

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

CITY OF ANACORTES, et al.,)	
)	No. 00-2-0049c
)	
v.)	COMPLIANCE
)	ORDER
)	(C/I Development
SKAGIT COUNTY,)	Issues)
)	
)	Respondent,
)	
and)	
)	
JOSH WILSON PROPERTIES, et al.,)	
)	
)	Intervenors.
)	
)	

In the February 6, 2001 final decision and order (FDO) we told the County to do the following in order to comply with the Growth Management Act (GMA, Act):

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

- (1) Within 180 days, CP and DRs must be consistent with the clear statement in CP at 4-1 that new growth will be encouraged within the UGAs and inappropriate conversion of undeveloped land will be reduced.
- (2) Review the challenged RFS designations and eliminate all those areas which do not comply with the interpretation of .070(5)(d) included in this FDO. If compliance is not achieved within 90 days, we will consider Petitioners’ request for invalidity.
- (3) Within 30 days, repeal all RMI designations and return those sites to their previous designations. Conduct a full SEPA analysis and public participation process before reinstating a RMI designation. Also conduct SEPA analysis to determine the appropriateness of the RMI designation for the proposed sites. As to the Culbertson site, analysis must include the appropriateness of including the site in the Anacortes UGA. If compliance is not achieved within 30 days, FOOSC’s request for invalidity will be considered.
- (4) Within 30 days, repeal the 2000 amendments to the CPPs. If the County wishes to amend its CPPs, it must return to the CPP Committee negotiation table and work out with its municipal members mutually agreeable amendments. The process must conform to the 1992 Framework Agreement and proper SEPA procedures must be followed.
- (5) We declare invalid the 410 acres of allotted rural C/I that have not been specifically designated through Ordinance #17938. Skagit County must make no further CP amendments adding to rural C/I, beyond that already specifically designated, until it implements its CP

amendment process discussed in Chapter 2 of the 1997 CP. This must include implementing the Monitoring Plan effectiveness and the Growth Management Indicators provision of 1997 CP 2-11 through 2-13.

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

A compliance hearing was held October 30, 2001, in Mount Vernon, WA. All three Board members were present. Representing Skagit County was Jay Derr; representing Friends of Skagit County (FOSC) and Gerald Steel was Gerald Steel; representing the City of Anacortes was Ian Munce; representing intervenors James and Nancy Duffy was Jonathon Sitkin; representing intervenor Upper Skagit Indian Tribe was Andrew Salter; and representing intervenor Town of Concrete was Patrick Hayden. In this decision we will refer to FOSC and Gerald Steel as FOSC.

At the hearing we admitted Exhibits 630, 631, 1000, and 4001-4004.

Presumption of Validity, Burden of Proof, and Standard of Review

Ordinance amendments made in response to a finding of noncompliance are presumed valid. RCW 36.70A.320.

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), we “shall find compliance unless [we] determine 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).

Remand Issue (1) – Encourage New Growth Within UGA

(1) Within 180 days, CP and DRs must be consistent with the clear statement in CP at 4-1 that new growth will be encouraged within the UGAs and inappropriate conversion of undeveloped land will be reduced.

Anacortes was frustrated that the County, even though it had not appealed Remand Issue (1) to Superior Court, had taken no action to amend its CP and DRs to ensure new growth will be encouraged within UGAs. Anacortes further complained that the County had adopted no other positive incentives for transformance of governance even though the City had given examples of what could be done.

The County acknowledged that it had taken no action on Remand Issue (1) and realized it would be found in continuing noncompliance.

We too, are frustrated that the County has taken no action in response to this remand. If the County has not taken the required action within 180 days, we will consider recommending sanctions.

Remand Issues Which County Appealed to Court and Adopted No Amendments to Address Findings of Noncompliance

(3) Within 30 days, repeal all RMI designations and return those sites to their previous designations. Conduct a full SEPA analysis and public participation process before reinstating a RMI designation. Also conduct SEPA analysis to determine the appropriateness of the RMI designation for the proposed sites. As to the Culbertson site, analysis must include the appropriateness of including the site in the Anacortes UGA. If compliance is not achieved within 30 days, FOSC's request for invalidity will be considered.

(4) Within 30 days, repeal the 2000 amendments to the CPPs. If the County wishes to amend its CPPs, it must return to the CPP Committee negotiation table and work out with its municipal members mutually agreeable amendments. The process must conform to the 1992 Framework Agreement and proper SEPA procedures must be followed.

(5) We declare invalid the 410 acres of allotted rural C/I that have not been specifically designated through Ordinance #17938. Skagit County must make no further CP amendments adding to rural C/I, beyond that already specifically designated, until it implements its CP amendment process discussed in Chapter 2 of the 1997 CP. This must include implementing the Monitoring Plan effectiveness and the Growth Management Indicators provision of 1997 CP 2-11 through 2-13.

In its statement of actions taken, the County acknowledged that its only action on Remand Issue (3) was its appeal to Superior Court. As to Remand Issue (4), the County stated that in addition to court appeal, it had sent a letter to various cities regarding opening negotiations on amending the Framework Agreement. Although some cities had expressed an interest in discussing amending the Framework Agreement, Anacortes had refused. Thus, nothing further was done. As to Remand Issue (5), in addition to its court appeal, staff had begun to implement the referenced provisions in Chapter 2 and had discussed those with the BOCC.

FOSC contended that, in addition to continued findings of noncompliance and invalidity already made on these remand issues, we should make a new finding of invalidity on all RMI designations due to their substantial interference with Goals 1, 2, 5, and 10 of the Act.

