State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

RIPARIAN OWNERS OF FERRY COUNTY & GARY F. HOWDEN, Petitioner(s), v. FERRY COUNTY, Respondent(s).	Case No. 09-1-0002 ORDER ON MOTION TO DISMISS

I. PROCEDURAL HISTORY

On January 29, 2009, RIPARIAN OWNERS OF FERRY COUNTY & GARY F. HOWDEN, by and through themselves, filed a Petition for Review.

On March 5, 2009, the Board held the telephonic Prehearing Conference. Present were, John Roskelley, Presiding Officer, and Board Members Joyce Mulliken and Raymond Paolella. Present for the Petitioners was Gary Howden. Present for the Respondent was Steve Graham.

On March 10, 2009, the Board issued its Prehearing Order.

On March 25, 2009, the Board received Respondent's Motion to Dismiss.

On April 8, 2009, the Board received Petitioners' Response to Motion to Dismiss.

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II. DISCUSSION

Respondent's Motion:

With its Motion to Dismiss, Ferry County (County) argues the petition for review (PFR) filed by Riparian Owners of Ferry County, and Gary Howden (Petitioners), and consisting of four issues, be dismissed in its entirety. The County contends the petition is without merit as detailed under each of the four issues in its brief.

Under Issue No. 1, the County contends the Petitioners are arguing constitutionality, which the Eastern Washington Growth Management Hearings Board (Board) has consistently held it does not have jurisdiction to determine under the Growth Management Act (GMA), and cites to *Superior Asphalt v. Yakima County*. [1] In addition, the County argues it does not have to "establish a threat" because state law requires the designation of critical areas, which by definition include fish and wildlife habitat conservation areas.[2] According to the County, there are no GMA requirements that a threat be established before designating critical areas. Petitioners' Issue No. 1 references RCW 36.70A.170(1).

Under Issue No. 2, the County claims the Petitioners fail to state a recognizable claim under the GMA, although Petitioners reference GMA provisions RCW 36.70A.020(6), RCW 36.70A.050 and RCW 36.70A.170. The County argues it complied with the property rights goal, RCW 36.70A.020(6), and cites to language in its Critical Areas Ordinance (CAO) at Section 7.4.3.[3] The County also argues it has the authority to require buffers as the method of protecting critical areas (waters of the state).[4] As for RCW 36.70A.050,[5] the County contends this statute's only mandate is on state government, and the Community, Trade and Economic Development Department (CTED) fulfilled this obligation of the state by

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[1] *Superior Asphalt v. Yakima Co*., EWGMHB Case No., Order on Dispositive Motion (March 30, 2006).
[2] Critical areas is defined by RCW 36.70A.030(5) and include fish and wildlife habitat conservation areas. WAC 365-190-080(5) defines "fish and wildlife habitat conservation areas" to include "naturally occurring ponds under 20 acres" and "waters of the state."
[3] Ferry County's Motion to Dismiss; Exhibit1.
[4] WAC 365-190-080(5)(b): "Counties and cities may consider the following when classifying and designating these areas: Establishing buffer zones around these areas to separate incompatible uses form the habitat areas."
[5] RCW 36.70A.050(1) is specific to the "department," which is defined by RCW 36.70A.030(6) as CTED. Under RCW 36.70A.050(3), the guidelines under subsection (1) shall be minimum guidelines that apply to all jurisdictions.

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issuing WAC 365-190.[6] As to RCW 36.70A.170, which requires counties to consider the guidelines under RCW 36.70A.050, the County claims Petitioners are only alleging this section was "violated insofar as streamside buffers were created with no identified threat being shown."[7] The County argues there is no such legal requirement.

Under Issue No. 3, the County argues there is no prohibition in either RCW 36.70A.020(6) or RCW 36.70A.172(1) that prevents the County from making amendments based on comments received prior to the enactment of the legislation. According to the County, Issue No. 3 does not make sense.

Under Issue No. 4, the County claims the Petitioners want the state to validate its data and do so within a certain period of time. At issue is Section 9.04 of the County's Ordinance #2008-02 for validation of point observations and/or polygon observations by the Washington State Department of Fish and Wildlife.

Petitioners' Response:

In response to the County's request for dismissal of all issues, Petitioners argue under Issue No. 1, which concerns constitutionality, that "all concerned are bound by recent decisions and reinterpretations of legislative and administrative law by the courts,"[8] and it is these that will be argued. Petitioners claim RCW 36.70A.170(1) allows local government latitude to protect critical areas, but "where appropriate,"[9] not everywhere. Petitioners argue the County failed to assess private property, but protected critical areas, which is broader than "where appropriate" and violates RCW 36.70A.170(1). Petitioners agree WAC 365-190-080(5) may consider establishing buffer zones,[10] but exceeded the Growth Management Act (GMA) goal of protecting critical areas "where appropriate" and arbitrarily applied buffers to all streams, thus violating the goals of the GMA.

