

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 Kipp Dunlap,

4
5 Petitioner,

Case No. 06-2-0001

6 v.

FINAL DECISION AND ORDER

7
8 City of Nooksack,

9
10 Respondent.

11
12 **I. SYNOPSIS OF DECISION**

13 This case presents a conflict between a farm operating in the City limits and the City's
14 critical areas ordinance. The City of Nooksack has not designated any agricultural lands of
15 long-term commercial significance but has adopted a critical areas ordinance (CAO) to allow
16 existing and on-going agricultural activities within critical areas under certain conditions.
17 Petitioner alleges that the City's CAO improperly regulates his agricultural activities so that
18 he cannot carry out necessary fence construction and repair. The Board acknowledges that
19 this is a difficult situation for both the Petitioner and the City. Although the Petitioner has
20 sought the intervention of the Board to resolve this dispute, under the terms of the Growth
21 Management Act (GMA) this decision can only address the compliance of the challenged
22 ordinance with the GMA, rather than actually resolving the underlying sources of conflict.
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26 Petitioner poses three challenges to the compliance of the CAO with the GMA (Ch. 36.70A
27 RCW): (1) a challenge to the requirements of RCW 36.70A.060(1) and 36.70A.040(3) to
28 conserve and protect agricultural resource lands; (2) a challenge to the public participation
29 and notice provisions of the GMA; and (3) a challenge to the consistency of the City's CAO
30 with the policies of adjacent jurisdictions under RCW 36.70A.100.
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1 As to the first issue, RCW 36.70A.060(1) and 36.70A.040(3)(in pertinent part) apply to
2 designated agricultural resource lands. Petitioner's property within the City is not
3 designated as agricultural resource land. Therefore, those provisions of the statute do not
4 apply to that portion of Petitioner's farm that is located within City limits.
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7 In addition, the City has adopted special provisions to allow agricultural activities within
8 critical area buffers under circumstances designed to protect critical areas. As a result, this
9 decision finds the City of Nooksack's enactment of a critical areas ordinance, with its special
10 provisions for the conservation of existing and on-going agricultural lands with critical areas,
11 does not violate RCW 36.70A.060(1) and 36.70A.040(3).
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14 To the extent that Petitioner seeks relief from enforcement actions taken against him for his
15 fencing activities in designated critical areas, the Board simply has no jurisdiction. See
16 RCW 36.70A.280 and 36.70A.030(7). Permitting decisions are outside the Board's
17 authority.
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20 As to the third issue, we also find that there has been no violation of RCW 36.70A.100 in the
21 coordination between County and City planning. The City has demonstrated ongoing
22 coordination with the County and other cities. Although the CAO of the City and the
23 County's rules on agricultural uses in critical areas are not the same, Petitioner has failed to
24 show that they are incompatible.
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26
27 However, as to the second issue, the Board finds that the City's failure to publish and
28 explicitly and expressly notice its extended comment period for draft amendments to its
29 critical areas ordinance (CAO) does not comply with the Growth Management Act's (GMA)
30 public participation and notice requirements. We find that the final draft significantly revised
31 the draft that had been made available for the November 21, 2005 public hearing. While we
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1 believe that the City acted in good faith, the City failed to comply with RCW 36.70A.035(2)
2 and 36.70A. 020 (11), and we remand on those grounds.