As to all three of these issues, FOSC requested that, if the County does not adopt regulations that

facially comply with the Act within 30 days, we should make a sanctions recommendation to the Governor. FOSC contended that since the County had not complied and had not requested a court stay on the remands, it had unreasonably delayed action and had shown bad faith, therefore justifying sanctions.

The County responded that it understands it will be declared in continuing noncompliance on all three remand issues and continuing invalidity on Remand Issue (5). The County did not ask that invalidity be lifted on (5). The County did request a stay from the Court but that issue will not be decided until the case is heard. The County gave several reasons why a pre-trial stay was not likely, even if the County requested it. The County further contended that, if it had adopted ordinances to comply, its appeal would have been mooted. Since (5) is under invalidity and no new substantial interference has been shown, it made sense to the County to wait for a court decision. No bad faith was shown from this conduct.

The County stated in its October 8, 2001 response brief at p. 24:

“Further the Supreme Court decision in Association of Rural Residents v. Kitsap County, 141 Wn.2d 185 (2000) (ARR) raises doubt whether the challenged sections are still ‘eligible’ for a growth management hearings board finding of invalidity. Under that case, the regulation found noncompliant by this Board is no longer effective if not amended during the remand period. Thus, the County’s RMI regulations, because they were not amended or repealed during the time of remand, have simply expired or lapsed. Since the County may not process any permit applications for lands in that designation [see proposed Exhibit 360 (Resolution No. 18444)], under ARR, the RMI zoning classification and regulations may not be substantially interfering with the goals of GMA. In effect, the ARR case invalidated them already.”

FOSC replied that taking interim action would not have mooted the County’s court appeal. Also it was the County’s right to appeal the FDO, but the law still requires the County to either comply with the FDO or obtain a stay. FOSC further stated in its October 17, 2001 reply brief at pp. 3 and 4:

“The County further argues that under Association of Rural Residents v. Kitsap County (ARR), 141 Wn.2d 185, 4 P.3d 115 (2000) and the order on invalidity on new C/I acreage, the effect of the Board’s FDO is being carried out even without any action by the County. Co. Br. at 24-25. This argument has little merit. On October 1, 2001, the County adopted Resolution No. 18444 authorizing the staff to continue to process permit applications that rely on code provisions invalidated under ARR when the applicant agrees not to bring an action for damages against the County for such processing. Ex. 630 at 2 attached to the Co. Br. By this action, the County has authorized processing and approval of permit applications even when it considers the underlying regulations and CP designations invalidated under the authority of ARR. Because the County has taken this action without seeking a stay of this Board’s order, this Board should find that the County has acted in bad faith.”

As to its invalidity request for the RMI designations, FOSC replied that the RMI designations may have

been invalidated by ARR. However, because the County continues to process permits when damage liability waivers are signed by applicants, FOSC continued to request a finding of invalidity. Further, since we did not previously direct the County to repeal the zoning, the zoning regulations could continue to be used even if the noncompliant CP designations had reverted to previous designations. The State Supreme Court has ruled that zoning regulations are key, not the CP designations. FOSC stressed that it is important to assure that RMI zoning is found invalid so this zoning cannot continue to be used to vest new development in the RMI zones. FOSC further charged that the County had actually added to the RMI zone during the remand period.

The County countered that:

1. The extra parcel added was simply a technical correction to correct an obvious mapping error.
2. Under ARR, RMI is gone.
3. The County is not still processing permits under the noncompliant provision.
4. Invalidity is not to be imposed just because the County chose to appeal the Board's decision instead of amending a regulation. FOSC must show that the regulation substantially interferes with the Goals of GMA. FOSC has made no such showing.
5. There cannot be a showing of substantial interference since all four RMI parcels are already developed.

Board Discussion on Remand Issues (3), (4), and (5)

We will tackle the ARR quagmire first. At the time the facts in ARR arose, the GMA allowed a FDO to include a finding of noncompliance with a maximum remand period of 180 days. *After the remand time had expired*, a Board on its own motion, or after one by petitioner, was required to set and conduct a hearing to determine whether the local government was then in compliance with the GMA. If a Board again determined noncompliance, the only remedy allowed was to transmit the finding of noncompliance to the Governor and recommend imposition of sanctions. No further hearings were authorized or contemplated under the GMA. Jurisdiction over the case ended.

In 1995, Boards were given the authority to find noncompliance and also determine invalidity. "Additional hearings" were authorized for the first time under RCW 36.70A.330(5). The phrase that the validity of CPs and DRs was not affected "during the period of the remand" was inserted by section .300(4).

In the 1997 amendments, section .300 allowed a remand period to extend beyond a 180-day period in cases of unusual scope or complexity. Those amendments also segregated invalidity determinations to their own section (.302) and retained the previous language from the 1995 version of .300, that the validity of CPs and DRs "during the period of remand" were not affected by an order of

noncompliance, only by a determination of invalidity. Other amendments to the invalidity section were added including one that required a Board to determine the action no longer substantially interfered with the goals of the Act before a determination of invalidity could be lifted. Jurisdiction “continues” after the remand period.

In ARR, the court said at page 192:

“...Kitsap County was required to bring the noncomplying IUGA into compliance by October 3, 1994. It did not. At the time the application was submitted, the period of remand had expired. Under current law, a noncomplying regulation remains in effect *during the period of remand*. RCW 36.70A.300(4)². This allows the noncomplying IUGA to remain in effect while it is being amended. In the current situation, Kitsap County missed the deadline for compliance; therefore, Partners’ application was submitted at a time the IUGA was no longer in effect because the period of remand had expired. Thus, the application had to vest to the preexisting rural 2.5 zoning.”

At the time the opinion in ARR was issued the Legislature had not adopted the 1997 amendments noted above. As shown by the footnote, the court was not even dealing with the 1995 amendments.

