

b.) Framework Agreement and 2000 CPP Amendments, and c.) Rural Commercial/Industrial (C/I) acreage.

The County requested that we do one of the following regarding the above issues:

- a.) Stay the CO;
- b.) Reconsider the time deadlines to coincide with those currently applying to the County through the January 18, 2002 Court Order Re: Continuance of Trial Date, entered in that case to give the parties an opportunity for settlement negotiations; or
- c.) Find compliance, since an interim ordinance to maintain “status quo” has been adopted on one of these issues. In response to the January 18, 2002 Court Order, the County adopted Ordinance 17523 on January 28, 2002, which redesignated the Culbertson, Ace Rock and Rozema Boat Works properties from RMI to RB. The parties, including FOOSC, had agreed that Twin Bridge Marine Park could keep its RMI designation through this interim ordinance.

Anacortes supported the County’s request for extension of time. However, as to the City’s request for a finding of compliance, the City stated:

“The City cannot support the County’s request for a finding of compliance based on a limited record and interim, settlement-related regulations. Such a finding is certainly premature and, the City would argue, inappropriate. The interim regulations are unlikely to be GMA compliant as permanent regulations. In any event, post compliance hearing actions taken by the County should be the subject of a new compliance hearing and not addressed through the limited mechanism of a Motion for Reconsideration.”

FOOSC agreed with the County’s request for an extension of time on these issues and pointed out that under the Court schedule all these issues could be resolved by the end of June 2002. FOOSC suggested that we amend the CO by changing 90 days to 148 days and requested that we also change the compliance dates on remand issue 1 and the remainder of issue 2 to the same timeline, so all could be handled at the same motions hearing.

FOOSC further stated that even though the County’s adoption of the interim measures were a serious effort to comply, the County should remain in continued noncompliance and continued invalidity on these issues, and we should not seriously consider the County’s suggestion that we find the County in compliance.

Board Action

In order to establish consistency among the settlement efforts, the trial court order, and the CO, we change allowed timelines in the CO for these issues from 90 days to 150 days, as long as the County does not modify its interim ordinance. In order to more efficiently handle all the remand issues at the same hearing, we also amend the compliance dates on remand issue 1 and the remainder of issue 2 to the same timeline. Having established the remand compliance date of July 1, 2002, we set a telephonic motions hearing for August 7, 2002. The County must supply a statement of action taken to comply by July 8, 2002. All motions must be filed by July 19, 2002, and responses are due July 31, 2002.

2.) Analysis of *Rural Residents v. Kitsap County (ARR)*, 141 Wn.2d 185 4P.3d.115 (2000).

The County asked us to reconsider the analysis of the *ARR* case in the CO, and to clearly indicate whether the RMI regulations lapsed at the end of the remand period. FOOSC also asked us to reconsider the analysis.

On March 13, 2002, we had a telephonic hearing concerning the motions to reconsider our interpretation of *ARR*. During that telephonic hearing, Friends of Skagit County withdrew its motion and supported our interpretation set forth in the January 31, 2002 order. The City of Anacortes' response brief and oral argument supported our interpretation.

The County's contention was that the *ARR* interpretation ignored the phrase "during the period of remand" which was fundamental to the Supreme Court's decision and which continues in the current statutory scheme. The remedy, if any is needed, should be with the Legislature rather than our interpretation, according to Skagit County.

The City of Anacortes contended that by its own language the *ARR* case was limited in applicability. First, as we noted in the January 31, 2002 order, the applicable statute at the time involved a cessation of GMHB authority at the end of a compliance period. Additionally, contended Anacortes, the factual situation of *ARR* involved no GMA development regulations (DRs) or comprehensive plan (CP) policies that had been adopted during the IUGA remand

period. Thus, the applicability to this factual situation where volumes of GMA CP policies and DRs had been adopted by Skagit County, is nonexistent. We agree.

At p. 197 of *ARR* the Supreme Court said:

“Because the IUGA had not been amended within the period of remand, the only land use regulations in effect were the preexisting zoning ordinances and, in the absence of [locally] adopted GMA plans or regulations, *GMA polices* cannot trump existing [locally] adopted land use regulations....” (Italics supplied)

In the original appellate decision at 95 Wn. App. 383 (1999), the Court of Appeals held that while the plat vested during the period of remand, the plat was still not in compliance with the GMA because of statutory GMA policies. In noting that the plaintiffs contention that the remand “voided” the 1993 adopted IUGA was without citation of authority, the Court said:

“Nothing in the statute equates a board’s finding of noncompliance with a determination of invalidity. The 1995 amendments clarified that the order of remand upon a finding of noncompliance, without a determination of invalidity, does not affect the validity of comprehensive plans and development regulations during the period of remand. There is no basis for a conclusion that the hearings boards had the power to invalidate local land use regulations prior to the 1995 amendment. We therefore reject the contention that the order of remand deprived the IUGA of regulatory affect.”