3 4 **II. PROCEDURAL HISTORY**

5 Mr. Dunlap's first Petition for Review was filed in early 2005 and captioned WWGMHB case
6 05-2-0001. Following a pre-hearing conference the matter was ripe for an intercession.
7 Petitioner's farm property at issue lies within both the City of Nooksack and unincorporated
8 Whatcom County. Parties agreed to the selection of a settlement officer, Dennis Dellwo,
9 attorney member of the Eastern Washington Growth Management Hearings Board. An
10 agreement was crafted that closed the case, allowed time for expected enactment of new
11 Whatcom County ordinances and for proposal of a City of Nooksack Critical Areas
12 Ordinance (CAO) that would involve Mr. Dunlap's participation in the development of a new
13 city CAO during the balance of 2005.
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17 A new case was filed when the public review and comment process on proposed
18 adjustments in the draft critical areas ordinance left Mr. Dunlap perplexed, discouraged, and
19 ready to challenge the new ordinance's terms (Ordinance 595).
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22 A prehearing conference was held, a 52-item index from the City submitted, and the parties
23 adhered to the Board's briefing schedule. The matter came before the Board at a Hearing
24 on the Merits of the Petition on June 6, 2006 at 1:30 in the afternoon in Bellingham. Kip and
25 Marilyn Dunlap appeared and presented testimony and argument. Thomas Fryer, attorney
26 for the City of Nooksack and Rollin Harper, planner for Nooksack, appeared on behalf of the
27 City. All three Board members were in attendance. At hearing Petitioner Dunlap proposed
28 for exhibit a March 14, 2003 letter from the City providing an exemption for a single family
29 residence on a shoreline portion of his farm property lying within the city limits of Nooksack
30 (Exhibit 55). It was admitted.
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1 At the request of Board members the City was asked to submit, post-hearing, a copy of its
2 public notice of the December 5, 2005 City Council meeting. The City sent in the "notice", a
3 copy of the Council meeting agenda posted on the front door of City Hall and on the front
4 counter of the office on the day of the meeting; a customary practice of this small city
5 (Exhibit 53). The City also sent a transcript of the Council public hearing tape featuring the
6 relevant portions of the November 21, 2006 City Council Public Hearing on the proposed
7 critical areas ordinance; a meeting where Mr. Dunlap was present. (Exhibit 54). Exhibits 53
8 and 54 are admitted.
9

10
11 Post-hearing comments regarding meeting minutes were sent to the Board's office on June
12 17, 2006 by Mr. Dunlap and marked received and filed by the Board office on the first
13 business day thereafter, June 19, 2006.
14

15 III. ISSUES PRESENTED

- 16
- 17 **1. Does the GMA require the City of Nooksack to provide provisions for ongoing**
18 **and existing agricultural (sic) pursuant to RCW 36.70A.060(1) and 36.70A.040(3)?**
19 **And, if so, does the City of Nooksack's Critical Area Ordinance do so?**
 - 20 **2. Did the City of Nooksack fail to meet the minimum requirements regarding the**
21 **public participation pursuant to RCW 36.70A.020(11) and RCW 36.70A.140 and**
22 **WAC 365-195-600?**
 - 23 **3. Is the City of Nooksack's Critical Area Ordinance required to be consistent with**
24 **other adjacent jurisdictions that share common borders pursuant to RCW**
25 **36.70A.100, WAC 365-195-070(7) and 365-195-520? And, if so, is the City of**
26 **Nooksack's Ordinance consistent with Whatcom County's Ordinance?**

27 IV. BURDEN OF PROOF

28
29 For purposes of board review of the comprehensive plans and development regulations
30 adopted by local government, the GMA establishes three major precepts: a presumption of
31 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
32 decisions of local government.

1 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
2 amendments to them are presumed valid upon adoption:

3
4 Except as provided in subsection (5) of this section, comprehensive plans and
5 development regulations, and amendments thereto, adopted under this chapter are
6 presumed valid upon adoption.

7
8 RCW 36.70A.320(1).

9 The statute further provides that the standard of review is 'clearly erroneous' for challenged
10 governmental enactments:

11 The board shall find compliance unless it determines that the action by the state
12 agency, county, or city is clearly erroneous in view of the entire record before the
13 board and in light of the goals and requirements of this chapter.

14 RCW 36.70A.320(3).

15 In order to find Nooksack's action clearly erroneous, the Board must be "left with the firm
16 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
17 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

18
19 Within the framework of state goals and requirements, the boards must grant deference to
20 local government in how they plan for growth:

21 In recognition of the broad range of discretion that may be exercised by counties and
22 cities in how they plan for growth, consistent with the requirements and goals of this
23 chapter, the legislature intends for the boards to grant deference to the counties and
24 cities in how they plan for growth, consistent with the requirements and goals of this
25 chapter. Local comprehensive plans and development regulations require counties
26 and cities to balance priorities and options for action in full consideration of local
27 circumstances. The legislature finds that while this chapter requires local planning to
28 take place within a framework of state goals and requirements, the ultimate burden
29 and responsibility for planning, harmonizing the planning goals of this chapter, and
30 implementing a county's or city's future rests with that community.

