

ordinance adopted by Whatcom County on January 23, 1996. Since significant histories were involved in each case and they have not been previously handled together, we have decided to continue using separate headings for each case rather than ordering consolidation.

In the rural areas case (94-2-0009), we held that significant portions of the ordinance allowed new urban commercial, new urban industrial, and new urban residential growth outside of properly established interim urban growth areas (IUGAs) and substantially interfered with the goals of the Growth Management Act (GMA, Act). Whatcom County had readopted its existing zoning code (WCC) provisions as development regulations (DRs) for rural areas. Regarding areas outside IUGAs, we found invalid the provisions of the WCC that allowed residential densities greater than 1 dwelling unit per 3 acres, planned unit development (PUD), clustering, and density bonus provisions, the general commercial, tourist commercial, and recreation commercial provisions of the WCC and the general industrial, light impact industrial, general manufacturing, and heavy impact industrial provisions.

The IUGA case (96-2-0008) dealt with the location and sizing of IUGA boundaries established adjacent to various cities and the noncontiguous IUGAs established throughout the County. We found that none of the IUGAs complied with the Act and specifically determined that the Blaine IUGA, Sumas IUGA, Bellingham IUGA in the "Geneva" area, and all the noncontiguous IUGAs substantially interfered with the Act and declared them to be invalid.

On June 16, 1997, we received a motion from Whatcom County to rescind the findings of invalidity entered in the two cases. The motion was accompanied by a brief. We received Petitioners' and some Intervenors' briefs on June 30, 1997, and a reply brief from Whatcom County on July 7, 1997. A hearing was held July 10, 1997.

Subsequent to the invalidity orders in these cases, the County made significant strides towards fulfilling its responsibilities under the GMA. On July 1, 1997, we entered an order in *Whatcom Environmental Council, et. al., v. Whatcom County*, #95-2-0071, rescinding invalidity as to critical areas. The rescission was based upon Whatcom County's readoption of its original 1992 critical areas ordinance. For a variety of reasons, primarily because the new ordinance expired in September 1997, we did not find compliance.

Additionally, on May 27, 1997, the County adopted a comprehensive plan (CP) and, as characterized by the County, "associated development regulations." The CP included a chapter on resource lands designation and policies and the DRs included an "agriculture protection zone."

In reviewing the motion, briefing, and exhibits submitted in this case, we continue our approach adopted in *Seaview Coast Coalition v. Pacific County*, #95-2-0076 (Order dated May 28, 1997). Because RCW 36.70A.330(2) requires a finding within 45 days of the County's motion to rescind invalidity, it is impossible to thoroughly review the record concerning the adoption of the CP to determine if compliance with the Act has been achieved. Rather, we make a facial review to determine if the action of the local government is a valid, good-faith attempt to comply. If so, we review the changes for the limited purpose of determining if those changes continue to "substantially interfere with the goals of the Act." *See also Friends of Skagit County, et. al., v. Skagit County*, #95-2-0065 (Order dated July 14, 1997).

Although not a party to either of the original cases, the City of Everson filed a response to Whatcom County's motion on July 8, 1997. Because a City has an absolute right to file a petition under the provisions of RCW 36.70A.280(2)(a), Everson has standing as a "participant" under RCW 36.70A.330(2). Everson's contention (not advocated by Whatcom County) was that the adoption of the CP urban growth areas (UGAs) rendered moot the invalidity findings with regard to IUGAs. The issues here are not moot because the ordinance in question was "enacted in response to the order of remand" (RCW 36.70A.300(3)(b)) and was presented by the County as the basis for rescission of the prior orders of invalidity.

Any questions concerning the burden of proof in motions to modify or rescind invalidity have been answered in ESB 6094, effective July 27, 1997. Section 20(4) provides that a county or city subject to a determination of invalidity has the burden of demonstrating that the new ordinance no longer substantially interferes with the goals of the Act. We decline to rely on that new provision in these cases. Our previous rulings in motions to rescind invalidity required that the local government make an initial showing that changes have been made such that substantial interference no longer applies. Petitioner then has to come forward with new evidence that the significant changes do still substantially interfere. In this case, even with the presumption in RCW 36.70A.320 (1) we find that the evidence is clear regardless of which party has the burden of proof. Accordingly, we conclude that a modification of our previous findings of invalidity is appropriate,

but that certain aspects of the CP and DRs continue to substantially interfere with the goals of the Act.

Even though we decline to rescind the determinations of invalidity in total, we recognize the significant achievements attained by Whatcom County in the adoption of its CP and associated DRs. We hope that with some additional fine-tuning by the County and some changes in the County's interpretation of GMA requirements, that all aspects of invalidity can thereafter be rescinded.

