

State of Washington

GROWTH MANAGEMENT HEARINGS BOARD

FOR EASTERN WASHINGTON

CONCERNED FRIENDS OF
FERRY COUNTY Case No. 99-1-0004
Petitioners **FINAL DECISION AND ORDER**

vs.

FERRY COUNTY,
Respondent

I. PROCEDURAL HISTORY

On April 5, 1999, Concerned Friends of Ferry County filed a petition for review with the Eastern Washington Growth Management Hearings Board.

On May 21, 1999, the Board held a prehearing conference and motion hearing in the Colville City Hall, Colville, Washington. At that time the Board heard Ferry County's Motion to Dismiss, citing lack of subject matter jurisdiction, failure to file petition within 60 days and failure to exhaust administrative remedies.

On the 27th day of May, 1999, an order was entered declaring the Eastern Washington Growth Management Hearings Board has jurisdiction to hear the petition of the Concerned Friends of Ferry County.

On the 13th day of August, 1999, the hearing on the merits was held in Republic with the Petitioner present, representing himself and the Respondent represented by the Ferry County Prosecutor, Stephen Graham.

The Petitioner's Motion to Supplement the Record was in part granted, allowing the record to be supplemented by the addition of three letters, dated December 16, 1998, January 20, 1999 and May 6, 1999.

II. SUBJECT MATTER JURISDICTION

Discussion:

Recent changes in the RCW 76.09.060 and WAC 222-30-050 have allowed Ferry County to release a landowner from the six-year moratorium on future development on forestlands. Ferry County Ordinance #99-01 adopted a procedure to authorize such a release. Because of its association with forestlands and critical areas, the Petitioner has asked us to review the ordinance and determine if it causes the County to be out of compliance with the Growth Management Act (GMA).

While the Growth Management Hearing Board does not have the jurisdiction to review an action of a County pursuant to a non-GMA statute unless that statute was used to comply with the

requirements of the GMA, the Board has jurisdiction to determine if a land use planning legislative action complies with the GMA, as long as there is a sufficient nexus between the action and the GMA. The Board's jurisdiction is not to determine whether the local government has properly enacted such law, but the effect of the law passed upon the County's compliance with the GMA.

We review Ferry County Ordinance #99-01 not to determine if the county is in compliance with the Washington Forest Practices Rules, WAC 222-20-050, but rather, if this action moves the County out of compliance with the GMA. To do otherwise would allow the myriad of other planning statutes to dramatically affect a County's Comprehensive Plan with no checks.

III. FACTUAL BACKGROUND

Forest Practices Rules, WAC 222-20-050, was modified to authorize local government entities to approve Conversion Option Harvest Plans (COHP) for certain Class II, Class III and Class IV – Special Forest Practice applications. This section allows a landowner to request the appropriate local government entity to approve a conversion option harvest plan and to maintain the option for conversion to a use other than commercial timber operation. If approved, this plan will release the landowner from the six-year moratorium on future development.

On February 1, 1999, the Board of County Commissioners passed Ordinance 99-01 (TFPO). This Ordinance established a procedure to allow the citizens of Ferry County to take advantage of this change in the Forest Practices Rules. The following are sections of the above Ordinance the Petitioners contends causes the County to be out of compliance with the GMA:

A. Section 2.00's stated purpose is "to provide a public process for the lifting of the mandatory six-year moratorium imposed pursuant to RCW Chapter 76.09.

B. Section 3.03 provides for review by the Administrator of all applications for a COHP. In section 3.03(2), residences are prohibited within fifty (50) feet of the ordinary high-water mark of any DNR Type 1, 2, or 3 stream as defined in WAC 222-16-030 or wetlands. The planning department may adjust these setbacks. Section 3.03(3) provides that within the shoreline jurisdiction, no more than 30% of the trees over a sixteen inch DBH shall be harvested in any ten-year period.

IV. ISSUES, DISCUSSIONS AND CONCLUSIONS

Issue 1: Does Ordinance TFP 99-01, of February 1, 1999, Section 3.03, subsections 1, 2, and 3 fail to comply with the GMA requirement that the county shall protect critical areas, including but not limited to wetlands, fish and wildlife habitat (including riparian areas), frequently flooded areas and aquifer recharge areas as required by RCW 36.70A.060 and RCW 36.70A.020 (9,10), and that the County shall use best available science as required by RCW 36.70A.173?

