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3 **State of Washington**
4 **GROWTH MANAGEMENT HEARINGS BOARD**
5 **FOR EASTERN WASHINGTON**

6 1000 FRIENDS OF WASHINGTON,

Case No. 04-1-0002

7 Petitioner,

FINAL DECISION AND ORDER

8 v.

9 CHELAN COUNTY,

10 Respondent,

11 DAVID & ROSEMARY PLUGRATH,

12 Intervenor.
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15 **I. PROCEDURAL BACKGROUND**

16 On March 8, 2004, 1000 FRIENDS OF WASHINGTON, by and through its attorney,
17 John Zilavy and Timothy Butler, filed a Petition for Review of the action of Respondent
18 Chelan County in adopting Resolution No. 2003-186 amending the Chelan County
19 Comprehensive Plan and County Zoning Map to change the designation and zoning of
20 approximately 90 acres of land from Agricultural Commercial to Rural Residential Resource
5 and 2.5.¹

21 On March 12, 2004, the Board received a Motion to Intervene from the owners of the
22 affected property, David and Rosemary Pflugrath, which motion was subsequently granted.
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25 ¹ At the Pre-Hearing Conference the Petitioner clarified its position that it was
26 actually challenging the redesignation and rezoning of approximately 24 acres from
Agricultural Commercial to Rural Residential Resource 2.5

1 On April 12, 2004, the Board held a telephonic Prehearing conference. Present were
2 Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and D.E. "Skip" Chilberg.
3 Present for Petitioner was John Zilavy and Timothy Butler. Present for Respondent was Billy
4 Plauche. Present for Intervenors was Robert Dodge. At the Prehearing conference the
5 Board heard the Motion to Intervene and no objections were received. The Board granted
6 Intervenor status to David and Rosemary Pflugrath.

7 On April 19, 2004, the Board issued the Prehearing Order.

8 On May 5, 2004, Respondent and Intervenors filed Motions to Dismiss.

9 On May 19, 2004, Petitioner filed its Opposition to Motion to Dismiss.

10 On May 25, 2004, Intervenors filed their Reply Memorandum in Support of Motion for
11 Order Dismissing Petition.

12 On May 26, 2004, Respondent Chelan County filed its Reply in Support of motion to
13 Dismiss.

14 On June 2, 2004, the Board held a telephonic Motion Hearing. Present were Presiding
15 Officer, Dennis Dellwo and Board Members Judy Wall and D.E. "Skip" Chilberg. Present for
16 Petitioner was John Zilavy and Timothy Butler. Present for Respondent was Billy Plauche.
17 Present for Intervenors was Robert Dodge.

18 On June 10, 2004, the Board issued its Order on Dispositive Motions.

19 Petitioner timely submitted its Hearing on the Merits Brief on June 29, 2004. The
20 County and Intervenor timely submitted their Hearing on the Merits Briefs on July 20, 2004.
21 Petitioner timely submitted a Reply Brief on the Merits on July 27, 2004.

22 On August 3, 2004, the Board held the Hearing on the Merits. Present were Presiding
23 Officer, Dennis Dellwo and Board Member Judy Wall. Board Member D.E. "Skip" Chilberg did
24 not participate in the Hearing on the Merits or decision in this matter. Present for Petitioner
25 was Timothy Butler. Present for Respondent was Billy Plauche. Present for Intervenors was
26 Robert Dodge. After presentations from all parties, the Board deliberated in closed session.
The Board reconvened the Hearing on the Merits and issued an oral decision finding for

1 Respondent Chelan County.

2 **II. STANDARD OF REVIEW/JURISDICTION**

3 Comprehensive plans and development regulations (and amendments thereto)
4 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
5 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioner to
6 demonstrate that any action taken by the respondent jurisdiction is not in compliance with
7 the Act.

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

10 The Board is charged with adjudicating GMA compliance, and, when
11 necessary, with invalidating noncompliant comprehensive plans and
12 development regulations. RCW 36.70A.280, .302. The Board "shall find
13 compliance unless it determines that the action by the state agency, county or
14 city is clearly erroneous in view of the entire record before the county, or city
15 is clearly erroneous in view of the entire record before the Board and in light
16 of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an
17 action "clearly erroneous" the Board must be "left with the firm and definite
18 conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util.*
19 *Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

20 *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543,
21 552, 14 P.3d 133, 138 (2000).

