

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON
STATE OF WASHINGTON

CONCERNED FRIENDS OF
FERRY COUNTY

Petitioner,

v.

FERRY COUNTY,

Respondent

Case No.: 00-1-0001

**FINAL DECISION AND
ORDER**

I. Procedural History

On January 18, 2000, David L. Robinson, pro se for Concerned Friends of Ferry County filed a Petition for Review regarding to Ferry County's Short Subdivision #72-1 with changes and Long Subdivision Ordinance #73-1 with changes adopted on November 15, 1999 and published on November 18, 1999.

On January 28, 2000, David L. Robinson filed Amended Petition for Review of Ferry County Revised Subdivision Ordinances #72-1 and #73-1 and on January 28, 2000, the Prehearing Order was issued setting a motions and briefing schedule and identifying the issues to be resolved.

On May 18, 2000, the Board held a Hearing on the Merits in Republic, Washington. All parties were represented.

II. Findings of Fact

1. Ferry County adopted their Critical Areas Ordinance in 1993.
2. Ferry County adopted their Comprehensive Plan on September 18, 1995.
3. The Ferry County Short Subdivision Ordinance #72-1 was adopted November 15, 1999.

4. The Ferry County Long Subdivision Ordinance #73-1 was adopted November 15, 1999.

III. Legal Issues and Discussion

Issue No. 1: The Ferry County Ordinance #72-1, short subdivision ordinance and Ferry County subdivision ordinance do not comply with RCW 36.70A.060(1) because they do not require notice that a subject property is within 300 feet of natural resource lands where appropriate. The setting of 2.5 acre minimum lot size does not assure the conservation of agricultural and forest resource lands, as designated under RCW 36.70A.170, RCW 36.70A.060(1).

Petitioner's position: The Petitioner contends Ferry County's Short Subdivision Ordinance 72-1 (SSO) and Long Subdivision Ordinance (73-1) (LSO) are on their face development regulations within the purview of the Growth Management Act. The Petitioner also contends each ordinance fails to provide proper language to give adequate notice of potential development of resource lands as required under RCW 36.70A.060(1).

Respondent's position: The Respondent states that while the County's Ordinances do not explicitly refer to the "500" foot limit mentioned in RCW 36.70A.060 the required notice is given and the County left the enforcement of what is "within or near" to the plat approval process administrator. The Respondent also states they have changed the plat ordinances seven times and chose language that would withstand any other legislative changes, which might modify the 500-foot distance.

Discussion: RCW 36.70A.060(1) in part states "...or for the extraction of minerals. Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or minerals resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. "

Ferry County Ordinance 73-1 requires as follows: "45.33 A statement affixed to the plat: The subject property is within or near designated agricultural, forest, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development. (73-1 Long Subdivision Ordinance, Page 22, Exhibit 44)."

Ferry County Ordinance 72-1 requires as follows: “ 08.33 A statement affixed to the plat: The subject property is within or near designated agricultural, forest, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development. (72-1 Short Subdivision Ordinance, Page 13, Exhibit 41)

The question is whether the notice is adequate and the county has met those criteria? The Ordinances require the specific notice be affixed on plats or permits “within or near” resource lands. The Growth Management Act requires that this notice be affixed on plats and permits, which affect lands on or within 500 feet of resource lands. The statute would prevail and the County Administrator dealing with these plats and permits must consider “within or near” the same as “on or within 500 feet of” resource lands. The Ordinances allow for this to happen. While having the “500 feet” in the ordinances would have been preferable, the County’s wording is not a violation of the GMA.

Conclusion: The County has complied with RCW 36.70A.060(1). The notice found in the Ordinances to be affixed upon plats and permits is word for word what the statute requires and that notice must, by law, be affixed to such plats or permits on or within 500 feet of resource lands.

Issue No. 2: Section 15.00 of The Short Subdivision Ordinance and Section 23.00 of the Ferry County Subdivision Ordinance does not comply with the Requirements of RCW 36.70A.060 and RCW 36.70A.172 because its standards for setbacks from water and wetlands are not based on best available science and because it is inconsistent with the requirement to protect critical areas.

Petitioner’s position: The Petitioner contends the Respondent has failed to protect critical areas and best available science was not included in development regulations for the County’s short and long subdivision ordinances.

The Petitioner cites a letter from Kevin Robinette explaining the difference between “setback” and “buffer” and goes on to say the County used the term “setback” instead of “buffer” in these long and short subdivision ordinances.