31 RCW 36.70A.3201 (in part).

32 In sum, the burden is on the Petitioner to overcome the presumption of validity and
demonstrate that any action taken by the County is clearly erroneous in light of the goals

1 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
2 Where not clearly erroneous and thus within the framework of state goals and requirements,
3 the planning choices of local government must be granted deference.
4

5 6 **V. DISCUSSION**

7 **1. Exemptions for Agriculture in the City's Critical Areas Ordinance.**

8 **Positions of the Parties**

9 Petitioner argues that RCW 36.70A.060 requires the City to exempt agricultural activities
10 from the requirements of its critical areas ordinance. Petitioner asserts that, to the contrary,
11 the City has fined him for agricultural activities occurring on land zoned for agriculture.
12 Petitioners' Brief on the Merits at 3. Mr. Dunlap points out that the challenged critical areas
13 ordinance does not exempt agricultural activity from regulation and requires a variance in
14 order to do fencing or fence maintenance. Ibid at 4. In this instance, because the City's
15 critical areas ordinance limits and requires modification of agricultural activities, he argues
16 that it fails to comply with RCW 36.70A.060(1) and 36.70A.040(3). Ibid.
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19
20 The City of Nooksack responds that there are no designated agricultural lands of long-term
21 commercial significance within its borders. Respondent's Response to Petitioner's Brief on
22 the Merits at 3. While the Petitioner's property is zoned for agriculture, the City notes it is
23 not designated agricultural resource land. Ibid. Nevertheless, the City has made special
24 provisions for agricultural activities in its critical areas ordinance (CAO). It allows
25 agricultural activity in conformance with a farm plan prepared by the Whatcom
26 Conservation District and it allows non-conforming uses and structures if the use was
27 lawfully permitted prior to the adoption of the CAO. Ibid. The City also notes that most of
28 the fencing activity on this farm property and other Nooksack property the Dunlaps own, for
29 which the Petitioner has been cited and fined, is regulated by the Shorelines Management
30 Act and that the State Shorelines Hearings Board denied Petitioner's request for a
31 variance. Ibid at 4.
32

1 **Board Discussion**

2 Petitioner rests his arguments on this issue upon two provisions of the GMA: RCW
3 36.70A.060(1) and 36.70A.040(3). These provide:

4 The county legislative authority of any county that does not meet either of the sets of
5 criteria established under subsection (1) of this section may adopt a resolution
6 indicating its intention to have subsection (1) of this section apply to the county.
7 Any county or city that is initially required to conform with all of the requirements of
8 this chapter under subsection (1) of this section shall take actions under this chapter
9 as follows...(b) the county and each city located within the county shall designate
10 critical areas, agricultural lands, forest lands, and mineral resource lands and adopt
11 development regulations conserving these designated agricultural lands, forest lands,
12 and critical areas, under RCW 36.70A.170 and 36.70A.060...

13 RCW 36.70A.040(3) (in pertinent part).

14 Each county that is required or chooses to plan under RCW 36.70A.040, and each
15 city within such county, shall adopt development regulations on or before September
16 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands
17 designated under RCW 36.70A.170. Regulations adopted under this subsection may
18 not prohibit uses legally existing on any parcel prior to their adoption and shall remain
19 in effect until the county or city adopts development regulations pursuant to RCW
20 36.70A.040. Such regulations shall assure that the use of lands adjacent to
21 agricultural, forest, or mineral resource lands shall not interfere with the continued
22 use, in the accustomed manner and in accordance with best management practices,
23 of these designated lands for the production of food, agricultural products, or timber,
24 or for the extraction of minerals. Counties and cities shall require that all plats, short
25 plats, development permits, and building permits issued for development activities
26 on, or within five hundred feet of, lands designated as agricultural lands, forest lands,
27 or mineral resource lands contain a notice that the subject property is within or near
28 designated agricultural lands, forest lands, or mineral resource lands on which a
29 variety of commercial activities may occur that are not compatible with residential
30 development for certain periods of limited duration. The notice for mineral resource
31 lands shall also inform that an application might be made for mining-related activities,
32 including mining, extraction, washing, crushing, stockpiling, blasting, transporting,
and recycling of minerals.

RCW 36.70A.060(1)

1 Since the City has not designated Petitioner's land as agricultural resource land¹, the
2 provisions of RCW 36.70A.060(1) do not apply to his property within the City boundaries.
3 RCW 36.70A.060(1) applies to *designated* agricultural resource lands.
4

