

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

CITY OF WALLA WALLA, CITIZENS FOR GOOD GOVERNANCE, 1000 FRIENDS OF WASHINGTON,

Petitioner,

v.

WALLA WALLA COUNTY,

Respondent.

Case No. 02-1-0012c

ORDER ON REMAND

I. BACKGROUND

On May 31, 2002, CITIZENS FOR GOOD GOVERNANCE and 1000 FRIENDS OF WASHINGTON, by and through their attorneys, Jeffrey Eustis and John Zilavy and CITY OF WALLA WALLA, by and through its attorney, Tim Donaldson, filed Petitions for Review.

On July 29, 2002, the Board issued an Order Consolidating Cases No. 01-1-0011 and 01-1-0012 under the above number.

A Hearing on the Merits was held in Walla Walla on the October 24, 2002. On November 26, 2002, the Board issued its Final Decision and Order.

On July 24, 2003, the Board received a Stipulation signed by the parties, stipulating compliance on all issues except the issue regarding agricultural lands, which has been remanded to the Board from Walla Walla County Superior Court.

On July 31, 2003, the Board issued its Order Finding Partial Compliance in this matter.

On November 14, 2003, the Board held the Remand Hearing in the above captioned matter. Present for the Board was the Presiding Officer, D.E. "Skip" Chilberg and fellow Board Members Dennis A. Dellwo and Judy Wall. Present for Petitioners were Jeff Eustis and John Zilavy. Present for Respondent were Dennis Reynolds and Chuck Maduel.

II. STANDARD OF REVIEW

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon

adoption by the local government. RCW 36.70A.320. The burden is on the Petitioner to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act. RCW 36.70A.320.

The Washington Supreme Court has summarized the standards for Board review of local government actions under Growth Management Act. It was stated:

The Board is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations. RCW 36.70A.280, .302. The Board "shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the county, or city is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an action "clearly erroneous" the Board must be "left with the firm and definite conviction that a mistake has been committed." *Department of Ecology v. Pub. Util.*

Dist. No. 1, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

The Board will grant deference to counties and cities in how they plan under Growth Management Act. RCW 36.70A.3201. But, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA." *King*

County v. Central Puget

Sound Growth Management

Hearings Board,

142 Wn.2d 543, 561, 14 P.2d 133

(2000). It has been further recognized that "[c]onsistent with *King*

County, and notwithstanding the 'deference' language of RCW

36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA.'"

Thurston County v. Cooper

Point Association,

108 Wn.App. 429, 444,

31 P.3d 28 (2001).

III. FINDINGS OF FACT

1. Walla Walla is a county planning under Chapter 36.70A.
2. Petitioners participated in hearings before the Board of County Commissioners regarding the development of the subject development

regulations.

3. The Walla Walla County Comprehensive Plan (CP) has no provision allowing the conversion of agricultural lands of commercial value to Recreational/cultural uses.

4. Walla Walla County Title 17 Zoning, permits the conversion of agricultural lands to recreational/cultural land uses but has no standards or criteria for such determination other than limiting the conversion to all Agricultural lands except lands identified as Primary Significance or Unique farmlands.

5. The Agricultural lands, which are subject to conversion to non-agricultural development, WWCC 17.16, total more than 96% of the County's identified agricultural lands of long term commercial significance.

6. The Conditional Use Permit (CUP) process does not require or even suggest that the non-agricultural uses involved herein be limited to lands with poor soils or lands otherwise unsuitable for farming.

IV. DISCUSSION

The Superior Court of Walla Walla County remanded to this Board a portion of the Final Decision and Order in *City of Walla Walla v. Walla Walla County*, No. 02-1-0012c. This Board was directed by the court to "make findings as to any legal or factual basis for not allowing use of Walla Walla County's CUP process in making such threshold determinations, including whether the mandated conservation, maintenance, and enhancement of the agricultural industry is being complied with, and whether any 'innovative zoning techniques' under RCW 36.70A.177 are applicable." (Walla Walla County Superior Court, *Walla Walla County v. Eastern Washington Growth Management Hearings Board*, No. 02-2-00784-9, April 21, 2003). The Board is to consider whether the County's use of its CUP process and its standards to make a "threshold"

decision on the siting of these challenged uses, protects agricultural lands of long-term commercial significance such that the regulations comply with the GMA. The Board finds that it does not.