The Court of Appeals holding that GMA IUGA designation was regulatory was rejected by the Supreme Court in its holding that “GMA policies cannot trump existing [locally] adopted land use regulations.” It may well have also been the impetus for the Supreme Court to include the difficult to understand fn.2 at p. 192. There the Supreme Court noted that while the 1995 amendments “give us some guidance in determining legislative intent,” those amendments were not the applicable law for the case in question.

Ultimately, the responsibility of a reviewing body is to determine legislative intent. It is simply incomprehensible that after the 1995 and 1997 amendments, the holding in *ARR* would have the effect contended by Skagit County. In the 1997 amendments, now codified as RCW 36.70A.300(3)(b), the Legislature set forth that a GMHB, in issuing a finding of noncompliance, would remand the matter to the affected government and specify a time not in excess of 180 days, “or such longer period as determined by the Board in cases of unusual

scope or complexity,” within which the local government “shall comply” with the Act. GMHBs were also given the authority to require periodic reports on the progress a jurisdiction was making towards compliance. In .300(4) the Legislature directed that unless there was a determination of invalidity under RCW 36.70A.302, a noncompliance finding and an order of remand would not affect the validity of CPs and DRs. In the invalidity codified section .302, the Legislature set forth detailed requirements in order for GMHB to make a determination of invalidity. That section allows a local government to adopt interim controls and “other measures” to be in effect until the local government adopts a “comprehensive plan and development regulations that *comply with the requirements of this chapter.*” Vesting under the interim control was allowed as long as a GMHB found that the interim measure did not substantially interfere with the fulfillment of the goals of the Act.

Local governments were also given the authority to request clarification, modification, or rescission of the invalidity determination under subsection (6). A hearing is to be held “expeditiously” and a supplemental order filed not later than thirty days after the hearing. Under subsection (7)(a) if the local government enacts an ordinance or resolution amending the invalid parts, “after a compliance hearing” a GMHB shall modify or rescind the determination of invalidity if the changes “will no longer substantially interfere with the fulfillment of the goals of this chapter.” In sub-subsection (b), if a GMHB determines invalidity is no longer applicable, “but does not find that the plan or regulation is *in compliance* with all of the requirements of this chapter, the board, in its order, *may require periodic reports* to the board on the progress the jurisdiction is making towards compliance.”

These sections, most clearly set forth the legislative intent that jurisdiction continues until such time as a local government achieves its GMA requirement of compliance. In the interim, periodic reports can be made, extensions can be granted, and invalidity determination made and/or rescinded. As we have noted many times in the past, the only impact of a determination of invalidity is prevent vesting to that particular ordinance or plan.

Under the County’s reading of *ARR*, a GMHB would have jurisdiction over a noncompliant ordinance or policy only until the initial remand period has expired. Of course, under the statute a GMHB has no opportunity to determine if a newly adopted ordinance is in compliance until after the remand period has expired. RCW 36.70A.330(1). At that compliance hearing, a

GMHB must reconsider the issue of invalidity under subsection (4) and may schedule additional hearings under subsection (5). Under the County's reading of *ARR* this could only occur if a local government adopted new amendments prior to the end of the remand period. But, the County contended, if a local government took no action to amend its noncompliance ordinance or plan during the remand period, that ordinance or resolution simply expired and a GMHB could no longer make a ruling on the issue of compliance.

During the telephonic hearing on March 13, 2002, the County did acknowledge that a prior determination of invalidity would carry beyond the period of remand until a Board determined that substantial interference no longer existed. The County was unable to explain how a determination of invalidity could continue beyond the remand period if the ordinance or plan to which it attached had expired or disappeared by the expiration of the remand period. The interpretation advocated by the County of *ARR* simply leads to absurd results and has no basis for determining legislative intent.

The following hypothetical also demonstrates the fallacy of the County's reading of *ARR*. Assume an initial DR was adopted by the County, properly appealed and found noncompliant. The record however, did not contain sufficient evidence to impose a determination of invalidity. The GMHB however, was concerned about the impact of the new DR and thus remanded the noncompliance finding to the County to be cured within 48 hours. By that action, the GMHB, under the County's reading of *ARR*, could effectively destroy the newly adopted DR without ever making even a determination of invalidity, which would merely prevent vesting to the DR.

Contrary to the original GMA statutory scheme that equated the "period of remand" with GMHB jurisdiction, the current continuing GMHB jurisdictional grant over noncompliant actions negates an *ARR* interpretation that extinguishes a GMA action at the end of the initial "period of remand" if the local government takes no action to cure the noncompliance.