5
6 Nevertheless, the City has created special provisions in its critical areas ordinance for
7 existing agricultural activities. Ordinance 595 (Exhibit 5) – NCC 16.08.080A. Petitioner
8 argues that these must “exempt” existing agricultural activities from regulation.² However,
9 even when the lands in question are designated agricultural lands of long-term agricultural
10 significance, RCW 36.70A.172 imposes upon the City an obligation to develop “policies and
11 development regulations to protect the functions and values of critical areas.” Here, the
12 City's critical areas ordinance creates buffer requirements for fish and wildlife habitat
13 conservation areas but allows “existing and ongoing agricultural activities and operations” to
14 continue as long as they are conducted pursuant to an approved farm plan or where they
15 utilize and incorporate recommended best management practices for those buffers. NCC
16 16.08.080(A). By doing this, the City has chosen a balance to protect the functions and
17 values of critical areas while allowing “existing and ongoing agricultural activities and
18 operations” in critical areas if they conform to specified best management practices.
19
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21
22 Petitioner Dunlap relies primarily upon the Nooksack enforcement citations issued against
23 him and fines levied for his fencing activity within the shoreline and critical areas buffers as
24 a basis for arguing that the City is failing to conserve and protect existing agriculture.
25 Exhibit 10. Not only do these citations pre-date the adoption of the challenged critical areas
26 ordinance, but the Board does not have authority to review specific enforcement actions.
27 The Growth Board has jurisdiction over the language of comprehensive plans, development
28 regulations and other GMA legislative actions. See RCW 36.70A.280(1)(a) and
29

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31 _____
32 ¹ Petitioner did not timely challenge the City's failure to designate his lands as agricultural resource lands.

² At argument, he clarified that this exemption should apply as long as the agricultural activities do not impact the protected critical areas or the impacts were mitigated.

1 6.70A.290(2). Permitting decisions are expressly excluded from this review. RCW
2 36.70A.030(7).

3
4 Even if Petitioner's property in the City had been designated as agricultural land of long-
5 term commercial significance, the special provisions for existing and on-going agriculture in
6 the City's critical areas ordinance are presumptively valid ways of protecting critical areas
7 while allowing existing agricultural activities to continue. Petitioner has failed in his burden of
8 showing the special provisions are clearly erroneous. RCW 36.70A.320(2). To the extent
9 that Mr. Dunlap asks the Board to issue an order requiring his specific agricultural activities
10 be allowed in the fish and wildlife protection buffers, he is seeking an order beyond the
11 jurisdiction of this Growth Management Hearings Board.
12
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14
15 **Conclusion:** Petitioner has failed to sustain his burden of proving that Ordinance 595 is
16 clearly erroneous and fails to comply with the requirements to conserve and protect existing
17 agricultural activity, as found in RCW 36.70A.060(1) and 36.70A.040(3).
18

19 2. GMA Requirements Regarding Public Participation

20 Positions of the Parties

21 Petitioner Dunlap argues that the City of Nooksack failed to meet public participation
22 requirements of RCW 36.70A.020(11), 36.70A.140 and WAC 365-195-600 by failing to
23 provide notice of significant changes to the proposed critical areas ordinance made prior to
24 enactment by the City Council. Petitioners' Brief on the Merits at 5-6. He asserts that the
25 changes to the draft ordinance were not available to the public prior to adoption of the
26 ordinance. Ibid at 6. Further, he urges that there was not actual notice of the final meeting
27 adopting Ordinance 595. Ibid at 6-7. Together, he urges that these fail to comply with the
28 requirement for early and continuous public involvement in the adoption of Ordinance 585.
29 Ibid.
30
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1 The City responds that notice of consideration of Ordinance 595 was provided through
2 publication of the commencement of the 60-day public review and comment period in the
3 Lynden Tribune on September 21, 2005. Affidavit of Rollin Harper, Nooksack City Planner,
4 In Support of Respondent's Reply to Petitioner's Brief on the Merits at 2. This included
5 notice of three public hearings to be held on October 17, November 7 and November 21,
6 2005. Exhibit 16. The City asserts that it held open the November 21st hearing to
7 December 5th for further public comment. Respondent's Response to Petitioner's Brief on
8 the Merits at 6; Exhibit 3 at 2. The City also notes that Petitioner had actual notice of the
9 continuance of the November 21st hearing since he was present for that public hearing. The
10 City further argues that Petitioner could have received a copy of the revised draft had he
11 requested one. Ibid at 6-7.
12
13

14 **Board Discussion**

15 RCW 36.70A.140 sets the requirements for the public participation program required of
16 every city and county subject to the GMA:
17

18 Each county and city that is required or chooses to plan under RCW 36.70A.040 shall
19 establish and broadly disseminate to the public a public participation program
20 identifying procedures providing for early and continuous public participation in the
21 development and amendment of comprehensive land use plans and development
22 regulations implementing such plans. The procedures shall provide for broad
23 dissemination of proposals and alternatives, opportunity for written comments, public
24 meetings after effective notice, provision for open discussion, communication
25 programs, information services, and consideration of and response to public
26 comments. In enacting legislation in response to the board's decision pursuant to
27 RCW 36.70A.300 declaring part or all of a comprehensive plan or development
28 regulation invalid, the county or city shall provide for public participation that is
29 appropriate and effective under the circumstances presented by the board's order.
30 Errors in exact compliance with the established program and procedures shall not
31 render the comprehensive land use plan or development regulations invalid if the
32 spirit of the program and procedures is observed.

