BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

EVERGREEN ISLANDS, et al.,)
) No. 00-2-0046c
Petitioners,) (General Issues)
)
v.) FINAL DECISION) AND ORDER
SKAGIT COUNTY,)
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Respondent,)
)
and)
)
AFFILIATED HEALTH SERVICES, et al.,)
)
Intervenors)
)

On August 21, 2000, we received a petition for review (PFR) from Friends of Skagit County (FOSC) (Case #00-2-0039). On September 14, 2000, we received a PFR from the City of Anacortes (Case #00-2-0041). On September 18, 2000, we received a PFR from Evergreen Islands (Case #00-2-0043). On September 25, 2000, we received a PFR from Jim Bender (Case #00-2-0046). On September 25, 2000, we received another PFR from FOSC and Gerald Steel (Case #00-2-0050). All the petitions challenged Ordinance #17938, general issues not pertaining to categories of issues in Cases #00-2-0047c, #00-2-0048c, #00-2-0049c, and #00-2-0050c. On October 4, 2000, a consolidation order of the above cases was entered.

Intervention was granted to Affiliated Health Services; Bouslog Investments, LLC and JBK Investments, LLC; Del Mar Community Service, Inc.; Randy and Katie Previs and Seavestco, Inc.; Crown Pacific Limited Partnership; Skagit County Public Hospital District 2 d/b/a Island Health Northwest; Association of Skagit County Landowners (ASCL); Carol Ehlers; Friends of Skagit County; Skagit River Resort, LLC and Donald Clark; and Towns of Concrete and Hamilton.

On December 20, 2000, a hearing on the merits was held at the Skagit County Administration

Building in Mount Vernon, Washington.

Pursuant to RCW 36.70A.320(1) Ordinance #17938 is presumed valid upon adoption. The burden is on Petitioners to demonstrate that the action taken by Skagit County is not in compliance with the requirements of the Growth Management Act (GMA, Act). RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), a 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]." In order to find the 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).

Since over 80 separate issues were raised by Petitioners in this consolidated case, we will discuss the issues by topic rather than by separate issue numbers. Further, issues have been raised and briefed that will not be discussed in this decision. **We find that, except as to the categories of issues set forth in the remainder of this order, Petitioners have failed to sustain their burden of showing that Skagit County has failed to comply with the Act.**

We compliment County staff, consultants, Planning Commission (PC) and Board of County Commissioners (BOCC) for the excellent job they have done creating a thorough record leading up to adoption of Ordinance #17938. Even though we have found noncompliance in some areas, the quality of the record is exemplary.

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Lot Aggregation and Legal Lot of Record

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In its recorded motion and supplemental findings of fact (Ex. 366) Skagit County set forth its rationale for eliminating its aggregation requirements:

> "369. Significant changes have been made to the standards that determine whether a substandard (smaller than the minimum lot size for a lot within the present zoning district) lot of record can be developed. History of ownership requirements have been removed and replaced with objective performance based criteria that focus on

health and safety considerations. Aggregation of substandard lots is no longer required. There is no longer a need for the term "Lot of record, legal." The changes, which for the first time include minimum lot sizes requirements, should reduce the total number of potential buildable lots. The present law (enacted in 1966) has been difficult to administer and enforce. Aggregation violations are discovered at the time a development application is submitted and lot certification requested. At that time, the law restricting development of illegally divided lots is virtually unenforceable. This is partly because of "due process" considerations as well as the impact of RCW 57.18.210, enacted by the State in 1969. That RCW contains an "Innocent Purchaser" exception (see Finding #382) to the general prohibition denying development permits' on lots divided in violation of State and Local law. The 1997 CP and Development Regulations eliminated "aggregation" for legal lots of record acquired after June 1, 1997. These changes even the playing field for properties acquired before that date. Lots of record would still need to meet minimum size requirements based on the health and safety requirements found in the On-site Sewage and Concurrency regulations before development could proceed.

370. The PC finds that the revised proposal for allowing development on substandard lots of record will not result in an increase in the amount of development than would have been otherwise allowed under the previous lot certification process. The currently proposed process allows development on formerly platted lots, even if those lots do not meet the dimensional requirements of the current zoning, as long as Health Department septic dimensional requirements are met. Formerly, substandard lots were required to be "certified," meaning it had to meet one of several criteria that demonstrated that it either was legally platted or at least segregated in compliance with the zoning requirements in effect at the time of the lot's creation. In practice, the Planning and Permit Center has found that there are almost no cases where a lot was not certified. The lot certification process is a time intensive and costly process which provides practically no benefit since it is very rare (perhaps once a year) that a non-certifiable lot is found. Experience has shown that changing to a process which essentially assumes the certificability of each lot will not result in an increase in the number of formerly platted substandard lots available for development.

371. The revised lot of record provisions are supported by CWPP 6.2."

The City Anacortes charged that the County's elimination of development regulation (DR) requirements for lot aggregation would result in significant rural sprawl on South Fidalgo Island, contribute to the urbanization of this area, and inevitably draw the City into the later, costly provision of remedial urban services.

Evergreen Islands did an intricate study of Fidalgo and Guemes Islands showing the number of new lots that theoretically could be created after aggregation was rescinded. It claimed that dropping the aggregation requirement would significantly increase the density potentials for those Islands and would contribute to a new pattern of low-density sprawl.

FOSC claimed that suspension of lot aggregation would vest thousands of urban-sized lots in the rural area and natural resource lands (NRL) - more than 4,000 in NRL alone. The AGO 1998 No. 4 Opinion said that the County may or may not require aggregation. It said nothing about the County's right to repeal an aggregation ordinance. FOSC further contended that GMA does not allow discontinuance of an aggregation ordinance when that discontinuance would allow thousands of lots to vest outside of urban growth areas (UGAs) that would not have been allowed previously. FOSC asked us to find noncompliance and to give the County only five days to readopt its old aggregation ordinance. FOSC further asked for a finding of invalidity.
The County responded:

(1) The aggregation ordinance required that substandard lots platted prior to the adoption of the County's subdivision ordinance in 1965 had to be combined with adjacent lots in the same ownership to satisfy the minimum lot size requirement.

(2) In actuality, neither the Planning and Permit Center nor the Assessor ever combined the substandard lots. Therefore, by the year 2000, the ordinance was unenforceable.

(3) RCW 58.17.210 protects the rights of all "innocent purchasers for value without actual notice" of lots which were illegally segregated without complying with state or local subdivision requirements. The Courts interpreted this provision as simply giving the innocent purchaser the right to build on the illegally-subdivided land. It also opened a loophole for a development permit if the County found "that the public interest will not be adversely affected thereby." The result was that development permits routinely followed illegal segregation. (Ex. 0014).

(4) AGO 1998 No. 4 Opinion reaffirmed a county's right to regulate "undeveloped" pre-1937 recorded plats. Where plats are partially sold and/or partially developed (all plats in Skagit County), jurisdictions should establish substantive standards to handle those situations. The County has done that through its adoption of SCC 14.18.000(9) and by establishing performance-based criteria for health and safety at SCC 14.16.850(4) to

determine whether a substandard lot of record can be developed.

(5) When the County attempted to take a hard line on an illegally segregated lot the Court reversed the County decision on an "innocent purchaser" argument (Ex. 0473).

(6) There was extreme administrative complexity with the former ordinance. The applicant was required to supply a title report not only on the applicant's substandard lot but on all adjacent lots back to 1965.

(7) The aggregation ordinance did not accomplish its purpose of reducing the development of substandard lots. Instead, it was a burdensome imposition on all applicants and on County staff.

(8) Even if County staff denied a variance from the ordinance, the hearings examiner uniformly granted appeals based on equity, due process, and/or innocent purchaser provisions of RCW 58.17.210.

(9) The aggregation ordinance needed to be fixed. The County chose a new system which provided regulations that were more conservative than the previous, unenforceable code and which would not result in more rural density.

(10)Under SCC 14.16.850(4)(d), lots of record are developable, even if they are substandard size, if they comply with (a) all the requirements for a development permit (including on-site sewage requirements under SCC 12.05) and (b) concurrency requirements (under SCC 14.28).

(11)These two requirements impose restrictions on development of substandard lots that are ascertainable, objective, and assure that development will be undertaken with due consideration for public health considerations and GMA's concurrency requirements.

(12)Petitioners have not shown that the new approach will allow more developable lots than would have been developed under the prior, unenforceable, lot aggregation ordinance.

(13)Unlike the previous ordinance, SCC 14.16.850(4) prohibits septic systems on substandard lots regardless of ownership of contiguous lots; reducing, rather than proliferating, the development of urban-sized lots.

(14)SCC 14.16.850(4)(b)(ii) requires compliance with the annual concurrency review of required services.

(15)Citizen complaints about the unfairness and arbitrariness of the old lot aggregation ordinance are replete in the record.

(16)Development should be triggered and governed by ascertainable criteria, consistent with public health considerations, not by blind adherence to arbitrary dates and ownership patterns.