We reaffirm our previous holding as to the effect of the *ARR* decision under these facts for the reasons set forth herein and set forth in the original order of January 31, 2002. The RMI regulations did not lapse at the end of the remand period.

3.) Reference to New RFS Designations

The County asked us to delete the paragraph beginning on p. 16, line 17, relating to “County’s decision to process three new requests for RFS designations despite County staff’s recommendation not to do so.” The County based this request on the argument that the record reflects that the County had already said it was not going to process those requests.

FOSC responded that this request should be denied since:

“The record shows that the County did decide in Ordinance No. 18375 to process three new requests for RFS designations despite the County staff’s recommendation not to do so. The fact that the County later adopted Ordinance No. 18387 (Ex. 629) and terminated processing of the three new requests does not make the Board’s statement in the subject paragraph inaccurate. Ordinance No. 18387 explicitly suggests that the property owners may resubmit these proposed RFS amendments to the County in the future. Ex. 629 (attached to Co. Mot.) at 2. This makes it even more important that the Board retain the language in the subject paragraph that the LAMIRD provisions were added to the GMA to acknowledge pre-existing development and “not as a prospective and ongoing rural development tool.” CO at 16.

Board Action

We agree with FOSC and deny the County’s motion

4.) Correction and Additions to Record

The County requested that we add Exhibits 629 and 627 to the CO at p. 2 line 21.

Board Action

We add Exhibits 627 and 629 to the CO at p. 2, line 21.

The County further requested that we add to the record the following documents to be considered in conjunction with its motion:

(Proposed) Exhibit No. 727

Order Re: Continuance of Trial Date, dated 1/18/02, in Skagit County Cause No. 01-2-00424-0.

(Proposed) Exhibit No. 728

Ordinance No. R20020037, dated January 28, 2002, adopted pursuant to the Order Re:
Continuance of Trial Date.

Both FOSC and Anacortes supported these additions to the record.

Board Action

We add Exhibits 627 and 629 to the CO at p. 2, line 21. We also grant the County's motion to add Exhibits 727 and 728 to the record.

FOSC Requests in its Motion

1.) Findings of Fact and conclusions of law

FOSC requested that we support the County with findings of fact and conclusions of law where appropriate.

Board Action

Since we made no new findings of invalidity in this CO, no findings of fact or conclusions of law are necessary.

2.) RFS Designations

FOSC stated that it was “disappointed that the Board has failed to adequately address the RFS designations in general.” However, it only provided argument on one RFS: the SW Quadrant of the Bow Hill Interchange. FOSC reargued whether the sewer line was ever actually extended onto the subject property and whether this constituted built environment. FOSC then provided a new argument that, if we find that this property is an existing use, the Bow Hill Land Company obtained a vested right with the sewer district for residences only and therefore should not be allowed to develop commercially.

Upper Skagit Indian Tribe responded:

“Intervenor, Upper Skagit Indian Tribe (“Tribe”), urges the Board to deny that portion of the motion for reconsideration filed by Friends of Skagit County (“FOSC”)

contending that the Board “failed to adequately address the RFS designations.” FOSC offers only a new argument in support of its motion, based solely upon a misinterpretation of the factual record, and FOSC’s motion fails to fall within the narrow grounds for a reconsideration motion set forth in WAC 242-02-832(2). FOSC also fails to meet its burden of proof to justify overturning the actions of the County or the prior decisions of this Board.”

The Tribe supported its contention with many points including:

- a.) The record before the Board established that a sewer trunk line was extended to the property in 1977, pursuant to a sewer service agreement for which monthly fees have been paid since that time.
- b.) In the CO the Board concluded that 1.) the sewer line was extended to the property and was part of the built environment in 1990; 2.) FOSC had failed to convince it that the County’s RFS designation was clearly erroneous; and 3.) the SW Quadrant RFS designation was in compliance with the Act.
- c.) FOSC’s entirely new argument does not fall within the narrow grounds identified in WAC 242-02-832(2) for a motion for reconsideration and should be denied on that basis alone.
- d.) Even if the new argument is considered, FOSC has misinterpreted the document it relied on. The Whatcom County Water Sewer District document was simply an allocation of space on the sewerline and not a use determination.
- e.) In the September 2, 1994 Assignment of Service Agreement, the Bow Hill Land Company assigned to the Tribe its rights, title and interest in and to the sewer service agreement with the Water District. By this assignment agreement the Tribe was assigned the right to 12,580 gallons per day of sewer use for “commercially zoned real property”.

The County supported the Tribe, contending that the CO was correct and that FOSC had not met the grounds for reconsideration in WAC 242-02-832.

Board Action

FOSC has failed to convince us that, given this specific record, the CO was incorrect. The motion is denied.

Pursuant to WAC 242-02-832(4), this decision constitutes a final decision and order for purposes of judicial review.

So ORDERED this 27th day of March, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member