

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

ABENROTH, et al.,)	
)	No. 97-2-0060c
Petitioners,)	
)	
v.)	ORDER ON
)	C/I REMAND
SKAGIT COUNTY,)	ZONES
)	
Respondent,)	
)	
and)	
)	
TOM and SHEILA BUGGIA, et al.,)	
)	
Intervenors.)	
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On April 9, 1999, Whatcom County Superior Court Judge Mura vacated a portion of our January 23, 1998 Final Decision and Order (FDO) relating to “all C/I zones outside UGAs and rural villages” in this case. The matter was remanded to us to “reconsider” our decision to declare the C/I zones outside UGAs and rural villages invalid in light of *Skagit Surveyors v. Friends (Skagit Surveyors)* 135 Wn.2d 542 (1998). The Court also directed that if an order of invalidity “is still warranted” we must specify “what development regulations” that we find that substantially interfere with the fulfillment of the goals of the Growth Management Act (GMA, Act).

We issued a scheduling memo for briefing on the matter. Friends of Skagit County (FOSC) filed its brief in a timely manner. Skagit County did not and later claimed that it had not received the memo. A review of our records conclusively demonstrated that the County did receive notice the same day as FOSC. On May 5, 1999, we held a hearing involving oral argument on the Superior Court remand issue. We allowed Skagit County to file a late brief and completed the hearing on May 11, 1999.

The issue in this case is the one that was decided in the original FDO: did Skagit County appropriately locate commercial and industrial (C/I) zones outside UGAs and rural villages? In the FDO we concluded the County did not and found invalidity regarding the location of those C/I zones. As we noted in the FDO and in a later order in this case regarding the Bayview UGA (June 10, 1998), “the County had inappropriately designated commercial and industrial locations.” We did so because of the total lack of analysis for placement of those locations.

In the County’s response brief preceding the original FDO, beginning at p.52, the claims of FOOSC concerning these designations were addressed. The County contended that it was in compliance because of the restrictions involved in Ordinance No. 16559 and the comprehensive plan (CP) policies for commercial uses. In support of its argument the County referenced section 7(1) of Ordinance No. 16559 that restricted uses on the various designated C/I zones to neighborhood businesses and resource-related uses. In the FDO we did not invalidate 7(1) of the ordinance although we found it to be noncompliant.

At no time during our hearing did the County contend that the designation of these zones was a pre-GMA development regulation (DR). Additionally, the County apparently did not make that claim in its appeal to Whatcom County Superior Court until it was later authorized to amend its pleading. The Whatcom Superior Court ruled that based on *Skagit Surveyors* the invalidity finding was “outside the statutory authority or jurisdiction of that Board,”

We are aware that RCW 34.05 requires an issue to be presented to an agency in order to authorize its presentation to Superior Court. While we were not participants in the Superior Court action we are puzzled how a claim never raised before us could be the basis for the Superior Court decision. We are aware of a recent Whatcom County Superior Court decision in a different case that imposed a strict standing burden on a non-lawyer group of citizens. The ruling directed that unless the citizens articulated the precise GMA legal issue with specificity during the public participation process before the local government, the issue could not be raised before a Growth Management Hearings Board. Apparently those kind of legal niceties do not apply to members of the bar who work for counties.

Because of the emphasis both parties placed on section 7(1) of Ordinance No. 16559 we set it

forth in total:

“(1) For property located outside the UGA on land zoned M, HOC, C-LI or NB prior to September 11, 1996, proposed new uses and proposed changes of use shall be limited to those permitted or special uses allowed in the Neighborhood Business Zone, SCC 14.04.065 as amended by Ordinance No. 16470 and to those permitted or special uses allowed in Ag-NRL, the RRc-NRL, the SF-NRL and the IF-NRL districts, SCC 14.04.107. 14.04.112, 14.04.122 and 14.04.125. The total square footage of any and all buildings(s) on a single parcel that are not uses permitted outright or by special use permit in the Ag-NRL, the RRc-NRL, the SF-NRL and the IF-NRL districts, SCC 14.04.107. 14.04.112, 14.04.122 and 14.04.125, shall not exceed the 3,000 square foot limitation of SCC 14.04.065, provided that storage or other uses that are accessory to the NB permitted use and do not exceed 50% of the square footage of the permitted use shall also be permitted.”

A great deal of argument was presented by the parties concerning whether this section should now be found invalid as a clarification of our earlier order vacated by Superior Court. We decline to find section 7(1) invalid because we do not find that it substantially interferes with the goals of the Act. In fact it is the only item in this entire C/I issue that although noncompliant, does not meet the substantial interference test.

We would, however, still find that the County took a GMA action in readopting its C/I zone locations, i.e., where they previously were, through the first sentence in section 7(1). This is especially true when reviewing the CP at 4-29 which states:

“Commercial and industrial uses throughout unincorporated Skagit County will be guided by the goals, objectives and policies articulated below. All such uses do not require a commercial or industrial comprehensive plan land use designation under this Plan. Existing and new commercial and industrial land uses will be subject to this Plan’s land use policies....”

In discussing the issue of potential rezones for C/I uses, in the County’s initial response brief at p. 53 the County acknowledged that “ under GMA, the County’s Plan and the County’s current zoning code, any rezone Skagit County undertakes in the future must be consistent with GMA and Skagit County’s new GMA Comprehensive Plan.”

The Superior Court, however, evidently accepted the new County argument that the zoning designations referred to in 7(1) were part of the pre-GMA development regulations that defined

the location of the C/I zones. The Court concluded when it stated that the invalidity was “beyond statutory authority,” that *Skagit Surveyors* precluded any finding of invalidity. In its brief on this case the County observed that many of the ills that will result from this Superior Court decision were pointed out by Justice Talmadge in the *Skagit Surveyor* case. Chortling, the County observed that Justice Talmadge lost that argument 7 to 2.

We cannot overemphasize how disappointed we are in the County’s approach to this issue. Certainly the County has a right to make whatever legal arguments it feels are appropriate in Court. However, in a variety of stipulated extension requests the County went from vowing to resolve this issue in two months to a series of extensions which have delayed resolution for more than two years, with no end in sight. The County’s argument has always been “well, it doesn’t matter because invalidity is in place.” It is becoming very clear that the County is not proceeding in good faith to resolve this issue. Rather, its approach is to delay a proper GMA analysis for where the zones should be located.

The County continues to be non-compliant with the GMA in the C/I designation issue.

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

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 21st day of May, 1999.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge

Board Member

Nan A. Henriksen

Board Member