(17)The County balanced many factors, including local considerations based upon over 30 years of administering the old code. RCW 36.70A.3201 directs Growth Management Hearings Boards to give increased deference to regulations adopted based on such local considerations.

Intervenor Previs supported the County's arguments and underscored several:

(1) GMA must be strictly construed.

(2) Petitioners failed to meet the clearly erroneous burden.

(3) The County's old aggregation ordinance was a "poster child" of a Goal 6 violation. GMA requires that citizens shall be protected from arbitrary and discriminatory action.

(4) The old aggregation ordinance did not focus on the goals of the Act but solely focused on the identity of the property owner both spatially and temporally.

(5) If in the chain of title there was common ownership, lots must be aggregated whether the current owners knew of its history or not.

(6) If individual small lots were owned by different people, there were no performance based standards. Now no one can build on a lot smaller than 12,500 square feet; before the owner of an individual lot could.

(7) The County has replaced those arbitrary standards with objective performance based criteria. None of the Petitioners has shown those criteria to be flawed.

(8) Evergreen Islands' analysis was theoretical and very flawed: no determination was made of actual feasibility of lot creation considering things like topography, critical areas, soils and placement of the current residence on the lot. Also, no consideration was given to the number of innocent purchasers and those who had already checkerboarded their property who would be able to develop in spite of the old ordinance.

(9) Restoration of the old, unfair, unworkable system makes no sense because of a huge County staffing problem and severe hardship to citizens for little or no gain.

(10) Petitioners have not shown that this change will actually increase density.

(11) The County has put a lot of effort into developing this solution and the Board should give deference to the County.

Intervenor ASCL reinforced the above responses pointing out specific examples of flaws which made the Evergreen Island analysis misleading.

Intervenor Del Mar also supported the County and other Intervenors' arguments.

Board Discussion

The GMA does not require local governments to unnecessarily make things more difficult for citizens. The least burdensome method of achieving a required GMA outcome is to be lauded, not criticized. There is a large body of evidence in the record that the aggregation ordinance, as implemented or the County's failure to implement it, was burdensome and arbitrary to land owners, ineffective in reaching the desired result, and needing to be fixed.

We agree with the County and Intervenors' argument that development should be triggered and governed by ascertainable criteria, consistent with public health considerations, not by blind adherence to arbitrary dates and ownership patterns. We are aware of the AG's opinion that the GMA does not require aggregation.

The Act, however, makes clear that DRs must be in place to ensure that the use of lands within or adjacent to NRL lands shall not interfere with the viability of those NRL uses. Skagit County had an aggregation ordinance in place when we found that the County had adequate provisions to protect NRL lands from non-compatible uses. If the County had not had that aggregation ordinance in place, it is unlikely we would have found compliance. (We were not told at that time that the aggregation ordinance was not working.)

This new permission to develop substandard lots in and near NRL lands fails to encourage conservation of productive forest and agricultural lands. Further, it fails to discourage uses incompatible with resource lands uses. *King County v. Cent. Puget Sound Bd. ___ Wn.2d. ___ (2000) (Soccer Fields)* case.

If the aggregation requirement is no longer in place, in order to achieve compliance, the County must adopt other measures that prevent incompatible development and uses from

encroaching on resource lands and their long term viability. This includes, not only the estimated 4,000 substandard lots within NRL lands, but also those in rural lands near designated NRL lands.

Further, the County must ensure by appropriate regulation that in allowing development of substandard lots it does not allow development which cumulatively requires urban services in rural areas and fails to reduce low-density sprawl.

Use of Urban Reserve in County Regulations Implementing CaRD

Petitioners challenged the County's implementing regulations of its comprehensive plan (CP) CaRD policies. The concept of clustering and the CP CaRD policies are not challenged. Some of the challenges that were made included:

(1) The County's implementing DRs provide that the remnant parcel be set aside for future urban development rather than permanent open space as earlier envisioned. Anacortes stated in its opening brief:

> "Minimum lot sizes on South Fidalgo Island can be as small as 5,000 square feet, or 3,000 square for attached dwellings, (SCC 14.18.310(7)), and the balance of the property can be set aside at the property owners sole discretion '…..for future urban growth areas' (SCC 14.18.300(1)(b) and 14.18.310(5)(c)), subject to a later '…. redesignation through a Comprehensive Plan Amendment', (SCC 14.18.310(5)(c))."

(2) Through the CaRD implementing DRs Fidalgo Island landowners can now build at urban levels in clusters and choose to set aside the residual for future urban development, with no city participation in that decision. The City will be the one to have to provide very expensive remedial urban services when this unwise urbanization leads to threats to public health and safety and to the environment.

(3) The DRs thwart the purpose of GMA and the goal of the County visioning process that cities be urban and rural remain rural.

(4) Monitoring must be done and a full State Environmental Policy Act (SEPA) analysis of alternatives conducted before any further allowance for greater density in the rural area.

The County responded:

(1) The Board already reviewed Skagit County's CaRD policies, including the associated rural densities and found them in compliance with the Act. *Abenroth v. Skagit County* 97-2-0060c (FDO 1-23-98).

(2) Petitioners should now be limited to arguing whether or not the CaRD provisions adopted in the Uniform Development Code (UDC), SCC 14.18.300-.330, are consistent with and implement those CaRD policies.

(3) In the RI zone, even though small lots are allowed, CaRD does not increase density over the currently permitted one du/2.5 acres, previously approved by the Board.

(4) Although CaRD has the possibility of increasing density in the Rural Reserve (RRv) zone, it is only from 1 du/10 acres to 2 du/10 acres.

(5) These CaRD reserve areas are only in those CaRDs deemed appropriate for potential future development and cannot be built upon until the CP is amended and a choice made to justify adding extra density to the area.

(6) Petitioners have failed to offer any evidence or analysis as to why the densities permitted are not consistent with the GMA or the Board's previous orders. The only evidence in the record clearly shows that this pattern of development is consistent with existing rural character in Skagit County and can be rural in nature.

Intervenor ASCL supported the County's arguments. It underscored that in order to actually develop the urban reserve areas, a CP amendment is required. This is not an easy process and could be appealed to the Board. If open space is required to be in perpetuity, how will that work for cities which may need to expand in the future?

Board Discussion and Conclusion

We have previously found the County's CP CaRD policies to be in compliance with the Act.

Well designed cluster development can be an excellent tool to preserve rural character, protect critical areas and resource lands, and develop more efficiently. If the urban reserve provision in the DRs were limited to lands near UGAs which had been studied and determined to be the best areas for future urban growth, this provision would implement the CP CaRD policies and comply with the Act. This determination would have been the County's to make after consultation with the Cities, a SEPA review of alternatives, and full public participation.

However, if that is the County's intent, the process needs to be redone, in cooperation with the Cities, and the DRs need to be clarified to reflect that intent. As written, the urban reserve applies throughout the County and will be implemented at the property owners' discretion rather than the County's. This does not comply with the Act.

Fidalgo Island Sub-Area Plan

Evergreen Islands contended that the County had already decided to urbanize Fidalgo Island against the will of the County's current inhabitants. Evergreen further asserted that the proposed study was merely a tool in the County's plan to urbanize the fragile island environments.

Anacortes agreed that it appeared quite obvious that the County intended to urbanize Fidalgo Island. Anacortes stated in its opening brief:

> "However, without the benefit of sub-area planning, joint City/County planning, and a SEPA review of alternatives, the County has jumped directly into a set of development regulations that will inevitably lead to urbanization of South Fidalgo Island."

Anacortes further contended that removal of aggregation requirements and reserving cluster remnant parcels for future urban growth, as adopted in Ordinance #17938, were two giant steps in that urbanization process. The City further pointed out that there was no concrete commitment to, or timeframe for, the sub-area plan in the CP. Environmental studies done before the CP was adopted demonstrated how difficult and costly it would be to serve that area with urban services. Anacortes contended that the County had "let the horses out of the barn prematurely." The City therefore asked us to require that the County complete a subarea plan to determine the Island's suitability for more intense development before more density is allowed on Fidalgo Island.

The County responded:

(1) Petitioners' fears of an urbanized Fidalgo Island, as a result of the sub-area planning process, are unfounded and premature.

(2) Evergreen Islands has failed to demonstrate how the future planning process to more carefully assess planning and environmental issues on Fidalgo Island is, at this stage, inconsistent with GMA.

(3) The CP language was specifically amended, at the request of Petitioners and others, to make it clear that this language was not intended to predetermine any particular outcome regarding possible future densities.

(4) This policy language simply recognizes that a cluster development approach might, in fact, be a better long-term strategy than a uniform pattern of 2.5, 5, or even 10-acre lots. It may make sense to minimize large-lot sprawl and encourage clustering. Nothing can be more dense than the underlying RI density.

(5) One of the main purposes of a Fidalgo Sub-Area Plan is to assess the very best strategy for preserving rural character, protecting the environment and accommodating any future urban growth, if appropriate.

