State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

CONCERNED FRIENDS OF FERRY COUNTY and DAVID ROBINSON, Petitioner, v. FERRY COUNTY, Respondent.	Case No. 04-1-0004 FINAL DECISION AND ORDER

I. PROCEDURAL BACKGROUND

On April 8, 2004, CONCERNED FRIENDS OF FERRY COUNTY and DAVID ROBINSON, by and through their representative, David Robinson, filed a Petition for Review.

On May 6, 2004, the Board held a telephonic Prehearing conference. Present were Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and D.E. "Skip" Chilberg. Present for Petitioner was David Robinson. Present for Respondent was Steve Graham.

On May 7, 2004, the Board issued its Prehearing Order.

On July 22, 2004, the Board received Petitioner's Hearing on the Merits Brief.

On August 17, 2004, the Board received Respondent's Hearing on the Merits Brief.

On August 20, 2004, the Board received Petitioner's Hearing on the Merits Reply Brief.

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On August 26, 2004, the Board held the Hearing on the Merits. Present were Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and D.E. "Skip" Chilberg. Present for Petitioner was David Robinson. Present for Respondent was Steve Graham.

II. STANDARD OF REVIEW

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioner to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act.

The Washington Supreme Court has summarized the standards for Board review of local government actions under Growth Management Act. It was stated:

> The Board is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations. RCW 36.70A.280, .302. The Board "shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the county, or city is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an action "clearly erroneous" the Board must be "left with the firm and definite conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util. Dist. No. 1,* 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

King County v. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 552, 14 P.3d 133, 138 (2000).

The Board will grant deference to counties and cities in how they plan under Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County,* and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and

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goals of the GMA." *Thurston County v. Cooper Point Association,* 108 Wn.App. 429, 444, 31 P.3d 28 (2001).

The Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

III. FINDINGS OF FACT

1. On February 9, 2004, Ferry County adopted Ordinance No. 2004-01, an amendment to the Ferry County Development Regulations for the protection of archaeological and historical areas within the county.

2. Section 8.03 DESIGNATION requires that any costs for any archaeological survey and cost of mitigation and/or protection plan shall be borne by the entity that claims the existence of a site.

3. The County does not have the statutory or constitutional authority to require the State, the Federal Government or the Tribes of Indians to pay for such surveys or costs of mitigation.

4. RCW 27.53.060 declares that it shall be unlawful for any person, firm, corporation or any agency or institution of the state or a political subdivision thereof to knowingly remove, alter, dig into, or excavate by use of any mechanical, hydraulic, or other means, or to damage, deface, or destroy any historic or prehistoric archaeological resource or site, or remove any archaeological object from such site. Such actions shall be a class C felony without having obtained a written permit from the director for such activities.

IV. LEGAL ISSUES, DISCUSSION AND CONCLUSIONS

At the Prehearing conference, the parties agreed that Issues 1, 2, 3, 5, 6, 7, and 8 are issues more appropriately addressed at the compliance stage in EWGMHB Case No. 01-1-0019. The Petitioner asked the Board to eliminate the above referenced issues in the Petition for Review filed on April 8, 2004. The only remaining issue in this matter is issue No. 4, which is addressed below.

Issue 4: Did the County fail to comply with RCW 36.70A.040 and -.120 and interfere substantially with GMA goals (RCW 36.70A.020) by not adopting implementing regulations

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to identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance?

Petitioner's position:

The Petitioners do not object to the main body of the subject ordinance and believe it will significantly advance the protection of the archeological and historic resources except for the objected to provision. The Petitioners' objection is to the provision that requires archaeological surveys and mitigation costs to be born not by the party that may impact the site, but by the entity that claims the site exists. The subject language is as follows:

> Costs for any archaeological survey and cost of mitigation and/or protection plan shall be born by which entity claims the existence of a site. The entity must respond within 30 days of notification and surveys shall be completed not to exceed 12 months. (8.03 of Ordinance #2004-01).

