

State of Washington

**GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

CITY OF ELLENSBURG, MIKE WILLIAMS)

AND PAULINE DIEFENBACH,) Case No. 95-1-0009

)

Petitioners) **FINAL
DECISION**

) **AND ORDER**

vs.)

)

KITTITAS COUNTY, Respondent)

)

Procedural History

On November 9, 1995, the City of Ellensburg, by and through its attorney, Paul Sullivan, and Mike Williams and Pauline Diefenbach, by and through their attorney, James D. Maloney III, filed a Petition for Review with the Growth Management Hearings Board for Eastern Washington. The petitions were consolidated as Case No. 95-1-0009.

On November 16, 1995 the Board set the hearing on the merits for March 6, 1995 and scheduled a prehearing conference.

On December 14, 1995, the Board held a prehearing conference in its office at 10:00 a.m. All parties were present. The legal issues were set and a motions and briefing schedule was established.

On November 14, 1995, Kittitas County filed a Notice of Appearance.

On December 19, 1996, a motion for intervention was filed by Roger Sparks. The Board denied the motion.

On March 6, 1996, the Board held its hearing on the merits at 10:00 a.m. in Ellensburg, Washington at the Hal Holmes Center. Present were Board Members Judy Wall, Presiding Officer; Tom Williams and D. E. "Skip" Chilberg. Also present were Barbara Hill, the Board's Administrative Assistant; Brooke Robinson, Court Reporter; Paul Sullivan, Attorney for Petitioner City of Ellensburg and James D. Maloney III, Attorney for Petitioners Mike Williams and Pauline Diefenbach; and Jim Hurson, Attorney for Respondent.

Findings of Fact

1. The 1992 Census of Agriculture showed the "market value of agricultural products sold" in Kittitas County to be \$70,276,000.00, of which \$32,142,000.00 resulted from the sale of crops and \$38,143,000.00 from the sale of livestock. Comparatively, this places the agricultural industry in Kittitas County in the middle of counties in the state with 18 counties having "higher product market value sales and 20 lower. P-Exhibits 2 and 29.
2. Similarly, the 1992 Census of Agriculture shows that Kittitas County has 355,560 acres of farmland, of which 94,715 acres are cropped. Of the cropland, 77,324 acres are irrigated. Cropland production is distributed as follows: 44% produced hay, 41 % produced pasture, 9% produced grains, 1.5% produced fruit, 2.5% produced vegetables, and 2% was miscellaneous. The remaining noncropped farmland is presumably rangeland. P-Exhibits 2 & 25.
3. The Kittitas Valley contains a total of 83,880 acres of cropland. These are classified by the land-capability classification system of the United States Department of Agriculture Soil Conservation Service as follows: 34,560 acres are classified as prime soils, 7,080 acres are classified as unique soils, 3,200 acres are classified as soils of statewide importance and 39,040 acres are classified as soils of local importance. P-Ex. 3.
- 4.
5. The land-capability classification system of the Soil Conservation Service system adjusts for reliability of irrigation water.

Discussion

Procedural History of Ordinance 95-13.

The Kittitas County Board of County Commissioners (the BOCC) held their first public hearing concerning agricultural resource lands on July 11, 1995. The county's initial proposal designated approximately 11,000 acres southeast of Ellensburg as lands of long-term commercial significance. P-Ex. 1. This designation was based on lands comprised primarily of class 1 and 2 soils that were located within irrigation districts having "senior" water rights. P-Ex. 2. The Planning Department staff recommended that the designation be expanded to include lands in irrigation districts having "junior" water rights, specifically lands within the Cascade and Kittitas Reclamation Districts. P-Ex. 1.

The planning department continued to recommend inclusion of all irrigated lands in lower Kittitas County in public hearings on August 1 and 8, 1995. P-Exs. 6 & 7. Subsequently, Kittitas County deleted the larger designation proposed by the Planning Department and reinstated the designation requirement that agricultural resource lands have "senior" water rights. Additional public hearings were held on August 22 and 29, 1995.

On September 15, 1995, the BOCC adopted Ordinance 95-13, designating 12,790 acres within the Commercial Agricultural Zone ("CAZ"). This designation is basically identical to the County's initial proposal. P-Ex. 1.

Criteria for Agricultural Resource Land Designation under the GMA.

The basic requirements for designation of agricultural resource lands under RCW 36.70A.170(1) are provided in the definitions of the terms "agricultural land" and "long-term commercial significance". RCW 36.70A.030(2) and (11) provides as follows:

(2) "Agricultural land" means land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW 84.33.100 through 84.33.140, finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production.

1. "Long-term commercial significance" includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land.

The Act further directed the Department of Commerce, Trade and Economic Development to produce minimum guidelines to classify agricultural, forest, and mineral resource lands and critical areas. RCW 36.70A.050.

