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GROWTH MANAGEMENT HEARINGS BOARD FOR EASTERN WASHINGTON

VICTOR MOORE AND ROBERTA MOORE,)

)

Petitioners) **Case No. 95-1-0002**

)

vs.) **FINAL DECISION AND ORDER**

)

WHITMAN COUNTY,)

)

Respondent)

)

Procedural History

On February 23, 1995, Victor Moore and Roberta Moore filed an appeal with the Eastern Washington Growth Management Hearings Board appealing Whitman County's County Code Chapter 9.03, WETLAND (**Chapter 9.03**), adopted on December 27, 1994.

On March 1, 1995, Whitman County filed its Notice of Appearance.

On April 19, 1995, the Board held its prehearing conference. All parties were present.

After determining that settlement could not be reached, the Board considered the legal issues and found them to be whether:

1. Chapter 9.03 fails to comply with RCW 36.70A.170(1)(d) by failing to designate critical areas, specifically, wetlands.
2. Chapter 9.03 fails to comply with RCW 36.70A.060(2) by failing to protect its critical areas, specifically, wetlands.
3. Chapter 9.03 fails to comply with RCW 36.70A.170(2) by failing to consider minimum

guidelines in designating wildlife habitat.

4. Whitman County failed to comply with RCW 36.70A.020 in meeting public participation requirements.

A motions hearing was held on May 17, 1995 by teleconference. Respondent's motion contended that the Board had no jurisdiction because Whitman County was not mandated, and had not opted into planning under RCW 36.70A. Petitioner's motion asserted that Whitman County's failure to tape the hearings on the proposed ordinance made a review of the record impossible. Both motions were denied.

The hearing on the merits was held on July 19, 1995 in the County Public Works Auditorium in Colfax, Washington.

Prior to hearing argument on the main issues, the Board heard a motion by Respondent requesting that any and all assertions, arguments and authorities not within the issues as identified in the Prehearing Order be stricken from Appellant's brief. At the Prehearing Conference, parties were given this latitude and therefore the motion was denied.

Respondent agreed that Whitman County would adopt development regulations to designate and protect all other critical areas as required under RCW 36.70A.170, not covered in the wetlands ordinance.

Findings of Fact

1. Prior to the classification and designating process, Whitman County formed a Wetlands Advisory Committee, which held 19 meetings. Whitman County Planning Commission took testimony and sent a recommendation for approval to the Board of County Commissioners (**BOCC**).
2. After Whitman County Board of Commissioners held two public hearings, on December 27, 1994 they adopted a resolution entitled Chapter 9.03 Wetlands which amended the County Code.
3. Whitman County did not adopt ordinances for geologically hazardous areas, aquifer recharge areas, fish and wildlife habitat areas and frequently flooded areas as required by RCW 36.70A.170.
4. Chapter 9.03 uses both the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989) and the Corps of Engineers Wetland Delineation Manual

(1987).

5. Whitman County's economy is agriculturally based.
6. Whitman County relied upon both the National Wetlands Inventory (NWI) and the Natural Resource Conservation Service (NRCS) [formerly known as the U.S. Soil Conservation Service] maps to designate wetlands.
7. Whitman County adopted most of the performance standards of the Department of Ecology's Model Wetland Ordinance.

Issue No. 1.

Chapter 9.03 fails to comply with RCW 36.70A.170(1)(d) by failing to designate critical areas, specifically, wetlands.

Petitioners maintained that the ordinance did not inventory or designate wetlands. They contended that a primary purpose of a wetland ordinance is to identify the designated areas so decision makers and citizens know where they are. Petitioner also alleged that while inventories may be used to identify critical areas the Washington Administrative Code(WAC) recommends that such maps be supplemented in circumstances where areas can not be readily identified by performance standards or definitions. WAC 365-190-040(1). Petitioner also contended that the county must reference any other ordinances that it relied upon in its resolution when using such ordinances to designate critical areas.

Respondent's position was that the Growth Management Act (GMA) does not require complete mapping of critical areas for the following reasons. WAC 365-190-040(1) provides... "In the circumstances where....wetlands.....cannot be identified, these areas should be designated by performance standards or definitions, so that they can be specifically identified during the processing of a permit or development authorization." Review of Chapter 9.03 includes a required definition for wetlands,(WAC 365-190-080), thus the required delineation is in compliance. The second requirement that the wetland be specifically identified during the permitting process is set forth in 9.10.020 of the Ordinance.

