

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

TOWN OF FRIDAY HARBOR, FRED R. KLEIN,)	
JOHN M. CAMPBELL, LYNN BAHRYCH, et al.,)	No. 99-2-0010c
)	
Petitioners,)	ORDER ON
)	RECISION OF
)	INVALIDITY
v.)	AND COMPLIANCE/
)	INVALIDITY
SAN JUAN COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
JOE SYMONS, FRIENDS OF THE SAN JUANS, and)	
KAREN J. KEY SPECK, et al.,)	
)	
Intervenors.)	
<hr/>		

On July 21, 1999, in our Final Decision and Order (FDO) we concluded that San Juan County had not achieved compliance for a limited number of items in adoption of its otherwise excellent comprehensive plan (CP), development regulation (DR, UDC) and Shoreline Master Program amendments (SMP). We also issued four findings of invalidity relating to:

- (1) Three areas surrounding the Friday Harbor UGA;
- (2) Rural densities throughout the County with a minimum lot size less than five acres;
- (3) Resource lot size less than a minimum 10 acres for agriculture and 20 acres for forest; and,
- (4) Minimum lot sizes of less than 5 acres adjoining resource lands.

Item (4) was modified slightly and clarified by our Order on Reconsideration dated August 25, 1999.

The County was originally given the full 180 days to achieve compliance. On February 7, 2000, we received a motion from San Juan County requesting a 180-day extension. The motion was accompanied by a progress report and a time line projection for completion. Finding that sufficient reasons under RCW 36.70A.300(3)(b) existed, we extended the remand timeframe an additional 180 days by order dated February 17, 2000.

On July 3, 2000, we received another motion from San Juan County requesting a 60-day extension to October 16, 2000, for completion of the remand work. We entered an order to that effect on July 18, 2000.

On October 2, 2000, the County adopted Ordinances #11-2000, #12-2000, and #13-2000 which amended the CP, DRs, official maps, SMP, and the Eastsound subarea plan. These actions will be referred to collectively as Ordinance #11-2000 or the 2000 amendments.

The County's October 2, 2000, adoptions generated a flurry of activity. On October 2, 2000, Petitioner Bahrych filed a motion requesting an expedited compliance hearing. We noted that under RCW 36.70A.330(1) we were without authority to set a compliance hearing until the time set for complying had expired, absent a request for an earlier hearing made by a city or county subject to a determination of invalidity. We noted that once the October 16, 2000, remand period had expired, we would fix a time for a compliance hearing.

On October 16, 2000, the County filed a "motion to rescind findings of invalidity" and a "motion to find compliance" based on the 2000 amendments. On October 17, 2000, we set a hearing date of November 14, 2000. We required briefing from those parties opposing the County's position by October 27, 2000, and responses by the County and its supporters by November 9, 2000.

The County recognized that as to rescission of invalidity it had the burden of proof under RCW 36.70A.320(4) to demonstrate that the "ordinances it enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter....." San Juan County suggested that the full compliance hearing be held at a later date and the November 14, 2000, hearing be limited to the rescission of invalidity motion involving a "facial review of the County's actions to determine if they are a valid, good faith attempt to

comply.” *Friends of Skagit County v. Skagit County* 95-2-0065 (7-14-97). Howls of protest from petitioners ensued immediately.

On October 20, 2000, we held a telephone conference with the parties and potential parties to discuss the County’s request to limit the hearing and the petitioners’ request to expand the hearing. During that conference all parties agreed that the appropriate scope of the November 14, 2000, hearing would involve the motion for rescision and issues of rural density compliance and potential new invalidity based on the 2000 amendments. A supplemental notice of hearing was issued October 26, 2000, that stated that the November 14, 2000, issues would be “limited to the County’s motion for rescision of invalidity, rural densities (including guest houses), compliance and/or new requests for invalidity as to rural densities.” We also issued an order on October 26, 2000, granting intervention to Dorothy Austin Mudd and Eagle Lake Development Limited Partnership (Eagle Lake) and directing that Maile Johnson would be thereafter deemed a participant. During the phone conference the County stated that it would not be able to complete the index for the record prior to October 25 or 26, 2000.

During all of this activity the clock continued to tick on the October 27, 2000, deadline for filing briefs by petitioners, Intervenor Mudd and participant Johnson (hereinafter referred to as Challengers). The County had filed its brief in support of rescision of invalidity on October 16, 2000, with its motion.