The minimum guidelines for classifying agricultural lands, WAC 365-190-050, provides:

(1) 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 eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys. 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 as indicated by:

- (a) The availability of public facilities;
- (b) Tax status;
- (c) The availability of public services;
- (d) Relationship or proximity to urban growth areas;
- (e) Predominant parcel size;
- (f) Land use settlement patterns and their compatibility with agricultural practices;
- (g) Intensity of nearby land uses;
- (h) History of land development permits issued nearby;
- (i) Land values under alternative uses; and
- (j) Proximity of markets.

(2) In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. 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 department of community development.

(3) Counties and cities may further classify additional agricultural lands of local importance. Classifying additional agricultural lands of local importance should include consultation with the board of the local conservation district and the local agriculture stabilization and conservation service committee....

The GMA through these definitions and guidelines creates a standard for analysis, classification and designation of agricultural lands of long-term commercial significance.

Criteria for Interim Agricultural Resource Land Designation under Ordinance 95-13.

Section 17A.55.030 of Ordinance 95-13 provides:

The designation of the interim Commercial Agricultural Zone is based upon the following criteria. The ability to reclassify out of the Commercial Agricultural Zone, or to qualify for classification into the Commercial Agricultural Zone shall also be based upon this criteria. A landowner applying for parcel(s) to be classified "out of" the Commercial Agricultural Zone must demonstrate that, at a minimum, two of the first three criteria A, B, or C; and one of the last three criteria D, E or F do not apply. A landowner applying for parcel(s) to be classified "into" the Commercial Agricultural Zone must demonstrate that, at a minimum, one of the first three criteria A, B or C; and one of the last three criteria D, E, or F do apply.

This reclassification process shall be conducted administratively by the county planning manager with an appeal provision to the Board of County Commissioners. If any lands are reclassified out of the Commercial Agricultural Zone to the Commercial Agricultural Zone Overlay, then the land reverts to the Commercial Agricultural Zone Overlay.

- A. Landowners evaluation of potential for commercial activities on subject parcel(s) based upon past, present and future productivity of the land; crops grown; potential for crop diversity; tax status; effect of governmental regulation both pro and con; which demonstrates economic agricultural viability.
- B. The lands to be designated shall receive the full allocation of water from either surface or groundwater sources.
- C. The landowner shall provide a description of the subject parcel(s) soils which are sufficient to support an enterprise as defined in SCS Handbook No. 210 USDA. This should also consider the subject parcel(s) applicability for erodible and highly erodible soils.
- D. An analysis of application of federal and state regulation that may be in conflict with Kittitas County Code 17A.02.15(A) & 17A.03.20 that makes an exemption for existing and ongoing agricultural and irrigation activities.
- E. Proximity to, or distance from urban type development and urban settlement patterns is consistent with commercial agricultural activities.
- F. Proximity to agricultural distribution markets, and proximity to viable supportive infrastructure to support and be consistent with commercial

agricultural activities.

Issue No. 1. Did Kittitas County err in the Issuance of a Declaration of Nonsignificance (DNS) for County Ordinance No. 95-13?

Ordinance No. 95-13 creates a "Commercial Agricultural Zone" (CAZ) of 12,790 acres and a "Commercial Agricultural Zone Overlay" (CAZO) which encompasses the balance of the land zoned Agricultural 20 in Kittitas County. Both the CAZ and the CAZO retain the underlying Agricultural 20 zoning that applied to these lands before its adoption. The Ordinance, also, restricted rezone criteria in the Agricultural 20 zone.

Petitioner City argues that the County erred in issuing a Declaration of Nonsignificance for this Ordinance, because the alleged inadequacy of resource land designation and conservation measures, in their view, substantively requires an environmental impact statement. Without passing judgment as to whether the Ordinance complies with the GMA, the Board notes that the underlying zoning still applies to these lands. The Ordinance, in fact, strengthened the rezone criteria in two ways. Further, Petitioners did not file a SEPA appeal to the determination.

Conclusion No. 1: The Board find that the County did not err in the issuance of a Declaration of Nonsignificance (DNS) for County Ordinance No. 95-3.

Issue No. 2. Is County Ordinance No. 95-13 inconsistent with the County-wide Planning Policies, specifically, with Policy I(1)(b)?

County-wide planning policy I (1) (b) (Urban Growth Areas) states in part:

The subdivision, rezone, capital improvements, and governmental service decision of all County governmental jurisdictions should be directed by their projected share of growth and should be in proportion to that projected share of growth.

See Kittitas County County-wide Planning Policies, adopted by County Resolution No. 94-153, City-Ex. 3.

Petitioner City argues that alleged inadequacies in Ordinance 95-13 allow excessive growth in the County compared to its projected share of growth, thus violating County-wide Planning Policy I (1) (b). The governmental jurisdiction in question, the County, contains both resource lands, including commercial agricultural lands, and rural lands. Assuming for purposes of this discussion, an inadequate agricultural designation, the Board is unable to say that the policy would-be violated. Conversely, assuming an expansive designation, the Board is, likewise, unable to show that the policy would not be violated. This is because the record fails to

proportionally show the division of potential development between agricultural and rural lands. The information is simply not in the record to make this judgment. Petitioner has not met the burden of proof.

Conclusion No. 2 The Board finds that the Record supports a finding that County Ordinance 95-13 is consistent with the County-wide Planning Policies, specifically, with Policy I (1) (b).