Decision:

WAC 365-190-080 states in part that in designating wetlands for regulatory purposes, counties shall use the definition of wetlands in RCW 36.70A.030(22). Counties should consider wetlands protection guidance provided by the Model Wetlands Protection Ordinance. Counties should consider a wetlands ratings system to reflect the relative function, value and uniqueness in their

jurisdictions. In developing a wetlands ratings system, counties should consider the following: 1) the Washington State four-tiered wetlands rating system; 2) wetlands functions and values 3) degree of sensitivity to disturbance; 4) rarity; and 5) ability to compensate for degradation or destruction. If a county chooses to not use the four tiered ratings system, the rationale for that decision must be included in its next annual report to the Department of Community, Trade and Economic Development(CTED).

Counties may use the National Wetlands Inventory as an information source for determining the approximate distribution and extent of wetlands. Counties should consider using the methodology in the Federal Manual for identifying and delineating jurisdiction wetlands, cooperatively produced by the U.S. Army Corps of Engineers, United States Environmental Protection Agency, United States Department of Soil Conservation Service and the United States Fish and Wildlife Service, that was issued in 1989, and Regulatory Guidance Letter 90-7 issued by the United States Corps of Engineers on November 29, 1990for regulatory delineations.

Pursuant to RCW 36.70A.170, critical areas are to be designated based upon the County's defined classification. Designation establishes the planning purposes.....the classification scheme; the general distribution, location, and extent of the critical areas. Inventories and maps can indicate designations of critical areas. In the circumstances where critical areas can not be readily identified, these areas should be designated by performance standards or definitions, so they can be specifically identified during the processing of a permit or development authorization. WAC 365-190-040(1). Designation means, at least, formal adoption of a policy statement, and may include further legislative action.

This Board finds that mapping has been done to identify known critical areas. Performance standards are acceptable as a method to identify unknown critical areas. Per Whitman County Code 9.03, performance standards will be applied upon land use application. The County adopted a four tiered classification and rating system in Chapter 9.10.030.

The GMA defines critical areas and requires the gathering of empirical facts to determine where and what type of critical areas are present with regard to specific parcels of land. However, the GMA does not require a specific method of gathering data for purposes of inventorying, designating or regulating critical areas.

The Board finds that the Whitman County Code Chapter 9.03 complies with the minimum requirements of the Act for designation of wetlands.

Issue No. 2.

Chapter 9.03 fails to comply with RCW 36.70A.060(2) by failing to protect its critical areas,

specifically, wetlands.

Petitioner contended that Chapter 9.03 failed to protect critical areas (wetlands) by exempting all ongoing agricultural activities, rural residential sites and Whitman County Port facilities.

Respondent contended that Petitioners' argument is not that the protections are inadequate rather that the exclusion of "ongoing agricultural activities" is in violation of the GMA. Subsection (2) of the Ordinance provides: "All ongoing agricultural activities are exempt from this ordinance. Only when an agricultural activity changes to a non-agricultural lands use will it be subject to regulation by this ordinance."

Decision:

WAC 365-190-080 provides the guidelines for protection of wetlands. Counties should consider wetlands protection provided by the Department of Ecology including the model wetlands protection ordinance. Whitman County has used the model wetlands ordinance as its guide. It established a four-tier wetlands rating system; it utilized the National Wetlands Inventory maps and it used the methodology in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989) and the Corps of Engineers Wetland Delineation Manual (1987) with appropriate amendments.

RCW 36.70A.060 says in part... ".regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county adopts development regulations pursuant to RCW 36.70A.120." Whitman County's Chapter 9.03.040(2) provides that an agricultural activity presently allowed under the County's zoning code is allowed to continue. The section clearly states that if there is a change from on-going agricultural use, the changed activity would then require compliance with Chapter 9.03. At the time of securing a permit for a zoning change, subdivision, or any change from agricultural use:

1. The permit application will ask the applicant if a wetland, as defined, exists on or near the project site.
2. Either during the pre-application discussion or during the application review, the NWI and NRCS maps will be consulted.
3. If either the applicant or the maps indicate a possible wetlands presence or potential environmental impact on a wetlands, the applicant will be required to consult a "qualified wetland professional" defined in 9.10.015(43) and file a "wetlands report", defined in 9.10.090.

4. The expert determines if a wetland is present and if so, its boundaries, by use of the methodologies set forth in the Corps of Engineers 1987 Manual or the 1989 Federal Manual as they are now or may be amended.
5. If the expert determines that no wetlands exist, the county can either accept or challenge that determination.
6. If challenged, the county will investigate and/or retain another "qualified wetlands professional" to do a second analysis. If the two experts agree, the county will accept the results. If the experts disagree, the county public works director or county engineer will have to decide which expert's opinion will be accepted.
7. If the administrative decision is that a wetland exists, then the applicant will be required to submit a full wetland report, which will include the wetlands boundaries, classification, alternatives and possible mitigations.