(6) Petitioners will have the opportunity to participate in the sub-area planning process and appeal to the Board if they feel the result fails to comply with GMA.

Board Discussion and Conclusion

We agree with the County and Anacortes that a careful sub-area assessment of topography and environmental constraints to development should be done. Developing the best strategy for preserving rural character, protecting the Island's fragile environment, and assessing its suitability for future urban growth are crucial before more intense development is allowed to occur. It is unfortunate that the County may have increased landowners' expectations of future urban development in rural areas by applying the CaRD urban reserve designation and removing aggregation requirements on the Island before this study has been done.

The County must set a specific timetable for, and firm commitment to, the timely completion of this Plan. The Fidalgo Sub-Area Plan must be completed and found to be compliant before the CaRD urban reserve development or any other increase in density are

allowed to occur on the Island.

Amendment to Annexation Requirement in the CP

The Cities complained that despite our previous rulings the County has made it much more difficult for cities to annex within their UGAs by adding tough new standards in its CP:

> "Contemplated changes in municipal…boundaries through annexation …are to assure that natural neighborhoods and communities are maintained; logical service areas are created and preserved; and, normally (sic) irregular boundaries are avoided." CP 7-11, Policy 7-A-A.2.

The Cities quoted our compliance order regarding short-term stipulated issues in *Abenroth*:

> "…that (1) "That which is urban should be municipal; (2) implicit in RCW 36.70A.110(4) is the principle that 'incorporations and annexations must occur; and (3) one of the three 'fundamental purposes' of CPs is to 'achieve the transformation of local governance within the UGAs such that cities are the primary providers of urban services.'"

The Cities further argued that concurrency within municipal UGAs in Skagit County is the responsibility of the Cities. The objective within UGAs is for annexation to occur before urban development. The County's actions do not reflect the intent of the GMA or of this Board's previous orders that transformance of governance must occur.

The County responded that adoption of Policy 7A-4.2 does not establish tough new criteria for annexation. It merely discusses key factors that joint planning should be based upon. It is nearly a verbatim restatement of statutory Boundary Review Board (BRB) objectives.

Board Discussion and Conclusion

Whether or not these are "tough new criteria," this is the first time the County CP includes a set of pre-GMA BRB annexation criteria for within UGAs. As we have stated in previous decisions, UGA provisions (including non-municipal UGAs) must provide for efficient phasing of urban infrastructure and transformance of governance.

Annexation within UGAs should occur as soon as possible and before urban development occurs. The interim solution of County implementation of City DRs within municipal UGAs is

excellent, but must be temporary. Under the GMA, within the municipal UGAs, logical boundary and other factors listed in the CP amendment are not relevant, since efficient phasing of infrastructure is key, not the interim shape of the city limits boundary.

In order to achieve compliance, the County must change its amendments to CP Policy 7A-4.29a to make it clear that annexations are to occur as soon as feasible within municipal UGAs to facilitate the efficient phasing of infrastructure and development.

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Vesting Provisions

FOSC claimed that the County's new vesting provisions (SCC 14.02.050) did not comply with the clear regulation requirements of CPP 7.4 and the GMA. They also did not comply with the internal consistency, predictability, public participation, concurrency, and adequacy requirements of the Act. They also violate Goals 6 and 7 of the Act and the CPPs. Vesting is too easily granted and the public is not properly notified of the future uses that may be vested. Unplanned, uncoordinated growth in violation of RCW 36.70A.010 will result. FOSC further contended that this vesting regulation should be found invalid for substantial interference with the fulfillment of Goal 2 which requires the County to reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

The Cities also challenged the new vesting provisions. They claimed that the County could not use recent Court decisions as an excuse for its overly generous vesting provisions. *Noble Manor Company v. Pierce County*, 133 Wn.2d. 269 (1997) said that without specific vesting rules, anything goes. However, with specific rules, that which is vested is only that which complies with those rules.

The County responded that recent case law has established generous vesting rules. SCC 14.02.050 is merely an attempt to codify vesting case law, and is therefore, within the range of choices available to the County under GMA.

The County contended that many of FOSC's concerns are addressed in 14.02.050:

"(2) If a permit application vested under Subsection (1), above, is approved, and that permit approval contemplates 1 or more future uses or permits on the property that are subject to that permit approval, then:

(a) If the permit approval contains a detailed description of the uses, including a detailed site plan drawn to scale, specifying the location of all buildings and improvements to be constructed in conjunction with the use(s), and such site plan is consistent with all laws and regulations in effect at the time the original application vested, then all permit applications in connection with the future uses(s) are vested to the laws and regulations in effect at the time of the vesting or the original permit application, and laws and regulations enacted after that vesting date shall not apply to the future use(s) or any permit applications filed in connection therewith;

(b) If the development approval does not describe in detail all future uses or does not contain a detailed site plan, drawn to scale, specifying the location of all buildings and improvements to be constructed in conjunction with the future uses(s), then the future use(s) shall be subject to all later enacted laws and regulations in effect at the time of the vesting of any required application for permits in connection with the future use(s).

Subject to the provisions of Subsection (4) below, it is the intention of this Subsection that, consistent with other Federal, State, and County regulatory requirements, an Applicant be able to vest his future development rights to the level of detail the Applicant chooses to show in the application documents."

The County concluded that because this provision is consistent with vesting law, Petitioners have failed to show either noncompliance or substantial interference.

Board Discussion and Conclusion

Even though we are concerned about the possible future impact of the County's vesting ordinance, we find that the ordinance does reflect current Appellate Court decisions and therefore was within the range of choices available to the County under GMA.

Rural Character

FOSC accused the County of continuing to allow pre-GMA uses and practices which fail to protect rural character. GMA was adopted to change rural uses and practices not to allow the County to cling to those harmful pre-GMA ways by defining them as "the rural character in Skagit County." FOSC further charged that the County's definition of its rural character is, in

effect, “really bad planning.”

The County responded that RCW 36.70A.070 instructed the County to assess its own local circumstances and define its own rural character. The County has developed an extensive and exhaustive record showing local circumstances, what Skagit County considers its own rural character to be, and has taken action to preserve that desired rural character. The County has not maintained “business as usual” through its definition of its rural character. Allowed uses and practices have been greatly curtailed. The majority of challenged practices now are regulated by special use permits. The County further maintained that it should be complimented for its hard work in protecting rural character, not chastised.

<u>Board Discussion</u>

Recently we have had extensive hearings in Skagit, Mason, and Lewis counties relating, in whole or in part, as to compliance with RCW 36.70A.070(5). The following is an analytical framework setting forth the standards established by the Legislature for the rural element of the CP and/or DRs. We will hereinafter refer to RCW 36.70A.070(5) simply as (5) along with appropriate subsections as (a), (b), (c), (d), and (e). We will refer to the definitions in RCW 36.70A.030 solely by their subsection number.

In analyzing (5) we start with the definitions established by the Legislature.

> “(15) “Rural development” refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development *can* consist of a *variety* of *uses* and *residential densities*, including clustered residential development, at levels that are consistent with the preservation of *rural character* and the *requirements* of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas. (Emphasis supplied).

We note that (5)(b) *requires* a variety of densities and uses rather than *allows* them. Some essential standards are shown by this definition.

> (1) No UGA nor designated resource land (RL) is to be included as part of the rural element. Additionally, agriculture or forest activities conducted in rural areas are not considered to be a part of rural development.

(2) Development in the rural area can allow a variety of uses and residential densities including clusters. However, such uses and densities must be only at levels that are:

a. consistent with rural character (as defined in (14)) preservation; AND
b. consistent with the requirements of (5).

"(14) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

> (a) In which open space, natural landscape, and vegetation predominate over the built environment;
> (b) That foster *traditional* rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;
> (c) That provide *visual landscapes* that are *traditionally* found in rural areas and communities;
> (d) That are *compatible* with the *use* of the land by wildlife and for fish and wildlife habitat;
> (e) That *reduce* the inappropriate conversion of undeveloped land into *sprawling*, *low-density development*;
> (f) That generally do not require the extension of urban governmental services; and
> (g) That are consistent with the *protection* of natural surface water flows and ground water and surface water recharge and discharge areas." (Emphasis supplied).

Several characteristics and standards are set forth in this definition. The patterns of land use and development ultimately developed by a County in its CP must involve certain characteristics.

(1) The natural environment must *predominate* over the built or manmade environment (See WAC 197-11-718).

(2) Traditional rural lifestyles including *rural-based* economies and opportunities are to be fostered.

(3) Visual landscapes, those *traditionally* found in rural areas, must be provided.

(4) The patterns of land use and development must be *compatible* with the use of the land by wildlife and *compatible* for fish and wildlife habitat.

(5) Sprawling, low-density development must be *reduced*.

(6) Generally the extension of urban governmental services are prohibited.

(7) The land use patterns must be consistent with the *protection* of surface water flows and ground water and surface water recharge and discharge areas.