Issue No. 3. Does County Ordinance No. 95-3 fail to comply with the requirement of RCW 36.70A.020(1), relating to the encouragement of growth in areas with adequate public facilities and services?

This issue suffers from the same problem as the previous issue and the Board's answer must be the same. A certain proportion of potential development will be in the County. Irrespective of the adequacy of the agricultural resource land measures, the question of rural land development is not addressed. Without a comparison of all potential development in the County in regard to this planning goal, the Board cannot make this judgment. Petitioner has not met its burden of proof.

Conclusion No. 3. The Board finds that the record supports a finding that Ordinance No. 95-13 complies with the requirements of RCW 36.70A.020(1), relating to the encouragement of growth in areas with adequate public facilities and services.

Issue No. 4. Does County Ordinance No. 95-13 fail to comply with the requirements of RCW 36.70A.020(2), relating to the reduction of sprawl?

Petitioners argue that alleged shortcomings in the Ordinance amount to a violation of planning goal number 2, relating to the reduction of sprawl. The Board disagrees. The question is not whether development should be precluded from agricultural resource lands, but the nature of the allowed development. Property developments which support the agricultural industry, and these encompass a wide range of uses, are necessary for its future vitality.

As with the above issues, the record and briefing failed to address the rural land classification. Resource lands and rural lands must be looked at together, in order to make this finding regarding sprawl. Whatever the merits of Ordinance 95-13, the Board will not find that an alleged violation of RCW 36.70A.060 and .170, amounts to a violation of RCW 36.70A.020(2).

Conclusion No. 4. The Board finds that Ordinance No. 95-13 does not violate the requirements of RCW 36.70A.020 (2), relating to the reduction of sprawl.

Issue No. 5. Does County Ordinance No. 95-13 Fail to Discourage Incompatible Uses of the Designated Lands, or Maintain and Enhance Natural Resource Industries, as is Required

by RCW 36.70A.020(8)?

RCW 36.70A.020(8) establishes two standards against which Ordinance No. 95-13 is to be tested. Does the Ordinance fulfill the minimum requirement of the Act to discourage incompatible uses of designated lands and does it meet the minimum requirement to maintain and enhance natural resource industries, in this case agriculture? Elements of this issue are contained in issues 8 and 9, and will be considered in greater depth under those headings.

Does the Ordinance Discourage Incompatible Uses of Designated Lands?

First, it is important to remember that the GMA creates the following land designations: 1) lands within urban growth areas, 2) resource lands, 3) critical areas and 4) rural lands. The lands within urban growth areas are to be the primary areas for development because they contain services and facilities necessary for efficient development. Resource lands are agricultural, forest and mineral lands that have particular importance for maintaining and enhancing the natural resource industries. Critical areas either have particular significance because they are important parts of natural systems that warrant protection or are areas where development is determined to be unsafe. Lands that do not warrant designation in one or more of the other categories are then designated as rural lands.

Thus the designation and conservation of resource lands, including agricultural lands of long-term commercial significance, attempts to maintain and enhance the natural resource industries. The Act recognizes that these are important segments of our overall economy and that indiscriminate development of resource lands places burdens on these industries.

The uses permitted in the CAZ, the lands designated as agricultural lands of long-term commercial significance, are those allowed in the underlying A-20 Agricultural zone, which in turn are the uses permitted in the A-3 Agricultural zone. K.C.C. Sec. 17.29.020A. The uses permitted in the A-3 zone include all uses permitted in the residential or suburban zone. K.C.C. Sec. 17.28.020A. This would include parks, playgrounds, public schools, and libraries that would not appear to be compatible with commercial agriculture. In addition there are conditional uses, which could be allowed under this zoning, that would not be compatible with commercial agriculture, including hospitals, convalescent homes, and day care facilities.

By allowing this broad range of uses, the County has failed to meet the minimum requirement under the Act to discourage incompatible uses on designated lands. With this finding the Board recognizes that there are many uses which, if located in a designated agricultural area, would be detrimental to the agricultural industry. Indeed, many uses are simply incompatible with commercial agriculture, a hospital, for instance. It is important to note that production practices of commercial agriculture are not always bucolic, even though for large parts of the year they

may seem to be. Commercial agriculture as practiced today is an industrial activity, often necessitating precise chemical applications and work regimes encompassing all hours of the day. When conflicts arise with other uses in an agricultural area, the agricultural viability of the area often goes down. Over time, the cumulative burden becomes unbearable for some producers, resulting in further conversion of agricultural lands and ever greater burdens on the remaining producers.

The important concern is the non-agricultural impact of on-exclusive zoning, by which we mean the cumulative impact of non-agricultural related activities on the designated agricultural area. In many cases it is a proposed developments level of impact and purpose that is determinative of whether it should be allowed or not. For instance, Petitioners argue that an airport is an incompatible use in an agricultural area. This statement is too general. Certainly a general purpose airport would be incompatible in an agricultural area, but a small airport for crop dusters might be needed by the agricultural industry. Similarly, electrical sub-stations may be needed to power irrigation pumps and there are many successful examples of oil exploration and production activities coexisting with commercial agriculture around the country, to mention two other uses that Petitioners suggested were incompatible with commercial agriculture. The Board finds these particular uses compatible. A line must be drawn which bars incompatible uses from agricultural resource lands but which allows uses necessary for the agricultural industry.

