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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

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CONCERNED FRIENDS OF FERRY COUNTY
and DAVID ROBINSON,

Case No. 04-1-0004

FINAL DECISION AND ORDER

Petitioner,

v.

FERRY COUNTY,

Respondent.

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I. PROCEDURAL BACKGROUND

On April 8, 2004, CONCERNED FRIENDS OF FERRY COUNTY and DAVID ROBINSON, by and through their representative, David Robinson, filed a Petition for Review.

On May 6, 2004, the Board held a telephonic Prehearing conference. Present were Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and D.E. "Skip" Chilberg. Present for Petitioner was David Robinson. Present for Respondent was Steve Graham.

On May 7, 2004, the Board issued its Prehearing Order.

On July 22, 2004, the Board received Petitioner's Hearing on the Merits Brief.

On August 17, 2004, the Board received Respondent's Hearing on the Merits Brief.

On August 20, 2004, the Board received Petitioner's Hearing on the Merits Reply Brief.

1 On August 26, 2004, the Board held the Hearing on the Merits. Present were Dennis
2 Dellwo, Presiding Officer, and Board Members Judy Wall and D.E. "Skip" Chilberg. Present
3 for Petitioner was David Robinson. Present for Respondent was Steve Graham.

4 II. STANDARD OF REVIEW

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

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

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

22 *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543,
23 552, 14 P.3d 133, 138 (2000).

24 The Board will grant deference to counties and cities in how they plan under Growth
25 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is
26 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

1 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31
2 P.3d 28 (2001).

3 The Board has jurisdiction over the subject matter of the Petition for Review. RCW
4 36.70A.280(1)(a).

5 **III. FINDINGS OF FACT**

- 6 1. On February 9, 2004, Ferry County adopted Ordinance No. 2004-01, an
7 amendment to the Ferry County Development Regulations for the
8 protection of archaeological and historical areas within the county.
- 9 2. Section 8.03 DESIGNATION requires that any costs for any
10 archaeological survey and cost of mitigation and/or protection plan
11 shall be borne by the entity that claims the existence of a site.
- 12 3. The County does not have the statutory or constitutional authority to
13 require the State, the Federal Government or the Tribes of Indians to
14 pay for such surveys or costs of mitigation.
- 15 4. RCW 27.53.060 declares that it shall be unlawful for any person, firm,
16 corporation or any agency or institution of the state or a political
17 subdivision thereof to knowingly remove, alter, dig into, or excavate by
18 use of any mechanical, hydraulic, or other means, or to damage,
19 deface, or destroy any historic or prehistoric archaeological resource or
20 site, or remove any archaeological object from such site. Such actions
21 shall be a class C felony without having obtained a written permit from
22 the director for such activities.

23 **IV. LEGAL ISSUES, DISCUSSION AND CONCLUSIONS**

24 At the Prehearing conference, the parties agreed that Issues 1, 2, 3, 5, 6, 7, and 8
25 are issues more appropriately addressed at the compliance stage in EWGMHB Case No. 01-
26 1-0019. The Petitioner asked the Board to eliminate the above referenced issues in the
Petition for Review filed on April 8, 2004. The only remaining issue in this matter is issue
No. 4, which is addressed below.

Issue 4: Did the County fail to comply with RCW 36.70A.040 and -.120 and interfere
substantially with GMA goals (RCW 36.70A.020) by not adopting implementing regulations

1 to identify and encourage the preservation of lands, sites, and structures that have
2 historical or archaeological significance?

3 **Petitioner's position:**

4 The Petitioners do not object to the main body of the subject ordinance and believe
5 it will significantly advance the protection of the archeological and historic resources except
6 for the objected to provision. The Petitioners' objection is to the provision that requires
7 archaeological surveys and mitigation costs to be born not by the party that may impact the
8 site, but by the entity that claims the site exists. The subject language is as follows:

9 Costs for any archaeological survey and cost of mitigation and/or protection plan
10 shall be born by which entity claims the existence of a site. The entity must respond
11 within 30 days of notification and surveys shall be completed not to exceed 12
12 months. (8.03 of Ordinance #2004-01).

13 The Petitioners contends that such a provision will not identify and encourage the
14 preservation of historical and archaeological sites. The Petitioners believe that it will
15 discourage the discovery and make its protection impossible. The Colville Tribes' History and
16 Archaeology Department has commented upon the objected to provision. They point out
17 that the County has no authority to obligate a Federal or Tribal entity to a particular course
18 of action. They object to the above language and believe that the proponent and
19 beneficiary of the project should cover the costs of the surveys and protection.