22 The Board will grant deference to counties and cities in how they plan under Growth
23 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is
24 bounded, however, by the goals and requirements of the GMA." *King County v. Central*
25 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133
26 (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).

1 The Board has jurisdiction over the subject matter of the Petition for Review. RCW
2 36.70A.280(1)(a).

3 **III. FINDINGS OF FACT**

- 4 1. February 1, 2000, the Chelan County Commissioners adopted
5 amendments to the County's comprehensive plan including the addition
6 of Rural Residence/Resource (RR-2.5) zoning, one dwelling unit per 2.5
7 acres.
- 8 2. The changes to the Chelan County Comprehensive Plan on February 1,
9 2000, were not challenged before this Board.
- 10 3. On December 30, the County Commissioners moved the Intervenors'
11 24 acres, the subject of this petition, from Commercial Agricultural to
12 Rural Residence/Resource 2.5 (RR-2.5).
- 13 4. The Petitioners did not provide this Board evidence of the County's
14 non-compliance other than the argument that the three Growth
15 Management Hearings Boards have found in previous decisions that
16 anything less than 5-acre lots are not rural.

17 **IV. DISCUSSION**

18 The Petition before the Board challenges Chelan County's designation of 24 acres of
19 property in rural Chelan County to a density of one dwelling unit per 2.5 acres. While the
20 property at issue was previously designated as commercial agricultural, Petitioner has made
21 clear that it is not challenging the re-designation of these 24 acres from agricultural to rural
22 lands. Rather, Petitioner's challenge is to the County's designation of these 24 acres as RR-
23 2.5, thus allowing a density of one dwelling unit per 2.5 acres rather than some other, less
24 dense, rural designation.

25 Chelan County asked the Board to reject the Petitioners' arguments on several
26 grounds. While the undersigned Board members disagree with each other on several of
those grounds, both Board members agree on a single basis that resolves the matter before
it.

1 It is clear from the decisions cited in the parties' briefs and in argument that this
2 Board, together with the Western and Central Puget Sound Boards, has held that the
3 Growth Management Act makes lot sizes smaller than five acres urban density. However,
4 that is not the issue now before the Board. The issue before the Board here, and the one
5 on which decides this matter, is the question of the burden of proof.

6 Recently this Board found another county's redesignation of certain lands from
7 agricultural to rural was not in compliance with the GMA. In making that decision, this
8 Board cited the Central Puget Sound Growth Management Hearings Board decision in *Grubb*
9 *v. City of Redmond*, CPSGMHB No. 00-3-0004. After this Board's decision, the Central
10 Board's order in *Grubb* was reversed by the Washington Court of Appeals in *Redmond v.*
11 *CPSGMHB*, 116 Wash. App. 48, 65 P.3d 337 (2003), because the Central Board
12 impermissibly shifted the burden of proof to the respondent city. The Eastern Board's
13 decision was appealed and while this Board did not believe it did so, the Superior Court
14 reversed the Board's decision and found that the Board impermissibly shifted the burden of
15 proof from the petitioner to the respondent.

16 In these decisions, the Courts have made it very clear that the burden of proof in
17 proceedings before this Board is on the petitioners. That is true even when dealing with
18 the removal of an agricultural designation, and even though the Supreme Court of the State
19 of Washington had said one of the key goals of the Growth Management Act was to
20 preserve agricultural resource lands.

21 Petitioners are correct that there does appear to exist in the Boards' decisions a
22 "bright line" as to the size of parcels in the rural area. However, the Courts have not
23 decided that issue, and nothing has been provided to the Board to show that such a "bright
24 line" acts to shift the burden of proof adopted in the Growth Management Act. We find that
25 a petitioner continues to have the burden of proving that a local government's actions are
26 out of compliance with the Growth Management Act, even when the challenge concerns
rural lot sizes smaller than 5 acres.