Ordinance 95-13 fails to meet the minimum requirements of the Act to discourage incompatible uses on designated lands, because many of the allowed uses are incompatible with commercial agriculture. Additionally, the Board finds that both the purposes, defined as whether a proposed development benefits agriculture or not, and the cumulative level of impact are important factors in the determination of compatible uses. The County has broad discretion as to how it accomplishes this task, but the Act's minimum requirements must be met.

Does the Ordinance Maintain and Enhance the Natural Resource Industries?

Ordinance No. 95-13 designated 12,790 acres of agricultural resource land in Kittitas County. In the same Ordinance it adopted a commercial agricultural zone overlay of 165,351 acres, which was composed of lands zoned A-20.City-Exs.1 and 2. This designation amounts to only 8 percent of the County's A-20 Agricultural Zone. The record further provides that there are 34,560 acres of prime and 7,080 acres of unique soils in the Kittitas Valley. P-Ex.3. The Board will further address this subject in Issue No. 8, including the County's criteria that designated lands must be assured their "full allocation of water".

In order to maintain the industry, it is necessary to designate and conserve a "critical mass" of the agricultural resource land. The Board defines "critical mass" as that quantity of resource land necessary to assure survival of the agricultural support system, the suppliers, processors and

marketing structures, required for survival of the agricultural industry in Kittitas County.

From the figures shown above, the Board finds that Ordinance 95-13 fails to meet the minimum requirement to maintain the County's agricultural industry. The current agricultural industry far surpasses the ordinance's limited designation. The Board fails to see how this designation rises to a "critical mass" necessary to maintain the industry. People may differ as to what is required to enhance the industry, but it is clear that this designation fails to meet the minimum required to maintain the industry.

Planning Goal Integration.

Respondent argues that the planning goals are internally inconsistent and that the County may choose one goal over another. For instance, they suggest that the County may give the affordable housing goal a higher priority than the goal to reduce urban sprawl, thus justifying sprawl in the name of advancing the housing goal. Similarly, they suggest that the property rights goal may override the goal of maintaining natural resource industries.

The Board has consistently recognized that the planning goals may be at some point inconsistent. It has, also, found, in almost all cases, that potential inconsistencies may be successfully reconciled. The County has a duty to attempt to harmonize the goals. It must consider and show its work where it cannot. It is one thing to suggest, as Respondent's attorney does, that achieving the housing goal conflicts with the goal of reducing sprawl, it is quite another to show that these goals cannot both be achieved. Where a jurisdiction holds that one planning goal should be sacrificed at the expense of another, the record must show the decision making process.

Likewise, it is impossible to say that the property rights goal may be used to grant a broad range of development projects on agricultural resource lands where the proposed developments are detrimental to the property rights of adjoining agricultural users. Both property owners have rights. The basis of zoning law is to protect the legitimate interests of property owners within a particular zone. Again, in most cases, these conflicts are reconcilable. The record needs to show the process of consideration by the decision makers where there is a finding that they are not reconcilable. The Nelson article clearly addresses many of the pertinent considerations. See Arthur C. Nelson, *Economic Critique of US Prime Farmland Preservation Policies*, Journal of Rural Studies, Vol. 6, No. 2, p.134 (1990). P-Ex. 6 and P-Ex. 2, Attachment 2.

The planning staff analysis dated June 21, 1994, recognizes the historic trend toward suburbanization of traditional agricultural lands and increases in short subdivisions and exempt land segregation's for non-farming purposes. City-Ex. 9. Based on these conclusions, this report stated that the present Ag.-20 zoning, which is the agricultural resource land zone, does not meet the Act's intent of protecting the county's most valuable agricultural areas from urban encroachment.

Respondent does not contest that uses are permitted in the CAZ that are inconsistent with conservation of commercial agricultural lands. It argues that it may simply weight one goal over another and if this results in protections which fail to maintain agricultural lands, so be it.

The Board disagrees and finds that a demonstration requirement, which it has long held, is needed. If a jurisdiction is unable to harmonize the planning goals, the record must show that the decision makers engaged in a valid process and considered the matter. This is the "show your work" standard. The record in this case fails to make this showing.

Conclusion No. 5. The Board finds that Ordinance 95-13 fails to comply with the requirements of RCW 36.70A.020 (8), because it fails to meet both of the planning goal's minimum requirements to discourage incompatible use on designated lands and to maintain and enhance natural resource industries.

Issue No. 6. Does County Ordinance No. 95-13 fail to comply with the requirements of RCW 36.70A.020(9), relating to open space and recreation?

The real issue in this case concerns the designation and conservation of agricultural resource lands. While an argument may be made that inadequate designation and conservation of resource lands violates RCW 36.70A.020(9), the Board finds that the record fails to establish this finding.

