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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

WENAS CITIZENS ASSOCIATION, et al

Petitioner(s),

v.

YAKIMA COUNTY,

Respondent(s).

Case No. 02-1-0008

ORDER ON CLOSURE OF CASE

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I. PROCEDURAL HISTORY

This case has a long history commencing in November 2002 when the Eastern Washington Growth Management Hearings Board (Board) issued its Final Decision and Order (FDO).¹ With this decision, the Board determined Yakima County's decision to de-designate approximately 1,086 acres of agricultural resource land was a violation of the Growth Management Act (GMA), RCW 36.70A. This de-designation was approved by the Board of Yakima County Commissioners with the adoption of Ordinance No. 1-2002, changing the designation of the property from Agricultural Resource to Rural Self-Sufficient and rezoning the property from Agricultural to Valley Rural.² The basis for the Board's ruling stemmed from the GMA's requirement to conserve and maintain agricultural lands of long-term commercial significance as required by RCW 36.70A.020(8), 36.70A.060(1), and

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¹ November 4, 2002 Final Decision and Order.

² With this amendment, the County allowed lots sizes as small as 5 acres in an area previously limited to lots no less than 40 acres. The Ordinance approved Application No. ZON-01-14, a comprehensive plan amendment sought by property owners Jim and Charlotte Caton.

1 36.70A.170. In addition, the Board found Yakima County had failed to comply with its own
2 code provisions related to the designation/de-designation of resource lands.

3 Yakima County and Intervenors, Jim and Charlotte Caton (Caton), appealed the
4 Board's decision to Yakima County Superior Court.³ In October 2003, the Honorable Susan
5 L. Hahn issued a ruling which reversed the Board, finding the Board had applied the wrong
6 standard of proof to the matter and the County's re-designation of the Caton property
7 complied with the GMA.

8 Petitioners appealed the matter to Division III of the Court of Appeals and, in a
9 December 2004 unpublished decision, the Court remanded the matter to the Board.⁴ In its
10 decision, the Court not only concurred with the lower court in that the Board had improperly
11 shifted the burden of proof and applied a heightened scrutiny to the County's actions, but
12 the Board did not properly evaluate the action using the GMA's full definition of agricultural
13 lands. The Court further concluded from the Board's holding that the County did not comply
14 with its own code provisions when taking the challenged act and could not be sustained
15 because the Board made no factual findings regarding any of the code criteria. The Court
16 also noted the Superior Court erred when it concluded Yakima County's action complied
17 with the GMA, as this is a matter within the Board's discretion.

18 In April 2005, the Board issued a Remand Order.⁵ In this Remand Order, the Board
19 conducted an in depth analysis of the law and facts relevant to the proceedings and
20 determined, once again, that Yakima County's decision to de-designate the Caton property
21 violated the GMA's mandated provisions for the conservation of agricultural resource lands.
22 And, as it had also done before, the Board concluded the County failed to satisfy its own
23 code provisions for such a de-designation.
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25 ³ Yakima County Superior Court, Docket 02-2-03956-1.

⁴ *Yakima County v. EWGMHB*, Docket 22525-9, 2004 Wash.App. LEXIS 2942 Dec. 2, 2004 (Unpublished).

26 ⁵ April 20, 2005 Order on Remand.

1 Yakima County and the Catons appealed the Board's decision.⁶ In May 2007, the
2 Honorable Blaine G. Gibson issued an order reversing the Board in favor of Yakima County
3 and reinstating the County's re-designation.

4 Petitioners sought direct review of the Superior Court's decision by the Supreme
5 Court. The Supreme Court denied review and transferred the matter to Division III of the
6 Court of Appeals. On September 11, 2008, the Court issued its decision on the second
7 appeal.⁷ It is this decision which brought the matter before the Board once again.

