this could be explained by the fact that those "issues had already been beaten into the ground." The County asserted that: "Any of the perceived errors alleged by Friends by the County were immaterial as to Friends, the only Petitioner before this Board."

The practice of releasing documents only days before the single public hearing on an ordinance does not constitute good public participation policy. We have difficulty in understanding the County's distinction between natural resource lands density and comprehensive plan density. The resulting change in industrial forest land went from 1 dwelling unit per 640 acres to 1 dwelling unit per 20 acres. The reliance on pre-existing ordinances was not made clear to the public. In Mr. Hough's response during questions from the Board, he stated that there was no matrix outlining existing ordinances relied upon showing how they conserved natural resource lands.

The County contended that any errors in public participation were "immaterial" because Friends participated thoroughly and was the only petitioner. A similar contention was resolved in *Moore-Clark Inc., et. al. v. Town of LaConner*, #94-2-0021. The same principle may be applied in this instance. How many more potential citizen participants were denied the opportunity to comment

because of the County's failure to provide adequate notice and a timely set of materials?

Conclusion - Issue #1

The opportunity for public participation afforded the citizens of Skagit County in the adoption of this ordinance falls short of meeting the goals and requirements of the Act. As the County responds to this Order, it should pay particular attention to adequate notice, including availability of pertinent materials to the public in advance of a public hearing. A clear delineation of pre-existing ordinances to be relied upon is essential. It should include specific ways in which the pre-existing ordinances conserve natural resource lands and meet the requirements of the Act.

ISSUE 2: Did Skagit County fail to comply with RCW 36.70A.170 and .060 by allegedly failing to adequately define, designate and conserve Natural Resource Lands (NRL)?

Forest Lands

Friends asserted that there was nothing in the staff report nor in the Commissioners' deliberations that discussed the need to consider criteria other than pre-existing zoning for forest land designation. In *Friends of Skagit County, et. al. v. Skagit County*, #95-2-0065, we found "Friends' comments regarding the need to consider criteria other than pre-existing zoning for forest and agricultural land designation...to be persuasive." Friends pointed out that the ordinance here stated that "existing codes are adequate for the protection and conservation of natural resource lands", but that this statement was presented without supporting reasoning. As noted under Issue 1, Mr. Hough admitted that there was no matrix nor outline of the ways in which pre-existing ordinances would be adequate for conservation of resource lands.

Friends noted that one designation criterion for industrial forest lands stated that "Industrial Forest Lands shall only be comprised of land zoned by the County as Forestry prior to adoption of this plan unless the property owner initiates a request for reclassification to Industrial Forest" (criterion #6) (emphasis supplied). Likewise, the secondary forest buffer was created only from land zoned "forestry" prior to adoption**.** Friends noted that the Forestry Citizens Advisory Committee identified "forest track size" and "land primarily devoted to growing trees" as the two prime criteria in designating forest lands. The Draft Environmental Impact Statement (DEIS) land use

designation element provided a map using these criteria which showed, according to Friends, "about 35,500 acres of Secondary Forest Land that is not designated Secondary Forest by the County in the current Ordinance. All of this additional Secondary Forest land is not currently zoned Forestry."

The County asserted that it had complied with RCW 36.70A.170 and .060. The County noted the designation criteria were established as a result of planning commission review over a period of nearly 2 years. The County listed its designation criteria and in that listing noted that criterion number 6:

> "considers the guidelines in WAC 365-190-060(7), history of land development permits issued nearby."

The County failed to recognize that criterion #6 is an exclusionary criterion. By stating that only lands previously zoned forestry would be zoned industrial forest, the County precluded other criteria such as predominant activity, average parcel size, or property tax classification from being used where the land in question had not been previously zoned forestry. Use of this sole criterion precludes designation of lands which clearly meet the criteria in the Act. Criterion #6 does not comply with the Act.

The addendum to the Final Environmental Impact Statement (FEIS) (Ex. 13) contained a discussion on forest land parcelization which stated that the minimum parcel size for industrial forest lands should be 640 acres. On page 15 in Exhibit 13, the discussion went on to note that:

> "the economic threshold in terms of unit size (acreage) where it is possible to actively manage in an industrial forest setting. . .is estimated to be greater than 500 acres. . . . [W]hat it means is that at the industrial level of forest management, where the business is growing trees, the unit size needs to be large to allow for economies of scale and to maintain land values at levels where timber companies can afford to practice commercial forestry."

Although the GMA does not specify a minimum lot parcel size for lands in long term commercial forestry designation, it does require their protection from conflicting uses. Under the record in this case, the County's choice of allowing such lands to be parcelized into 20 acre lots does not comply with the Act.