Respondent’s position: Respondent states that while RCW 36.70A.060(2) requires development regulations shall, “protect critical areas that are required to be designated under RCW 36.70A.170, Ferry’s County’s Long Subdivision Ordinance’s stated purpose is to facilitate the appropriate development of land in accordance with the ability of the

natural resources of Ferry County to accommodate such development; to prevent the overcrowding of land with development; to lessen congestion in the streets and highways and provide proper ingress and egress; to facilitate adequate provision for water, drainage, access, sewage disposal, parks and recreation areas, fire protection, schools, and other public and general uses; and to assure uniform documentation and conveyance by accurate legal description; [and] to provide penalties for violation..."

Ferry County's Short Subdivision Ordinance has a similar stated purpose.

The Respondent contends the critical areas are not designated or protected by these two ordinances. Ferry County adopted their Critical Areas Ordinance in 1993 and the County is now revisiting that ordinance. The Respondent also contends the Critical Areas Ordinance is not before the Board and cannot be argued at this time. They further contend that because the subdivision ordinance requires at least 50 feet setbacks doesn't mean the more specific critical areas ordinance buffers are being modified. The setbacks provided in the critical areas ordinance would control, not the more general Long and Short Subdivision Ordinances.

Discussion: RCW 36.70A.060 states that development regulations shall "...protect critical areas that are required to be designated under RCW 36.70A.170." Ferry County contends Ordinance 72-1 and 73-1 are not the last word on protection of critical areas. The County adopted its critical areas ordinance in 1993 and that ordinance is not before us. These platting ordinances should not be reviewed as critical areas ordinances and will not be treated as such.

The County has stated they are in the process of revisiting the Critical Areas Ordinance at this time and when the County adopts amendments to that ordinance, then will be the appropriate time to hear those issues.

The County cites WAC 365-190-080(5)(b)(v) which is the requirements for critical areas. Buffer zones are elements of critical areas ordinances and regulations, but not required for subdivision ordinances. The critical areas ordinance is the controlling regulation, not the more general subdivision ordinances.

The County also cites WAC 365-195-825(4)(b) which states "counties and cities may add other items related to public health, safety and general welfare to the [goals of subdivisions] such as protection of critical areas, conservation of natural resource lands and affordable housing..." However, this is not required.

WAC 365-195-805(1) states:

“..In determining the specific regulations to be adopted, jurisdictions may select from a wide variety of types of controls. The strategy should include consideration of: (a) the choice of substantive requirements, such as the delineation of use zones; general development limitations concerning lot size, setbacks, etc. (Emphasis added).

The words “setback” and “Buffer” may be used in different situations. The use of “setbacks” in this case is not inappropriate.

Conclusion: The setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The critical area ordinances required by the GMA to be adopted are controlling. Adequate protection of critical areas must be found in that ordinance. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not place the County in noncompliance with the GMA.

Issue No. 3: The Ferry County Ordinance #72-1, Short Subdivision Ordinance and Ferry County Subdivision Ordinance do not comply with RCW 36.70A.060 because they were adopted out of sequence and before the adoption of a Critical Areas Ordinance. This out of sequence action precludes the adoption of development regulations that are consistent with the protection of critical areas.

Petitioner’s position: The Petitioner states the County did not adopt any development regulations including a final Critical Areas Ordinance at the time they adopted the Comprehensive Plan on September 18, 1995 or within 6 months of that date. The Petitioner also states the only development regulations adopted addressing critical areas are the two subject ordinances. The Petitioner contends the language in WAC 365-195-805(3) is mandatory and the development regulations should be adopted after the comprehensive plan.

Respondent’s position: The County cites WAC 365-195-800, which states development regulations are “specific controls placed on development or land use activities... [And they] must be consistent with comprehensive plans developed pursuant to the act and they must implement those comprehensive plans.”

The County states since development regulations “implement” comprehensive plans, it is clear they should generally follow comprehensive plans. The County also states they are putting the finishing touches on their comprehensive plan through Case No. 97-1-0018. They contend the final development regulations should not be adopted while the Comprehensive Plan is still subject to change.

They further state they are trying to enact all their laws and regulations as soon as possible to put controls on problematic growth patterns. The County has updated their pre-GMA subdivision ordinances before completing the comprehensive plan.

Discussion: WAC 365-195-805(3) states:

“(3) Adoption schedule. The strategy should include a schedule for the adoption or amendment of the development regulations identified. Individual regulations or amendments may be adopted at different times. However, all of the regulations identified should be adopted by the applicable final deadline for adoption of development regulations.”

While it may have been appropriate to adopt the development regulations more timely, the Board finds the language in WAC 365-195-805(3) is directive only. Words *should* and *may be* do not have the same weight as words like *shall*.

Conclusion: The Petitioners have not carried their burden of proof and the County is not out of compliance in Issue No. 3.

Issue No. 4: The setting of 2.5 acre minimum lot size does not assure the conservation of agricultural and forest resource lands as designated under RCW36.70A.070 and do not protect the rural element of Ferry County by reducing the inappropriate conversion of undeveloped land.