Conclusion No. 6. The Board finds that Ordinance No. 95-13 complies with the requirements of RCW 36.70A.020(9) relating to open space and recreation.

Issue No. 7. Does County Ordinance No. 95-13 fail to protect the environment and enhance air and water quality, as is required by RCW 36.70A.020(10)?

Petitioners have not demonstrated by a preponderance of the evidence that Ordinance 95-13 violates RCW 36.70A.020 (10).

Conclusion No. 7. The Board finds that Ordinance 95-13 complies with the requirements of RCW 36.70A.020 (10).

Issue No. 8. Does Kittitas County Ordinance 95-13 designate agricultural lands of long-term commercial significance as required by RCW 36.70A.170(1)?

This issue, as well as Issue No. 9, is at the heart of this case. As the Board has previously said, the designation of agricultural land, addressed in this issue, and the conservation of this resource land, addressed in Issue No. 9, are really two sides of the same coin. The best conservation measures will not protect undesignated resource land, and, conversely, the broadest designation

will not ensure resource conservation if conservation measures are inadequate. Successful resource conservation requires both. *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB Case No. 94-1-0015 at 551. In this issue the Board will consider only the extent of the designation.

Kittitas County Ordinance No. 95-13 designates lands of long-term commercial significance. The question before the Board is whether this designation meets the minimum requirements of the GMA. To answer this question, the Board must and will base its decision on the record developed before the BOCC. RCW 36.70A.290(4).

Whether Ordinance 95-13 Substantively Complies with GMA Minimum Designation Requirements?

Ordinance 95-13 establishes a set of criteria for designation. K.C.C Sec. 17A.55.030. A land owner may "opt-in" or "opt-out" of the CAZ based upon an evaluation of the land owners situation in regard to the criteria. The question of whether the Ordinance's "opt-out" provision complies with the Act will be addressed under Issue No. 9.

Kittitas County contains 355,560 acres of farmland. Of this total 94,715 acres are used to grow crops and the remaining acres are used for grazing or range land. Of the cropland 77,324 acres are irrigated. The Kittitas Valley contains a majority of the cropland, a total of 83,880 acres. These acres are classified by the Soil Conservation Service as follows: 34,560 acres are classified as prime soils, 7,080 acres are classified as unique soils, 3,200 acres are classified as soils of statewide importance and 39,040 acres are classified as soils of local importance. See Findings of Fact 2 and 3.

Ordinance 95-13 creates an interim designation of 12,790 acres of agricultural resource land in a block southeast of Ellensburg. The designated land is primarily composed of prime soils and encompasses only lands holding "senior" water rights. None of the parties suggests that the designated land fails to qualify for designation. Rather, Petitioners argue that Kittitas County's designation criteria are more restrictive than the requirements of GMA, and, thus, inconsistent with the Act. Because of this inconsistency, the Ordinance fails to designate agricultural lands that surpass the minimum requirement for designation.

Petitioners argue that two of Kittitas County's designation criteria overly restrict the designation. These are criterion A, which involves the landowners evaluation of the commercial value of the land and criterion B, which restricts designation to lands receiving their full allocation of irrigation water. Of particular concern to Petitioners is designation criterion B. Under the County's view, only lands with "senior" water rights, which are assured a full allocation of water are designated. Lands with "junior" water rights are not designated.

All the parties agree that irrigation water is needed to produce good crops in the Kittitas Valley. The question is whether the record supports the County's decision that lands with "junior" water rights should be necessarily excluded from designation.

First, it should be noted that "senior" and "junior" water rights are not precise terms. Water rights lay along a continuum. Generally, those holding the best rights are considered "senior" while those holding lesser rights are considered "junior". Of the "junior" rights, some are almost as valuable as the "senior" rights and others are of little value. The critical question is whether the land in question receives enough water to be economically viable.

The Soil Conservation Service land-capability classification system adjusts for reliability of irrigation water. Irrigated lands of a particular soil type which receive water at least seven out of ten years, retain that soils' classification. If an adequate water supply is received less than seventy per cent of the time, the classification is demoted. The minimum guidelines provide that counties and cities *shall* consider the Soil Conservation Services soil classification system when designating agricultural lands. WAC 365-190-050. This system already takes into account the reliability of irrigation water. The County's criterion for the full allocation of water imposes a requirement that significantly restricts designation beyond that indicated by the SCS system.

The record, moreover, demonstrates that actual availability of water to "junior" right holders insignificantly more reliable than the level required by the SCS system. Irrigated agricultural lands with "junior" rights in Kittitas County will only experience significant crop loss once in twenty-five years. P-Ex. 5. According to Don Schraam, Hydrology Manager, Bureau of Reclamation, such a loss only occurs when the available water supply falls below 55% of a full allocation. P-Ex. 5. There is little or no crop loss where the available water supply is 70% or more. P-Ex. 5. The only year, since 1972, in which the available water supply was below 55% was 1994. P-Ex. 5. Additionally some of the lands holding "junior" surface rights, also, hold ground water rights and as such are insulated from low flow years.

