BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

FRIENDS OF SKAGIT COUNTY,	)	
	)	No. 98-2-0016
Petitioners,		
)	)	FINAL
v.	)	DECISION
AND	)	ORDER
SKAGIT COUNTY,	)	
	)	
Respondent.	)	
	)	

On September 9, 1998, we received a petition for review from Friends of Skagit County (FOSC) challenging Ordinance No. 17098, Skagit County's (County) Short CaRD Ordinance. An amended petition, filed September 19, 1998, raised ten issues. By way of an Order Granting Extension and additional work at the local level, including two sets of amendments to the Ordinance, most of the issues were resolved. We commend the parties for working together to narrow this case to just two remaining issues.

The Hearing on the Merits (HOTM) was held on May 5, 1999, at the Skagit County Administration Building in Mount Vernon. Present were Nan Henriksen, Les Eldridge and William Nielsen of this Board. Representing FOSC was Gerald Steel. Representing Skagit County was John Moffat.

At the HOTM we admitted into the record as Ex. 66 Ordinance No. 17418, adopted April 20, 1998, the most recent version of Ordinance No. 17098. The changes made to the newest ordinance retained the issues in this case.

The two issues that remain for our decision are FOSC's claims that the Ordinance:

(1) creates a "floating zone" that allows commercial recreational uses outside the UGA that may be urban in nature; and

(2) includes unclear language in SCC 14.08.118(9)(c)(ii)(C) which does not clearly prevent a series of Short CaRD developments from creating a higher density of development than is permitted by the Comprehensive Plan (CP).

As in all cases before us, the burden is on Petitioner FOSC to demonstrate that the actions taken by Skagit County are not in compliance with the requirements of the Growth Management Act (GMA) RCW 36.70A.320(2). Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action by [Skagit County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For us to find Skagit County's action clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

I. <u>Recreational Uses Allowed</u>

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FOSC claimed:

"In SCC) (*sic*) 14.08.118(6)(d)(i); 14.08.118(9)(a)(iv), (9)(b)(i), and (9)(c)(ii)(A)(l) the County seeks to sidestep the designation process and allow anyone who does a short CaRD anywhere in the rural area of the County (and in most natural resource designations) to have their remainder parcel approved for commercial recreational facilities. Commercial facilities such as a commercial golf course or a shooting range that do not need any new buildings do not need anything more from the County besides a grading permit. To add buildings to these recreational facilities requires only a special use permit. SCC 14.08.118(9)(c)(ii)(A)(l). The County proposes that such commercial recreational facilities may occur in any rural and resource designation except Ag-NRL. SCC 14.08.118(6)(d)(i); SCC 14.08.118(9)(a)(iv); (9)(b)(i); (9)(c)(ii)(A)(l).

Under the County's proposal, such commercial recreational facilities are no longer "being left to the whim of changing elected officials and staff." Instead, such commercial facilities are approved Countywide through the Short CaRD Ordinance. Consistent with the Board ruling in <u>Abenroth</u>, the Board should find that commercial recreational facilities first should only occur in the rural area and not in the natural resource lands, and second, such facilities should be required to obtain a Comprehensive Plan amendment.

Under ESB 6094, small scale commercial recreational uses are a form of more intensive rural development. RCW 36.70A.070(5)(d)(ii). As such, these uses must be contained in limited areas. RCW 36.70A.070(5)(d). The location for these limited areas must be shown on the Comprehensive Plan map. RCW 36.70A.070(1). The provisions of ESB 6094 cannot be met by a short CaRD Ordinance that allows commercial recreational uses by a "floating zone" technique that allows such uses everywhere outside the UGA."

The County Responded that:

(1) It is the County's intention, through the adoption of SCC 14.08.118(9)(a)(iv) and (9)(c)(ii)(A), that limited recreational use be allowed on remainder open space lands following a Short CaRD subdivision where that use is otherwise consistent with the CP and Zoning Ordinance.

(2) FOSC has failed to show how this allowance of limited recreational use, as allowed by the CP and the County Zoning Ordinance (SCC 14.04) is "commercial" development or how it is contrary to GMA.

(3) The CP allows recreational uses on both rural and resource lands.

(4) County DRs do not preclude recreational uses.

(5) Specific limited recreational uses are allowed in IF-NRL, SF-NRL and RRc-NRL zones as special uses, but only if allowed by the overlay provision in the special use Ordinance, SCC 14.04.150(1)(c), which provides that there must be a "finding prior to permitting the special use, that the special use will not interfere with the resource activity."

(6) There is nothing in the CP or zoning Ordinance which would prevent the allowed recreational uses in rural areas, if they are consistent with the CP and satisfy the requirements of SCC 14.04.150 for a special use permit.

(7) FOSC does not say what it means by "commercial." However, there is nothing in the GMA, CP or SCC 14.04.150 that prohibits someone charging for the use of the recreational facilities allowed in that section.

(8) The 1997 amendments to the GMA clarify that recreational uses are to be encouraged in rural areas as long as they do not lead to low-density sprawl.

FOSC replied:

(1) The Ordinance puts no visual or functional limits on the recreational uses

and recreational buildings allowed.

(2) The CP does not allow commercial recreational uses that are urban in nature. This Ordinance must be clarified to prohibit such uses.

(3) The Ordinance does not explicitly limit recreational uses in NRL to those otherwise permitted in the Zoning Ordinance.

(4) The key issue is that urban commercial uses are not prohibited in the NRL or rural zoning districts. Therefore, any urban commercial recreational use allowed by the non-specific language of the Short CaRD Ordinance would become allowed in these zoning districts. Therefore the County should be required to modify the Short CaRD Ordinance to only allow recreational uses explicitly permitted by the underlying zoning.