8 On June 10, 2009, the Board held a telephonic hearing. Present were Joyce Mulliken,
9 Presiding Officer, and Board Members John Roskelley and Raymond Paoella. Present for the
10 Petitioners was David Mann, for the Respondent was Terry Austin, and for the Intervenors
11 was Jamie Carmody. The purpose of this hearing was to allow the parties an opportunity to
12 discuss the proceedings and consider whether any further issues remain for the Board to
13 address. The Board received nominal briefing from Yakima County and Intervenors;⁸
14 Petitioners did not file any written briefing.

14 II. DISCUSSION

15 Although this matter has a lengthy history with the Board, the current starting point
16 for the Board is the September 2008 decision of the Court of Appeals. This decision
17 provides, in relevant part:⁹

18 The Board must find compliance with the Growth Management Act (GMA,
19 chapter 36.70A RCW, unless it determines that the County's action was clearly
20 erroneous. We concluded that the Board erred by reversing the County's
21 decision to redesignate the Caton property from agricultural resource to rural
22 self-sufficient. We also concluded that the County satisfied the criteria set
23 forth in Yakima County Code (YCC) 16B.10.040(1)(e). Accordingly, we
24 reverse the Board and affirm the County's redesignation of the Caton property
25 from agricultural resource to rural self-sufficient, and the rezone from
26 agricultural to valley rural.

...

⁶ Yakima County Superior Court, Docket 05-2-01630-1

⁷ *Yakima County v. EWGMHB*, 146 Wn. App. 679 (2008).

⁸ June 4, 2009 Letter from Yakima County; June 4, 2009 Intervenor's Remand Synopsis.

⁹ 146 Wn. App. 679 (internal citations omitted).

1 The Catons and the County challenge the Board's order on remand based on
2 RCW 34.05.570(3)(d) and (e). Specifically, they contend that the Board's
3 order was an erroneous interpretation and application of the law under
4 subsection (d), and that the order was not supported by substantial evidence
5 under subsection (e).

6 ...
7 The Catons and the County argue that the Board failed to grant deference to
8 the actions of the County. They assert that this case involves a factual
9 dispute and not the interpretation of the GMA. In contrast, WCA argues that
10 the Catons' and the County's position requires that the Board grant unbridled
11 deference to the actions of the County.

12 Here, the Board must find the County's action in compliance unless it
13 determines the action is "clearly erroneous in view of the entire record before
14 the board and in light of the goals and requirements of [the GMA]. The
15 question for this court is whether the Board erred by concluding that the
16 actions of the County were clearly erroneous.

17 *Agricultural Lands of Long-Term Commercial Significance ...*

18 To determine whether the re-designation of the Caton property was clearly
19 erroneous, we must examine whether the property meets the GMA definition
20 of "agricultural land."

21 ...
22 In summary, the Board has failed to show that the County erred by
23 determining that the Caton property was not agricultural land of long-term
24 commercial significance. There is little evidence that the property is
25 commercially productive farmland. The County's re-designation was not
26 clearly erroneous in view of the entire record before the Board and in light of
the goals and requirements of the GMA.

Criteria for Amendment ...

The Board ultimately determined that the re-designation of the Caton property
did not fit any of the re-designation criteria contained in YCC 16B.010.040(1).
We disagree. The County did not err by determining that the re-designation
better implements the comprehensive plan.

...
We conclude that the County was not clearly erroneous in determining that
the rural self-sufficient designation better implements the comprehensive plan.

...
We reverse the Board's order that the County erroneously re-designated the
Caton property and that the County failed to meet the criteria of YCC

1 16B.10.040 for re-designation. We affirm the County's action re-designating
2 the Caton property from agricultural resource to rural self sufficient and
3 rezoning from agricultural to valley rural.

4 The Court of Appeals did not address the issue of whether or not the Board granted
5 proper deference to the County's planning decision, but rather the Court's opinion was
6 based on the evidence presented by the parties. The Court's analysis of the evidence was in
7 direct contrast to that of the Board's conclusion as to the agricultural resource nature of the
8 Caton property and the County's compliance with its own code provisions. Thus, the Board
9 does not read the Court's opinion as one finding the Board erroneously interpreted or mis-
10 applied the GMA's definition of agricultural land. Rather, the Board reads the decision as
11 the Court seeing the evidence in a contrary manner, which supports the County's removal
12 of agricultural resource lands from legally-mandated conservation.