RCW 36.70A.140.

1 There is no question here that the City complied with the requirements for public
2 participation in the adoption of the City's critical areas ordinance until changes were made in
3 the November 21, 2005 draft CAO.
4

5 The challenge posed by Petitioner is to the procedure used to review and adopt changes to
6 the revised draft. This challenge more accurately implicates RCW 36.70A.035(2)(a):
7

8 Except as otherwise provided in (b) of this subsection, if the legislative body of a
9 county or city chooses to consider a change to an amendment to a comprehensive
10 plan or development regulation, and the change is proposed after the opportunity for
11 review and comment has passed under the county's or city's procedures, an
12 opportunity for review and comment on the proposed change shall be provided
13 before the local legislative body votes on the proposed change.

14 RCW 36.70A.035(2)(a).

15 The November 21st draft of the critical areas ordinance is found as Exhibit 23. A
16 memorandum from Mr. Harper dated November 21, 2005 discusses the changes made from
17 the earlier draft, explaining that the changes respond to comments from the Washington
18 Department of Fish and Wildlife (WDFW). Exhibit 22. The changes included a new
19 subsection addressing species of local importance; the increase of the maximum standard
20 buffer width to 150 feet; addition of a prohibition against using buffer averaging in highly
21 functioning fish and wildlife habitat; information about what is required in a mitigation plan;
22 clarification on site enhancement; timelines for monitoring proposed mitigation; sections
23 concerning low impact development requirements. Exhibit 22.
24

25
26 Importantly, RCW 36.70A.035(2)(a) requires that the public be given an opportunity to
27 review and comment on a change if the opportunity for comment and change has passed
28 under the City's procedures. The City's notification of public comment period and public
29 hearings provided that the 60-day comment period closed at 5:00 p.m. on November 21,
30 2005. Exhibit 16.
31
32

1 The City urges that the comment period was held open as a result of a Council motion at the
2 November 21st public hearing and refers the Board to the minutes of that meeting. Exhibit
3 3. The minutes state “Councilman Judy made a motion to keep the public hearing open
4 until next meeting and make a final decision at that meeting on December 5th, second
5 Councilman Steiner. Motion carried.” Exhibit 3 at 2. At the hearing on the merits, the City
6 agreed that no copy of the revised draft of the ordinance was made available to the public,
7 although the City asserts that it would have been provided on the next day, if requested.
8

9
10 The Board does not question any party’s good faith and general intentions in this matter.
11 The evidence in the record indicates the City’s good faith in extending the public hearing on
12 the proposed CAO in this case to allow further public input on the revised draft. However,
13 we have to agree with Petitioner that there was insufficient notice that the comment period
14 remained open; and changes to the draft ordinance were not readily available to read and
15 review. Since there was an express comment period closure date set out in writing (Exhibit
16 16), the City had an obligation to provide express notice of the extension of the comment
17 period. Petitioner represents that he had no idea he could still make comments or that he
18 could have access to the revised draft. The motion to “keep the public hearing open” did
19 not explicitly advise the public of its opportunity to have access to and comment on the
20 revised draft. Further publication of the extended hearing and comment period was
21 required to meet the GMA requirements for public participation.
22
23

24
25 **Conclusion:** The City adopted a significantly revised version of its original draft critical
26 areas ordinance without expressly extending the public comment period and providing the
27 draft ordinance and full staff comments or recommendations for public review. Failure to do
28 so was clearly erroneous, even though not done in bad faith, and therefore violates the
29 requirements for significant revisions in RCW 36.70A. 035(2)(a), and RCW 36.70A.020(11),
30 the GMA’s public participation goal.
31
32

1 **3. Consistency Between the City’s Critical Areas Ordinance and the Whatcom**
2 **County Critical Areas Ordinance**

