

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

MERRILL H. ENGLISH AND PROJECT	)	
FOR INFORMED CITIZENS,	)	<b>Case No. 93-1-0002</b>
	)	
Petitioners	)	
	)	<b>FINAL DECISION AND</b>
<b>ORDER</b>		
1000 FRIENDS OF WASHINGTON, a not-for-	)	
profit organization,	)	
Intervenors	)	
	)	
v.	)	
	)	
BOARD OF COUNTY COMMISSIONERS OF	)	
COLUMBIA COUNTY,	)	
	)	
Respondents	)	
_____	)	

**Procedural History of the Case**

On June 11, 1993, Merrill H. English and Project for Informed Citizens filed a petition for review with the Eastern Washington Growth Planning Hearings Board (the Board). The petition was assigned Case No. 93-1-0002. The petition asked 1) that an order be entered finding that Columbia County (the County) was not in compliance with the Growth Management Act (GMA) because the Ordinance did not conserve resource lands and protect critical areas; 2) that the

Ordinance be set aside 3) that the County be required to enact a new ordinance that complies with the Growth Management Act and State Environmental Protection Act (SEPA), and 4) an award be entered granting petitioner's reasonable costs.

On July 23, 1993, 1000 Friends of Washington filed a Motion for Intervenor Status.

On July 28, 1993, a prehearing conference was held at the Board office in Yakima, Washington. Terry Nealey, Columbia County Prosecutor, filed a Dispositive Motion similar to a Motion for Summary Judgment. The motion was subsequently withdrawn on August 16, 1993.

After ascertaining that settlement could not be reached, Judy Wall, the Presiding Officer commenced the Prehearing Conference. At that time, the Board considered 1000 Friends of Washington's Motion for Intervenor Status. After reviewing the County's written response and hearing oral arguments from each party and the applicant, the Board granted Intervenor status limited to the issues and facts presented in the petition, pursuant to WAC 242-02-270. The Board adopted a Motions and Briefing Schedule and set forth legal issues one (1) through nine (9).

Regarding the issue of awarding reasonable costs incurred in prosecuting the petition, the Board determined it lacked authority to grant said relief. (See Prehearing Conference Order dated August 3, 1993.)

On August 20, 1993, a telephone conference hearing was held in the Board office, to determine the Final Witness List and the Final Exhibit List. Present were Presiding Officer Judy Wall, Board members Graham Tollefson and Tom Williams and Board secretary Barbara Hill. Participating by telephone were Petitioner Merrill H. English and Faith Thorn for Project for Informed Citizens; Eleanore Baxendale for 1000 Friends of Washington, Intervenor; Terry Nealey, Columbia County Prosecutor; Jon McFarland and George Touchette, County Commissioners, and Kim Lyonais and Jan Strohbehn of Columbia County Planning Department for Respondent. The Board heard testimony related to the designation of the record and witnesses and adopted the Final Exhibit and Witness List.

On September 10, 1993, Petitioner and Intervenor filed their briefs with the Board.

On September 23, 1993, Alexander W. (Sandy) Mackie filed a Notice of Association with the Columbia County Prosecutor as Counsel for the Respondents.

On September 24, 1993, Pacific Legal Foundation filed a Motion To Participate as Amicus Curiae, pursuant to WAC 242-02-280, and filed an Amicus Curiae brief in support of Columbia County.

On September 24, 1993, Respondent filed its brief with the Board.

On September 30, 1993, Petitioner and Intervenor filed their rebuttals.

On Wednesday, October 6, 1993 beginning at 9:00 a.m., a formal hearing was held at the Dayton and Columbia County Fairgrounds Youth Building.

A) At the commencement of the formal hearing, the Board heard argument on the Motion for Amicus Curiae status. We then granted Pacific Legal Foundation Amicus Curiae status and allowed Intervenor seven (7) days after the hearing in which to reply to said brief.

B) Petitioner filed a request for reconsideration of final designation of exhibit and witnesses, i.e., the August 11, 1993 Department of Fisheries letter re Interim Ordinance failure to protect critical area. The Board denied this request on the basis this letter was not available to the County Commissioners at the time of their decision.

C) Respondent requested the entry of the County Budget and the County Historical Building Activity Record as proposed county exhibits. The Board denied this request.

## **Findings of Fact**

The County opted in as a Growth Management Planning County on September 9, 1991.

Resolution No. 91-19A

The County entered into an Interlocal Agreement with the City of Dayton on April 27, 1992.