13 However, allowing the Court's holding addressed the issues at hand, as this very
14 same Court has previously stated - whether an amendment complies with the GMA is a
15 matter within the Board's discretion.¹⁰ The Court's decision reverses the Board's April 2005
16 Remand Order and affirms the County's action, concluding that the evidence did not
17 support a finding that the County's actions were clearly erroneous. The Board clearly
18 acknowledges, and does not dispute, that it is bound by decisions of the Court. The Court
19 of Appeals has spoken, holding the Board erred by finding the County's actions clearly
20 erroneous in relationship to the GMA's definition for agricultural lands and consistency with
21 Yakima County GMA-enacted provisions based on evidence presented, and the Board will
22 comply with the Court's holding. Therefore, the Board is compelled to enter a finding of
23 compliance.

24 ¹⁰ See, e.g. this Court's unpublished decision in *Yakima County v. EWGMHB*, Docket 22525-9-III (Dec. 2,
25 2004)(citing to *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793 (1998); *Hillis v. Dept. of Ecology*, 131 Wn.2d 373
26 (1997). See also, *WEAN v. Island County*, 122 Wn. App. 156, 165-66 (2004); *Coffey v. City of Walla Walla*,
145 Wn. App. 435 (2008); *Woods v. Kittitas County*, 162 Wn.2d 597, 614-15 (2007).

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III. ORDER

Based upon review of the briefing and statements of the parties, the Board's April 2005 Remand Order, case law, and the decision of the Court of Appeal's issued on September 11, 2008, the Board ORDERS:

- As directed by the September 11, 2008 decision of the Court of Appeals, Division III, the Board finds and concludes that Yakima County's re-designation of the 1,086 acres of land, as approved by Ordinance No. 01-2002, complies with the Growth Management Act, RCW 36.70A. Therefore, the Board enters a Finding of Compliance.
- The matter of *WENAS Citizens Association, et al v. Yakima County*, Case No. 02-1-0008 is CLOSED.

SO ORDERED this 17th day of June 2009.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD

Joyce Mulliken, Board Member

Ray Paoella, Board Member

CONCURRENCE:

Although I concur with my fellow board members in regards to the closure of the case before the Board, I write separately to voice my concerns over the loss of valuable agricultural resource lands.

In its September 2008 ruling, the Court reviewed the very same evidence before the Board in 2005, however the Court concluded these 1,086 acres of agricultural land were not

1 suitable to be conserved and protected under the GMA. I'm uncomfortable with this
2 resolution of the Court, given both the evidence in the Record and, the Legislature's clear
3 intent set forth in RCW's 36.70A.020(8), 36.70A.060(1) and 36.70A.170, that there is a
4 GMA mandate to conserve and maintain agricultural lands. *See, King County v. CPSGMHB*
5 142 Wn.2d 543 (2000).

6 The Board's Order on Remand issued April 20, 2005, thoroughly documented the
7 evidence in connection with the Canton's lands history, consistency with the GMA's
8 Agricultural Land definition (growing capacity, soils, productivity, proximity to population,
9 and the possibility of more intense uses), and sought to address both courts concerns. The
10 evidence is found in the Findings of Fact and includes: (1) the subject property, consisting
11 of 1086 acres, was originally zoned Exclusive Agriculture in 1982; (2) the subject property
12 was re-designated Agricultural Resource land by Yakima County in its 1997 GMA
13 Comprehensive Plan (Plan 2015); (3) the subject property is and has been taxed at open
14 space, farm and agricultural land pursuant to RCW 84.34.020; (4) the subject property has
15 historically and is currently used for commercial cattle grazing; (5) the subject property has
16 excellent soils for dry land farming, some of which rank in the top 7.4% and top 1.5% for
17 range land production; (6) the subject property has soils that have a high available water
18 capacity, ideal for agricultural production; (7) the subject property as now configured
19 without the steeper slopes is farmable for grass hay and winter wheat; (8) the subject
20 property has been under the U.S.D.A. CRP program for eleven years; (9) the subject
21 property is surrounded by properties designated Agricultural Resource.

