

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

FRIENDS OF SKAGIT COUNTY and)	
		GERALD STEEL)
		No. 01-2-0002)
		(FOSC #26))
		Petitioners,)
) FINAL)
) DECISION)
v.)	AND ORDER)
)	
SKAGIT COUNTY,)	
)	
)	Respondent,)
))
and)	
)	
CLARENCE JONES, et al.,)	
)	
Intervenors)	
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Synopsis of the Order

The majority in this case find that Petitioners have failed to meet their burden of demonstrating clear error on the part of the County in adopting Ordinance #18057. We find that the actions regarding redesignation of the properties at issue were a continuation of the process begun in 1997 and were limited to the previously-declared County intent to review property owner's requests at that time for examination of mapping errors and inadvertent misapplication of Comprehensive Plan (CP) criteria. Petitioners' request for a declaration of invalidity is denied. A dissent from the majority opinion can be found at page nine.

Introduction

On May 30, 2001, a hearing on the merits of this case was held in the Skagit County Courthouse. Present for the Western Washington Growth Management Hearings Board (WWGMHB, Board) were: Les Eldridge, Nan Henriksen, and William H. Nielsen. John Moffat represented Skagit County and County Planner Guy McNally was also present. Gerald Steele represented himself and Friends of Skagit County

(FOSC), Marianne Manville-Ailles of Skagit Surveyors represented Intervenor Clarence Jones, and C. Thomas Moser appeared for Intervenors Howard and Cheryl Rogers. Proposed Exhibits 022 through 026 were admitted to the index of the record. We took official notice of proposed Exhibits 102, 103, and 104.

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

Pursuant to RCW 36.70A.320(1), Ordinance #18057 is presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the action taken by Skagit County is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the action by [Skagit County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” 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).

Contentions

Petitioners FOOSC, et al., contended that the County had failed to comply with RCW 36.70A.130 because it had adopted amendments to its CP and DRs more than once in a given year. Petitioners further charged that the adoption of Ordinance #18057 was not accompanied by public participation opportunities which complied with the Growth Management Act (Act). Petitioners also alleged that the County had failed to comply with the requirements of Section .070 of the Act (rural lands), despite our admonition to do so found in Case #99-2-0016, *FOOSC v. Skagit County, W. M. and Joanne Lennox, et al., Intervenors*. (Final Decision Order 9-7-99). (*FOOSC 99-16*).

FOOSC raised the specter of ongoing and never-ending redesignations stretched out over long periods of time without public participation. This would ensue, they contended, if we should find the County’s actions compliant. Petitioners maintained that Ordinance #16559 was the implementing ordinance for the 1997 CP, which authorized map corrections, and when it was repealed in November 1999, the County was left without a legal basis for continuing to implement the 1997 version of the CP. Instead, Petitioners asserted that the Year 2000 CP requirements and their implementing DRs were the only criteria left for the County to carry out redesignations. Petitioners contended that because the legal foundation for the 1997 CP requirements had been removed, the requirements for public participation and consistency with the Year

2000-amended CP were then in place.

Petitioners also argued that the designation of large blocks of property such as Birdsvie, in areas where subarea planning had not yet been completed, was an improper sequence prohibited by the GMA. Petitioners noted that the Peek property was not properly identified and so no opportunity for public comment on it was ever afforded. They asserted that the Heilman property was the subject of a remand which required public participation under Section .130(2)(b).

County and Intervenors responded that the adoption of Ordinance #18057 was a continuation of the CP amendment process for the year 1997 and did not count against the once-a-year requirement for Year 2000. County and Intervenors maintained that no additional public participation was necessary because the Board of County Commissioners (BOCC) (not WWGMHB) had remanded the properties which were the subject of Ordinance #18057 to the Planning Commission (PC) for correction under the limited criteria set forth in Ordinances #16550 and #16559 (mapping errors and inadvertent misapplication of CP criteria) and that no additional public-participation was required. Finally, the County contended that it had not applied the requirements of Section .070(5)(d) because the subject properties were not limited areas of more intensive rural development (LAMIRDs), but merely one of a set of varieties of rural densities, in the range of one unit per 2.5 acres, under .070(5)(b) rather than .070(5)(d). Redesignation, the County argued, was from rural reserve to rural intermediate and met the criteria of the CP and the Act.