Perhaps the reading of ARR in the Court’s reasoning might become more clear by breaking out a two sentence paragraph beginning with the sentence that starts ‘under current law.’ The first part of the original paragraph then simply sets forth that under the original language of the GMA in 1991, the Legislature had not established any basis for action or jurisdiction by a Board or for local governments beyond the period of the remand. After that time, because of RCW 36.70A.300(4), which was not involved in the factual situation of ARR, legislative intent was to the contrary. Perhaps this is what the court was discussing in the sentence and the footnote after its reference to RCW 36.70A.300(4).

The 1995 and 1997 amendments give rise to an entirely different scenario with regard to the initial FDO finding of noncompliance than the ARR situation. While the local government is still under a duty to cure the noncompliance, it is clear from the 1995 and 1997 amendments that a Board retains jurisdiction and has the authority to extend the remand period until compliance is achieved.

In any event what is clear is that the Legislature has expressed its intent on at least two separate occasions in 1995 and 1997 that a local government has the duty to comply with the Act and that duty continues beyond the initial remand period of the FDO. During that time beyond the initial FDO remand period, unless there is a determination of invalidity, CPs and DRs remain in effect and must be used by a local government. The purported use of pre-GMA regulations on the basis of ARR involves a total misreading of that case and a failure to follow GMA requirements.

As to FOSC's claim that adoption and implementation of Resolution 18444 showed bad faith, we reviewed that resolution which states in part:

“**Whereas**, in light of the ARR case, the regulations which the GMHB found noncompliant in the FDOs and which the County did not amend within the remand periods, are likely ineffective after the expiration of those remand periods (either 30, 90, or 180 days), thereby casting doubt on the County's ability to process applications filed after the expiration of those remand periods relying on those noncompliant regulations; and

Whereas, in light of the potential liability to the County of processing applications based on regulations found noncompliant by the GMHB but which were not amended during the remand period, and recognizing the interest of permit applicants to move forward with their plans,

Now, therefore be it resolved that the Planning and Permit Center afford to applicants for permits affected by regulations found noncompliant by the GMHB FDOs and not amended within the remand period the option either (1) defer all permit processing of these applications until the uncertainty is resolved by the County's pending court appeals, or (2) agree to processing of the permit applications pursuant to previous applicable code provisions, subject to the applicant signing a waiver of any right to bring a claim for damages against the County as a result of processing the applications under such earlier regulations. This Resolution shall take effect immediately and shall apply to all applications currently pending in the Planning and Permit Center.”

Giving applicants the option to proceed at their own risk is commonly done in invalidity situations and shows no bad faith on the part of the County.

We agree with FOSC that adopting interim regulations to bring itself into compliance would not have mooted the County's court appeal. Island County has done that on a regular basis.

We intended that our original remand (3) included repeal of implementing zoning regulations for the RMI designations.

The County remains in noncompliance on Remand Issues (3), (4) and (5), and continuing invalidity on Remand Issue (5).

As to FOSC's request for additional invalidity for the RMI designations and zoning, FOSC has not made a sufficient showing of substantial interference with the Goals of the Act. That would be very difficult since all four areas designated RMI are already developed.

As to Remand Issue (4), we note that the County did attempt to get the cities and County together to work on changes to the Framework Plan, but Anacortes refused to participate. We urge both the

County and Anacortes to focus on finding solutions.

As to FOOSC's sanction request on Remand Issues (3), (4) and (5), we too, are disheartened that the County has not taken interim action to bring itself into compliance while awaiting a court decision.

We will allow the County 90 more days to adopt interim measures to comply with the remands on these issues. If the County does not make a serious effort to comply within that extension of time, we will reconsider FOOSC's request for a recommendation of sanctions.

Remand Issue (2) – Review of the Challenged RFS Designations

(2) Review the challenged RFS designations and eliminate all those areas which do not comply with the interpretation of .070(5)(d) included in this FDO. If compliance is not achieved within 90 days, we will consider Petitioners' request for invalidity.

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In its statement of actions taken, the County reported that it had reviewed and reaffirmed its RFS designations as evidenced by Ordinance #18375, adopted August 21, 2001.

FOOSC acknowledged that the County had taken official action on this remand issue but that action only reaffirmed previous action and made no changes to be consistent with GMA. In addition to a finding of continuing noncompliance, FOOSC requested new findings of invalidity on all RFS designations except Conway and the NW Quadrant of Bow Hill. FOOSC also requested that, if the County does not adopt RFS designations that facially comply with the Act within 30 days, we make a sanctions recommendation to the Governor.

FOOSC supported these requests with many arguments, some of which were:

1. The County did no independent research on this remand issue, but relied on additional information provided by the RFS landowners.
2. RFS designations and zoning do not comply with either RCW 36.70A.070(5)(d)(i) or .070(5)(d)(iii). RFS designations must meet all criteria of (d)(i) or all criteria of (d)(iii) in order to comply with the GMA.
3. According to the County's own findings, RFS designations primarily serve the traveling public, rather than support the needs of the local rural population. Therefore, no RFS businesses meet the criterion on (d)(i) to principally serve existing and projected rural population.
4. RFS designation criteria and implementing zoning are not in compliance with (d)(iii) because of failure to meet requirements of (5)(c)(ii) and (iii).
5. .070(5)(c)(ii) requires development standards to assure visual compatibility with surrounding rural areas, thus requiring the pattern of land use established in RFS designations under .070(5)

- (d)(ii) to have open space, natural landscape, and vegetation predominate over the build environment, so that visual landscapes can remain rural. None of the designated RFS are planned to meet that requirement.
6. RFS also does not comply with the (d)(ii) requirement that adjacent (d)(ii) businesses must be isolated.
 7. RFS designations fail to comply under (d)(i): (1) where there was no more intensive commercial build environment in the designated area on July 1, 1990; or (2) when such RFS areas are not predominately delineated by such built environment features; or (3) where too much land undeveloped in 1990 is included in the designated area.
 8. The FDO stated that to comply with the restrictions found in (d), and particularly (d)(v), the area included within the logical outer boundary (LOB) must have manmade structures in place (built) on July 1, 1990.
 9. The County is currently processing three additional RFS requests against County staffs' advice.
 10. All that are not compliant should be found invalid because the intense pressure to develop substantially interferes with Goals 1, 2, 5, and 10 of the Act.