22 The Court of Appeals reviewed the facts of the case using the three-prong test, as
23 established by the Supreme Court in the 2007 *Lewis County* decision which delineated the
24 most recent definition for agricultural lands of long-term commercial significance. The Court
25 of Appeals concluded the evidence in the Record supported the Board's determination that
26 the first prong--not characterized by urban growth, was correct, but disagreed with the
Board on the second prong--primarily devoted to agriculture, and third prong--long-term
commercial significance.

1 In regards to the second prong, “primarily devoted”, the Court failed to take into
2 consideration that RCW 36.70A.030(2) includes “animal products” and “livestock”. If the
3 agricultural land is used for grazing, feeding, or the raising of livestock, and is “primarily
4 devoted to” (being used or capable of being used) this activity, then it fulfills the definition
5 of agricultural land. The Canton land was originally (and primarily) devoted to wheat
6 production, but was taken out of production. The land was then enrolled in the U.S.D.A.’s
7 CRP program AND cattle production—possibly a more lucrative use of the property given
8 the price of wheat years ago. Despite the Court’s holdings, the property does not have to
9 be in dry land farming production; located in a water district; have irrigation rights; or
10 adequate precipitation in the area. Not only can the grazing of cattle on agricultural land be
11 considered as “primarily devoted to”, the CRP lands can also be considered a crop due to
12 their purpose and income.

13 In addition, the Court (and the County) failed to do a complete WAC 365-190-050(1)
14 factor analysis, and appears to have only looked at the first three factors in RCW
15 36.70A.030(10); (1) growing capacity; (2) productivity; and (3) soil composition, in its
16 analysis as to whether the land should be classified as agricultural lands of long-term
17 commercial significance. Certainly, these three factors should be incorporated in the
18 analysis, but these factors must be taken **in consideration of the land’s proximity to**
19 **population areas and the more intense uses of the land.** The Court seemed to focus
20 on the first part, but did not take into consideration population areas or uses of the land,
21 which the Record shows favors a designation of agricultural land. If the Court had then
22 used the factors found in WAC 365-190-050(1), a different conclusion may have come
23 about.

24 According to WAC 365-190-040(2)(g), “[A]gricultural designation changes should be
25 based on consistency with one or more of the following criteria: (i) change in circumstances
26 pertaining to the comprehensive plan or public policy; (ii) a change in circumstances beyond
the control of the landowner pertaining to the subject property; (iii) an error in designation;

1 and (iv) new information on natural resource land or critical area status." From the record,
2 none of these factors proved to be viable and the Court failed to address these criteria.

3 The GMA is based in large part on the "conservation and wise use of our lands" and
4 the protection and designation of these lands is fundamental to the Act. (RCW 36.70A.010).
5 Goal (8) of the GMA directs counties and cities to "maintain and enhance" natural resource
6 based-industries, including agricultural industries, and encourages the conservation of
7 productive agricultural lands. [RCW 36.70A.020(8)]. In addition, the GMA requires counties
8 and cities to adopt development regulations to "assure the conservation of
9 agricultural...lands...designated under RCW 36.70A.170. The County failed to follow its own
code and failed to de-designate agricultural land as required by WAC 365-190-050.

10 In this case, I believe the Petitioners provided clear, cogent, and convincing evidence
11 that Yakima County, in the de-designation of the Canton's 1,086 acres of agricultural land,
12 is out of compliance with the GMA. Thus, I question, under this Court's analysis, how any
13 designated agricultural land is safe from the sprawl of residential development in Yakima
14 County.

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16 _____
John Roskelley, Board Member