The record fails to show why lands with similar soil classes should be treated differently, simply because theater rights attached to these lands are described as "senior" or "junior". The record fails to show a significant difference in productivity. City-Ex. 14.

There may be non-productive acres with very "junior" rights, that do not warrant designation. This is a valid subject of consideration. The record, however, fails to show this type of inquiry.

The Board notes that the minimum guidelines specifically mention prime and unique soils for designation consideration. Indeed, if these soil classes are not designated the County is required to make a report to the department of community, trade and economic development stating why

this designation was not made. WAC 365-190-050(2).

Finally, agricultural land designation fundamentally concerns protection of the resource. The test for designation under both the Act and the minimum guidelines is whether the agricultural land in question is commercially significant over the long-term. WAC 365-190-050(2) directs consideration of prime and unique soils, in particular. This does not, however, limit designation to these classes. WAC 365-190-050(1) directs consideration to lands composed of a variety of soil classes, including, but not limited to prime and unique soils, in relation to a list of criteria reflecting the level of development in their area. The County has a range of discretion in making this determination and the extent of any particular designation may vary from county to county depending on the level of protection above the minimum requirement they choose to grant the industry, but the baseline test is always whether the land is commercially significant over the long-term.

The term "long-term commercial significance" establishes criteria for agricultural land. It fundamentally concerns the land's growing capacity and productivity, as measured by the SCS land-capability classification system. The test is the land's ability to commercially produce crops, rather than the profitability of any crop or farm. Whether a particular farm is profitable is subject to a wide variety of factors including: its debt load, the market for the crop and its substitutes, the weather, the water supply, tillage practices, management practices, timely harvest, and our country's foreign policy as it concerns crop exports.

Agricultural lands are classified because they are commercially productive. They have the growing capacity to be commercially significant over time. While it is probably true that more productive soils are generally more profitable, profitability is not the relevant test, because profit requires consideration of factors independent of the resource land's commercial significance as measured by its productive potential and the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by the eleven factors listed in WAC 365-190-050(1). A review of these factors indicates that they mainly involve lands near urban growth areas.

The requirement is to designate and conserve the commercially significant land upon which the agricultural industry is based, the land necessary to maintain the industry. Although, a local jurisdiction has discretion to modify GMA definitions, the modified definitions must still assure the minimum level of protection required by the Act. The Board has consistently upheld this concept. See *Confederated Tribes v. Yakima County*, EWGMHB Case No. 94-1-0021 and *English v. Columbia County*, EWGMHB Case No. 93-1-0002.

Ordinance 95-13 made an interim designation. As this Board has previously held, lands that fall within the GMA definition and criteria must be designated on an interim basis to assure their

conservation prior to consideration at the comprehensive plan level. *Ridge v. Kittitas County*, EWGMHB Case No. 94-1-0017. This case dealt with forest lands, but they are both resource lands and are governed by the same statutes, RCW 36.70A.060 and .170. An interim designation is made to protect the resource. It recognizes that once resource lands are lost through inappropriate development, it is difficult, if not impossible to reverse the loss. At the comprehensive plan level, designations are reviewed and possibly modified in the light of newly developed information and the need to successfully integrate all the components of the plan.

The Board finds that Ordinance 95-13 fails to designate sufficient agricultural resource land to meet the minimum requirement of the Growth Management Act. The Board makes this finding, because it finds that the County's criteria are overly restrictive and inconsistent with the requirements of the Act, resulting in an insufficient designation. The record fails to show that the County's designation criteria comply with the requirements of the Act.

Whether the Adoption of Ordinance 95-13 Procedurally Complies with GMA Minimum Designation Requirements?

Substantive compliance with the Act is the Board's first consideration. If it finds substantive compliance with the minimum requirements of the Act, its inquiry ends, except where the public participation process is at issue. If substantive compliance is arguable, the Board looks to evidence of procedural compliance. If the record shows valid consideration of the factors necessary for compliance, weight is given to the decision maker's position. Failure to show consideration of the required factors, shifts weight to the other side. It should be remembered that the decision maker, here the BOCC, has both the power and duty to make this inquiry. It controls the process.

The record fails to show consideration by the BOCC of the factors required by the Act. The Ordinance has no findings of fact. There is no showing why less than one-half of the prime soils are designated, why none of the unique soils are designated, why none of the lands in the West-side sub-area were designated, or why the livestock industry, which accounts for over one-half of the County's agricultural industry in dollar value, was excluded from designation.

Necessary consideration by the decision maker simply involves a focused discussion of factors required for compliance, a discussion that weighs and measures the relevant factors. The record must show this process.

Conclusion No. 8. The Board finds that Kittitas County Ordinance No. 95-13 fails to designate agricultural lands of long-term commercial significance as required by RCW36.70A.170(1).

Legal Issue 9: Does County Ordinance 95-13 assure the conservation of agricultural lands,

as is required by RCW36.70A.060 (1)?