3 **Positions of the Parties**

4 Petitioner Dunlap claims that RCW 36.70A.100 requires counties, and cities within them, to
5 coordinate planning on regional issues. Petitioners’ Brief on the Merits at 7. He argues that
6 the City’s critical areas ordinance is not consistent with the Whatcom County critical areas
7 ordinance or the county-wide planning policies. Ibid at 8. In particular, Mr. Dunlap asserts
8 that the County CAO exempts ongoing agriculture conducted in buffer areas provided it
9 meets listed requirements, while the City allows agriculture to continue but does not exempt
10 it from other conditions or clearly allow agricultural activities to occur in the buffers. Ibid.
11

12
13 The City responds that RCW 36.70A.100 requires the comprehensive plan of the City to be
14 coordinated with the County’s plan, and those of other adjacent jurisdictions, but does not
15 address development regulations such as the critical areas ordinance. Respondent’s
16 Response to Petitioner’s Brief on the Merits at 7. Nooksack maintains that it has worked
17 with the Whatcom County Growth Management Oversight Committee to coordinate updates
18 to both the Whatcom County and cities of Everson and Nooksack comprehensive plans.
19 The City was also involved, through its representative Mr. Harper, in coordinated efforts to
20 review the best available science, consider alternative approaches to address agriculture,
21 and review draft County CAO regulations. Ibid at 8. As a result, the City’s CAO was
22 drafted with input from Whatcom County and the City of Everson. Ibid.
23
24

25
26 **Board Discussion**

27 The provision of the GMA upon which Petitioner relies to argue that the City’s critical areas
28 ordinance must be consistent with the County’s critical areas ordinance is RCW 36.70A.100:

29 The comprehensive plan of each county or city that is adopted pursuant to RCW
30 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans
31 adopted pursuant to RCW 36.70A.040 of other counties or cities with which the
32 county or city has, in part, common borders or related regional issues.

RCW 36.70A.100.

1 Petitioner also cites WAC 365-195-070(7) and 365-195-520. Petitioners' Brief on the Merits
2 at 7. These administrative regulations are part of the "Procedural Criteria for Adopting
3 Comprehensive Plans and Development Regulations" promulgated by the Department of
4 Community, Trade and Economic Development (CTED). These administrative regulations
5 are *guidance* to assist local jurisdictions in meeting their GMA obligations. WAC 365-195-
6 020.
7

8
9 WAC 365-195-070(7) discusses "consistency" as that term is used in the GMA: "In general,
10 the phrase "not incompatible with" conveys the meaning of "consistency" most suited to
11 preserving flexibility for local variations".
12

13 WAC 365-195-520 further elaborates upon "interjurisdictional consistency":
14

15 Adopted county-wide planning policies are designed to ensure that city and county
16 comprehensive plans are consistent. Each local comprehensive plan should
17 demonstrate that such policies have been followed in its development.

18 WAC 365-195-520.
19

20 None of the cited laws and regulations require consistency between *development*
21 *regulations* in adjacent jurisdictions; rather they are all addressed to comprehensive plans.
22 Therefore, Petitioner fails to cite authority for the proposition that the City's critical areas
23 regulations must be consistent with the County's critical areas regulations.³
24

25 Petitioner cites Whatcom County's County-Wide Planning Policies for the proposition that
26 the County "puts a strong emphasis on agriculture because they recognize the importance
27 of agriculture and the role it has in the County." However, even assuming Petitioner has
28 standing to raise a claim of failure to comply with the county-wide planning policies,
29 Petitioner fails to show how the City's critical areas ordinance is incompatible with a strong
30 emphasis on agriculture. The City has created special provisions for ongoing agriculture
31
32

³ This is not to say that such consistency will not naturally arise from consistent comprehensive plan provisions.

1 within its borders, even though there are no designated agricultural resource lands in the
2 City of Nooksack. See NCC 16.08.080(A).

3
4 Whatcom County Code establishes conditions under which agricultural activities are allowed
5 within critical areas:

6 WCC 16.16.290 Conservation program on agriculture lands (CPAL).
7 Ongoing agriculture activities shall be permitted within critical areas and/or their
8 buffers in accordance with the standards of this chapter or pursuant to an approved
9 conservation program established by this section. This program shall be subject to
10 continued monitoring and adaptive management to ensure that it meets the purpose
11 and intent of this chapter.

12 While Petitioner may feel that Whatcom County has made more flexible rules for agricultural
13 activity in buffer zones, he fails to show the City's provisions do not also allow existing and
14 on-going agricultural activity to take place in critical areas under appropriate conditions and
15 with mitigation. The provisions in the County Code are not identical to those in the City
16 CAO, but Petitioner fails to show that they are incompatible with one another.