After receiving what were claimed to be 139 pages of briefing and 354 pages of unnumbered exhibits from Challengers, the County filed yet another motion on October 31, 2000, to “revise the issues for consideration at the November 14, 2000, hearing.” We received written responses from other parties and held a second telephonic hearing on November 6, 2000. Noting that the stack of materials submitted by the County was relatively equal to the stack submitted by Challengers, we denied the motion by order dated October 7, 2000. We also noted that the County’s concern about the lack of numbering of exhibits had much to do with its inability to file the record index until October 26, 2000. We declined to strike any exhibits at that time. Because some of the Challengers had failed to serve their briefs on the County by the deadline, we allowed the County and Eagle Lake to submit response briefs by 9:00 a.m. November 13, 2000, the day before the hearing. Eagle Lake filed its brief on November 9, 2000, the same date as the County filed its reply brief concerning rescision of invalidity. On November 13, 2000, the County

filed its brief in support of compliance on rural densities, including guesthouses.

As a result of the County's separate motion to strike certain exhibits and portions of Challengers' briefing, an avalanche of paperwork from all parties cascaded into our office, often reaching crescendo proportions. We deeply appreciate the County's submission on the day of the hearing summarizing its objections that remained after all parties had an opportunity to review the final index and the complete record. Hereinafter our ruling concerning the still disputed aspects of the record and supplemental evidence.

(1) Bahrych declaration October 27, 2000: The declaration is admitted except as to paragraphs 6, 7, 8, 12 and 15. Exhibit 29 to the Bahrych brief will not be admitted for the November 14, 2000, hearing but will be admitted for the January 17, 2001, hearing.

(2) Symons declaration November 9, 2000: The declaration will be admitted except for paragraphs 1, 2 and 3. Paragraphs 4 and 5 will not be admitted for the November 14, 2000, hearing but will be admitted for the January 17, 2001, hearing. Exhibits 16, 19 and 20 attached to the Symons brief and the Symons declaration dated November 12, 2000, will not be admitted for the November 14, 2000, hearing but will be admitted for the January 17, 2001, hearing.

(3) Johnson declaration October 26, 2000: Paragraph 1 is not admitted. Paragraphs 3, 4 and 5 and the November 12, 2000, Johnson declaration will not be admitted for the November 14, 2000, hearing but will be admitted for the January 17, 2001 hearing. The Johnson declaration of November 13, 2000, will not be admitted. The attachment to the Johnson second motion to supplement the record will not be admitted for the November 14, 2000, hearing but will be admitted for the January 17, 2001, hearing.

In reviewing the preceding pages of procedural history for the November 14, 2000, hearing and in deciding the scope of the hearing and the scope of this written decision, we cannot over-emphasize the difficulties presented by the 45-day limitation found in RCW 36.70A.330(2) not only on us but, more significantly, upon the parties. Here we had to balance the County's request to deal only with the recision of invalidity with the very reasonable request of the Challengers to

review the entire County action and perhaps impose new or different invalidity determinations resulting from the County's actions during the remand period. The provisions of the 2000 amendments extended beyond the four County actions to remove invalidity and included, at least arguably, merely a shift in emphasis by the County without addressing the fundamental reasons for the original invalidity. The scope of the response to the noncompliance and invalidity in this case makes it very difficult to fairly determine the issues piecemeal. There are serious questions about whether the County has achieved compliance, and whether new invalidity ought to be found, on a number of issues, but we are simply not able to address those issues until the January 17, 2001, hearing. The decision to wait results from both the speed under which this order must be issued as well as the lack of completeness by all sides on some of the reserved issues. This is not a criticism to any of the parties because the time constraints they labored under were probably even more significant than the one under which we are laboring.

It seems incongruous for the legislature to specify in RCW 36.70A.302(6) that a county or city subject to a determination of invalidity in a FDO may file a motion requesting "the Board clarify, modify or rescind the order" that then requires us to schedule a hearing "expeditiously" and issue a supplemental order not later than 30 days after the date of the hearing. While we might interpret that section to supercede RCW 36.70A.330(2), the .302(6) provision is more in the nature of a motion for reconsideration after issuance of the FDO. Section .330(2) deals with a motion filed after a response to the determination of invalidity has been concluded. An expeditious hearing and a 30-day order issuance would have been better for all parties, and for us, in this particular case.

We turn to the issues decided in this order. RCW 36.70A.320(4) states that San Juan County has the burden of showing that the action it took in response to the determination of invalidity "will no longer substantially interfere with the fulfillment of the goals of this chapter...." Since the enactment of Laws 1997, c. 429. A local government is no longer required to demonstrate *compliance* with the Growth Management Act (GMA, Act) before invalidity is rescinded. For all other issues the Challengers bear the burden of demonstrating noncompliance, and substantial interference with the goals of the Act, under the clearly erroneous standard. RCW 36.70A.320 (2). At p. 5 of the County's brief in support of rescision, it makes the statement that a local government must first sustain its burden of removing substantial interference before the

ordinance or CP amendment is entitled to the presumption of validity under RCW 36.70A.320 (1). While this may be true, we will apply the presumption of validity to the ordinances adopted by the County on October 2, 2000, before we address the County's motion to rescind invalidity.