At the conclusion of the hearing, the County requested that if any invalidity determinations were to be retained we do so "with a scalpel." This requested approach is certainly consistent with the provisions of RCW 36.70A.300(2). Nonetheless, that approach can be viewed as "micro-managing" the County's GMA planning. Such a role is one we do not seek, do not believe is appropriate under GMA, and will go to great lengths to avoid. We reiterate that the GMA correctly provides a wide discretion of local decision-making subject only to the parameters contained in the Act.

Many significant changes were made in the adoption of the CP and "associated" DRs. New, updated population projections were used and the 150 percent market factor within UGAs was reduced at least as to residential growth projections. The planning horizon was expanded to the year 2015. Resource lands designations were made.

Additional analysis was done on the Cherry Point industrial area for its establishment as a noncontiguous UGA. A more persuasive and complete analysis of the heavy industrial needs and available supply for the planning period was shown in this record. Adopted DRs for Cherry Point limit the area to heavy industrial large users and necessary accessory or supporting uses. Costs of utilities and other infrastructure are to be borne by the development rather than by the public at large. While we have concerns about whether the Cherry Point industrial UGA complies with the Act, particularly RCW 36.70A.360, we are convinced that the designation no longer substantially interferes with the goals of the Act and thus rescind that portion of our previous order.

The IUGA for the City of Sumas was reduced significantly in the UGA designations. One hundred and fifty-three acres of the UGA designation outside the municipal boundary was designated industrial. The previously designated 547 acres of residential development outside of municipal

boundaries was reduced to 170 acres, none of which is in the floodplain area. Again, while we may have reservations about whether the Sumas UGA complies with the Act, we are convinced that it no longer substantially interferes with the goals. Accordingly, we modify our previous order to remove the determination of invalidity for the Sumas UGA.

We rescind the determination of invalidity as to the PUD ordinance because the County has limited application of the PUDs to UGAs. The exception is that PUDs remain under a determination of invalidity as applied to the Blaine UGA outside municipal boundaries and the "Geneva" portion of the Bellingham UGA.

We remain convinced that the balance of the determinations of invalidity should continue. The other changes made by the County still substantially interfere with the goals of the Act. One of the major purposes of the GMA is to direct growth into urban areas. The reasons for directing growth to urban areas is to conserve and protect resource land and critical areas, and to make more efficient use of taxpayer dollars for necessary infrastructure costs. As to the rural areas (94-2-0008), the changes that were made still allow new urban growth outside UGAs. As noted in our earlier order, RCW 36.70A.110 absolutely prohibits such urban growth. While the County has made modifications to its other noncontiguous UGA designations, the changes have not been substantial and the supporting analysis does not justify the extent of the designations.

We thoroughly reviewed the series of maps contained in Exhibits J-1 through J-12. The rationale for the new designations relied heavily on existing development patterns and the availability of public facilities, particularly water and sewer.

The historical development patterns analysis is flawed because it allows expansion of residential and commercial growth well beyond that which is needed to allow infill and provide appropriate services to the surrounding community. We have never held that the use of "small town/crossroads/hamlet" areas violate the GMA. The issue has never been presented. Even without the clarifying amendments of ESB 6094, such designations are and were appropriate, subject to limitations necessary to avoid expansion which would constitute new urban growth. We note that even under the clarifying amendments of ESB 6094, the areas in question go well beyond infill of existing patterns and localized services.

Whatcom County also relied heavily upon a necessity of showing water and/or sewer "availability" prior to allowing this new growth. Simply because a particular water and/or sewer district is willing to provide expanded availability is not sufficient to justify allowance of new urban growth. Need and availability of alternatives must be analyzed as well as the overall tax burden or cost of the various alternatives. None of that analysis was done in this case.

These same problems exist for the "resort areas" such as Sudden Valley, Pleasant Valley, and Point Roberts as well as the "suburban enclaves" in other areas outside of established UGAs.

The Guide Meridian and gateway industrial designations were changed to eliminate the IUGA designation and identify each as "regional transportation corridors." The necessity of further study of these two areas was acknowledged. The allowance of more intense development was based upon the rationale of existing development. In the gateway industrial designation, examination of the maps in Exhibits J-1 through J-12 demonstrated that most of the proposed corridor was outside existing development. We have consistently said that existing development alone does not justify new urban growth outside of UGAs.

Many of the concerns expressed on the Custer IUGA invalidation were corrected by Whatcom County. A supplemental Environmental Impact Statement was issued and a zoning change requiring a "master plan process" was implemented. Custer was designated as a "provisional" UGA and limited to intermodal and transportation services with accessory and supporting uses. Prior to any urban level development a master plan for the entire area will be required to be adopted after a public hearing and a "project level SEPA review." While these changes are a significant improvement over the prior IUGA designation, notably absent is an analysis of need, supply, and public facilities and service costs associated with this designation. We recognize that the area may well provide an opportunity for necessary transportation services. A complete analysis concerning the overall needs and supply of the entire County as well as the costs associated with development of the Custer area must be done. The mechanism of designating the area "provisional" without a complete analysis, that was done only for the Cherry Point UGA, continues to substantially interfere with the goals of the Act.