Petitioner presents four arguments that Ordinance 95-13 does not, as follows:

- (a) the uses allowed in the CAZ and CAZO zones include residential, processing, home occupations, gas and oil exploration, and public utility buildings.
- (b) properties in the CAZ and CAZO zones are subject to parcel splits.
- (c) the ordinance includes no prohibitions of rezone; and,
- (d) properties may be opted-out of the CAZ designation.

Respondent defends Ordinance 95-13 as providing additional, and adequate, protection for CAZ and CAZO lands by elimination of previously allowable divisions under non-conforming lot size rules, and the increase in the minimum size needed to have a one-time lot split.

Our discussion of the issue will address each of the points in order as raised by Petitioner.

(a) Petitioner argues that specified allowed uses are inconsistent with conservation of agricultural lands of long-term significance. Kittitas County chose not to respond to this argument. However, Petitioner has not presented evidence that any of the subject uses objected to prevent conservation of commercial agricultural lands. In the view of this Board, residential use is necessary for farm owners, and in some cases, farm workers, for commercial agriculture to be successful.

Likewise, processing, as it relates to agricultural products, may be best located on or near the point of production. Home occupations need not interfere with commercial agriculture; in fact, they may provide income that enables the farm family to continue in commercial agriculture. Gas and oil exploration, as regulated, should not significantly interfere with agricultural activities. Finally, public utility buildings are a necessary part of our public service infrastructure, and are necessary as well for a viable agricultural industry. The placement of public utility buildings on commercial agricultural land will not impede agricultural activity.

(b) Petitioner argues that properties are subject to one-time splits which will prevent conservation of agricultural lands. Respondent counters with demonstrated improvements in allowed practices, including elimination of non-conforming lot-size divisions, and an increase from 6 to 10 acres in the CAZ or from 6 to 8 acres in the CAZO as the minimum lot size for a one-time split. Although this Board may prefer a larger minimum lot size to qualify for a one-time split, Petitioners have not provided evidence that the selected minimums will significantly impede commercial agricultural activity, nor evidence that a larger minimum would significantly enhance commercial

agricultural activity. This Board must recognize the significant improvements made by Ordinance 95-13 in eliminating divisions of land with non-conforming lot sizes in CAZ and CAZO and in the respective increases in minimum lot sizes to qualify for the one-time split. Although a larger minimum might be desirable, this Board defers to local preference in this matter.

(c) Petitioner argues that Ordinance 95-13 includes no prohibition of rezone, and this does not conserve commercial agricultural lands. Kittitas County did not respond to this argument. This Board recognizes that any rezone could eliminate all the protections provided for commercial agricultural activity. However, zoning powers are vested bylaw with the Board of County Commissioners. This Board has no jurisdiction in any future zoning action by a Board of County Commissioners unless that action is petitioned to this Board. While the GMA requires the conservation of agricultural lands of long-term commercial significance, it does not, and cannot, prohibit rezone actions. Any rezone, of course, would be subject to compliance with approved comprehensive plans, and the goals of the Growth Management Act.

(d) Petitioner argues that provisions for land to be “opted-out of the CAZ designation are subjective, easily met, and little could be done to prevent opting-out upon request by a land-owner. If owners can "opt-out” virtually at-will, then obviously Ordinance 95-13 does not provide protections that conserve agricultural lands of long-term commercial significance. Respondent's brief and argument do not address this issue specifically, but allude only to the County's responsibility to "encourage the conservation of ...productive agricultural lands." The Respondent makes no argument, either in their brief or verbally, that the opt-out provisions in Ordinance. 95-13"encourage the conservation of ...productive agricultural lands". This Board's decision on the issue must entail an analysis of the criteria which a land-owner must meet in order to opt-out of the CAZ designation, and a determination of whether that criteria is consistent with conservation of lands for long-term commercial significance.

Ordinance 95-13, Sec. 17A.55.030, provides for a land-owner to opt out of the CAZ designation if the following criteria are met: "A landowner applying for parcel(s) to be classified "out of" the Commercial Agricultural Zone must demonstrate at a minimum two of the first three criteria A., B., or C.; and one of the last three criteria D., E., or F do not apply. A landowner applying for parcel(s)to be classified "into" the Commercial Agricultural Zone must demonstrate that at a minimum one of the first three criteria A., B., or C.; and one of the last three criteria D., E., or F do apply.

This reclassification process shall be conducted administratively by the county planning manager with an appeal provision to the Board of County Commissioners. If any lands are reclassified out of the Commercial Agricultural Zone to the Commercial Agricultural Zone Overlay, then the land reverts to the Commercial Agricultural Zone Overlay.

Section 17A.55.030 (A) provides for solely the landowners evaluation of potential for commercial agricultural activities on the subject parcels as one of the three criteria to be met to opt out. Obviously, if a landowner felt it was in his best interest to opt out, he could easily evaluate potential factors to conclude the land is no longer economically viable as productive agricultural land. It is clear to this Board that a landowner's evaluation could beclouded by a view toward short-term financial gain at the expense of the long-term prospects for preservation of the commercial agricultural industry.