Conclusion: The Board has answered this question in Case No. 95-1-0010 Order on Compliance dated April 16, 1997 and Third Order on Compliance dated March 25, 1998. Therefore, this issue will not be addressed again here.

Issue No. 5: Do subdivision regulations 72-1 and 73-1 fail to comply with RCW 36.70A.040(4)(d) because they are not consistent with the provisions of the Comprehensive Plan as they relate to lot sizes for “residential uses based upon historic lots and lot size?” Specifically, do the regulations fail to be consistent with comprehensive plan policies 7.12.3.1, and 7.123.4,6: “development regulations should provide for such uses and limits, subject to concurrency requirements outlined in section 7.12.4; and “development regulations shall be developed to identify how the criteria is to be accomplished under differing circumstances and to provide specific limitations as required by RCW 36.70A.070(5)(d)(i-v) RCW 36.70A.040(4)(d).

Petitioner’s position: The Petitioner claims Ferry County Long and Short Subdivision Ordinances have no criteria stating historic lot sizes are to be allowed within the various

Rural Service Areas (RSAs). The Petitioner contends the County has set a minimum lot size of 2.5 acres for subdivisions and did not give itself any opportunity to deviate from this 2.5-acre lot size unless something is already platted. The County has not adopted the measures needed, i.e., smaller lot sizes within RSAs and “to minimize and contain the existing areas or uses of more intensive rural development.” Thus the whole county can only have new lots with a minimum size of 2.5 acres both within and outside the RSAs and “thereby allowing a new pattern of low-density sprawl.”

Respondent’s position: The Respondent contends concurrency is defined in the procedural criteria established in WAC 365-195-070(3) as “the situation in which adequate facilities are available when the impacts of development occur or within a specified time thereafter.” The Respondent also cites WAC 365-195-210, which in part states that adequate public facilities “means facilities which have the capacity to serve development without decreasing levels of services below locally established minimums.” The term “available public facilities” is defined as including facilities and services that “are in place or that a financial commitment is in place to provide the facilities or services within a specified time.”

The Respondent further contends Ferry County does not have the same growth pressures as other counties and therefore they don’t need the same strict concurrency requirements of other counties.

Discussion: RCW 36.70A.040(4)(d) states:

“..the county and each city located within the county shall adopt a comprehensive land use plan and development regulations that are consistent with and implement the comprehensive plan within four years of the certification by the office of financial management, but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.” (Emphasis added)

The Respondent, having adopted its Comprehensive Plan in 1995, should have by this time adopted development regulations that are consistent with and implement the Comprehensive Plan. Ferry County admits they are working on the Comprehensive Plan through case No. 97-1-0018 and that development regulations will be done following the adoption of the amended comprehensive plan.

The Long and Short Plat Subdivision Ordinances are not where the County will adopt

the required consistent development regulations. However, these land use regulations must be consistent with the Comprehensive Plan especially, where, as to the RSAs, they stand alone. 2.5-acre lots are the minimum size of lots allowed within a RSA when using the Short and Long Subdivision Ordinances. This is inconsistent with the Comprehensive Plan's provisions dealing with Rural Service Areas. A provision is needed to allow smaller lot sizes within the RSAs "to minimize and contain the existing areas or uses of more rural development".

Conclusion: The County is out of compliance with the GMA and the Short and Long Subdivision Ordinances must be modified to be consistent with the Plan.

IV. ORDER

Issue 1: The Board finds the notice found in the Short and Long Subdivision Plats Ordinance does not violate RCW 36.70A.060.(1).

Issue 2: The Board finds the setbacks found in Ordinances 72-1 and 73-1 are not controlling when dealing with critical areas. The Critical Areas Ordinance required by the GMA to be adopted are controlling. The setback found in the Short and Long Subdivision Ordinances is not controlling and therefore does not violate the GMA.

Issue 3: The Board finds the Petitioners have not carried their burden of proof and the County is found in compliance on this issue.

Issue 4: The Board answered this question in Case No. 95-1-0010 Order on Compliance dated April 16, 1997 and Third Order on Compliance dated March 25, 1998.

Issue 5: The Board finds Ferry County is not in compliance with the GMA and the Short and Long Subdivision Ordinances must be modified to be consistent with the Plan regarding lot size within RSAs.

Ferry County has 60 days to come into compliance with this Order and the Growth Management Act.

Pursuant to RCW 36.70A.300, 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 6th day of July, 2000.

EASTERN WASHINGTON

GROWTH MANAGEMENT HEARINGS BOARD

Judy Wall, Presiding Officer

D. E. "Skip" Chilberg, Board Member

Dennis A. Dellwo, Board Member