The County noted our previous finding that rural intermediate zoning relates to Section .070(5)(b) (variety of rural densities). The County claimed that Ordinance #16550, Paragraph 1.26, remained in place, and that we had previously found the limiting criteria in that section to be compliant. *FOSC 99-16*. The County claimed that the property owners relied upon the County's promise that any request presented before May 31, 1997, would be considered in the next year's CP amendments. Those amendments were postponed when the County entered into a settlement agreement with FOSC in which they both agreed to suspend the 1998 "first-year" amendment action until after the uniform development code (UDC) had been adopted. This factor, the County argued, was the primary one in the delay in adoption of the redesignations which the County had promised its residents it would consider. Meanwhile, in its Year 2000 amendments to the CP and the UDC adoption, it tightened the criteria significantly. The County stressed that the very limited number of properties which fell under the 1997 promise, precluded any massive redesignations which did not comply with the now-adopted 2000 amendments. These few pre-2000 redesignations were limited to the original 1997 complaints and were never expanded, nor could they be, claimed the County.

In its remand, the BOCC called upon the PC to use the proper criteria. The BOCC pointed out the PC's previous redesignation error in using improper criteria. This, the County argued, was why no additional public participation was required. In Ordinance #17294, the County noted, BOCC findings of fact addressed the cumulative effect of the continued 1997 amendments and the Year 2000 amendments. Intervenors Jones and Rogers joined in the County's argument.

Conclusion

We find that the County was not clearly erroneous in its adoption of amendments to its CP in Ordinance #18057. The record is clear that the properties addressed in Ordinance #18057 were all subject to the amendment request remanded to the PC by the BOCC in Ordinance #17294 (including the Heilman 16-acre matter). The record further shows that Ordinance #18057 did not redesignate any properties not identified in Resolution #16853 as part of the 1997 CP amendment request. The PC scheduled a public meeting to deliberate on the remanded properties and provided notice to the public. We find that the County's action was a continuation of its promise to its citizens (which we found compliant in *FOSC 99-16*) and which was delayed by factors including the settlement agreement between FOSC and the County, #004468. Section 2.4.3 of that agreement states, in part, that when the County adopted a complete UDC and all CP amendments necessary to comply with the requirements of the GMA and the County-wide planning policies, then "the County and FOSC agree to complete any hearings board proceeding on the 1997 CP amendments that are the subject of Case #99-2-0016, *FOSC v. Skagit County, W. M. and Joanne Lennox, et al., Intervenors*, and to obtain a final decision and order from the hearings board in that case".

We find that Ordinance #16550 was in effect and controlled the County's action in the continuation of its process on the 1997 amendments made necessary by mapping error or inadvertent misapplication of CP criteria. Ordinance #16550's adoption language shows the clear intent of the County that it was the controlling DRs regarding the 1997 amendment process at issue.

In our FDO on Issue 1 and portions of Issue 5 for *FOSC 99-16* we noted the County's declaration that the process of error correction subsequent to the adoption of the CP was a one-time approach made necessary by the magnitude of the effects of CP adoption in a short time frame. We further noted the County's acknowledgement that future redesignation amendments would include application of all requirements of RCW 36.70A and CP 2-5. Petitioners have failed to persuade us that the actions in Ordinance #18057 were anything more than the County's allowance of individual property owners submitting evidence of technical errors or misapplication of CP criteria and subsequent review and action on those submissions.

Nor have Petitioners demonstrated clear error on the part of the County in not applying Section .070(5)(d)

(LAMIRDS) in its redesignation decisions in Ordinance #18057. We reiterate our holding in *FOSC 99-16* that “the rural intermediate categories as applied here simply recognize the existing parcel size and concentration in the study areas and constitutes compliance within the dictates of Section .070(5)(b) which calls for a variety of rural densities”.

We deny the request of Petitioners that Ordinance #18057 as it applies to the Heilman, Foss, and Nelson redesignations be declared invalid.

The majority in this case find the adoption of Ordinance #18057 in compliance with the Act.

Findings of Fact pursuant to RCW 36.70A.270(6) are incorporated herein as Appendix I.

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 13th day of June, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

Nan A. Henriksen
Board Member

APPENDIX I
Findings of Fact Pursuant to RCW 36.70A.270(6)