The County responded in part at pp. 7, 8, 9 and 11 of its response brief:

“FOOSC acknowledges that a C/I designation is appropriate for many of the properties designated RFS, but complains that these properties should be given a C/I designation other than RFS...

...RCW 36.70A.070(5)(d) does not create or define RFS, RB or any other particular set of C/I standards and regulations. This section describes, in subsections (i), (ii), and (iii), three types of more intensive rural development that may be allowed, but nothing in the statute suggests, let alone requires, that each of these types be segregated into a separate designation. While Skagit County chose to establish detailed separate designations, and obviously looked to subsection (d) for guidance on the more intensive uses it could allow, GMA did not require, and the County did not decide, that each designation would be limited to one statutory type of use.

Thus, it is Skagit County, not GMA, that has defined the standards and regulations for each C/I designation and determined which designation was appropriate for which LAMIRD. This is exactly the role assigned to the County government by GMA. As this Board recognized in the FDO (at p. 10), the 1997 Legislature strongly reiterated that local county officials have ‘broad discretion’ in how they plan. RCW 36.70A.3201. It might be that FOOSC’s preferred C/I designations for some or all of the properties the County designated RFS would be within the discretion of local planning officials. However, FOOSC is not the planning authority for Skagit County. The County’s planning decisions – not FOOSC’s preferences – are presumed valid unless FOOSC shows they are clearly erroneous. RCW 36.70A.320(1)-(3)...

...the plain language of the statute makes clear that LAMIRDS under either RCW 36.70A(5)(d)(i) or (iii) can contain a single lot or multiple lots. There is no LAMIRD category in GMA limited to a ‘single lot.’ FOOSC’s invention of a ‘single lot LAMIRD’ is internally contradictory. The ‘A’ in LAMIRD as defined in the introductory text to RCW 36.70A.070(5)(d) [‘Limited area of more intensive rural development’ – (emphasis added)] means ‘area.’ Moreover, the statute makes clear that all of these areas, including those discussed in RCW 36.70A.070(5)(d)(iii), can contain multiple lots. That subsection expressly

allows ‘intensification of development on lots...’ (Id., emphasis added) The Legislature used the plural; it did not limit the subsection to development on ‘an isolated lot’ as FOSC asserts. This Board likewise recognized that LAMIRDs under (d)(iii) are bounded by ‘lots,’ not by a ‘single lot.’ (See FDO at p. 13) Indeed, the Board expressly rejected FOSC’s argument that RCW 36.70A.070(5)(d)(iii) does not permit designation of an area of more than a single lot...

...Therefore under RCW 36.70A.070(5)(d)(i), (iv) and (v), a LAMIRD can include parcels that did not have C/I uses in existence on July 1, 1990, if the area is defined by ‘manmade’ structures in place on that date. Both prior to the 2000 Plan adoption, and in the hearings on remand, the County has exhaustively documented the existence of ‘built environment’ as defined in the FDO at all four of the RFS designations (Exhibit 0158, pp. 10-23; Exhibit 364, Attachment A, pp. 33-35; Exhibit 591, pp. 1-4; Exhibit 618, Appendix 1 thereto, Findings 31-18, pp. 13-15; Appendix 2 thereto, Findings 2-4) Since the area of a LAMIRD under RCW 36.70A.070(5)(d)(i) is defined by the built environment, not merely the uses, existing in 1990, there is no merit to FOSC’s claim that only the precise parcels containing C/I uses in 1990, and not adjoining parcels included in a logical outer boundary, can be included in the designation. Nor is there anything in the statute mandating that the area defined according to RCW 36.70A.070(5)(d)(i) and (iv) must include more than one lot.”

The County further contended:

1. The record reflects that the County took a close look at all RFS designations to ensure that they met the requirements of (5)(d) as interpreted by the Board in the FDO. That was all the FDO required it to do.
2. Also, in the FDO, the Board stated that “built environment” includes manmade improvements above or below the ground.
3. The County has repeatedly demonstrated in the record that the RFS designations are supported under both (d)(i) and (iii).
4. FOSC first brought up incompatibility with (c)(ii) and (c)(iii) in its reply brief so that argument should not even be considered. However, if one looks at the County DRs one will see that rural character is protected by the size and use limitations dictated by County ordinance.
5. The County is not going to use RFS for new designations.

Board Discussion on Non-site Specific RFS Arguments

We see nothing wrong with the County’s approach of asking the affected landowners to provide additional information to ensure that their RFS designations complied with the interpretation of .070(5) (d) included in the FDO. Nothing in the Act requires that the County do its own independent research on this remand issue. The record shows that the County did review that information as required by the FDO.

We will not reiterate here the analysis of the meaning of 36.70A.070(5)(d) at pp. 8-16 of the February 6, 2001 FDO for this case. We reference and incorporate that discussion as part of this decision.