17
18
19 **Conclusion:** Petitioner has failed to show that the City's critical areas ordinance is
20 inconsistent with the critical areas ordinance of Whatcom County as required by any
21 provision of the GMA. Further, he has failed to establish that the City's critical areas
22 ordinance is inconsistent with the Countywide Planning Policies or that the City failed to
23 consult with the County and other cities in setting the policies of its critical areas ordinance.
24

25 VI. FINDINGS OF FACT

- 26
- 27 1. The City of Nooksack is, a city in Whatcom County, which is located west of the crest
28 of the Cascade Mountains, and is required to plan under the terms of RCW
29 36.70A.040.
 - 30 2. Kip and Marilyn Dunlap are owners of farm property, addressed at 302 West Lincoln
31 Street, that lies in both Nooksack and unincorporated Whatcom County, and are
32 owners of other property within the City of Nooksack.

- 1 3. Kip M. Dunlap participated in the City's 2005 process leading to the adoption of a
2 Nooksack critical areas ordinance (Ordinance 595).
- 3 4. Nooksack adopted the final version of Ordinance 595 describing and regulating critical
4 areas in that City on December 19, 2005. A copy of the draft ordinance was sent to the
5 State Department of Community, Trade and Economic Development in October 2005.
- 6 5. Mr. Dunlap filed a Petition for Review of this ordinance with the Board on January 13,
7 2006, and pursued his case. The petition challenges the adoption of the City's
8 Ordinance 595, a critical areas ordinance.
- 9 6. There are no designated agricultural lands of long-term commercial significance in the
10 City of Nooksack.
- 11 7. Those portions of Petitioner's farm that are located within the City of Nooksack are not
12 designated by the City as agricultural lands of long-term commercial significance but
13 those portions of Petitioner's farm located outside the City are designated by the
14 County as resource lands (by Whatcom County).
- 15 8. Nooksack's critical areas ordinance (CAO) creates special provisions for "existing and
16 on-going agricultural activities and operations" within designated critical areas within
17 the municipality.
- 18 9. The City has chosen a balance to protect the functions and values of critical areas
19 while allowing "existing and ongoing agricultural activities and operations" in critical
20 areas if they conform to specified best management practices.
- 21 10. The City's enforcement actions taken against Petitioner for his fencing activities within
22 critical areas are not subject to this Board's jurisdiction.
- 23 11. Notice of consideration of Ordinance 595 was provided through publication of the
24 commencement of the 60-day public review and comment period in the Lynden
25 Tribune on September 21, 2005.
- 26 12. This notice stated that three public hearings would be held on October 17, November 7
27 and November 21, 2005.
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- 1 13. The City's notice also provided that the 60-day public comment period closed at 5:00
2 p.m. on November 21, 2005.
- 3 14. At the November 21, 2005 public hearing, City staff proposed a revised draft of the
4 critical areas ordinance to respond to comments received from the Washington
5 Department of Fish and Wildlife (WDFW).
6
- 7 15. The changes included a new subsection addressing species of local importance; the
8 increase of the maximum standard buffer width to 150 feet; addition of a prohibition
9 against using buffer averaging in highly functioning fish and wildlife habitat; information
10 about what is required in a mitigation plan; clarification on site enhancement; timelines
11 for monitoring proposed mitigation; sections concerning low impact development
12 requirements.
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- 14 16. At the November 21, 2005 public hearing, Councilman Judy made a motion to "keep
15 the public hearing open until next meeting and make a final decision at that meeting on
16 December 5."
- 17 17. Copies of the revised draft were not made available to the public at the November 21,
18 2005, and no announcement was made concerning their future availability. The City
19 would have provided copies of the revised draft the following day, if such copies had
20 been requested.
21
- 22 18. No announcement was made that the public comment period would be held open until
23 December 5, 2005, although that was the City's intention.
- 24 19. Whatcom County Code establishes conditions under which agricultural activities are
25 allowed within critical areas:
- 26 16.16.290 Conservation program on agriculture lands (CPAL).
27 Ongoing agriculture activities shall be permitted within critical areas and/or their
28 buffers in accordance with the standards of this chapter or pursuant to an approved
29 conservation program established by this section. This program shall be subject to
30 continued monitoring and adaptive management to ensure that it meets the purpose
31 and intent of this chapter.
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2 20. Nooksack's CAO creates buffer requirements for Fish and Wildlife Habitat Critical
3 Areas but also allows "existing and ongoing agricultural activities and operations to
4 continue as long as they are conducted pursuant to an approved farm plan and
5 incorporate best management practices for those buffers. NCC 16.08.080 (A).
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8 **VII. CONCLUSIONS OF LAW**