In the Final Decision and Order herein, the Board found that the Development Regulations, WWCC Sec. 17.16, authorizing incompatible and unrelated recreational or cultural uses, within Primary Agricultural, Exclusive Agriculture, General Agriculture and Agriculture Residential designations are out of compliance. These lands comprise over 96% of Walla Walla County's agricultural lands of long-term commercial value. Some of the permitted activities included golf facilities, gun ranges, outdoor and indoor, parks, recreational facilities (public and private), RV parks and campgrounds, all-terrain vehicles parks, assembly halls, and accessory uses.

The CUP is written in general language and in no way directs that only lands with poor soil be considered for conversion to the above uses. The County asks the Board to recognize an affidavit submitted by their interim Director of Regional Planning for Walla Walla County as the County's "law" limiting the conversion only to lands with poor soil. That affidavit and its correction purport to establish the criteria for permitting conversion of these lands to non-agricultural uses. However, even the affidavit is unclear. Nowhere in the County's DRs, CP or CUP is there a requirement that such a non-agricultural use be on lands of poor soil or soil not suitable for agricultural purposes. The affidavit of Kenneth Kuhn, the acting Director of Regional Planning, also does not make it clear that applications will be rejected if the soil is not poor or unsuited for agricultural purposes. A person may infer that is the case, but it is unclear. The County submitted as additional exhibits, Sections of the Walla Walla County Zoning Code, which allow the Director of the Department of Planning to issue official code interpretations. This Code provision provides that "upon request or as determined necessary, the director shall interpret the meaning or application of the provisions of said titles and issue a written administrative interpretation within thirty days." However, there is no language to be interpreted or the language interpreted does not deal with the issue before us. A key provision of the affidavit, placing the burden upon the applicant to show the poor quality of land, was incorrectly written and had to be corrected the day before the GMA hearing. A special application form was also prepared which sought information regarding the quality of soils. Each of these are documents

that may show the intention of the County, but are not required by or contained in the County's Comprehensive Plan or the Development Regulations which authorize this conversion of Agricultural lands. The Regulations that do exist are those that authorize the change of use on all but Primary Significance or Unique farmlands. With no regulations to address the specific criteria of this conversion, the landowner is told only that the CUP process is to be used. That process makes no mention of agricultural lands nor does it include standards or criteria, which would limit or guide the landowner or the County.

The actions of the County are non-reviewable by the Growth Management Hearings Boards unless they are found in the County's Comprehensive Plan or Development Regulations. RCW 36.70A.280(a). The Board looks at the development regulations developed by the County for review of the applications for non-agricultural development upon agricultural lands. The County has stated on the record that it is their intent to allow only non-productive or poor agricultural soil/lands to be converted in this manner. However, nowhere does this criteria or standard exist in their Comprehensive Plan or Development Regulations.

The research of the Petitioners and the Board has found direction from Washington State Supreme Court. *Burien Bark Supply v. King County*, 106 Wn.2d 868; 725 P.2d 994 (1986), supports the Petitioners' contentions:

Neither the arguments made nor the decisions cited by the County are persuasive in this case. The general, subjective performance standards of the code do not reduce the discretion of county officials to a constitutionally acceptable degree. Nor do "common practice and understanding" help KCC 21.30.010 provide fair notice of what it prohibits. The County cannot argue that a common practice and understanding exists when county employees could not agree among themselves whether the "process" at Burien Bark Supply was "limited." A citizen should be able to determine the law by reading the published code. A citizen should not be subjected to *ad hoc* interpretations of the law by county officials.

Instead, *Grant Cy. v. Bohne*, *supra*, is more applicable to this case. In *Grant Cy.* the County used an ordinance that prohibited "buildings" in a certain district to prohibit the location of a mobile home in that district. We

concluded that the ordinance did not give fair warning that it prohibited a mobile home. We also concluded that the ordinance unconstitutionally allowed county officials the discretion to decide exactly what the ordinance prohibited, saying the decision to prohibit a type of housing may never be left to the whim of local officials. The county must provide ascertainable standards to guide local officials who enforce zoning ordinances in order to satisfy due process.

A further look at *Grant County v.*

Bohne , 89 Wn.2d 953, 577 P.2d 138; April 20, (1978) finds language that also supports the Petitioners' arguments:

Clearly, a variance may be lawfully granted only within the guidelines set forth in the zoning ordinance. *Lewis v.*

Medina , 87 Wn.2d 19, 548 P.2d 1093 (1976). p. 957.