"(16) "Rural governmental services" or "rural services" include those public services and public facilities *historically* and *typically* delivered at an intensity usually found in rural areas, and may include domestic water systems, fire and police protection services, transportation and public transit services, and other public utilities associated with *rural development* and normally not associated with urban areas. Rural services do not include storm or sanitary sewers, except as otherwise authorized by RCW 36.70A.110(4)." (Emphasis supplied).

Certain characteristics are shown in this definition.

(1) Storm and sanitary services are prohibited, except to alleviate an existing health or environmental hazard.

(2) This definition and the definition of urban services found in (19) both include domestic water systems, fire and police protection, and transportation and public transit services. The distinguishing characteristic is that rural services must be "historically and typically delivered at an intensity usually found in rural areas." Urban services are those that are provided "at an intensity historically and typically provided in cities,…."

The Legislature often uses the terms "historical" and "traditional" to define the essence of rural. As noted later such terms are intended to encompass more than what was present in the rural areas of a county before GMA.

Subject to the definitions, the Legislature requires counties to include a rural element in the CP outside of UGAs and RLs. The Legislature recognized in (5)(a) that local circumstances are an important consideration "in establishing patterns of rural densities and uses." This provision is consistent with the wide discretion allowed to local governments under the GMA. RCW 36.70A.3201.

However, that discretion was not intended by the Legislature to be unbridled. RCW 36.70A.3201 involves discretion that is "consistent" with the goals and requirements of the Act. (5)(a) requires a county (through a written record) to "harmonize the goals" and "meet the requirements" of the GMA. The language of (14), (15), and (16), emphasize that the patterns of uses and densities

must be those which are “historical” and “typical” to rural areas. The Legislature did not say that whatever existed in a particular county on June 30, 1990, automatically became the existing rural character of that county. The Legislature has clearly said that the rural element must have parameters involving generalized historical and traditional “lifestyles” and “visual compatibility,” as well as the predominance of the natural environment, compatibility with wildlife and fish, protection of waters and the reduction of “sprawling, low-density development.”

(5)(b) requires that the rural element include rural development (15), forestry and agriculture in rural areas. A variety of “rural densities, uses, essential public facilities and rural governmental services” must be provided. To achieve such “a variety of rural densities and uses” clustering and other “innovative” techniques may be included. Those innovative techniques, however, must involve “appropriate rural densities and uses” that are *not* characterized by urban growth (17) **and** that are “consistent with rural character” (14).

Additionally, (5)(c) includes other requirements that must be included in the rural element “that apply to rural development [15] and protect rural character [14]” of the area” established by a county. In the rural element a county must:

(i) contain or otherwise control rural development,
(ii) assure visual compatibility with the “surrounding rural area,”
(iii) reduce sprawling low-density development,
(iv) protect critical areas and surface water and ground water resources, and
(v) protect against conflicts with RLs.

The requirements of (c)(iv) and (v) require that a county review its current policies and regulations to determine if they are sufficient to comply with subsections (c)(iv) and (v). If existing policies and regulations do not meet these requirements then a county has the duty to adopt new ones. If existing polices and regulations in place at the time of adoption of the rural element are adequate, no new ones are necessary.

To summarize, a county may allow and shall provide a variety of *rural uses and rural densities* that are consistent with the definition of rural character (14) and also comply with the requirements of (5)(a), (b), and (c). UGAs and RL designations are excluded, as are agricultural

or farming activities in the rural areas (15). A variety of rural uses and rural densities, essential public facilities, and rural services are both allowed and required (15), (5)(b). Rural services must be "historically and typically" at an intensity not found in urban areas but found in rural areas. Traditional rural lifestyles, including rural-based economies are to be fostered. The natural environment is to predominate and rural visual landscape compatibility must be assured. Protection of critical areas and natural water flows and recharge and discharge areas, as well as compatibility of the uses and densities with wildlife and their habitat is required. Clusters and other innovative techniques may be allowed but must "accommodate appropriate rural densities and uses not characterized by urban growth" and be consistent with rural character (14). Rural uses and densities must be contained or otherwise controlled and must reduce existing sprawling low-density development in the rural area.

With this framework in mind, we will now discuss the two rural character challenges that FOSC argued most convincingly.

Rural Sign Regulations

FOSC described the rural sign regulation in SCC 14.16.820 as the most egregious assault on GMA rural character requirements. FOSC gave the following reasons to support this charge:

(1) RCW 36.70A.070(5)(c) requires "Assuring visual compatibility of rural development with the surrounding rural area." The CP also has policies and objectives to protect rural character. Yet the sign ordinance allows signage that is completely out of harmony with rural character of Skagit County.

(2) The code allows roof signs, including electrified roof signs, on any building. A building permit is required only if the signs are individually greater than 32-square feet or 6 feet tall. There is no requirement that other buildings in the area must already have roof signs. Therefore, neighborhood rural character will be destroyed by offensive signage.

(3) The code allows signs of any type and any size to be painted on buildings advertising

on-premise or off-premise activities.

(4) The code allows on-premise temporary signs advertising organizations for 45 days per year per sign without any limitations as to size, number of signs, illumination, placement, or other criteria.

(5) The code allows unlimited use of temporary and permanent off-premise "directional" signs for private commercial purposes.

(6) The code allows commercial businesses and home occupations anywhere in the rural area to use pennants, flags, banners, whirlers, streamers, and inflatable balloons of unlimited size for 14 continuous days every six months for so called "special events." It even allows search lights to be used by commercial businesses, home occupations, or anyone, for up to five consecutive days and up to 30 days per year.

(7) All of the above uses are allowed as exemptions in the sign code with no permit required. Even worse violations of rural character are allowed with a permit application.

(8) FOSC went on to list many more provisions of the Ordinance that it found to be most offensive to protection of rural character.

(9) FOSC ended by asking that the sign ordinance be remanded for the County to set much stricter parameters for rural signage. It also asked that the sign ordinance be found invalid for substantial interference with Goals 2, 5, 6, and 10 of the Act.

The County responded:

(1) FOSC mischaracterizes what the code would permit, spins outrageous hypotheticals and then simply declares that this will happen and is inconsistent with rural character and GMA. FOSC has failed to meet its burden.

(2) GMA does not prohibit signs in rural areas. GMA simply requires the County to assess what its rural character is, gives the County significant discretion in doing so, and gives deference to those ultimate County choices. Current Skagit County rural character has "developed" in the context of the existing, relatively lax, sign code requirements. Indeed, the current sign code is a substantial revision to, and tightening of, the previous sign regulations in Skagit County. This also demonstrates that the parade of hypothetical horribles that FOSC asserts has not happened and is not likely to happen under a more restrictive code.

(3) The record on existing rural character in Skagit County includes a bit of the "eclectic" mix of painted barns and miscellaneous signs associated with scattered rural businesses that FOSC declares is not rural character. Petitioners must demonstrate from evidence in the record that the County's choices are clearly erroneous and inconsistent with the requirements of GMA. FOSC has not met its burden.

(4) SCC 14.16.820 significantly controls what kinds of signs and how many can be located on a parcel. FOSC either misunderstands or mischaracterizes what the code would permit. For example, on-premise signs are limited to signage for the lawful uses of property. So if the property does not permit commercial uses, signage for commercial usage is not permitted. Off-premise signs are limited to a few uses (real estate signs, temporary roadside stand signs) or, in the case of billboards, are limited to only a few zones.

(5) "The rural character at issue was established under a much, much more permissive sign code, and it is that rural character with which the County must now be consistent."

Board Discussion and Conclusion

We disagree with the County's statement in (5) above. As we discussed previously, the Legislature did not say that whatever existed anywhere in the rural area of a particular county on June 30, 1990, automatically became the existing rural character of that county. Although the County created an excellent written record, it must also meet the requirements of the GMA. The GMA was adopted in part to change rural uses and practices, not to allow counties to continue pre-GMA ways by defining them as "the rural character of our County." We appreciate the work the County has done to somewhat limit the use of signage from its previous lack of restrictions. However, if Skagit County citizens took advantage of what is allowed under the new sign codes, signage would predominate over open space, natural landscape, and vegetation. RCW 36.70A.030(14) prohibits that result.

Further, RCW 36.70A.070(5)(c) requires "assuring visual compatibility of rural development with the surrounding rural area." Although the ordinance allows electrified roof signs, searchlights, and a plethora of other signage, there is no requirement in the County code that other buildings in the area must already have similar signage in order for this new signage to be allowed. Therefore, the code allows neighborhood rural character to be destroyed by offensive signage that has not been located in that particular neighborhood before. **We find that the**

County was clearly erroneous in the choices it made regarding rural signage provisions. The County must set much more strict parameters for rural signage in order to comply with the goals and requirements of the Act.

FOSC also requested that the sign ordinance be found invalid for substantial interference with Goals 2, 5, 6, and 10 of the Act. We will not grant that request at this time. If the County has not severely limited signage allowed in rural areas by the compliance date, we will reconsider invalidation at that time.