Petitioner's Position: The Petitioners contend the Timber & Forest Practice Ordinance, (TFPO), conflicts with the designated buffer widths established in the Interim Critical Areas Ordinance (ICAO). The TFPO provides for a minimum of a 50-foot setback for all wetlands, regardless of class. The Petitioners further believe that the best science was not used and the effect is to remove the County from compliance. Further they contend the reduction of the charge for the 6-years

waiver from \$500.00 to \$50.00 would result in a domino effect, which would rapidly spread as forest and other resource land uses become increasingly unsupportable in an area where residential development is allowed.

Respondent's Position:The Respondent contends section 2 cannot be construed to conflict with the GMA. The waiver of the 6-years is currently available upon the payment of fee of \$500.00. The new ordinance changes little, except to decrease the fee to \$50.00. This new ordinance also permits the waiver of the 6-years moratorium only if the applicant is in "compliance with all other local regulations, ordinances, and/or resolutions."

The County insists the "domino effect" referred to in the petitioner's brief is without factual support. It has not occurred in similar situations and this change is permitted by State law.

Discussion:The Respondent County has specifically stated that the buffers listed in their I.C.A.O at Section 7.06 take precedence over the buffers found in the subject ordinance, TFPO. The County unequivocally stated that the buffers found in the Interim Critical Areas Ordinance must be complied with before any development may occur on the subject property. It is also the belief of this Board that the Comprehensive Plan and the buffers contained therein govern. The land-owner must comply with the Comprehensive Plan of Ferry County and the implementing ordinances prior to development of lands within the subject area. The TFPO provides only a method, allowed by State law, to eliminate the 6-year moratorium at less cost.

Conclusion:The passage of the TFPO, 99-01 by Ferry County, particularly Section 3.03, does not take the Comprehensive Plan out of compliance with the Growth Management Act. If the buffer width found therein were controlling and took precedence over those found in the ICAO, we would have a different result.

Issue 2: Does Ordinance TFP 99-01, of February 1, 1999, section 2.00 fail to comply with the GMA requirement that the County shall conserve and protect resource lands as required by RCW 36.70A.060 and RCW 36.70A.020(8), because the provisions for a waiver of the 6-year moratorium fail to assure the conservation of forest resource lands?

Petitioners' Position:The Petitioners contend Section 2.02.2 of the TFPO allows a single family to erect a residence on a building site as large as 5 acres. They believe building sites as large as allowed under the TFPO would lead to a failure to conserve resource lands.

Respondent's Position:The Respondent points out that the Comprehensive Plan allows for buildings to be constructed on lots of 10 acres, 5 acres and 2.5 acres depending upon the location. The building of a home on this land is subject to the Comprehensive Plan and other land use Ordinances.

Discussion:The Comprehensive Plan controls and the size of the lot is determined by the Plan and its implementing ordinances.

Conclusion:The Petitioners have not carried their burden of proof and we find the TFPO is secondary to the Comprehensive Plan and does not render the Plan out of compliance.

Issue 3: Does the TFPO in its entirety fail to comply with the GMA since its impact on and ability to satisfy the GMA Goals cannot be effectively determined until the Comprehensive Plan and Implementing Development Regulations are adopted and in compliance?

Petitioners' Position:The Petitioners believe that without the implementing development regulations we cannot determine compliance.They believe the county is out of compliance with the TFPO and the small set back and does not feel we should wait until all the regulations are prepared before the non-compliance is declared.

Respondent's Position:The Respondent again asserts that the Interim Critical Areas Ordinance exists and are in compliance.Any structure would still be subject to all other laws or regulations, including the GMA and the County's Comprehensive Plan and implementing regulations.Also, the Respondent does not believe the references to "best available science" and "36.70A are applicable.They believe Timber and Forest Practices Ordinance 99-1-01 is not a GMA regulation to which these terms are applicable.

Discussion: The review of Ordinance 99-01 is limited to whether the existence of this ordinance causes the Comprehensive Plan to be non-compliant. We do not have the jurisdiction to determine if the ordinance was properly adopted or followed procedures found in the GMA. We look only on its effect upon the Comprehensive Plan.

Conclusion: The passage of Ordinance 99-01 does not cause the Comprehensive Plan to be non-compliant. The Petitioner did not carry its burden of proof.

V.ORDER

The passage of the Timber and Forest Practices Ordinance99-01 does not cause Ferry County to be out of compliance with the Growth Management Act.The TRPO is subject to existing ordinances, particularly the Comprehensive Plan and the implementing regulations, including the Interim Critical Areas Ordinance.

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 23rd day of August, 1999.

EASTERN WASHINGTON

GROWTH MANAGEMENT HEARINGS BOARD

Dennis A. Dellwo, Presiding Officer

Judy Wall, Board Member

D. E. "Skip" Chilberg, Board Member