The County established a Visioning Committee on May 4, 1992, consisting of city, town and county elected officials to guide the progress of the Growth Management program. The Committee consisted of two representatives from the County, two from the City of Dayton and one from the Town of Starbuck. On May 14, 1992, the committee held their first meeting.

Kim Lyonais, the County Planner, prepared an Environmental Checklist.

Over the next several months, the County met with local interest groups. The County also held public meetings involving the Department of Community Development and held a special wetland presentation.

On October 12, 1992, the County hired John Kleim, consultant, to begin the GMA process. He

drafted a workbook and distributed it on November 28, 1992 to the residents of Columbia County. On December 12, 1992, the County held a Growth Management Informational Workshop.

On February 1, 1993, the Planning Commission held a workshop to review the draft designation of resource lands and critical areas.

On February 20, 1993, the Columbia County Planning Department received a letter from Merrill English protesting both the lack of citizen participation and the County's proposed designation of resource lands and critical areas and the interim development regulations for their conservation and protection.

On March 15, 1993, the Planning Commission held a public hearing on proposed classification and designation of resource lands and interim development regulations for their protection.

Copies of the draft were made available to the public. The Planning Commission voted to send the draft to the County Commissioners.

On April 16, 1993, the County Commissioners received a letter from Project for Informed Citizens protesting the February 1993 draft.

On April 19, 1993, the County held a public hearing on the draft and then deferred action to May 3, 1993, at which time County Ordinance #93-07, Designation of Resource Lands and Critical Areas in Columbia County, was adopted.

## **DISCUSSION OF THE ISSUES**

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### **Issue No. 1**

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### **Are the criteria for designation of agricultural lands adequate under the Growth Management Act?**

RCW 36.70A.050(1) states: "Subject to the definition provided in RCW 36.70A.030, the Department shall adopt guidelines, under Chapter 34.05 RCW, no later than September 1, 1990, to guide the classification of: (a) agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas. The department shall consult with the department of agriculture regarding guidelines for agricultural lands, the department of natural resources regarding forest lands and mineral resource lands, and the department of ecology regarding critical areas." RCW 36.70A.050 (3) provides, "the guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but shall allow for regional differences...."

RCW36.70A.030(2) defines "Agricultural land" as "land primarily devoted to the commercial production of ...grain, hay, straw, turf, seed..., and that has long-term commercial significance for agricultural production." "Long-term commercial significance" includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration of land's proximity to population areas and the possibility of more intense uses of the land. RCW36.70A.030(10).

WAC 365-190-050(1) states the criteria to be used in the designation of agricultural land of long-term significance. "In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service as defined in Agriculture Handbook No. 210.... These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land ...."

WAC 365-190-050(1) provides the general rule for classification of agricultural lands. It meets the tests required for "agricultural land of long-term commercial significance." 36.70A.030(2)

and (10). Consideration is given to the growing capacity, productivity and soil composition of the land as well as its proximity to population areas and the possibility of more intense uses of the land.

The Department of Community Development guidelines shall be minimum guidelines that apply to all jurisdictions in designating agricultural lands. RCW 36.70A.050(3). While Columbia County may incorporate additional criteria in its classification system, WAC 365-190-050(1) remains the standard by which the ordinance is measured. In Exhibit 5, page 24, John M. Kliem's Classification, Designation and Interim Development Regulations for Resource Lands and Critical Areas in Columbia County, he states "the Minimum Guidelines suggest the Department of Agriculture's Soil Conservation Service (SCS) classifications of "prime" and "unique" as the basis for classifying agricultural lands of long-term commercial significance." This statement must be seen in the total context of WAC 365-190-050. SCS records show that thousands of acres of less-than-prime agricultural land is more productive and higher yielding than the land classified as "prime". Exhibit 40.

WAC 365-190-050(2) states that counties and cities should consider using the classification of prime and unique soils as the County has done in their ordinance. It goes on to state, however, that "If a county or city chooses to not use these categories, the rationale for that decision must be included in its next annual report to the department of community development." Because prime

and unique soils are of high quality and productivity they need to be considered in the classification of agricultural lands. Their inclusion alone, however, is not sufficient if other soil classes meet the tests of growing capacity, productivity and soil composition. It is clear that the 8-10% of agricultural land in the county classified as "prime" falls far short of what the minimum guidelines would have designated.