(5) The 1997 GMA amendments allow only "small-scale" uses and only allow these uses in locations that have been designated for these uses in the CP. The Ordinance reflects neither of these limitations.

At the HOTM the County replied that FOSC's assertion that the Short CaRD Ordinance creates new permitted use of unlimited recreational uses is "dead wrong." The County explained that the Short CaRD Ordinance is an overlay ordinance which provides an extra layer of protection on top of the other ordinances. Thus, if an activity is not allowed by the CP and underlying zoning ordinances, the Short CaRD Ordinance does not allow additional uses. Since an applicant must comply with the CP and all underlying code usage limitations, there is no need for the Short CaRD Ordinance to reiterate those limitations.

Board Discussion and Conclusion

We are convinced it is the County's intent that no additional recreational uses would be created by the Short CaRD Ordinance. However, the Ordinance does not restrict recreational uses to only those allowed in various zoning districts. Given the wording of SCC 14.08.117 and the fact that the Short CaRD Ordinance is more recent than the pre-GMA zoning code still being used, an applicant could successfully force the County to accept recreational uses that it has no intention of allowing. We are unable to find compliance until the Ordinance does what the County claims it intends: clearly states that only recreational uses explicitly permitted by the underlying zones will be allowed when the Short CaRD Ordinance is utilized.

II. Allowed Densities

Friends claimed:

(1) The Ordinance does not meet the standards of CPP 7.4 (incorporated into the CP) to be "clear" that initial subdivision and future subdivision on remainder parcels must together not create a higher density than allowed by the designation category in the CP.

(2) This is also a violation of RCW 36.70A.040(3) which requires the DR to implement and be consistent with the CP.

The County responded:

(1) Ordinance No. 17352 is sufficiently clear that initial and future subdivisions on remainder parcels not allow density in excess of that allowed on the underlying parcel.

(2) SCC 14.08.118(9)(c)(ii)(C) prohibits this. That section states:

> "No further subdivisions can allow density credits on any newly created parcel in excess of that allowed by the Comprehensive Plan on the original parcel."

FOSC replied:

> "The meaning of this code section is certainly not clear as required by CPP 7.4. The first problem is with the term density credits. This seems to refer to some future transfer of development rights program. "Density credits" are nowhere defined in Skagit County Code. Second, the above quoted code section seems to state that the density of development on a newly created parcel [presumably the remainder parcel] is only limited to the density originally allowed on the original parcel. Thus if four units per 20 acres were allowed on the original parcel in the Rural designation, this section seems to say that three units per 15 acres would be allowed on a 15-acre remainder parcel even if the total number of parcels (now at 6) would exceed the four total parcels allowed by the CP."

FOSC once again asked us to direct the County to clarify its ordinance so that the density of development on an original parcel will never exceed the density allowed by the CP when there

are multiple subdivisions.

The County responded that SCC 14.08.118(l) provides:

> "Density. The maximum residential gross densities may not exceed those set forth on the Land Use Element of the Comprehensive Plan."

The County claimed that that provision plus SCC 14.08.118(9)(c)(ii)(C) clearly preclude excess densities being allowed. Since there would be a covenant on any remainder parcel, even if ownership had changed, further subdivisions beyond that provided in the CP would not be allowed.

Board Discussion and Conclusion

We agree with the County that it would require an incredibly strained reading of SCC 14.08.118 (9)(c)(ii)(C) and .118(l) to reach FOSC's interpretation that subsequent subdivisions could be allowed to reach a density greater than that allowed in the CP. Although the County might save itself some future grief by further clarifying ultimate densities allowed, FOSC has not met its burden of showing that the County was clearly erroneous as to the language of the Ordinance relating to densities allowed by sequential CaRD subdivisions.

Pursuant to RCW 36.70A.270(6) Findings of Fact are attached hereto and incorporated by reference.

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

Pursuant to WAC 242-02-830(2), a motion for reconsideration may be filed within ten days of issuance of this decision.

So ORDERED this _____ day of May, 1999.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

Nan A. Henriksen
Board Member

_____

Les Eldridge
Board Member

_____

William H. Nielsen
Board Member

APPENDIX I – Case #98-2-0016
FINDINGS OF FACT
Pursuant to RCW 36.70A.270(6)

1. No recreational uses are specifically prohibited in the NRL, Rural and Rural Intermediate zoning districts.

2. The Short CaRD Ordinance at SCC 14.08.117 states:

> "In the event of conflict between the provisions of this ordinance and SCC 14.04 (Zoning Ordinance) and other requirements in SCC 14.08, this ordinance shall take precedence. In the case of conflict between this ordinance and any other Skagit County ordinance, the most restrictive shall prevail, unless explicitly provided in this ordinance."

3. The second sentence of SCC 14.08.117 appears to refer to all other ordinances <u>except</u> 14.04, which was the subject of the first sentence.

4. Therefore, any recreational use allowed by the non-specific language of the Short

CaRD Ordinance could become allowed in the zoning districts referred to in Finding #1, in spite of the County's stated intent to the contrary.

5. The provisions of RCW 36.70A.070(d)(ii) set limitations on the types of recreational uses that are to be allowed in rural areas.

7. The combination of the provisions of SCC 14.08.118(1) and (9)(c)(ii)(C) make it sufficiently clear that the density of development allowed as a result of sequential CaRD subdivisions would never exceed the density allowed for the original parcel by the CP.