1. Adoption of Ordinance #18057 was a continuation of the CP amendment process for the year 1997.
2. Properties addressed in the Ordinance were limited to those which had undergone mapping errors or inadvertent misapplication of the CP criteria.
3. The remand from the BOCC to the PC carried with it no requirement for additional public participation.
4. The County correctly applied the requirements of Section .070(5)(b).
5. Ordinance #16550 was adopted by the BOCC and in effect at the time Ordinance #18057 was adopted.
6. Ordinance #16550, paragraph 1.26 states, in part, “The County shall review this information (designation-in-error presented by property owners by July 31, 1997) as part of its first annual review of the CP”.
7. Ordinance #18057 states that its purpose was to adopt and incorporate PC findings relating to properties and/or study areas remanded as part of the 1997 CP amendment process.
8. Under both Ordinance #16550 (par. 1.26) and Resolution #16853, the County’s review of the redesignation requests were to be based upon the “application of existing land use designation criteria on property-specific (landowner initiated) and County-identified geographical areas to address ‘technical mapping errors or inadvertent application of designation criteria’.” (Exhibit 85, PC Recorded Motion on 1997 Annual Amendments to the Skagit County CP, p. 1. *FOSC 99-16*)

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Dissenting Opinion

In its desire to “do justice” or prevent “unfairness”, the majority in this case sweeps aside the legal effect of the County’s actions. While that may be a laudable goal for this case, it was the County’s own actions and inactions that caused the problem here. A review of the appropriate ordinances leads to the inescapable conclusion that Skagit County cannot use its 1997 “inadvertent” designation criteria for authorizing these redesignations.

On May 19, 1997, the BOCC adopted Ordinance #16550. That ordinance adopted the 1997 CP to be effective June 1, 1997. As part of the **findings of fact** which the BOCC adopted from the “findings of fact made in the PCs Recorded Motion...” was finding 1.26. That finding is the basis upon which the County now contends authorizes and directs it to use the “inadvertent” criteria. There was no similar provision established in the body of the 1997 CP.

However, contemporaneously with the adoption of the CP the County also adopted, on May 29, 1997, an “interim ordinance to *implement* the comprehensive plan...and establishing a process for review of alleged errors in comprehensive plan designations.” (Emphasis supplied). That “interim” ordinance was #16559, also effective June 1, 1997. By its own terms it was designed to implement the CP and establish a process for review of the alleged errors under the **finding of fact** 1.26 in the CP adopting ordinance #16550.

The County’s multitudinous “interim” ordinances continued thereafter with #17000 adopted May 29, 1998, #17209 adopted November 17, 1998, #17442 adopted May 17, 1999 and #17646 adopted November 15, 1999. It is that final “interim” ordinance that dictates the result in this case and establishes the legal requirement that the County use the 2000 amended CP criteria for these individual redesignations.

Implementing Ordinance #16559 contained a specific section (#11) entitled “Errors in Comprehensive Plan Map” that established the requirements for use of the 1997 criteria. That section stated:

“(1) If a property owner, on or before July 31, 1997, presents the County with information indicating that such property did not meet the designation criteria for the land use designation given in the 1997 Comprehensive Plan and that the comprehensive plan designation was, therefore, in error, the County shall consider this alleged designation error as part of the first year of amendments to the comprehensive plan, following the procedures of SCC 14.01.053 and .054. The property owners shall not be required to pay any fees if the sole request is to correct an error in applying the designation criteria. Nothing in this section is intended to change any of the land use designation criteria approved by the County in the comprehensive plan, including, but not limited to those criteria that allow inclusion of some parcels that may not individually meet certain designation criteria if they are contained within a larger area of parcels that do meet the designation criteria, nor is this section intended to preclude corrections in the Comprehensive Plan Maps in future years’ amendments to the Comprehensive Plan.”

This is the provision, as an adopted DR to implement the CP, that authorized the County to use the “inadvertent application” criteria during the first year CP amendment process. As noted by the majority this first year process did not get completed until November 2000. While that is unfortunate, it does not provide the basis for us to ignore what the County did. During each of the “interim” ordinance readoptions noted above no changes to Section 11 of Ordinance #16559 was made until November 15, 1999. On that date Ordinance #17646 amended Ordinance #16559, in part, by repealing Section 11. By the very language contained in Ordinance #17646 the County found that Section 11 was “no longer applicable”.

There is absolutely no language in Ordinance #17646 that indicates the County intended to “resume review of and/or action on” these pending property amendments under the 1997 criteria. Even if such language had been contained in Ordinance #17646 the undeniable legal effect of repeal of Section 11 in that ordinance

renders the County without any authority to decide these redesignation requests under the 1997 criteria.

The County cannot use a **finding of fact** set forth in its CP adopting ordinance as authority for not following its current CP under the facts of this case. The authorizing implementing DR was repealed and at that point consideration of the 1997 criteria ended.

I would find a failure to comply with the Act and remand to the County for use of the current CP and DR amendment provisions for these redesignations.

Dated this 13th day of June, 2001

William H. Nielsen
Board Member