As to FOOSC's contention that the County must pick one subsection of (5)(d) and all RFSs must strictly comply with its specific criteria, we are convinced by the County that no such rigid interpretation of (5)(d) is required by the Act. Many of the other arguments posed by FOOSC read finer distinctions and requirements into (5)(d) than we believe the Legislature intended in its adoption of (5)(d) or we intended in the FDO interpretation. Examples of that will be discussed under the sections on challenges to specific RFS designations below.

We take official note of, and are saddened by the County's decision to process three new requests for RFS designations despite County staff's recommendation not to. We remind the County that LAMIRD provisions were added to GMA to allow the County to acknowledge pre-existing development, not as a prospective and ongoing rural development tool. The County must not add new LAMIRD designations six years after that opportunity was provided through addition of (5)(d).

We will be focusing on two key questions as we review separately each of the challenged RFS designations:

1. Was there "built environment" in July 1990?
2. Is the logical outer boundary properly defined as predominantly delineated by the built environment?

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Alger RFS – South East Quadrant of Alger Interchange

Ordinance #17938 finding stated:

"Alger: the 4 parcels located in the southeast quadrant of the interchange totaling approximately 5 acres, including the parcel containing an existing gas station/mini-mart, the adjacent parcel to the east on which there is a permitted but currently unbuilt commercial sales operation, and 2 approximately .5 acre parcels to the south, which have been legally filled and graded for commercial development, all four of which parcels are served or prepared to be served by water, sewer and power, and are bounded by elements of the built or natural environment which create logical boundaries to any future commercial sprawl. (Exhibit No. 0364, p. 34)"

After review upon remand, Finding 37 of Ordinance #17938 stated:

"The SE Quadrant of the Alger interchange (Attachment J, Map 3), also known as the 'Buggia' property was addressed in detail in the findings for Ordinance 17938. Those findings support continued designation of the site as RFS, since the site improvements for a commercial log home sales business existed on the site on July 1, 1990, and there are logical physical boundaries to the north, east, south and west to constrain further commercial development."

FOOSC claimed that the Alger RFS did not comply because:

1. The log home business did not actually begin operation on the site until October, 1990;

2. This operation, that consisted essentially of a log sorting yard, was not a commercial operation on July 1, 1990, so does not justify a RFS designation;
3. There was inadequate, more intensive commercial built environment on the site on July 1, 1990 based on an aerial photo taken in 1991;
4. Even if the log operation qualified, that development was only found on one parcel in 1990 and cannot justify a RFS designation that includes four parcels, since the Act requires areas designated under (d)(i) be minimized and contained.

The County responded:

1. Ex. 588, p. 60, in the record shows a commercial operation constructing, assembling and selling manufactured homes was established in the spring of 1990, prior to the July 1 cutoff.
2. FOOSC's claim that the designation must be confined to the one parcel where development existed in 1990 is not supported by the Act.
3. These four lots (two of which are extremely small) are bounded by elements of the built or natural environment which create logical outer boundaries that preclude any further commercial sprawl.

Board Discussion

The record does show that there was built environment on July 1, 1990. We reject FOOSC's argument that designation of a LAMIRD must be confined to the only lot on which development existed in 1990. The important test is whether the 5 acres designated have a logical outer boundary that complies with (5)(d). The County's choice of LOB is considered valid and must be upheld unless proved to be noncompliant. FOOSC has not met that burden.

We find the Alger RFS designation to be in compliance with the Act.

Bow Hill Road RFS

North West Quadrant

FOOSC acknowledged on the record that this parcel had commercial development on July 1, 1990. FOOSC's comment letter in the record did not dispute that this property qualified for RFS designation. However, during this compliance hearing process, FOOSC claimed that since it does not qualify under (d) (i) it must be designated some other rural C/I designation rather than RFS.

We agree with the County that it is the County's choice of C/I designation, not FOOSC's preferred C/I designation, that is presumed valid. FOOSC has failed to convince us that designation of the North West Quadrant of the Bow Hill Road interchange was clearly erroneous. **We therefore find the NW**

Quadrant's RFS designation to be in compliance with the Act.

South West Quadrant

The Planning Commission adopted Finding 35 regarding this property owned by the Upper Skagit Tribe (Tribe):

“The SW Quadrant of the Bow Hill Interchange (Attachment J, Map 2), is owned by the Upper Skagit Tribe, has had a trunk sewer line extended to the property since 1977 pursuant to a sewer service agreement for which monthly fees have been paid since that time. This sewer service agreement was acknowledged by the County and the Sewer District in a 1980 interlocal agreement. PUD water has also been extended to the site, but this occurred after July 1, 1990. FOSC in its comment letter acknowledges the presence of this pipe, which is an aspect of the man-made or built environment, but then seeks to argue, unsuccessfully, that it is not significant. The presence of this sewer line is documented, among other places in the record, in a March 23, 2001, letter to the Department from Samish Water District Manager Terry Klimpel (Exhibit 535):

District inspection reports and drawings indicate that in 1977, a four-inch sewer force main was installed to serve that property [Upper Skagit Tribe's property in SW quadrant of I-5/Bow Hill Road interchange]. These documents show the main runs south along the western edge of the WSDOT right-of-way and terminates south of Bow Hill Road on the southwest corner of the I-5 interchange at Bow Hill Road. They also show the main extending across Bow Hill Road to the property. The existence and location of this line were confirmed through personal communication with Gene Welch, the former District Manager.