In the August 23, 1994 minutes of the Planning Commission meeting, Mr. Baldwin from County Planning said "an estimated 2% of Whitman County is a wetland area. The majority of that land is in agricultural production. The Soil Conservation Service already regulates agricultural wetlands."

The County has made provision for rural residential sites in Section 9.10.020 (4) wherein it is noted that such siting is controlled by the county zoning ordinance and short subdivision ordinance. The applicant for such site must demonstrate in the Certificate of Zoning compliance that the development is at least 200 feet away from wetlands, including but not limited to those designated by NWI or NRCS maps.

Section 9.10.040(3) "Relationship to other jurisdictional agencies: In cases where other agencies exert jurisdictional control over wetlands; including, but not limited to, the Army Corps of Engineers, the U.S. Fish and Wildlife Service, the Environmental Protection Agency, U.S. Department of Agriculture, or the Washington State Departments of Fish and Wildlife, or Washington State Department of Ecology, and it is determined by the County Public Works Director and/or the County Engineer that the permit conditions satisfy the requirements of this ordinance, the County Public Works Director and/or the County Engineer may allow requirements imposed by these jurisdictions to substitute for the requirements of this ordinance. The County Public Works Director and/or the County Engineer's decision shall be in writing and mailed to the applicant. Applicants must submit a copy of the agency's application, permit conditions, and detailed plans to the County Public Works Director and/or the County Engineering order for this exemption to be reviewed and judged."

The Board finds that Whitman County is in compliance with minimum requirements of the GMA for the protection of wetlands.

Issue No. 3

Chapter 9.03 fails to comply with RCW 36.70A.170(2) by failing to consider minimum guidelines in designating wildlife habitat.

In discussion both at the prehearing conference and the hearing on the merits, Respondent acknowledged the wildlife habitat issue had not been addressed but would be later on. Therefore, the County is not in compliance with this portion of the critical area requirements.

Issue No. 4

Whitman County failed to comply with RCW 36.70A.020 in meeting public participation requirements.

Petitioner argued that the wetlands advisory committee was heavily weighted toward agricultural interest and that opportunity for public input was inadequate.

Respondent argued that Whitman County was not required to comply with RCW 36.70A.020(11) (public participation).

Decision:

RCW 36.70A.050 directs CTED to establish minimum guidelines that apply to all jurisdictions. These have been established by WAC 365-190. WAC-365-190-040(2) states that "Counties..shall involve the public in classifying and designating...critical areas."

Whitman County established a Wetland Advisory Committee and held public hearings which allowed public input. The Whitman County Board of County Commissioners solicited citizen involvement through newspapers and letters to stakeholders. From those responses, Whitman County created a citizen advisory board that held 19 meetings and delivered their final report and recommendation to the Whitman County Planning Commission. The Planning Commission reviewed the final report, took public testimony and made a recommendation for a proposed wetland ordinance. The Board of County Commissioners then held two public hearings, made minor modifications and then adopted the ordinance.

The heart of the GMA's public participation requirement is RCW 36.70A.140 and .020(11). Local governments planning under GMA are mandated to establish procedures for early and continuous

public participation in addition to any other existing statutory requirements. This Board has always held that public participation is the very core of the GMA.

The Board finds that Whitman County was required to comply with public participation goals and requirements of the Act in developing a critical area ordinance and has done so.

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

FINAL DECISION AND ORDER

1. The Board finds that the Whitman County Code Chapter 9.03 complies with the minimum requirements of the Act for designation of wetlands.
2. The Board finds that Whitman County is in compliance with minimum requirements of the GMA for the protection of wetlands.
3. The Board finds that Whitman County is not in compliance with the minimum guidelines in designating wildlife habitat.
4. The Board finds that Whitman County has complied with the public participation goals and requirements in developing Chapter 9.03 Wetlands.
5. The Board hereby orders Whitman County to bring all other components of the critical area requirements of the GMA into compliance no later than February 2, 1996.

This is a Final Order under RCW 36.70A.300 for purposes of appeal.

SO ORDERED this 16th day of August, 1995.

EASTERN WASHINGTON

GROWTH MANAGEMENT HEARINGS BOARD

Judy Wall, Presiding Officer

Tom Williams, Boar