The Birch Bay UGA designation looks remarkably similar to the one held invalid as an IUGA. We recognize that many small lots exist in the area and that, for the most part, the area may not be

useful for resource lands. It does support a resort/recreation/retirement system and does have a utility provider in place. Nonetheless, that rationale does not apply to the large amount of land that, according to Exhibits J-1 through J-12, is not riddled with existing development and which does not have a needs analysis sufficient to justify its inclusion as a noncontiguous UGA. Particularly troublesome was the apparent designation of urban residential (4 units per acre) in the Point Whitehorn area adjacent to the Cherry Point UGA. This seems wholly inconsistent with the County's avowed policy of protection of and encouraging heavy industrial uses in the Cherry Point UGA. A more tightly drawn UGA might not substantially interfere with the goals of the Act but the one presently designated certainly continues to interfere. Again, simply because a utility provider is in place does not justify a failure to analyze the cost of vastly expanding the existing pattern of development and whether that cost is justified given alternatives for new urban growth within existing cities.

We turn then to the city IUGA designations determined to be invalid in #96-2-0008; Blaine, and the "Geneva" portion of Bellingham. We determine that both these contiguous UGAs continue to substantially interfere with the goals of the Act.

The city of Blaine UGA continues to present difficulties. The area east of Blaine, which encompasses a portion the City's water supply (aquifer recharge area), continues to be used as a justification for inclusion of significant acreage that is neither needed for urban development, nor expected to develop at urban densities even beyond the 2015 planning period adopted by the CP. The justification for inclusion of this area is that it "makes sense" to allow the City to have greater control over its water supply. The area as drawn is significantly oversized for even that purpose. More importantly, as noted by Petitioner, protection of critical areas is a function of RCW 36.70A.060 and .170, not .110. During the hearing the County acknowledged that it would continue to exercise planning jurisdiction over the area and that no interlocal agreement had been entered with Blaine to give the City "greater control."

Likewise, a similar rationale does not justify the oversized UGA connecting the City boundaries with the Semi-ah-moo resort and surrounding properties. The County acknowledged during the hearing that very little, if any, of the UGA would be subject to City jurisdiction, nor was any urban growth anticipated within the planning period. If there is a necessity for a "land bridge" between these two areas it certainly must be much more tightly drawn than the one here. Without some type

of interlocal agreement giving the City planning jurisdiction over this, and the Drayton Harbor, area the rationale is hollow. We reiterate that protection of critical areas is a function of a proper ordinance, not of the establishment of a UGA. The designation of appropriate open space and green belt areas between the proposed adjacent Blaine UGA and Birch Bay UGA could reduce the substantial interference presently existing.

Finally the "Geneva" area of the Bellingham UGA as designated allows significant expansion of the preexisting development. Nothing has changed since our prior order with regard to the critical deficiency for water resource and watershed impacts in that area. A comprehensive study of those impacts is just beginning even though the problem has been in existence for years. While there may well be merit to the contention that better protection for the watershed would be provided by urban type facilities, there is nothing in this record that gives Bellingham the jurisdiction necessary over the area to implement those strategies. Nor is there any analysis that warrants expansion to a greater urban densification without thorough knowledge of how that expansion would impact the existing critical watershed deficiencies. Given that Lake Whatcom supplies the majority of Whatcom County's residential water supply, it is difficult to envision expansion and intensification of this area without completion of an adequate study showing a necessity for and impact of such urban growth.

In many instances the County eliminated an IUGA designation but continued the urban type zoning for those areas. Additionally, the County adopted WCC 20.71 (resort overlay) as a response to previous determinations of invalidity. We find all of those changes including WCC 20.71 to substantially interfere with the goals of the Act because they allow new urban growth to occur outside properly established UGAs. Additionally, the County eliminated the bonus density provisions of its zoning code in the rural areas but did not change the clustering provisions. Those provisions do not have minimum lot sizes nor a maximum number of lots per site and as such continues to allow urban growth outside of properly established UGAs. The application of the clustering provisions to the agricultural overlay district, without limitations found in WCC 20.30 additionally substantially interferes with Goal 8 of the Act to maintain and enhance resource-based industries. *Hudson & Huber v. Clallam County*, #96-2-0031.

We specifically readopt the findings and conclusions found in the March 29, 1996, and September 12, 1996, orders in these cases.

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

So ORDERED this 25th day of July, 1997.

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