Uses and Dimensional Standards Allowed

FOSC challenged the lack of building height restrictions in all zones outside of UGAs, claiming that the language of the code was clearly erroneous because height was only required to "conform to the Skagit County Building Code." The building code allows buildings of unlimited height when proper construction methods are used. FOSC charged that due to this failure to restrict height, 16 sections of the code were in violation of the rural character requirements of the Act and the CP.

FOSC also requested that due to the excessive number of inappropriate uses, the permitted use and special use sections of all the rural residential and resource zones be remanded to the County for tightening.

FOSC gave specific examples of what it considered to be inappropriate uses in several of the rural residential zones. In the NRL zones, FOSC challenged uses that it believed would lead to ultimate conversion of NRL land to commercial enterprises. Some of the non-NRL challenged uses were: outdoor outfitters enterprises, shooting clubs (if they damage or convert NRL lands), kennels, wrecking yards for storage of unlicensed/inoperable vehicles, racetracks, off-road vehicle parks, campground developed, private aircraft landing field (conversion), animal clinics, specialized recreation facilities, mortuaries, and Home Based Business 2 (HBB2) (that are not NRL-related commercial activities).

The County responded:

(1) FOSC challenges the County's decision to defer to the UDC and other regulations to

restrict building height, rather than to specify a height for each zone in the UDC. However, FOSC provides no analysis whatsoever, instead concluding that unspecified "rural character requirements of the Act and CP" are violated without evidence or explanation. FOSC ignores the County's findings regarding other factors which effectively limit building height. The County's Recorded Motion provides evidence of the County's deliberation and rationale:

> "Many of the zones within the UDC do not contain a specific height limit, but rather simply defer to the Uniform Building Code to limit height based on various occupancy types. The Planning (*sic*) finds that many of the zones limit the uses or FAR sufficient to also consequently limit the height. The Uniform Building Code adequately limits height based on a number of considerations. First, single-family residences are limited to three stories in height. For other types of construction, such as for industrial buildings, Uniform Fire Code requirements will effectively limit the height of buildings. Specifically, tall buildings (above four stores) will require a fire flow which cannot be supported by rural fire districts and this lack of fire flow will limit the permitted heights. Taller buildings also trigger and (*sic*) type and cost of construction that is not justified with the rural intensity of the uses that are permitted by the code. These factors would effectively limit the height of construction in Skagit County to no greater than four stories, with the possible exception of non-occupied structures such as agricultural silos."

FOSC has not shown that the County is clearly erroneous to rely on fire flow and other UDC concerns and the practical realities of construction types and costs to regulate building height.

(2) Regarding FOSC's challenge to the choices the County made as to what uses to allow where, it is apparent that while FOSC may disagree with the County's choices, it has failed to make any sort of showing why those choices violate GMA. With nothing more to support its proposed revisions than the barest of conclusions, FOSC cannot carry its burden on any particular use, for any zone. FOSC's principle "evidence" is simply a previous comment letter from FOSC with the same unsupported assertions or suggestions. Further, most of the allegedly illegal uses are hearings examiner special uses. Under this authority, the examiner will ensure that the use gets more consideration, requires a finding of consistency with existing land uses in the zone, and also ensures a public forum before such uses are permitted. FOSC is often wrong in its assumptions and conclusions regarding what uses are permitted in what zones.

(3) The County supported the challenged uses in each of the zones in more detail.

(4) As to NRL zones, special uses must address impacts to NRL land and long-term natural resource production. Further, a brief review of the definitions and/or the specific language for these uses reveals that they are not of any intensity to cause any appreciable impact to ongoing natural resource activity.

Board Discussion and Conclusion

Although we might prefer some of the conclusions presented by FOSC, our test under the Act is not to determine whether Petitioner's suggestions would improve the Ordinance; rather, it is to determine if the challenged choices the County made failed to comply with the goals and requirements of the Act. On the whole, as to rural zones, FOSC has failed to show that the County's choices were clearly erroneous.

However, many of the challenged uses allowed by administrative or hearings examiner special use permit in Ag-NRL, IF-NRL, SF-NRL, and RRC-NRL do not comply with the Act. The County's defense of these uses - that the hearings examiner will ensure that the use gets careful consideration, ensures public participation, and addresses impacts to NRL land and long-term natural resource production - are not convincing. SCC 14.16.900(2)(b)(v)(f) merely states "impacts on long-term natural resource management and production will be minimized."

Recently the Supreme Court has addressed the agricultural resource lands (ARL) provisions of the GMA in *Redmond v. Growth Hearings Bd.* 136 Wn.2d 38 (1998) *(Redmond)* and in the *Soccer Fields* case. In both cases the Court made very strong statements concerning the need to preserve ARLs as a fundamental necessity of the maintenance and the enhancement of the agricultural industry. In the *Soccer Fields* case the Court said at p. 19 of the slip opinion:

> "In summary, the agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses."

In the *Soccer Fields* case the Court noted that while the goals of the Act are not set forth in any priority order "the verbs of the agricultural provisions mandate specific, direct action." At p. 20

of the slip opinion the Court reiterated the holding of *Redmond* by quoting from p. 47 of that case "with approval" the observation that:

> …"Allowing conversion of resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry."

The Supreme Court also noted that the provisions of RCW 36.70A.3201 grant a great deal of local discretion but "bounded" such discretion with the requirement that the discretion be exercised "consistent with the requirements and goals of"…. GMA. Ultimately, at p. 23 of the slip opinion in the *Soccer Fields* case the Court held that:

> …"After properly designating agricultural lands in the APD, the County may not then undermine the Act's agricultural conservation mandate by adopting "innovative" amendments that allow the conversion of entire parcels of prime agricultural soils to an unrelated use…"

Although the *Soccer Fields* case dealt specifically with ARLs, those holdings are equally applicable to other NRLs. The concept of clustering and the CP CaRD policies are not challenged. **In SCC 14.16.400, .410, .420, and .430 Skagit County has allowed in NRLs uses which fail to comply with the Supreme Court's opinion of the proper interpretation of the Act's goals and requirements.**
The fact that a special use permit is required does not remedy this failure to comply.

<u>Commercial Composting on Ag-NRL Lands</u>

-
Petitioner Bender challenged the County's DRs which allow commercial composting of municipal yard waste on pre-existing concrete pads in designated agricultural NRL lands. Bender supported this challenge with the following arguments:

(1) Commercial composting will violate the following 1997 CP policies:

CP Policy 3.1 ("prime agricultural lands shall be protected and preserved"); 4.4 and 4.4.2 (requests for changes with the agricultural zoning designations require the proposed use to be "directly related to agricultural enhancement or production"); 4.5 and 4.5.1 ("farm based

businesses must remain an accessory use, secondary to the primary agricultural use of an actively farmed property"); 6.3 ("the primary use of any parcel on lands designated as agriculture shall be agricultural production and related processing, and support services").

(2) This type of business interferes with natural resource use of NRL because of the increased traffic unrelated to resource production. This use also consumes the developed area of the NRL parcel for non-agricultural purposes and makes the parcel less likely to be able to sustain agricultural use in the future.

(3) A March 13, 2000 letter from the County administrative official stated that this type of business "simply should not be allowed as either a special use or permitted use on non-renewable Agriculture-NRL lands."

(4) Despite the above information, the County included SCC 14.16.400(2)(e) in its DRs. This code section allows "composting with no net loss of original soil" as a "permitted use" in the Ag-NRL district.

(5) Commercial composting of municipal yard waste on concrete pads for commercial sales to city residents is not an agricultural use and does not comply with the Act.

(6) The farm-based business regulation should be clarified to require that the product must always be "soil-dependent" because the allowance of farm-based businesses with products that are not "soil dependent" amounts to a conversion of Ag-NRL lands to non-agricultural uses.

(7) In Ordinance #17535, farm-based business was allowed as an accessory use or special use while under Ordinance #17938 it is an outright permitted use without requiring any other on-site agricultural use.

(8) SCC 14.16.400(2)(e) which allows commercial composting in the Ag-NRL district should be found invalid for substantial interference with RCW 36.70A.020(2), (5), (6), and (8) because the use is an "inappropriate conversion;" is not "within the capacities of the state's natural resource;" is an "arbitrary" action; and does not conserve productive agricultural land "and discourage incompatible uses."

The County responded:

(1) Petitioner Bender has failed to show how SCC 14.16.400(2)(e) fails to comply with the GMA.

(2) Bender bases his complaint on a site-specific land use proposal by an individual. This

is not the forum for Bender to be complaining about Cassidy Topsoil, Inc's. proposal.

(3) Bender makes the incorrect assumption that "commercial composting of municipal yard waste on concrete pads" is a use that would be allowed under SCC 14.16.400(2)(e).

(4) The code does not allow new concrete pads for new composting uses.