The Petitioners contends that such a provision will not identify and encourage the preservation of historical and archaeological sites. The Petitioners believe that it will discourage the discovery and make its protection impossible. The Colville Tribes' History and Archaeology Department has commented upon the objected to provision. They point out that the County has no authority to obligate a Federal or Tribal entity to a particular course of action. They object to the above language and believe that the proponent and beneficiary of the project should cover the costs of the surveys and protection.

The State of Washington Assistant State Archaeologist, Stephenie Kramer, also objected to the subject paragraph. Ms. Kramer points out that no money has been allocated for such expenses nor would OAHP concur with any protection or mitigation plan that would require OAHP to bear the costs of the plan.

Respondent's position:

The County contends that the burden of protecting our history and archaeological sites should be the burden of the public and not a single land owner. They believe that the County should be allowed to require the State, the Federal Government or Indian tribes to bear this cost. The County believes that the objection of the State, the Tribes and other

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entities does not invalidate the ordinance. Those entities do not have a vote on the County's local ordinance – only the county commissioners do. The County believes that RCW 36.70A is not violated and therefore the ordinance must be found in compliance.

The County believes that the practicalities of an ordinance should be left to the County who knows the subject of enforcement the best. The determination of who is to bear the cost of any endeavor is within the sound discretion of government officials. The County Commissioners are the ones that make similar decisions with respect to the levying of taxes, fees, assessments, and fines. The County further points to Article Eleven, Section eleven of the State Constitution which provides that: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

Discussion:

The Hearings Board must presume the actions of the County are valid. However, this is not without limit. If it is clear to the Board that the actions of the County are clearly erroneous and the Board is left with a firm and definite conviction that a mistake has been committed, the Board must find the actions of the County out of compliance.

Here, the County has taken excellent steps to comply with RCW 30.70A.020(13). That Goal requires the County to identify and encourage the preservation of lands, sites, and structures, which have historical or archaeological significance. The County has, however, made one glaring mistake.

The Board cannot decide whether it would be better or more equitable to require the Federal or State government to bear the burden of preserving these valuable artifacts. The Board must only determine if the County has complied with the requirements of the GMA. Here the County has failed. The Board has taken judicial notice of State and Federal Law and has no difficulty in finding that, without specific authority, the County cannot require the State, Federal Government or a Tribe to pay the costs for the archaeological surveys and costs of mitigation of discovered historic or archaeological sites. This being true, the

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Board finds that the County Ordinance will not encourage the identification and preservation of these sites.

The State Office of Archaeology and Historic Preservation (OAHP) has stated in their testimony that they would not accept a plan if such plan requires the State to bear the costs. No development upon the land would be allowed to proceed if it impacts such site without the OAHP approval. The Colville Confederated Tribes objected to this language as well. Because 4 or 5 of the tribes that make up this Confederation have historic ties to Ferry County and half of their reservation is in Ferry County, it is expected that most of the historic sites be related to these tribes. There is no authority possessed by the County to require the Tribes to pay for such a plan or survey.

The lack of authority of the County to require payment of the costs of such survey or plan causes the effectiveness of the Ordinance to be nonexistent. It would discourage the discovery of the sites due to the potential costs or delays, discourage others from reporting them and making it virtually impossible to comply with the existing state law which requires an approved plan prior to the disturbance of such a site.

While the Board must congratulate the County for the good work on the Ordinance, the provision relating to the bearing of the costs of the survey and mitigation plan ruins its effectiveness and causes it to not be in compliance with the GMA.

Conclusion:

Because the County developed an unrealistic designation of responsibility for the costs of the survey and mitigation plan, the Ferry County Development regulation contained in Ordinance #2004-01 dealing with Historic Archaeological Resources Preservation, Section 8.00, is out of compliance with the Growth Management Act, RCW 36.70A.020(13).

V. ORDER

1. The County is out of compliance regarding issue 4.

Ferry County must take the appropriate legislative action to bring themselves into compliance with this Order by **November 8, 2004**, 60 days from the date issued.

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Pursuant to RCW 36.70A.300(5), this is a Final Order for purposes of appeal. Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this Final Decision and Order.

SO ORDERED this 8th day of September 2004.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
Dennis Dellwo, Board Member

_____
Judy Wall, Board Member

_____
D.E. "Skip" Chilberg, Board Member

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