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Agricultural Lands

Friends asserted that about 26,500 acres of land with prime upland soils was not designated as agricultural. They further contended that roughly 1,500 acres of prime agricultural land were excluded because they were within IUGAs established prior to the designation of natural resource lands. Friends contended that RCW 36.70A.170(1)(a) requires land to be designated agricultural if it meets three criteria: "agricultural lands," "lands not already characterized by urban growth," and "lands with long-term significance for the commercial production of food or other agricultural products". Exhibit 28 noted that many of the County's dairy and cattle operations were located on prime upland soils, or used these areas for hay and silage production and grazing. Nearly one-third of the "farmgate" value produced in the county was derived from the dairy industry, according to Exhibit 28.

The County listed typical uses of upland soils as hay land, pasture land, woodland and home sites. It listed three types of upland soils and then characterized the difference between them and lowland soils as "significant." It asserted that upland areas varied between pasture land and woodland, and did not have long-term commercial significance as agricultural land. The County stated that the majority of the lands that were utilized for pasture or hay ground were not capable of maintaining sole support for a family.

The County's assertion that long-term significance for commercial production of food or other agricultural products requires the land to provide sole support for a family does not appear in the Act. The acreage in question is currently in agricultural use. The use of "sole support" as the basis of determining long-term commercial significance does not comply with the Act.

Mineral Lands

Friends argued that all of the environmental documentation in the record stated that four actions were necessary to conserve mineral resource lands. They pointed out that the FEIS Addendum (Ex. 13) was consistent with the staff report in recommending four actions that should be implemented to accomplish the task of conserving mineral deposits for long-term resource extraction. The staff report (Ex. 7-12) delineated these actions as follows:

1. A right-to-mine ordinance.
2. Low rural densities (1 unit per 10 acres) within a quarter of a mile of designated mineral resource areas.
3. Mining Districts as a zoning designation.

4. Notification to existing and future land owners that mining is the planned and preferred use on designated mining sites.

Petitioners alleged that "the BOCC, without a single word of deliberation on this issue, passed the Ordinance with the claim that it meets the requirements of RCW 36.70A.060 without including any of these actions."

The County did not address these issues in its brief. They argued at the hearing only that the 1 unit per 5 acre controls were adequate to protect mineral lands.

The adoption of the Ordinance without deliberation on the recommended actions to protect mineral lands may have been an oversight, but certainly was not a reasoned consideration of appropriate factors. The Ordinance does not adequately protect mineral lands. It is not in compliance with the Act.

Conclusion - Issue #2

The County has failed to designate forest and agricultural lands which meet the criteria of the Act and has failed to adequately conserve mineral lands. The record does not show how the pre-existing ordinances adopted as part of Ordinance #15841 conserve natural resource lands to the degree required by the Act.

ISSUE 3: Did the County fail to comply with GMA by allegedly failing to provide environmental documentation sufficient to properly designate and conserve NRL?

This issue was abandoned by the Petitioners.

ISSUE 4: Did Skagit County fail to comply with the GMA because it allegedly failed to adopt development regulations to conserve mineral resource lands in areas not designated agricultural or forestry that are not covered by the Shoreline Master Program?

This issue is subsumed in Issue 2.

ISSUE 5: Did Skagit County fail to comply with the GMA because it excluded from

agricultural, forest and mineral designation those lands included in interim urban growth areas?

Friends referred to the designation map contained in Attachment A, Ordinance #15841 (Ex. 1) and asserted that the "purple areas" on the map labeled "urban growth areas" were not adopted urban growth areas nor IUGAs, but were only proposed UGAs in the May, 1995, Draft Skagit County Comprehensive Plan (Ex. 14). Friends estimated agricultural land within the purple areas to be between 1,000 and 1,500 acres. They also asserted that mineral land was included within the purple-colored areas.

Friends pointed out that *Friends of Skagit County, et. al. v. Skagit County,* #95-2-0065 called upon the County to bring interim urban growth area boundaries back to city limits by the end of November, 1995. Friends cited this Board's conclusion in *Port Townsend, et. al. v. Jefferson County*, #94-2-0006, in which we said:

> "We do not go as far as petitioners request in holding that the sequence is absolutely mandatory but agree that it would be very difficult to find compliance outside that sequence (Natural Resource Lands first, then IUGAs). Any city or county using a different progression would have a difficult hurdle to leap to show that good planning allowed such a deviation."

Friends asserted that the County did not show reasons why the sequence should be altered.