The District has an obligation, recognized by Skagit County, to serve the property indicated. Please note Section 2; Paragraph a, sentence 3 of the Interlocal Cooperative Agreement between the District and Skagit County, dated February 25, 1980. (bold emphasis added)

This statement by the Samish Water District directly rebuts FOSC's assertion that 'this pipe never was connected to or became a part of the sewer system.' Furthermore, in a March 23, 2001, letter to the Department (Exhibit 536), Upper Skagit Tribe Acting General Manager Doreen Maloney points out that the 1977 Sewer Service Agreement (part of the record for Ordinance No. 17938) between the Bow Hill Land Company (from whom the Upper Skagit Tribe purchased the property) and Water District No. 12 (now Samish Water District) specifically allowed the Bow Hill Land Company to 'construct, install and **connect** a sewer line' to the Water District's main line (bold emphasis added). Along with its letter, the Upper Skagit Tribe submitted several other documents, including inspection reports from 1977, demonstrating the line's installation at that time. This 4-inch force main constitutes an element of the 'built environment' that, according to the Hearings Board, may include above-ground and below-ground improvements made to the property by man. Because of this element of the built environment, the RFS designation is warranted.”

In its comment letter to the County, FOSC claimed that this property was underdeveloped as of July 1, 1990, and contained no water or sewer extension. In response, the County adopted additional findings refuting FOSC's claims.

During the compliance hearing process FOSC continued to seek further information to show that the sewer pipe which borders the property never was extended onto the land designated RFS, thus failing the built environment requirement for man-made features on the designated RFS land. Further, FOSC continued to argue that the boundary was not predominantly delineated by the built environment.

The Tribe responded:

“With regard to the 10-acre parcel on the southwest quadrant of the Bow Hill interchange, the record establishes that a trunk sewer line was extended to the property in 1977 pursuant to a sewer service agreement for which monthly fees have been paid since that time. The sewer service agreement was acknowledged by the County and Sewer District in a 1980 interlocal agreement. The presence of this sewer line is documented in a number of places in the record, including March 23, 2001 and June 19, 2001 letters to the County from the Samish Water District Manager, Terry Klimpel. Exhibit 536, attached hereto as Exhibit F; Exhibit 593, attached hereto as Exhibit G. Indeed, the 1977 sewer service agreement (part of the record for Ordinance No. 17938 between Bow Hill Land Company (from whom the Skagit Tribe purchased the property) and Water District No. 12 (now the Samish Water District)) specifically allowed Bow Hill Land Company to ‘construct, install, and connect a sewer line’ to the water district’s main line. See Exhibits D and E hereto. FOSC contends that the sewer pipe that was in place prior to 1990 was never connected to the sewer system that serves the northwest quadrant. This is not true. Attached hereto as Exhibit H is a letter and drawing from the Samish Water District establishing that this pipe was connected to the sewer main. See also Exhibit G. These documents together confirm that below-ground facilities were in place prior to July 1, 1990, and establish that this quadrant satisfies the Board’s definition of ‘in existence’ set forth in the Final Decision and Order at pages 22-23. The County’s designation of this quadrant as RFS should be affirmed.”

The County further responded that one needs to look at the context of the interchange as a whole with the huge casino and hotel and steep slopes that do provide a proper boundary.

Board Discussion

Given the fact that a trunk sewer line was extended to this property in 1977 pursuant to a sewer service agreement for which monthly fees have been paid ever since, arguing over whether or not the last few feet were connected in 1990, seems to be putting the letter of our interpretation in the FDO ahead of its intent. As long as the sewer line was extended to the property rather than simply sitting next to the property but built to serve an area beyond the property, we will consider it part of the built environment. After reviewing the record developed by the County, FOSC has failed to convince us that the County’s RFS designation of the SW Quadrant was clearly erroneous. **We therefore find the SW Quadrant’s RFS designation is in compliance with the Act.**

South East Quadrant

The staff report on the SE Quadrant stated:

“Bow Hill Road, SE Quadrant: The SE quadrant of the Bow Hill Interchange is immediately across the road from the Casino property owned by the Upper Skagit Tribe. Rural residential or natural resource uses would be inconsistent with the operation of this Casino property. The property is located at this active traffic intersection adjacent to an I-5 interchange and is well-suited to Rural Freeway Service development. Steep slopes to the west and east of the property, as well as a property-owner commitment to place the southern portion of the property in protected open space, create logical boundaries to further commercial development. Further, this property submitted a binding site plan application for commercial uses that was determined by the County to be complete in early January 1998, establishing certain vested commercial development rights for the property. (Proposed finding #23 of the 90-Day Compliance Ordinance incorrectly stated that the binding site plan had been approved). While this completed application was determined complete in 1998, the County is obligated to consider property rights pursuant to RCW 36.70A.020(6). Vested approvals are constitutionally-protected property rights. To remove rural commercial zoning that recognizes these constitutionally-protected property rights would make financing and eventual development of this property difficult, if not impossible and is inconsistent with Goal 6 of the GMA. Given that the property is located at a logical place for Rural Freeway Service, has vested development rights for freeway oriented commercial development, and has logical boundaries limiting expansion, the RFS designation is warranted.”

FOSC challenged this designation for many reasons including:

1. There is a road on only one boundary of this site and no man-made features on the other boundaries, so the LOB is not predominately delineated by the built environment.
2. There was no public water or sewer on the property or adjacent to the property in 1990.
3. The area to the west and south of the designated RFS site is flat and has no built environment features.
4. Since there are no qualifying man-made features and the boundary is not predominantly delineated by the built environment, this area cannot qualify as an existing area under (d)(i).
5. Vested rights cannot qualify this property as an existing area under (d)(i).
6. The Act bases allowed designations on the built environment and not on the potential-to-be-built environment.

The County conceded that this property contained no built environment as of July 1, 1990. However, it contended that if one considered the following, RFS designation seemed warranted: (1) Is located at a very busy highway interchange where a huge casino and hotel are located, (2) Has steep slopes to provide a logical boundary,

(3) Has vested development rights for freeway oriented commercial development.