While there is opportunity for the exercise of local judgment and it is obvious that the local community understands its agricultural lands better than anyone else, the conclusions reached must be the product of a valid process. The record must show that the County considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). This record is insufficient to show that these factors were considered. Additionally, the record fails to show how a logical designation was made that includes less than ten per cent of the agricultural land in the County, the prime and unique soils only, and excludes large soil classification groups that are as much or more productive than the designated prime soils.<sup>[1]</sup> A preponderance of the evidence shows that the failure to consider the required factors under GMA resulted in the designation criteria excluding lands that should have been designated.

These are interim designations effective only until the comprehensive plan is adopted. The designation of these resource lands ideally should be a simple, inexpensive process that does not

hinder development of the comprehensive plan. While there are a variety of possible designations, using the County's existing A1 zoning designation might be the simplest one.

**Conclusion No. 1: The Board finds the county's designation of agricultural lands is not in compliance with RCW 36.70A.050, RCW 36.70A.030 and WAC 365-190-050.**

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Issue No. 2

**Are the criteria for designation of forest lands adequate under the Growth Management Act?**

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Petitioner noted that Intervenor would cover this issue (Petitioner brief, page 2). Intervenor's reply brief at page 19 states the Intervenor does not challenge the classification of forest lands of long-term commercial significance and withdraws the issue.

Issue No. 3

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**Are the regulations to conserve forest land and to conserve farmland adequate under the Growth Management Act?**

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The County is required under RCW 36.70A.060 to assure the conservation of both forest and agricultural lands of long-term commercial significance until such time as the comprehensive plan is completed. The second edition of the Random House Dictionary of the English Language defines "conservation" as 1) "the act of conserving, prevention of injury, decay, waste or loss" and 4) "the careful utilization of a natural resource in order to prevent depletion". Thus, conservation prevents the loss or degradation of the resource. Using this definition, we hold "conservation" as used in RCW36.70A.060 is intended to maintain agricultural and forest resource lands.

The Ordinance does not adequately protect these lands, since any designated land can be developed so long as its development does not interfere with the long-term commercial use of other agriculture or forest resource lands. Ordinance 93-07, Section 3, A. Under this ordinance, each individual parcel of natural resource land can be converted to alternative uses, one by one. While the risk of this happening may be low, this does not change the requirement that resource lands be conserved in this interim period. The balancing of various goals under GMA occurs during development of the comprehensive plan. If the County is to rely on other ordinances to protect resource lands, the level of this protection can only be known by referencing the

ordinances upon which there is reliance.

Relying on the "triggering mechanisms" of WAC 197-11-660 (SEPA) and the Columbia County Environmental Ordinance 85-1 fails to assure conservation because they allow development that is incompatible with the conservation of resource lands through their exemptions. A group of 20 residences could be constructed, for instance, under an exemption without reaching a "trigger".

Ordinance 85-1, Part III, Section 2.

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Agricultural or forest land uses, legal under the zoning ordinance, are not changed under the GMA. Only conflicting non-agricultural or non-forest land uses are required to be limited.

**Conclusion No. 3: The Board finds that County Ordinance No. 93-07 to conserve forest land and to conserve farmland is not in compliance with RCW 36.70A.060.**

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Issue No. 4.

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**Are the regulations adequate to protect critical areas?**

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The County's plan for protecting critical areas is practical and adequate with two exceptions.

First, Intervenor argues persuasively that relying on unnamed regulations to enforce the protection of critical areas is inadequate. We concur. It is necessary to add those ordinances by reference which will cover those activities in critical areas of a non-project nature as well as those requiring full County review. Secondly, until such time as Comprehensive Plans are adopted by the County, this interim ordinance is to protect designated critical areas. RCW 36.70A.060. County Ordinance No. 93-07 in Section 3(B) uses "minimize impact" as the standard of protection. This is inadequate. There must be a specific, objective standard for review in the ordinance that will protect with reasonable certainty. The required standard of protection should be to "prevent adverse impacts" or at the very minimum "mitigate adverse impacts". (Refer to WAC 197-11-768.)

**Conclusion No. 4: The Board finds that County Ordinance No. 93-07 is not in compliance with RCW 36.70A.060.**

Issue No. 5.

**Is "expanded SEPA" adequate to meet the requirements for regulations to protect critical areas or must specific objective regulations be adopted.**

The requirement for an interim ordinance has the sole purpose of protecting critical areas as a whole until the balancing with other goals and the inclusion of public and local judgments by local elected officials can be incorporated in the comprehensive plan. SEPA and "expanded SEPA" have exceptions and thresholds that do not provide the interim protection envisioned by the Act. The Board agrees this may not be a problem in Columbia County, but the County ordinance must include a standard of interim protection in each category that all parties can rely on until the comprehensive plan can be adopted.