(5) Bender's reliance on an administrative official's interpretation of a prior code as applied to the specific facts of that case is also without merit.

(6) The current definition of "farm-based business" was originally adopted on June 25, 1998, as part of Ordinance #17029. This adopted amendment to the CP definitions was not appealed to the Board. The definition of "farm-based business" in Ordinance #17029 is identical to that definition now adopted as part of the UDC in 14.04.020.

(7) When a County adopts a new DR to mirror a CP provision it adopted two years earlier or a code section adopted one year earlier that were unchallenged, that does not start a new appeal period.

(8) Bender has not shown noncompliance, let alone substantial interference with respect to these issues.

<u>Board Discussion and Conclusions</u>

Petitioner has not convinced us that the County was clearly erroneous in bringing forward its CP definition of "farm-based business" to its UDC. We also agree with the County that this is not the forum for site-specific concerns.

As to the general issue, the County claimed that SCC 14.16.400(2)(e) did not allow composting on concrete pads as Bender claimed. SCC 14.16.400(2)(e) simply states, "Permitted Uses. (e) Composting with no net loss of original soil."

We are hard pressed to see how this description of a permitted use would not allow commercial composting of municipal yard waste on pre-existing concrete pads within the Ag-NRL lands.

We understand beleaguered dairy farmers' need to find additional sources of income. However, this type of use must either be clearly precluded in the Ag-NRL lands, or must be a hearing examiner or administrative special use to ensure that this non-agricultural use is temporary and priority always given to agricultural uses. Regulations must also ensure that no leaching of

toxins from urban yard debris is allowed to contaminate the agricultural soil and that the additional truck traffic will not interfere with agricultural uses.

We find no such safeguards in the current ordinance and therefore find SCC 14.16.400(2)(e), as currently written, to be noncompliant with the GMA and the County's own agricultural conservation policies. The Supreme Court's holding in *Soccer Fields* case (as discussed on pp. 31 and 32 of this decision) supports this conclusion.

Concrete UGA

FOSC claimed that the Concrete UGA boundary was oversized and failed to comply with the Act. It asserted that Concrete could accommodate its allocated growth within municipal limits and therefore must not be allowed a UGA outside its current boundary. FOSC also requested that we give the County 90 days to reduce the Concrete UGA to its municipal boundary and, if not done, find the unincorporated UGA automatically invalid for substantial interference with Goals 1 and 2.

The Town of Concrete responded:

(1) The record shows that the town has been working and meeting with the County on its UGA for years. It has done its required analysis and submitted thousands of pages of information to the Department of Community Trade and Economic Development (CTED) and the County.

(2) FOSC did not participate at all in Concrete's process and only submitted one letter in the County process.

(3) The town has reduced its proposed UGA by 50%.

(4) Concrete has never claimed a need for a UGA merely for its allocated population. Rather, RCW 36.70A.110 also authorizes the inclusion of adjacent areas that are already at urban standards. Grasmere, the included area, has sidewalks, curbs, gutters, and urban water. Where existing urban development and sidewalks end, the boundary of the UGA terminates. The town has documented that it can meet minimum urban density requirements and can supply the area with urban services. The Town will enforce concurrency and has a sewer comprehensive plan to serve the area. This plan has been

approved by the Department of Ecology (DOE) and CTED.

(5) Based on the record, the County was not clearly erroneous in its decision that the unincorporated UGA was already characterized by urban growth and should be included in Concrete's UGA.

Board Discussion and Conclusion

The record shows that the area included in the Concrete UGA is characterized by urban growth and is served by Concrete. All the other municipal UGAs have long since been found in compliance. It is pointless to require the County to shrink those UGAs in small amounts so Concrete can include an area in its UGA that is already urbanized. **Given this record, we find that including that area within the Concrete UGA, thereby requiring any new development to meet Concrete's DRs and concurrency requirements and develop to urban standards, complies with the Act.**

Water Service to Rural Areas

FOSC charged that the County's amended CP and coordinated water system plan (CWSP) redefining urban and rural water services, as implemented in SCC 14.36.040, still did not comply with the Act. FOSC complained that the definition of rural water service applied by the CP, CWSP, and SCC did not preclude a water line extension from inside a UGA to outside a UGA that is structurally capable of providing urban water service to areas outside the UGAs. Therefore, these policies and regulations do not preclude future water system extension from being used for future urban water service outside the UGAs. Thus, the Act's requirement to ensure that rural extensions be designed to prevent them from being structurally capable of providing urban water service was violated.

The County responded that it had adopted "rural" and "urban" Levels of Service (LOS) standards in its CP as required by the Act. These standards are mirrored in the CWSP Glossary. The CWSP also adopted fire flow standards for "urban" and "rural" areas. This addresses public safety issues. Because the water pipe sizes are a function of hydraulic engineering, including, but not limited to, distance served, topography, and pressure; it is not appropriate or possible to set a water pipe size as an urban vs. rural LOS.

Intervenors Towns of Hamilton and Concrete supported the County's action. They have Group A water systems and need to serve customers outside their boundaries to spread their fixed costs. They must meet the design standards set by the Department of Health (DOH). The CWSP complies with the Act.

Intervenor Del Mar Community Services, also a water purveyor, supported the County and underscored that the CWSP is excellent; the County cannot usurp DOH's role in water system design; and if they followed FOSC's demands, rural areas would be made vulnerable to fire for no good reason. Intervenor Clark and others also supported these arguments.

Board Discussion and Conclusion

The County has developed LOS standards for rural and for urban water service as required by the Act. FOSC has not convinced us that the Act requires water service to rural areas be designed to be structurally incapable of providing an urban LOS. Rather, the County's land use regulations must preclude new urban development in the rural area. **The County is in compliance with the Act as to LOS standards for rural and urban water service.**

Concurrency

FOSC raised several concurrency challenges. On the whole, we are not persuaded that the County was clearly erroneous in the choices it made regarding concurrency. The one exception is the County's failure to add all municipal concurrency ordinances to Appendix A and keep them current. This is required for the Cities to be able to administer their concurrency ordinances within their UGAs outside their current municipal boundaries. This issue is also discussed in the FDO for Case #00-2-0050c (2-6-01). The County agreed that a remand should occur to clarify its intent to adopt current city DRs for the UGAs.

Identification of Open Space Corridors

FOSC contended that the County failed to adequately address open space corridors within and between UGAs in violation of RCW 36.70A.110(2) and -.160.

The County countered that FOSC ignored the city maps for each municipal UGA in the record which identified these open space and green belt areas within UGAs. With respect to corridors between UGAs, FOSC ignored the County Parks and Recreation Development Plan. The County adopted these requirements. Further, the County carefully considered and recognized other important categories of open space under private ownership and control that, while not necessarily mapped as such on the CP map, nonetheless provide valuable open space functions.

FOSC replied that City maps in the map portfolio do not show green belts in unincorporated UGAs. Open space corridors between UGAs are not shown in the Parks Plan. Further, the CP does not reference the Parks Plan.

Board Discussion and Conclusion

RCW 36.70A.110(2) requires counties to include "greenbelt and open space areas" in its UGAs. RCW 36.70A.160 requires counties to "identify open space corridors within and between urban growth areas."

The County CP at 4-33 states:

> "The Open Space Areas are intended to provide for a variety of open space types. Open space areas include greenbelt corridors within and around urban growth areas, green belts which connect critical areas, lands receiving open space tax incentives, resource lands, conservation easements, rural open space areas, park lands, and significant historic, archaeological, scenic and cultural lands. The Potential Greenbelts and Public Open Space Areas overlay found on the Urban Growth Area Maps, Maps 3A – 3K, are general in nature and will be more thoroughly designated through the project review process. More detailed mapping together with specific protection techniques including a revenue plan are included as a part of the Parks, Recreation and Open Space Plan and Conservation Futures Plan. Potential greenbelts and open space areas will be a mix of the three categories of open space: (1) Public, (2) Private and (3) Open Space Taxation……."

This generalized discussion in the CP, plus city maps (that do not show green belts in unincorporated UGAs) and County parks plan maps (which do not show open space corridors between UGAs), do not adequately meet the requirements of RCW 36.70A.110(2)

and .160.

Changes to the Big Lake Rural Village (RV) Provisions

FOSC challenged the County's expansion of the Big Lake RV boundary for many reasons including:

(1) The Board found the Big Lake UGA not in compliance with the Act in the *Abenroth* FDO. The County responded by removing the UGA designation for Big Lake and designating the exact same area as RV.

(2) In the CP and UDC the County has now substantially expanded the boundary and residential development potential for the Big Lake Rural Village.

(3) CP 4A-7.8 provides "changes to Rural Area designation should occur through the community development planning process (subarea joint planning)" by evaluating many specified criteria.

(4) The County has proposed a community planning process for Big Lake for the future in CP 4A-7.15, but it expanded the boundary before that planning process was even begun.

(5) The County has expanded the RV without following the criteria in CP Chapter 2. There was no monitoring program and analysis as required in CP Chapter 2.