As the County noted, because of the extreme time restrictions imposed by the 45-day limit for issuing an order, we have often reviewed new legislative actions only facially in order to determine if the County's action to remove invalidity constitutes a good-faith effort. However, the GMA does not prohibit us from addressing the issues of compliance and potential new invalidity determinations when circumstances and the record indicate that such action is called for. RCW 36.70A.330(1). Nonetheless, we fully acknowledge that in spite of all the best efforts by all of the parties in this case, and because of the severe time limits that restricted the kind of thorough review and analysis of all the issues that we typically engage in, we will only address the County's request for rescission, the redesignation of resource lands, and a limited review of the guesthouse issue. All other issues that were presented at the November 14, 2000, hearing will be dealt with after the January 17, 2001, hearing. The parties may, but are not required to, submit supplemental briefing and exhibits on the issues already considered but postponed, as well as submitting new briefing and new exhibits relating the County actions that were not part of the original November 14, 2000, hearing.

Superficially the four actions that the County took relating to invalidity would appear to remove the substantial interference determinations of the FDO. The County did adopt a minimum 5-acre density in the areas surrounding Friday Harbor, adopted a minimum 5-acre density throughout the rural area, adopted a minimum 10-acre density for agricultural resource land (ARL), and a 20-acre minimum density for forest resource land (FRL), and adopted a minimum 5-acre lot size surrounding resource lands except in limited circumstances involving Lopez Village and Eastsound, where a 50-foot buffer was adopted. Had the County stopped at that point, we may well have found that the County had sustained its burden of showing that the actions "in response to the FDO" removed substantial interference.

However, the County took additional action to allow rural residential clusters under UDC 6.21, exempted tenant-in-common properties under UDC 3.2.4e, and redesignated approximately 1,000 acres of resource lands to either a lower density ARL from FRL or a 5-acre rural designation

from ARL. The County conceded that in adopting the redesignations it did not use the process provided for in its DR at UDC 9.3. Rather the County claimed that it had authority to circumvent the adopted redesignation process because it was in response to the FDO under RCW 36.70A.130 (2)(b).

The County's reliance on the .130(2)(b) provision "to resolve an appeal of a comprehensive plan filed with a Growth Management Hearings Board or with the court" is misplaced. The resource land redesignations were not part of the noncompliance and/or invalidity provisions of the FDO. In fact, at p. 9 of the FDO, we specifically held that resource land designations were not part of the issues presented in this case. We find that as to the approximate 1,000 acres of redesignated resource lands, the County has not sustained its burden of showing that its actions no longer substantially interfere with Goal 8 of the Act.

Even if we were to find that the County's process in adopting the redesignations was allowable and that Challengers had the burden of proving noncompliance and substantial interference as to the redesignation properties, we would reach the same conclusion. In a staff report of September 21, 2000, less than two weeks before adoption of the ordinances, the staff recommended against virtually all of the redesignations, finding that "...none of the parcels seem to have erroneously designated resource lands based on comprehensive plan criteria for resource value." The County by-passed its previously adopted process, provided virtually no public participation opportunities, and made the redesignations without any supporting evidence in the record. The County further adopted a new policy to review all resource lands designations over the next three years. It is contrary to the GMA to redesignate some 3% of the County's total resource lands piecemeal through a remand process that was not required by the FDO to address any resource land designation issues.

While we have some serious questions about the residential clustering provisions of the UDC and the tenant-in-common exception, we do not have time, within the very limited window for issuing this order, to thoroughly review those provisions and determine whether noncompliance and/or invalidity is appropriate.

In addition to what San Juan County did in response to the finding of noncompliance and

invalidity, we are concerned about what the County did not do during the extensive remand period with regard to the guesthouse issue. Although it disputed whether the allowance of a guesthouse with every single family residence (SFR) doubled density, as noted at p. 13 of the FDO, the County:

“...Nonetheless acknowledged it had nothing more than anecdotal guestimates as to what was in existence at the current time, what the projected need, if any, for additional guesthouses was and no analysis at all of potential costs for additional guesthouse public facilities and services needs.

Because the allowance of guesthouses is so intertwined with the density issues noted above, which are noncompliant and in most cases invalid, we find that the CP and UDC provisions allowing new guesthouses do not comply with Act...

If the County wishes to allow guesthouses as an accessory dwelling unit for each SFR it must first do an analysis which includes existing conditions, a reasonable projection of future guesthouse additions and the need for them as well as the potential additional cost of public services and facilities needed for this new growth. The County must also ensure that the additional guesthouse densities are considered and consistent with the basic densities to be established during the remand. SJC must particularly analyze the impact of its guesthouses on its shorelines, R/Ls, and critical areas.”