In addition, a primary factor in economic viability for agricultural purposes is the County's actions in zoning. If zoning allows a higher use, such as a residential subdivision on agricultural land, the price paid for that land will increase to the point that debt service or return on investment expectations preclude economically viable agricultural activity. One of the purposes of the GMA is to encourage preservation of agricultural lands. If the landowner perceives a potential for a higher use allowable by the county, that perception itself will increase land prices to ensure the land is no longer economically viable for agricultural purposes. While this Board will not suggest what economic criteria should apply in permitting a landowner to opt out, that criteria must be based on something other than the landowner's perception of what is in his short-term economic interest, and on perceptions of what other uses maybe allowed on the land.

Section 17A.55.030(B) provides an additional one of three factors to be met for opting out by a vague reference to the land receiving a full allocation of water. The water allocation issue is discussed more fully in Issue # 8. And the same arguments apply here as well. Evidence submitted to this Board indicates that possession of a junior water right is not a significant factor in determining a land's long-term potential for commercial agricultural uses. This criteria as written could be used to op out on the basis of a one-year water shortage of even 1% less than a full water allocation. The criteria as written has almost no relevance to issues relating to sustaining agriculture as an industry in Kittitas County. The Board finds that two of the first three criteria are easily met, thus fulfilling the first requirement for option out under the Ordinance. This applies to a significant amount of agricultural land should landowners wish to change their land's use.

A landowner wishing to opt out under 17A.55.030 must meet only one of the final three criteria listed in that section to qualify. Petitioners argue that these criteria are subjective, and rely on an improper delegation of authority to the county's planning manager. Neither the brief nor oral arguments addressed why this delegation was improper, so this Board has no basis to rule as such. However, of these last three criteria listed, we agree that all three are, in fact, vague and subject to very loose interpretation by either the landowner or county planning manager. As written, they provide almost no guidance to a landowner or county planning manager to determine criteria for qualifying in or out of the CAZ. A solid argument could be made for virtually every parcel in Kittitas County to be excluded under one of these three criteria provided.

This analysis of the criteria can lead only to a conclusion that the criteria provided in 17A.55.030 for opting out are not sufficient to assure the conservation of agricultural lands of long-term commercial significance, as required by RCW 36.70A.060(1).

Conclusion No. 9. The Board finds that Ordinance 95-13 fails to assure the conservation of agricultural lands as required by RCW 36.70A.060(1).

Issue No. 10. Can the Kittitas County Board of Commissioners rely exclusively on "public opinion" as a basis for formulating Growth Management Act compliance?

This issue was previously considered in *English v. Columbia County*. In that case the Board said:

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. *English v. Columbia County*, EWGMHB Case No. 93-1-0002, at 339.[\[FN1\]](#)

The Board reaffirms this position.

Conclusion No. 10: The Board finds that while the Act requires that county commissioners consider public opinion in formulating compliance with the GMA, public opinion cannot be used to override a requirement of the Act.

Conclusion

1. The Board finds that the County did not err in the issuance of a declaration of no significance (DNS) for County Ordinance No. 95-3.
2. The Board finds that the record supports a finding that County Ordinance 95-13 is consistent with wide-wide Planning Policies, specifically, with Policy I (1) (b).
3. The Board finds that the record supports a finding that Ordinance No. 95-13 complies with the requirements of RCW 36.70A.020(1), relating to the encouragement of growth in areas with adequate public facilities and services.
4. The Board finds that Ordinance No. 95-13 does not violate the requirements of RCW 36.70A.020(2), relating to the reduction of sprawl.

5. The Board finds that Ordinance 95-13 fails to comply with the requirements of RCW 36.70A.020(8), because it fails to meet both of the planning goal's minimum requirements to discourage incompatible uses on designated lands and to maintain and enhance natural resource industries.
6. The Board finds that Ordinance No. 95-13 complies with the requirements of RCW 36.70A.020(9) relating to open spaces and recreation.
7. The Board finds that Ordinance 95-13 complies with the requirements of RCW 36.70A.020(10).
8. The Board finds that Ordinance No. 95-13 fails to designate agricultural lands of long-term commercial significance as required by RCW 36.70A.170(1).
9. The Board finds that Ordinance 95-13 fails to assure the conservation of agricultural lands as required by RCW36.70A.060 (1).
10. The Board finds that while the Act requires that county commissioners consider public opinion in formulating compliance with the GMA, public opinion cannot be used to override a requirement of the Act.

ORDER

1. The Board finds Kittitas County Ordinance 95-13 is in compliance with the Growth Management Act in regards to Issues 1, 2, 3, 4, 6 and 7.
2. The Board finds Kittitas County is not in compliance with the Growth Management Act in regards to Issues 5, 8, and 9.
3. The Board therefore remands Ordinance 95-13 back to Kittitas County for further consideration and revision to bring Issues 5, 8 and 9 into compliance with the Growth Management Act on or before September 6, 1996.

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

So Ordered this 7th day of May, 1996.

EASTERN WASHINGTON

GROWTH MANAGEMENT HEARINGS BOARD

Judy Wall, Presiding Officer

Tom A. Williams, Board Member

D. E. "Skip" Chilberg, Board Member

[FN1](#)

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