**Conclusion No. 5: The Board finds "expanded SEPA" is not adequate to protect critical areas without specific objective regulations being added.**

Issue No. 6.

**Did the County comply with State Environmental Policy Act, as defined in RCW 43.21C.030 (2) (e), RCW 43.21C.030 (2)(c), RCW 43.21C.031, WAC 197-11-310, WAC 197-11-704(2)(b)(i) as noted in Petition for Review, page 4 paragraphs 9 and 10?**

Petitioner notes in his brief on page 5 that the Intervenor will cover this issue. In the Intervenor's reply brief at page 24, it is stated that this has not been argued and is withdrawn.

Issue No. 7.

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**Should Petitioners be estopped from participating in the appeal if they did not object or participate in the process leading to the county's decision in passing the ordinance?**

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RCW 36.70A.280(2) provides that a person who has ... appeared before the county ..., regarding the matter on which a review is being requested, may file a petition. Petitioners have participated in the underlying process by attending and participating in several meetings on this subject and have had a letter entered into the record. The County was aware of their concerns. The GMA provides a broad grant of standing, which the Petitioners have met. There is no requirement that they do more than this.

**Conclusion No. 7: The Board finds that Petitioners have standing and should not estopped from participating in this appeal.**

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Issue No. 8.

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**Should the County Commissioners rely on public opinion as a basis for formulating Growth**

## **Management Act compliance?**

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County Commissioners, as the legislative body of the County, are the only ones in a position to evaluate all the competing factors. The GMA envisions public participation from the earliest time possible (RCW.36.70A.050(2)). While this is an "interim" regulation, the County could only benefit by public participation throughout its process. Public opinion cannot be used, however, to override a requirement of the GMA.

**Conclusion No. 8: The Board finds that the County Commissioners should rely on public opinion as one of the bases for formulating Growth Management Act compliance.**

## **Issue No. 9.**

### **Were public participation requirements adequately followed?**

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The Growth Management Act has no specific public participation program requirements for the adoption of "interim" ordinances. Although the workbook was "one piece" of the public participation program, there were other opportunities for public involvement.

**Conclusion No. 9: The Board finds the County's public participation program was legally**

**adequate.**

NOW, THEREFORE, having reviewed the file and exhibits in this case, considered the briefs submitted by the parties, heard testimony, and having entered the foregoing Findings of Fact and Conclusions, the Board makes the following

**FINAL DECISION AND ORDER:**

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The Columbia County Ordinance No. 93-07 to designate and protect resource lands and critical areas under their jurisdiction, and the act of the Columbia County Board of Commissioners adopting them, are not in compliance with the requirements of the Growth Management Act.

Ordinance No. 93-07 is therefore remanded to the Board of Columbia County Commissioners for reconsideration as follows:

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1. Columbia County is instructed to designate agricultural lands of long-term commercial significance using the factors required in RCW 36.70A.030 and WAC 365-190-050(1).
2. Columbia County is instructed to include by reference all ordinances upon which it is relying for regulation under Columbia County Ordinance No. 93-07.

3. Columbia County is instructed to incorporate a means to protect critical areas and conserve resource lands, at a reasonable level below the threshold triggers of WAC 197-11-660 (SEPA) and the Columbia County Environmental Ordinance 85-1.
  
4. Columbia County is instructed to substitute an objective standard that protects critical areas in place of the current standard to "minimize impacts" in Ordinance No. 93-07, Section 3, B.
  
5. Columbia County is instructed to modify the language of Ordinance No. 93-07 Section 3, Interim Development Regulations, in accordance with RCW 36.70A.060(1) to conserve resource lands and protect critical areas.
  
6. Columbia County shall bring this ordinance into compliance with the Growth Management Act on or before January 15, 1994.

SO ORDERED this 12th day of November, 1993.

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Judy Wall, Presiding Officer/Board Member  
Growth Planning Hearings Board  
for Eastern Washington

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Graham Tollefson, Board Member

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Tom A. Williams, Board Member

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[\[1\]](#) There are 24,941 acres of the Athena soil series, slope range of 8% to 15%, within Columbia County. The productivity from this one type of non-prime farmland is higher than all the prime farmland in the County combined. Exh. 40.