(6) The Big Lake Rural Village has been expanded to become contiguous with the boundary of the Mount Vernon UGA. This is a fundamental flaw because the future expansion of the Mount Vernon UGA toward Big Lake will be precluded by the suburban densities of 1 du/acre allowed in this expansion area.

(7) The GMA requires that the RV have a "logical boundary delineated predominately by the built environment." Most of the boundary of the expanded RV is not bounded by physical boundaries and/or "delineated predominately by the built environment." No consideration was given to boundaries of existing areas as those areas existed on July 1, 1990. The County has not shown its work in delineating the Big Lake boundary under the criteria of RCW 36.70A.070(5).

(8) All of these issues must be addressed in a community planning process according to CP4A-7.8 before the boundary of the Rural Village is modified, and before the density in the Overlook Golf Course is increased from 1 du/5 acres to 1 du/1 acre. Expansion of

development potential in the Big Lake RV as was done by Ordinance #17938 is clearly erroneous.

(9) Because the RV is so close to the Mount Vernon UGA, the expansion of both the area and the density in the Rural Village should be found invalid for substantial interference with Goal 1 and Goal 2. If development vests in expansion areas and/or at the expanded densities allowed by Ordinance #17938, it will be impossible to reverse the damage in the community planning process.

The County responded:

(1) Finding 87 of the County's Recorded Motion explains that the residential development potential of Big Lake has been substantially reduced when it was changed from a UGA to an RV.

(2) The record now contains ample description and evidence to support the unique local circumstances, specific boundary choices and minor modifications made.

(3) The adopted CP policies for this Rural Village appropriately constrain and protect further development in this area until sub-area planning is completed.

(4) FOSC cites to no GMA provisions that preclude the RV boundary from being contiguous with the Mount Vernon UGA. The Big Lake subarea plan will specifically look at potential UGA expansion issues in this area.

(5) FOSC has not met its burden and the County's designation of the Big Lake RV, together with its innovative policies to encourage clustered development, should be upheld.

Board Discussion and Conclusion

The record shows that the County failed to follow its own CP policies and do an analysis for compliance with RCW 36.70A.070(5) when it expanded the Big Lake RV boundary. In order to comply with the Act the County must complete a Big Lake subarea planning process according to CP 4A-7.8, analyze the proposed boundary expansion according to the criteria in RCW 36.70A.070(5)(d) and consider the potential of this area for Mount Vernon UGA expansion before the boundary is expanded or greater densities are allowed for the Overlake Golf Course.

Miscellaneous Issues

FOSC challenged numerous sections of the DRs as being potentially confusing or not fully implementing the CP. On most of those issues, we agree with the County that FOSC's speculative concerns over implementation fail to meet its burden of proof and do not justify a finding of GMA noncompliance. However, the following UDC sections do warrant a remand for consistency and/or clarification.

SCC 14.10.020(1)

FOSC challenged SCC 14.10.020(1) for its lack of clarity. The section calls for variances to the public works standards in SCC 14.36 to be determined administratively by the Department of Public Works pursuant to Section 2.10 of the Skagit County Road Standards Manual. SCC 14.36 includes standards for roads, stormwater, sanitary sewer, and water systems. Section 2.10 of the Road Standards Manual does not address stormwater, sanitary sewer and water system standards.

The County conceded that the language in SCC 14.01.020(1) is not fully consistent with SCC 14.36 by limiting Public Works review to Section 2.10 of the Skagit County Road Standards Manual, which does not contain standards for stormwater, sewer and water systems. Further, other sections of SCC provide a clearer description of what entity is responsible for what variance decisions. The County stated it was willing to process an amendment to SCC 14.01.020(1) to avoid confusion.

In order to achieve compliance the County must amend SCC 14.01.020(1) to be similar to its proposed amendment at p. 58 of its response brief.

Inconsistency Regarding Side Setbacks

FOSC asserted that SCC 14.04.020 defines "Lot line, front" to include any parcel boundary on a street. But SCC 14.16.140 and other code sections define a front setback of one distance and a side setback on a street right-of-way as a different distance. Under the definition of the "Lot line, front" the side on a street right-of-way is considered a front so the code is internally inconsistent on this issue.

The County conceded that there is a small chance for confusion when SCC 14.06 setbacks are applied in conjunction with the definition of "Lot line, front" in SCC 14.04.020. The County stated that it was willing to process an amendment to SCC 14.04.020 to avoid the possibility of confusion.

In order to achieve compliance the County must amend SCC 14.04.020 to be similar to its proposed amendment at p. 59 of its response brief.

Inconsistent Population Projections

FOSC pointed out that the population projections that the County used for its Capital Facilities Plan (CFP) are inconsistent with the population projections used in other parts of the CP. Therefore, the CFP must be revised based on proper projections. Further, FOSC contended that in order to be internally consistent, all elements of the plan must be based on the same 20-year planning period.

The County acknowledged the population projection inconsistency and pledged to correct this inconsistency. The County showed that it had corrected this in the CFP for 2000-2006. The inconsistency had no effect on the CFP 2000-2005 dates, assumptions or conclusions.

In order to achieve compliance the County must take action to ensure that all elements of its CP use the same population projections and 20-year planning period.

Minimum Residential Densities for the Concrete UGA

FOSC stated that the FDO in *Abenroth* required the County to place a note on its CP maps for unincorporated UGAs that specifies minimum residential densities of 4 du/acre with a maximum lot size of ¼ acre. In the 2000 CP the County has adopted an unincorporated municipal UGA for the Town of Concrete that provides for residential development. The County should be held to the previously cited decision and be required to place the same density note now on the UGA map for Concrete.

The County responded that the failure to include the minimum density notation on the County's

map for the Concrete UGA was, at most, a typographical oversight. The County also noted that Town of Concrete Ordinance #439 establishes maximum lot sizes that comport with urban standards. The County has adopted these regulations for the Concrete UGA.

In order to achieve compliance the County must place the minimum density note on the UGA map for Concrete consistent with other UGA maps.

ORDER

In order to comply with the Act, the County must take the following actions by the deadlines specified:

(1) If the aggregation requirement is not reinstated, the County must adopt other measures that prevent incompatible development and uses from encroaching on designated resource lands and their long-term viability. This includes not only the estimated 4,000 substandard lots within NRL lands, but also those in rural areas near designated NRL lands. Further, the County must ensure by appropriate regulations that in allowing development of substandard lots, it does not allow development which will cumulatively require urban services in rural areas and which fails to reduce low-density sprawl. If compliance is not achieved within 90 days, we will consider Petitioners' request for invalidity.

(2) If the County wishes to retain its urban reserve provision in the CaRD DRs, it must limit that option to lands near UGAs which it has determined to be the best areas for future urban growth. The process to determine future urban growth suitability must include consultation with the impacted municipalities, SEPA review of alternatives, and full public participation. These actions must be taken within 180 days.

(3) Set a specific timetable for, and firm commitment to, the timely completion of the Fidalgo Sub-Area Plan. This plan must be completed and found to be compliant <u>before</u> the CaRD urban reserve development or any other increase in density are allowed to occur on the Island. The specific timetable and scope of work must be developed and supplied to us within 90 days.

(4) Within 90 days, change the amendments to CP Policy 7A-4.29a to make it clear that annexations are to occur as soon as feasible within municipal UGAs to facilitate the efficient phasing of urban infrastructure and development.

(5) Set much more strict parameters for rural signage to protect the rural character of the

County and conform with RCW 36.70A.030(14)(a) and .070(5)(c). If compliance is not achieved within 90 days, we will consider Petitioners' request for invalidity.

(6) Within 90 days, remove the uses allowed in NRLs listed in SCC 14.16.400, .410, .420, and .430, which do not comply with the Supreme Court's opinion of the proper interpretation of the Act's goals and requirements in the *Soccer Fields* case.

(7) Either clarify SCC 14.16.400(2)(e) to prohibit commercial composting of municipal yard waste on pre-existing concrete pads within the Ag-NRL lands, or adopt safeguards to ensure that this non-agricultural use is temporary, priority is always given to agricultural uses, no leaching of toxins from urban yard debris is allowed to contaminate the agricultural soil, and ensure that additional truck traffic will not interfere with ongoing agricultural uses. If compliance is not achieved within 90 days, we will consider Petitioners' request for invalidity.

(8) Within 30 days, adopt current city DRs for enforcement within municipal UGAs. Changes to city ordinances must be adopted promptly in the future to ensure enforceability of the updated municipal codes.

(9) Within 180 days, adopt maps or some other clear mechanism to identify greenbelts and open space areas within UGAs and open space corridors within and between UGAs.

(10) Within 30 days, repeal the changes made to the Big Lake rural village in the 2000 CP and UDC. Complete a Big Lake subarea planning process according to CP 4A-7.8, analyze the proposed boundary expansion according to the criteria in RCW 36.70A.070(5)(d), and consider the potential of this area for Mount Vernon UGA expansion <u>before</u> reexpanding the boundary or allowing greater densities for the Overlake Golf Course. If repeal of the changes is not made within 30 days, we will invoke invalidity.