- 9 A. The Board has jurisdiction over the parties and subject matter of this petition for review.
10 B. The petition was timely filed and the Petitioner, Kip M. Dunlap, has standing to raise
11 the issues put forward in his petition for review.
12 C. Nooksack Ordinance 595 complies with the requirements to conserve and protect
13 existing agricultural activity, found in RCW 36.70A.060(1) and 36.70A.040(3).
14 D. Failure of the City to properly extend the comment period and to provide notice of the
15 opportunity to access a published version of the significantly revised draft of Ordinance
16 595 prior to adoption is clearly erroneous and violates RCW 36.70A.035(2)(a) and
17 RCW 36.70A.020 (11).
18 E. Ordinance 595 complies with the consistency requirements of RCW 36.70A.100.
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21 **VIII. ORDER**

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23 Based on the foregoing, the Board remands the critical areas ordinance, No. 595, (Ch.
24 16.08, Nooksack City Code) to the City for compliance with RCW 36.70A.035(2) and
25 36.70A.020 (11) in the adoption of the revisions of November 21, 2005.
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Item	Date Due
Compliance	September 30, 2006
Compliance Report	October 9, 2006
Any objections to a Finding of Compliance	October 13, 2006
City Response to any Objections	October 19, 2006
Compliance Hearing	October 27, 2006
Projected Date for Compliance Order	November 15, 2006

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1 Pursuant to RCW 36.70A.300 this is a final order of the Board.

2 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
3 of mailing of this Order to file a petition for reconsideration. The original and three
4 copies of a motion for reconsideration, together with any argument in support
5 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
6 original and three copies of the motion for reconsideration directly to the Board, with
7 a copy served on all other parties of record. **Filing means actual receipt of the**
8 **document at the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-
9 330. The filing of a motion for reconsideration is not a prerequisite for filing a petition
10 for judicial review.

11 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
12 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
13 judicial review may be instituted by filing a petition in superior court according to the
14 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
15 Enforcement. The petition for judicial review of this Order shall be filed with the
16 appropriate court and served on the Board, the Office of the Attorney General, and all
17 parties within thirty days after service of the final order, as provided in RCW
18 34.05.542. Service on the Board may be accomplished in person or by mail, but
19 service on the Board means **actual receipt of the document at the Board office** within
20 thirty days after service of the final order. A petition for judicial review may not be
21 served on the Board by fax or by electronic mail.

22 **Service.** This Order was served on you the day it was deposited in the United States
23 mail. RCW 34.05.010(19)

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DONE this 7th day of July 2006.

Holly Gadbow, Board Member

Margery Hite, Board Member

1 Concurring Opinion

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3 The issues raised by Petitioner Dunlap point out the difficulty of owning and managing
4 property lying both within the bounds of a municipality and within the unincorporated portion
5 of a county. This circumstance brought about management challenges for the Petitioner
6 over time and planning challenges for the City as it sought to have healthy development,
7 forward planning, and still conserve traditional resource-based uses for as long as
8 practicable. Having a farm straddle a city and unincorporated county land----one farm
9 having two different land and zoning designations-----led to disappointment with the choices,
10 and with the local process for enacting final terms of a Growth Management Act-compliant
11 critical areas ordinance (CAO).
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15 While this decision determines the City of Nooksack's enactment of Ordinance 595, with its
16 special provisions for conservation of existing agricultural lands with critical areas to be
17 compliant, Nooksack's failure to publish explicit and express notice of its extended comment
18 period for draft amendments to its CAO---and announce where the draft was available for
19 inspection---- does not comply with the GMA's public participation requirements.
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22 Petitioner Dunlap may feel that Whatcom County has made more flexible rules for
23 agricultural activity in critical area buffer zones, but he does not demonstrate the City of
24 Nooksack's provisions fail to allow existing and on-going agricultural activity to take place in
25 critical areas under certain conditions and with mitigation. Understanding and negotiating
26 specific protections that can work on the Dunlap property would go a long way toward
27 engaging best management practices that would work for as long as that in-town property is
28 actively farmed.
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Gayle Rothrock