20 The State of Washington Assistant State Archaeologist, Stephenie Kramer, also
21 objected to the subject paragraph. Ms. Kramer points out that no money has been allocated
22 for such expenses nor would OAHP concur with any protection or mitigation plan that would
23 require OAHP to bear the costs of the plan.

24 **Respondent's position:**

25 The County contends that the burden of protecting our history and archaeological
26 sites should be the burden of the public and not a single land owner. They believe that the
County should be allowed to require the State, the Federal Government or Indian tribes to
bear this cost. The County believes that the objection of the State, the Tribes and other

1 entities does not invalidate the ordinance. Those entities do not have a vote on the County's
2 local ordinance – only the county commissioners do. The County believes that RCW 36.70A
3 is not violated and therefore the ordinance must be found in compliance.

4 The County believes that the practicalities of an ordinance should be left to the
5 County who knows the subject of enforcement the best. The determination of who is to
6 bear the cost of any endeavor is within the sound discretion of government officials. The
7 County Commissioners are the ones that make similar decisions with respect to the levying
8 of taxes, fees, assessments, and fines. The County further points to Article Eleven, Section
9 eleven of the State Constitution which provides that: "Any county, city, town or township
10 may make and enforce within its limits all such local police, sanitary and other regulations
as are not in conflict with general laws."

11 **Discussion:**

12 The Hearings Board must presume the actions of the County are valid. However, this
13 is not without limit. If it is clear to the Board that the actions of the County are clearly
14 erroneous and the Board is left with a firm and definite conviction that a mistake has been
15 committed, the Board must find the actions of the County out of compliance.

16 Here, the County has taken excellent steps to comply with RCW 30.70A.020(13).
17 That Goal requires the County to identify and encourage the preservation of lands, sites,
18 and structures, which have historical or archaeological significance. The County has,
however, made one glaring mistake.

19 The Board cannot decide whether it would be better or more equitable to require the
20 Federal or State government to bear the burden of preserving these valuable artifacts. The
21 Board must only determine if the County has complied with the requirements of the GMA.
22 Here the County has failed. The Board has taken judicial notice of State and Federal Law
23 and has no difficulty in finding that, without specific authority, the County cannot require
24 the State, Federal Government or a Tribe to pay the costs for the archaeological surveys
25 and costs of mitigation of discovered historic or archaeological sites. This being true, the
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1 Board finds that the County Ordinance will not encourage the identification and preservation
2 of these sites.

3 The State Office of Archaeology and Historic Preservation (OAHP) has stated in their
4 testimony that they would not accept a plan if such plan requires the State to bear the
5 costs. No development upon the land would be allowed to proceed if it impacts such site
6 without the OAHP approval. The Colville Confederated Tribes objected to this language as
7 well. Because 4 or 5 of the tribes that make up this Confederation have historic ties to Ferry
8 County and half of their reservation is in Ferry County, it is expected that most of the
9 historic sites be related to these tribes. There is no authority possessed by the County to
require the Tribes to pay for such a plan or survey.

10 The lack of authority of the County to require payment of the costs of such survey or
11 plan causes the effectiveness of the Ordinance to be nonexistent. It would discourage the
12 discovery of the sites due to the potential costs or delays, discourage others from reporting
13 them and making it virtually impossible to comply with the existing state law which requires
14 an approved plan prior to the disturbance of such a site.

15 While the Board must congratulate the County for the good work on the Ordinance,
16 the provision relating to the bearing of the costs of the survey and mitigation plan ruins its
effectiveness and causes it to not be in compliance with the GMA.

17 **Conclusion:**

18 Because the County developed an unrealistic designation of responsibility for the
19 costs of the survey and mitigation plan, the Ferry County Development regulation contained
20 in Ordinance #2004-01 dealing with Historic Archaeological Resources Preservation, Section
21 8.00, is out of compliance with the Growth Management Act, RCW 36.70A.020(13).

22 **V. ORDER**

23 1. The County is out of compliance regarding issue 4.

24 Ferry County must take the appropriate legislative action to bring themselves into
25 compliance with this Order by **November 8, 2004**, 60 days from the date issued.

1 Pursuant to RCW 36.70A.300(5), this is a Final Order for purposes of
2 appeal. Pursuant to WAC 242-02-832, a motion for reconsideration may be filed
3 within ten days of service of this Final Decision and Order.

4 SO ORDERED this 8th day of September 2004.

5 EASTERN WASHINGTON GROWTH MANAGEMENT
6 HEARINGS BOARD

7 _____
8 Dennis Dellwo, Board Member

9 _____
10 Judy Wall, Board Member

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12 D.E. "Skip" Chilberg, Board Member