The Tribe supported and reiterated the arguments made in the staff report above and stressed:

“Pursuant to RCW 36.70A.020(6), the County is obligated to consider property rights in its GMA designations and decisions. Vested approvals are certainly constitutionally protected property rights. See Skagit County Code 14.02.050; Noble Manor Co. v. Pierce County, 133 Wn.2d 269 (1997). The County

also correctly concluded that the removal of a rural commercial zoning designation that recognize these rights would render future financing de elopement of the property difficult, if not impossible, and thus inconsistent with Goal 6 of the GMA. The County concluded that the property was located in a logical place for rural freeway service, has vested development rights for freeway oriented commercial development, and has logical boundaries limiting expansion.” p. 7 Tribe’s October 8, 2001 brief.

Board Discussion

Although an RFS designation may seem logical for the SE Quadrant, in order to qualify as a limited area of more intense rural development (LAMIRD), the property must meet the criteria for a LAMIRD under RCW 36.70A.070(5)(d). There were no man-made structures either on or under the property as of July 1, 1990. Vesting is not a criterion in the LAMIRD analysis.

We find that the RFS designation of the SE Quadrant of the Bow Hill interchange is not in compliance with the Act.

FOSC’s request for a finding of invalidity is denied. If the County does not repeal this RFS designation within 90 days and FOSC can supply a convincing showing of substantial interference, we will reconsider FOSC’s request at that time.

Conway RFS – South East Quadrant of the Conway Interchange

Planning Commission Finding 33 provided:

“The SE Quadrant of the Conway interchange (Attachment J, Map 1) has had a Texaco service station in continuous operation since 1971 – prior to and ON July 1, 1990. Friends of Skagit County (FOSC) acknowledged in its comment letter that ‘on July 1, 1990, there was a gas station on the parcel designated RFS at Conway Road and I-5’ (FOSC letter, p.58). This site does therefore satisfy the requirements under RCW 36.70A.070(5)(d) as further interpreted by the Hearings Board of existing areas or uses that existed on July 1, 1990. The RFS designation is warranted.

FOSC contended that even though the Conway Texaco did exist on July 1, 1990, the property does not qualify as an existing area under (d)(i). Therefore, Conway Texaco must be designated as a Rural Business or other designation that is appropriate for isolated existing uses.

The County responded that FOSC’s argument boiled down to simply preferring a different commercial designation and should be rejected.

Board Discussion

We are not persuaded by FOSC’s “use vs. area” argument. There were existing man-made improvements as of July 1, 1990, and the established boundary meets LOB requirements. It is the County’s chosen designation, not FOSC’s preference, that is presumed valid under the Act.

FOSC has not carried its burden of showing the RB, but not RFS designation, is compliant with the Act. **We find the Conway RFS designation to be in compliance with the Act.**

Cook Road RFS

South East Quadrant

The June 18, 2001 staff report states:

“Cook Road/I-5, SE Quadrant: the record supports the continued finding that man-made infrastructure was built before and ON July 1, 1990. The record and findings for Ordinance No. 17938 note that there was a service station on this property south of Cook Road from the 1960s through the late 1980s. This is demonstrable through Assessor’s records. The gas station building was removed in the late 1980s, but other site improvements including pavement, access roads and culverts that were serving that service station were still existing on the site ON July 1, 1990, as stated in Finding #25 of the proposed 90-Day Compliance Ordinance. FOSC’s suggestion that this was a small clearing used for parking related to rural or natural resource land uses is false. FOSC also states: ‘According to private discussions with the Samish Water District (formerly Whatcom Water District #12) personnel, there was no sewer connection to this property on or before July 1, 1990.’ While this is true, FOSC neglects to mention sewer service agreements between the Water District and the owners of property to the north and south of Cook Road. As stated in a March 20, 2001 letter from Samish Water District manager Terry Klimpel to the Department:

However, please note section 2, paragraph a, sentence 3 of the Interlocal Cooperative Agreement between the District and Skagit County, dated February 25, 1980 [part of the record for Ordinance No. 17938], also accompanying this letter **The District has an obligation, recognized by Skagit County, to serve the properties you indicated.** Please refer to Exhibit ‘C’ of the document, in particular the entries for Pierson & Associates and Regency Investment Corp. (bold emphases added)

The property that contained these man-made improvements in this quadrant was a single parcel on July 1, 1990, since the short plat of this quadrant was not approved until 1991. The roads that define the logical boundaries of this quadrant existed on July 1, 1990. The RFS designation is warranted.

FOSC argued in part:

1. Even though there had been a service station on this property earlier, the Act requires the commercial development to be “in existence” on July 1, 1990. Therefore this property does not qualify.
2. Although a tight line sewer ran along Highway 99 next to the property on July 1, 1990, it should not be considered “built environment” that justifies a LAMIRD designation.
3. A tight sewer line that travels half way across the county to solve environmental sewage problems in an adjacent county, cannot be considered “built environment” that justifies new commercial development after July 1, 1990, at a location where no commercial development

existed on July 1, 1990.

4. An option for future sewer service with Whatcom County Water District is irrelevant in the determination of whether or not a specific lot has more intensive development on July 1, 1990.
5. Even if the previous development qualified as built environment, the man-made features were only on one parcel in the SE Quadrant on July 1, 1990, and could therefore only qualify as an existing use and not an existing area. This would allow a Rural Business designation but not an RFS designation.