Because of the “intertwined” nature of the findings of invalidity on the density issues we found it unnecessary to address invalidity as to guesthouses in the FDO.

At the direction of the Board of County Commissioners (BOCC), staff compiled its analysis of the guesthouse issue in response to the FDO (4-14-00 staff report). Staff prepared an analysis of “county assessor data” which was admittedly incomplete. Staff then prepared an analysis of the impact of current guesthouses “based on these simplifying assumptions” and concluded that the limited number of guesthouse found in its report “represents an approximately 12% greater occupancy than represented by the density that would be permitted by zoning.” Staff further concluded that its analysis and estimates indicated that guesthouses had an affect on density in the County, and on demand for public facilities and services. Staff recommended that additional data be developed.

The planning commission (PC) held a public hearing on the issue and adopted a number of

findings. In Finding #13 the PC found that “guesthouses have the potential to dramatically affect the population and associated negative environmental impacts.” In Finding #15 the PC determined that “detached guesthouses have greater negative environmental impacts than attached guesthouse” and in Finding #17 determined that “the conclusions developed by the County [staff] for the use of guesthouses are based substantially on conjecture.” The PC concluded that detached guesthouses functioned much as a main residence, had the same impacts as a principal residence and thus should be treated as a “separate dwelling unit” for purposes of density analysis. A letter from the Office of Community Development, dated September 13, 2000, concluded that a “reexamination” of the County’s policy of allowing one guesthouse for each SFR was necessary. A similar recommendation was made by the Prosecuting Attorney in a letter in May 2000 to the BOCC.

In spite of these recommendations and the specific finding of staff under its admittedly incomplete analysis that at least a 12% additional density from guesthouses was found, the BOCC declined to adopt any policies or regulations regarding the impact of allowable guesthouse densities on its rural and/or resource lands. The only action the County did take was to adopt a finding that the continued construction and use of guesthouses would have a “20% - 30%” favorable effect on affordable housing uses.

We find that the County’s current policies and regulations regarding guesthouses continue to fail to comply with the Act. In addition the UDC provisions which authorize construction of new guesthouses in the rural and/or resource designations of San Juan County substantially interfere with Goals 1, 2, 8, 10, 12, and 14. While we have serious questions about the impact of both long-term and short-term rental of guesthouses in rural and/or resource lands, we will address that issue at the January 17, 2001 hearing.

Challengers have sustained their burden of showing the allowance of new construction of guesthouses within designated rural and/or resource lands substantially interferes with the goals of Act.

ORDER

Provisions of the 2000 Ordinances that redesignate resource lands and provisions of the UDC that allow new guesthouse construction in rural or resource areas are determined invalid. In order to comply with the Act the County must:

1. Redesignate resource land only after complying with previously adopted county processes; and,
2. Within 180 days, adequately analyze the effects of new guesthouse construction in rural and resource areas.

Findings of Fact and Conclusions of Law pursuant to RCW 36.70A.302(1)(b) 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 30th day of November, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge
Board Member

Nan A. Henriksen
Board Member

Findings of Fact
Appendix I

1. The County adopted a series of ordinances on October 2, 2000, which concluded its remand work resulting from the July 21, 1999, FDO.
2. The County adopted minimum densities of 1 du/5 acres in the areas surrounding Friday Harbor and throughout the rural areas, designated 1 du/10 acres for ARL and 1 du/20 acres for FRL and 1 du/5 acres for areas surrounding RLs.
3. The County also redesignated approximately 1,000 acres of resource lands. The redesignations were not in response to the FDO.
4. The County did not use its adopted UDC process in making the RL redesignations.
5. The County has not sustained its burden of removing substantial interference as to the resource land redesignations. It has sustained its burden as to the remaining determinations of invalidity in the FDO.
6. Challengers have sustained their burden of showing noncompliance and substantial interference with Goal 8 of the Act for the RL redesignations.
7. The County staff analysis of the impact of guesthouses was incomplete and inadequate.
8. The PC recommended treating detached guesthouses as a separate residence.
9. Even though the incomplete staff analysis found a 12% impact on density, the BOCC took no action to revise densities in either rural or RL designated areas, continuing to allow new guesthouse construction.
10. Challengers have sustained their burden of showing noncompliance and substantial interference with Goals, 1, 2, 8, 10, 12, and 14 in the allowance of new guesthouse construction in rural and resource areas.

Conclusions of Law

Appendix I

1. Redesignation of approximately 1,000 acres of resource land remains and/or is now determined to be invalid.
2. The allowance of new guesthouse construction in rural and resource lands is determined to be invalid.