In *City of Seattle v.*

Crispin , 149 Wn.2d 896 ; 71 P.3d 208; June 19, 2003, we find additional express language in the County Code:

We have recognized that the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application. P.905.

The Growth Management Act requires the County to identify and preserve Agricultural Lands of Long-term commercial Value. The County has identified a large portion of their lands as such, 92%. This is admirable. We recognize that such a whole scale designation was a precautionary step. It is quite possible that, upon detailed examination, some of these lands might not qualify as Agricultural Resource Lands. However, the County must have a compliant procedure allowing the consideration of other uses of this land if it were believed that particular lands were in fact not viable agricultural lands and compatible with the agricultural uses around it. If this is what the County desires to do, the County must adopt a procedure allowing the careful examination of the subject parcel and the redesignation of such parcel only if it is found to be poor soil and unsuited for agricultural use and compatible with the agricultural uses around it.

The County has not gone far enough. The County allows the conversion of these lands yet establishes no criteria or standards giving the landowner an understanding of its application. The reference to "in conformance with the comprehensive plan." 17.40.020 (A)(3) does not clarify the meaning of the statute or provide the criteria needed. The County's Comprehensive Plan requires the protection of agriculture resource lands, but gives no direction to the landowner as to how a change of use could take place. The County needs to include in the Comprehensive Plan or in their Development Regulations, the standards and criteria for conversion from Agricultural to recreational/cultural. The Board would then have the ability to review this action and determine its compliance with the GMA.

CONCLUSION:

The Board is directed by the Walla Walla County Superior Court to determine if the CUP process should be allowed to be for the threshold determination in the conversion of agricultural lands to non-agricultural uses. The EWGMHB has jurisdiction to review the County's Comprehensive Plan and the Development Regulations established to implement that Plan. The Conditional Use Process, without standards or criteria will not protect Agricultural Lands of Long-term Commercial use. Walla Walla County Code 17.40.020 permits conversion of Agricultural Lands of Long-term Commercial Significance to non-agricultural uses without limiting the conversion specifically to land with poor soils or lands otherwise unsuited for agriculture. They fail to comply with the Growth Management Act. While "innovative zoning techniques" under RCW 36.70A.177 are applicable, they cannot be taken advantage of without the County having a clear method for the review of such parcels and their approval for conversion. The County is directed to put their requirements in a form that can be reviewed by this Board under the GMA.

The use of CUP without standards or criteria is clearly erroneous and non-compliant with the GMA. The process adopted by the County does not conserve, maintain, and enhance the agricultural industry.

V. CONCLUSIONS OF LAW

1. This Board has jurisdiction over this challenge to Walla Walla County's development regulations and policies pertaining to conversion of agricultural lands to non-agricultural uses.

2. Petitioners have standing to challenge Walla Walla County's development regulations and policies pertaining to conversion of agricultural lands to non-agricultural uses.
3. Walla Walla County's conditional use process may be used to make "threshold determinations" regarding conversion of agricultural lands to recreational uses, provided adequate standards and criteria are in place in the County's Comprehensive Plan or development regulations to guide that determination.
4. RCW 36.70A.177 "innovative zoning techniques" are applicable in this case, provided the subject conversions do not conflict with the County's mandate to conserve designated agricultural lands of long term commercial significance.
5. The County's development regulations, allowing conversion of agricultural lands to non agricultural uses, lack clarity with regard to: the conversion of only lands that consist of poor soils or not otherwise suitable for agricultural use; the protection of agricultural lands of commercial value; and the need for the new land use to be compatible with the agricultural uses going on around it. Until these matters are specified, the County is not in compliance with the GMA with respect to protection of agricultural land of commercial significance. (RCW 36.70A.050).

VI. ORDER

1. Walla Walla County Code Title 17 does not comply with provisions of the Growth management Act requiring protection of designated agricultural land of long-term significance. Walla Walla County is directed to provide standards and criteria for proposed conversion of agricultural lands to recreational uses.
2. Walla Walla County is directed to provide standards and criteria within their development regulations to protect agricultural lands from improper conversion to non-agricultural uses.
3. Walla Walla County is directed to make the necessary changes within 120 days of this Order.

Pursuant to RCW 36.70A.300(5), 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 from the date of service of this Order.

SO ORDERED this 16th day of December 2003.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD

D.E. "Skip" Chilberg, Board Member

Judy Wall, Board Member

Dennis Dellwo, Board Member