The County responded:

1. The presence of existing pavement on the property from a service station that had existed from the 1950s through the 1980s, combined with access roads and culverts and an existing contractual agreement for sewer service constitute sufficient improvements to qualify as a built environment under RCW 36.70A.070(5)(d).
2. GMA does not require “commercial development” to be in existence on July 1, 1990. The key phrase in .070(5)(d)(iv) is “built environment,” not “commercial development.” FOOSC ignores this important distinction, and with it, ignores much of the Board’s analysis of .070(5)(d) in the FDO.
3. Although the gas station that had been there before had been removed, there were still man-made improvements as evidenced in Ex. 530, a letter from the prior owner:

“The gas station building was removed by Chevron in 1987 because of petroleum pollution concerns. The blacktop area continued and the building site was also covered with blacktop. The access roads and culverts were preserved and still are in use today...

... This land is surrounded for hundreds of feet on all sides by a wall of cars, trucks, parked cars and the railroad. The freeway, Cook Road and the railroad area all elevated making the property unsuitable for use other than commercial industrial.”

4. Sewer lines that would serve these properties were within the road rights-of-way on July 1, 1990. There were also contractual commitments to provide sewer service to these specific properties in place before July 1, 1990. That distinguishes this parcel from FOOSC’s generic argument that a cross-county trunk line cannot be considered “built environment” for every parcel it passes by.
5. This property is surrounded by I-5, Cook Road, Old Highway 99, and a drainage ditch previously upheld by the Board.
6. This was all one parcel on July 1, 1990, and only subsequently short platted.

Board Discussion

The record shows that the SE Quadrant of Cook Road did have man-made improvements in place as of

July 1, 1990. Further, with a sewer pipe in the adjacent right-of-way with the connection paid for by the Duffeys as of July 1, 1990, we will consider the sewer pipe as part of the built environment. FOSC has failed to persuade us that the County was clearly erroneous in designating this property RFS. **We find the SE Quadrant RFS designation to be in compliance with the Act.**

North East Quadrant

Many of the arguments we listed in the above section on the SE Quadrant were also made on this quadrant and will not be restated here. The major difference is that there were no man-made improvements except a farmhouse within the challenged property.

The County pointed out that the property is bounded on the west by I-5, on the south by Cook Road, on the east by Old Highway 99, and on the north by the drainage ditch already found to be a compliant LOB boundary. Further, since there was a sewer line in place adjacent to the property by which the property owners had paid to be served before July 1, 1990, this area was comprised of limited, logical boundaries of the built environment justifying it as a LAMIRD.

Intervenor Duffy further contended:

1. FOSC is wrong in stating that the property owners only bought an option, not a contract to construct. They purchased the actual improvement and were entitled to service.
2. Not only was the sewer line existing prior to July 1, 1990, but a contract rezone for the commercial development of the site was executed in 1977, creating the contractual and vested right to develop the property. Further, a short plat was filed and recorded in 1982 for the development of specific commercial activities, vesting the project for the right to develop the specified commercial activities.
3. The “built environment” must mean and include those developments which are vested, not that they must actually be built. Under Washington law being vested is functionally synonymous with being built (right to build = built).
4. The County has already limited the type and scale of uses allowed in RFS and has carefully scrutinized applicants for RFS designation to ensure that development is contained.
5. Nonconforming uses are very difficult to finance.
6. FOSC’s request for invalidity and sanctions are not appropriate since the FDO asked the County to re-evaluate the RFS designations in accordance with the Board’s interpretation of (5) (d) in the FDO. The County has done that.

FOSC replied with the same arguments listed in the previous section. In addition, FOSC stressed that “right to build” ≠ “built environment” for the purpose of designating LAMIRDS

Board Discussion

As we stated previously in this decision, we do not agree with the theory that vested or “right to build” = “built environment” in the context of RCW 36.70A.070(5)(d). Vested projects can be built, but the property cannot be designated as a LAMIRD if it does not meet the criterion of containing built environment as of July 1, 1990. In this case, however, we have determined above that since the sewer pipe was adjacent to the property in the right-of-way with connection paid for by the property owners as of July 1, 1990, we will consider the sewer pipe as part of the built environment. Thus, since the property qualifies for having “built environment” as of July 1, 1990, and has logical outer boundaries, FOSC has failed to show that the County was clearly erroneous in its designation of the NE Quadrant as RFS.

We find the RFS designation of the NE Quadrant to be in compliance with the Act.

Remand Issue (6) – Catch-all

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

This finding of noncompliance was simply a catchall in case we had found the County in noncompliance in the body of the decision but inadvertently overlooked it in the Order section. FOSC has not convinced us that any such omission was made. **We therefore find the County in compliance as to Issue (6).**

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 31st day of January, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

Glossary of Terms

ARR	Association of Rural Residents v. Kitsap County, 141 Wn.2d 185 (2000)
BOCC	Board of County Commissioners
C/I	Commercial/Industrial
CA	Critical Area
CP	Comprehensive Plan
CPP(s)	Countywide Planning Policies
DR(s)	Development Regulations
FDO	Final Decision and Order
FOSC	Friends of Skagit County
GMA (Act)	Growth Management Act
LAMIRD	Limited Areas of More Intensive Rural Development
LOB	Logical Outer Boundary
RFS	Rural Freeway Service
RMI	Rural Marine Industrial
SEPA	State Environmental Policy Act
UGA(s)	Urban Growth Areas

² “At the time the IUGA was first remanded, the GMHB only had the power to find that an IUGA did not comply with the GMA, not to void or invalidate the IUGA. See Laws of 1991, Sp. Sess., ch. 32, § 11. The Legislature amended the statute in 1995, giving the GMHB power to declare development regulations invalid and providing that ‘a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand.’ RCW 36.70A.300(4); See *Skagit Surveyors and Eng’rs., LLC., v. Friends of Skagit County*, 135 Wn.2d 542, 560-62, 958 P.2d 962 (1988). While these amendments give us some guidance in determining legislative intent, they do not directly affect this case.”