(11) Within 90 days, amend SCC 14.01.020(1) to be similar to the County's proposed amendment at p. 58 of its response brief.

(12) Within 90 days, amend SCC 14.04.020 to be similar to the County's proposed amendment at p. 59 of its response brief.

(13) Within 180 days, take action to ensure that all elements of the CP use the same population projections and 20-year planning period.

(14) Within 90 days, place a minimum density note on the UGA map for

Concrete consistent with other UGA maps.

(15)Any findings of noncompliance in previous sections of the FDO are incorporated by reference.

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and attached as Appendix I and incorporated herein by reference.

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 6th day of February, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Nan A. Henriksen
Board Member

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William H. Nielsen
Board Member

Appendix I

Findings of Fact pursuant to RCW 36.70A.270(6)

Repeal of Lot Aggregation

1. Unlike the previous ordinance, SCC 14.16.850(4) prohibits septic systems on substandard lots regardless of ownership of contiguous lots.
2. There is a large body of evidence in the record that the aggregation ordinance, as implemented **~~do not ???,~~** was burdensome and arbitrary to land owners, ineffective in

reaching the desired result, and needing to be fixed.

3. It is estimated that there are more than 4,000 urban-sized lots in Skagit County NRL zones.
4. The Act makes clear that development regulations must be in place to ensure that the use of lands within or adjacent to NRL lands shall not interfere with the viability of those NRL uses. Skagit County had an aggregation ordinance in place when we found that the County had adequate provisions to protect NRL lands from non-compatible uses.

Urban Reserve in CaRD Implementation

1. The County's implementing DRs provide that the remnant parcel may be set aside for future urban development rather than permanent open space as earlier envisioned.
2. Through the CaRD implementing DRs, Fidalgo Island landowners can build at urban levels now in clusters and choose to set aside the residual for future urban development with no City of Anacortes participation in that decision.
3. The urban reserve provision in the DRs is not limited to lands near urban growth areas which have been adequately studied and determined to be the best areas for future urban growth.

Fidalgo Island Sub-Area Plan

1. The County stated that one of the main purposes of a Fidalgo Sub-Area Plan is to assess the very best strategy for preserving rural character, protecting the environment and accommodating any future urban growth, if appropriate.
2. The County removed aggregation requirements and reserved cluster remnant parcels for future urban growth without first doing a careful sub-area assessment to determine the Island's suitability for more intense development.
3. The record shows no specific timetable for, nor firm commitment to, the timely completion of a Fidalgo Island Sub-Area Plan.

Annexation Requirement in CP

1. The compliance order in *Abenroth* stated:

"…that (1) "That which is urban should be municipal; (2) implicit in RCW 36.70A.110(4) is the principle that 'incorporations and annexations must occur; and (3) one of the three 'fundamental purposes' of CPs is to 'achieve the transformation of local governance within the UGAs such that cities are the primary providers of urban services.'"

2. Concurrency within municipal UGAs in Skagit County is the responsibility of the Cities.
3. The County amended CP Policy 7A-4.29a to include a set of pre-GMA BRB annexation criteria for <u>within</u> UGAs.

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<u>Vesting Provisions</u>

1. The County's new vesting Ordinance reflects current Appellate Court decisions regarding vesting.

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<u>Rural Sign Regulations</u>

1. RCW 36.70A.070(5)(c) requires "Assuring visual compatibility of rural development with the surrounding rural area." The CP also has policies and objectives to protect rural character.
2. If Skagit County citizens took advantage of what is allowed under the new sign codes, signage would predominate over open space, natural landscape, and vegetation. RCW 36.70A.030(14)(a) prohibits that result.
3. RCW 36.70A.070(5)(c) requires "assuring visual compatibility of rural development with the surrounding rural area." Although the ordinance allows electrified roof signs, searchlights, and a plethora of other signage, there is no requirement in the County code that other buildings in the area must already have similar signage in order for this new signage to be allowed.

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<u>Uses Allowed</u>

1. In the NRL zones, FOSC challenged uses that it believed would lead to ultimate

conversion of NRL land to commercial enterprises. Some of the non-NRL challenged uses were: outdoor outfitters enterprises, shooting clubs (if they damage or convert NRL lands), kennels, wrecking yards for storage of unlicensed/inoperable vehicles, racetracks, off-road vehicle parks, campground developed, private aircraft landing field (conversion), animal clinics, specialized recreation facilities, mortuaries, and HBB2 (that are not NRL-related commercial activities).

2. SCC 14.16.900(2)(b)(v)(f) merely states "impacts on long-term natural resource management and production will be minimized."
3. Recently the Supreme Court has addressed the agricultural resource lands (ARL) provisions of the GMA in *Redmond v. Growth Hearings Bd.* 136 Wn.2d 38 (1998) *(Redmond)* and *King County v. Cent. Puget Sound Bd.* ___ Wn.2d __ (2000) (*Soccer Fields*). In both cases the Court made very strong statements concerning the need to preserve ARLs as a fundamental necessity of the maintenance and the enhancement of the agricultural industry.
4. In the *Soccer Fields* case the Court noted that while the goals of the Act are not set forth in any priority order "the verbs of the agricultural provisions mandate specific, direct action."
5. At p. 47 of *Redmond* the Court stated …"Allowing conversion of resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry."
6. At p. 23 of the slip opinion in the *Soccer Fields* case the Court held that:

…"After properly designating agricultural lands in the APD, the County may not then undermine the Act's agricultural conservation mandate by adopting "innovative" amendments that allow the conversion of entire parcels of prime agricultural soils to a non-related use…"

<u>Commercial Composting on Ag-NRL Lands</u>

1. The current definition of "farm-based business" was originally adopted on June 25, 1998, as part of Ordinance #17029. This adopted amendment to the CP definitions was not appealed. The definition of "farm-based business" in Ordinance #17029 is identical to that definition now adopted as part of the UDC in 14.04.020.
2. SCC 14.16.400(2)(e) simply states, "Permitted Uses. (e) Composting with no net loss of

original soil."

3. Petitioner Bender claimed that SCC 14.16.400(2)(e) allows commercial composting of municipal yard waste on pre-existing concrete pads in designated agricultural NRL lands.
4. There are no safeguards in place to preclude this use or to ensure that, if allowed, this non-agricultural use is temporary, priority is always given to agricultural uses, no leaching of toxins from urban yard debris is allowed to contaminate the agricultural soil, and additional truck traffic will not interfere with ongoing agriculture.

Concrete UGA

1. Concrete did not claim a need for a UGA merely for its allocated population. Rather, RCW 36.70A.110 also authorizes the inclusion of adjacent areas that are already at urban standards. Grasmere, the included area, has sidewalks, curbs, gutters, and urban water. Where existing urban development and sidewalks end, the boundary of the UGA terminates. The town has documented that it can meet minimum urban density requirements and can supply the area with urban services. The Town has stated that it will enforce concurrency and has a sewer comprehensive plan to serve the area. This plan has been approved by DOE and CTED.
2. All the other municipal UGAs have long since been found in compliance.

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Water Service in Rural Areas

1. The County has developed LOS standards for rural and for urban water service as required by the Act.
2. Because the water pipe sizes are a function of hydraulic engineering, including, but not limited to, distance served, topography, and pressure; it is not appropriate or possible to set a water pipe size as an urban vs. rural LOS.
3. The County cannot usurp DOH's role in water system design.

4. The Act does not require water service to rural areas be designed to be structurally incapable of providing an urban LOS.

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Identification of Open Space Corridors

1. RCW 36.70A.110(2) requires counties to include "greenbelt and open space areas" in its UGAs.
2. RCW 36.70A.160 requires counties to "identify open space corridors within and between urban growth areas."
3. The County has provided no maps which adequately meet the requirements of RCW 36.70A.110(2) and/or -.160.

Changes to the Big Lake Rural Village Provisions

1. The Board found the Big Lake UGA not in compliance with the Act in the *Abenroth* FDO. The County responded by removing the UGA designation for Big Lake and designating the exact same area as a Rural Village.
2. In the CP and UDC the County has now expanded the boundary and residential development potential for the Big Lake Rural Village.
3. CP 4A-7.8 provides "changes to Rural Area designation should occur through the community development planning process (subarea joint planning)" by evaluating many specified criteria.
4. The County has proposed a community planning process for Big Lake for the future in CP4A-7.15, but it expanded the boundary and added density before that planning process was even begun.
5. The County has expanded the Rural Village without following the criteria in CP Chapter 2. There was no monitoring program and analysis as required in CP Chapter
6. The Big Lake Rural Village has been expanded to become contiguous with the boundary of the Mount Vernon UGA.
7. The County has not shown its work in delineating the Big Lake boundary under the criteria of RCW 36.70A.070(5)(d).