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[6] WAC 365-190: Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas.
[7] Ferry County's Motion to Dismiss at 3.
[8] Petitioners' Response to Motion to Dismiss at 1.
[9] RCW 36.70A.170(1).
[10] WAC 365-190-080(5)

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Under Issue No. 2, Petitioners claim the County has not documented for the record its "Ferry County specific"[11] criteria, including defining the County's functions and values to be used to determine which critical areas would be appropriate to be designated. Furthermore, Petitioners argue the County gave only "superficial recognition to RCW 36.70A.020(6)"[12] and failed to meet the goal of the GMA.

Under Issue No. 3, Petitioners contend the record will show Best Available Science (BAS) was used in the draft Ferry County Resource Lands and Critical Areas Ordinance #2008-01 (RLCAO), including an analysis for reasoned departure. But in the final RLCAO, the County failed to use BAS, preferring buffer widths recommended by Futurewise.[13] Petitioners claim the County violated RCW's 36.70A.020(6), 36.70A.170(1), and 36.70A.172(1), and the redefinition of wording in the latter by the Supreme Court in *Swinomish v. WWGMHB*.[14]

Under Issue No. 4, Petitioners claim the validation process "did not establish a reasonable or negotiable time frame for accomplishment of the validation of a point or polygon area if it were necessary before issuing a development permit."[15] Petitioners contend if there is no time period, then the permit application is effectively suspended until some action is accomplished and the development rights of the owner/developer are suspended.

Board Discussion:

Issue No. 1:

Petitioners issue pertains to RCW 36.70A.170(1), which requires counties and cities to designate critical areas. Under the GMA, critical areas, unlike natural resource lands, have no qualifying factors. The County designated critical areas in its Ferry County Critical Areas Ordinance #2008-02, including Sections 9.01.3, 9.01.4, and 9.01.5. These three

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[11] Petitioners' Response at 3.

[12] Ibid at 3.

[13] Petitioners' Response at 4.

[14] Petitioners failed to provide case specifics.

[15] Petitioners' Response at 4.

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sections in the CAO are taken directly from WAC 365-190-080(5)(c)(v), .080(5)(a)(vi), and .080(5)(a)(vii). Petitioners contend the three sections are not in compliance because the County failed to establish a threat to the functions and values of these critical areas.[16]

Critical areas include (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) **fish and wildlife habitat conservation areas;** (d) frequently flooded areas; and (e) geologically hazardous areas.[17] Fish and wildlife habitat conservation areas include "waters of the state," which is defined, in part, as lakes, rivers, ponds, streams, inland waters, and all other surface waters and watercourses within the jurisdiction of the state of Washington.[18]

Ferry County is required by RCW 36.70A.060(2) to adopt development regulations that protect critical areas which are to be designated under RCW 36.70A.170, and as defined by RCW 36.70A.030(5) and WAC 365-190-080. The GMA does not require a threat to be established to the functions and values of critical areas for these areas to be designated and protected.[19] The term "where appropriate," indicates all critical areas as defined by the GMA and not just "waters of the state". Local jurisdictions have discretion as to how this will be accomplished, but not "where" if the critical area falls within the definition. Ferry County chose to include buffers along streams as one method to protect its critical areas, which is allowed under the GMA.

Therefore, the County's motion to dismiss Issue No. 1 is **GRANTED**. The County is required to designate and protect critical areas and there is nothing in the GMA that requires the establishment of a threat to the critical area prior to designation.

Issue No. 2:

Petitioners' Issue No. 2 pertains to RCW 36.70A.020(6), the property rights goal; RCW 36.70A.050, guidelines to classify agriculture, forest, and mineral lands and critical

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[16] Petitioners' Statement of Issues, Issue No. 1.
[17] RCW 36.70A.030(5).
[18] WAC 173-183-100(47).
[19] RCW 36.70A.060(1)(a) and (b) limit in some ways development regulations for natural resource lands, but there are no such restrictions placed on development regulations that protect critical areas under RCW 36.70A.060(2).

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areas; and RCW 36.70A.170, designation of critical areas. As in Issue No. 1, Petitioners contend the County established streamside buffers in areas where no identifiable threat to water quality, fish and wildlife exists.