The County responded that the purple areas were "special study areas." Secondly, the IUGAs adopted in 1994 were in compliance with GMA at the time of the adoption of Ordinance #15841, which then prohibited the designation of forest, agricultural and natural resource lands located within UGAs because of RCW 36.70A.060(4).

Absent a clear reason for altering the referenced sequence, the County must designate appropriate NRLs before designating IUGAs or UGAs. In *Bremerton, et. al., v. Kitsap County*, CPSGMHB, #95-3-0039, the Central Board said:

> "Two of the Act's most powerful organizing concepts to combat sprawl are the identification and conservation of resource lands and protection of critical areas. . . and the subsequent setting of urban growth areas, (UGAs) to accommodate urban

> growth. . . . It is significant that the Act required cities and counties to identify and conserve resource lands and identify and protect critical areas before the date that IUGAs had to be adopted. This sequence illustrates a fundamental axiom of growth management: "the land speaks first." Only after a county's agricultural, forestry and mineral resource lands have been identified and actions taken to conserve them, and its critical areas, including aquifers, are identified and protected, is it then possible and appropriate to determine where, on the remaining land, urban growth should be directed pursuant to RCW 36.70A.110."

Conclusion- Issue #5

We have held that GMA sequencing of NRL and critical areas before IUGAs must be followed unless there are overriding reasons not to do so. No such reasons appear in this record. Quite the contrary. The County must not use the out-of-sequence adoption of IUGAs as a reason for failing to designate NRL within the IUGAs.

ISSUE 6: Did Skagit County fail to comply with the GMA because portions of Skagit County Code (SCC) 14.24.160 are allegedly inconsistent with the goals, requirements and definitions of GMA and the County-wide Planning Policies?

Friends noted that Skagit County Code 14.24.160(4) "adopts by reference the policies in the following county codes, plans, ordinances and resolutions" (Ex. 35). Nineteen documents were referenced. All of those documents predated the GMA. Friends asserted that among those were sections .230 and .240 which "allow the Health Department to grant a "public water system satisfactory evaluation" approving a public water system for growth outside IUGAs in conflict with the Final Order in WWGMHB #95-2-0065." Friends further noted that the aggregation ordinance, SCC 14.04.190(5), already found out of compliance with GMA and remanded in #95-2-0065, was also adopted by reference in Ordinance #15841. The zoning map included in chapter 14 also permitted commercial and industrial development outside IUGAs, according to Friends, which conflicted with the Final Order in #95-2-0065. Friends cited Section .170, allowing mobile home parks outside IUGAs, to be in conflict with County-wide Planning Policy (CPP) 4.7.

The County responded that the Ordinance (Ex. 1) and staff report (Ex. 7) outlined the total package of codes to be utilized by the County in designation and conservation of natural resource lands and

asserted that County Code 14.24 provides an "additional regulatory tool to further support the goals of the County Countywide Policies and GMA."

Conclusion - Issue #6

Pre-existing Codes adopted by reference and by the County's own admission without a clear statement as to how they were to support the conservation of natural resource lands cannot be seen as internally consistent nor consistent with the GMA or the CPPs. The County needs to review carefully the pre-existing ordinances adopted and sort out the consistencies and inconsistencies before applying them wholesale to the conservation of natural resource lands. In *Whatcom Environmental Council, et. al. v. Whatcom County*, #95-2-0071, we said with regard to pre-existing ordinances that an:

> "...inclusive GMA-based ordinance is much more effective for GMA compliance than reliance upon a scattered landscape of non-GMA laws."

CONCLUSION

The County has failed to make documents available to the public in a timely fashion so that intelligent comment could be made at the one public hearing held for this Ordinance. No clear delineation of pre-existing ordinances and how they were relied upon to comply with the Act was available. The County used an exclusionary criterion in designating forest lands which ruled out large areas of land which may have otherwise met the forest land criteria in the Act. The record failed to demonstrate the reason for exclusion of prime upland agricultural areas. The use of the ability of the land to provide sole support for a family as a requirement is not in compliance with the Act. The County failed to adequately protect mineral lands from conflicting uses. The County adopted IUGAs out of the normal sequence and used that adoption as a reason for failing to designate natural resource lands within the IUGAs. The County has readopted pre-existing ordinances which conflict with the goals and requirements of the Act.

ORDER

Ordinance #15841 is remanded to the County. It must be brought into compliance with the Act within 90 days of the date of this Order.

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

Dated this 22nd day of January, 1996.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Les Eldridge
Presiding Officer

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Board Member

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