The Board will take each provision separately. In regards to RCW 36.70A.020(6), the County clearly considered private property rights. The end results are not only included in the introduction of Ferry County's CAO Ordinance #2008-02, and in Section 2.00 PURPOSE; but also in the County's Comprehensive Plan under Sections 7.4.3 and 7.4.16 (Goals); and in its Development Regulations Ordinance #2008-03, at page 2 (Whereas…), and in Section 11.05(4)(e). The evidence is clear and convincing, not only in the recently adopted documents, but also in the numerous cases, past and present, before this Board. The Board notes that Ferry County has a long history of concern for private property rights and this is reflected in legislative documents, ordinances and regulations, and in its occasional non-compliance related to land use issues.

In regards to RCW 36.70A.050, the County is correct that this provision is directed toward CTED, a state agency, and requires the "department" to adopt guidelines to classify agriculture, forest, and mineral lands, and critical areas.[20] "Department" as used in RCW 36.70A is defined as the department of community, trade, and economic development under RCW 36.70A.030(6).

As to RCW 36.70A.170, Petitioners' claim in this issue is similar to their claim under Issue No. 1, and concerns whether a "threat to water quality and fish and wildlife exist" prior to establishing streamside buffers. Petitioners argue in their brief that the County failed to consider, define and establish "functions and values" criteria specific to Ferry County,"[21] but this terminology, "functions and values" is specific to RCW 36.70A.172, which relates to best available science (BAS). This provision in the GMA was not in

[20] Respondent's Motion to Dismiss at 3.
[21] Petitioners' Response to Motion at 3.

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Petitioner's Issue No. 2 and, therefore, cannot be argued here.[22] The GMA requires counties and cities to adopt development regulations that protect critical areas, which are to be designated under RCW 36.70A.170. The argument concerning "where appropriate" is stated above under Issue No. 1.

Therefore, the County's motion to dismiss Issue No. 2 is **GRANTED**. The County has considered and addressed RCW 36.70A.020(6); it is not required to act under RCW 36.70A.050; and the County is required to designate and protect critical areas. There is nothing in the GMA that requires the establishment of a threat to the critical area prior to designation. Petitioner's "functions and values" argument relates to RCW 36.70A.172, which is not specified under Issue No. 2.

Issue No. 3:

Petitioners' Issue No. 3 claims the County failed to comply with RCW 36.70A.020(6) and RCW 36.70A.172(1) when it adjusted buffers from those recommended in the version of the CAO presented to the public in December 2007, to those incorporated in the adopted version. In their brief, Petitioners' inappropriately mentioned RCW 36.70A.170[23] as being "violated,"[24] which will not be considered in this issue as it is not part of the issue statement.[25] The requirements for a PFR as contained in RCW 36.70A.290(1), are:

> All requests for review to a growth management hearings board shall be initiated by *filing a petition* that *includes a detailed statement of issues presented for the resolution by the board.* (Emphasis added).

In addition, WAC 242-02-210 sets forth the contents of a PFR and includes, in pertinent part:

> A petition for review shall *substantially contain:*
> ...

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[22] The Board is referring to RCW 36.70A.290(1), which in part states, "The board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order."
[23] Petitioners' Response to Motion to Dismiss at 4.
[24] Ibid.
[25] RCW 36.70A.290(1).

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> (2)(c) A *detailed statement of the issues* presented for resolution by the board that specifies the provision of the act or other statute allegedly being violated and, if applicable, the provision of the document that is being appealed.
> ...
> (3) *One copy of the applicable provisions of the document being appealed, if any, shall be attached to the petition for review.* Petitioner shall provide the board with a copy of the *entire document being appealed within thirty days* of filing a petition for review, unless otherwise directed by the board. (Emphasis added).

The Board believes Issue No. 3 pertains more to public participation found in RCW 36.70A.020(11), RCW 36.70A.035, and RCW 36.70A.140, than RCW 36.70A.020(6). The County argued "[T]here is no prohibition in either of these statutes that prevents the county from making amendments based on comments received or new ideas that are developed prior to enactment."[26] Petitioners failed to argue the provision at all. In regards to RCW 36.70A.020(6), this is dismissed for lack of argument and evidence.

RCW 36.70A.172, on the other hand, will be heard. Petitioners framed their argument to indicate BAS may not have been used by the County in its consideration. Briefing was so vague and limited by the County, it failed to carry its burden of proof. The Board will allow argument under RCW 36.70A.172.

Therefore, the County's motion to dismiss Issue No. 3 is **GRANTED** in part and **DENIED** in part. The County's motion to dismiss is granted for argument pertaining to RCW 36.70A.020(6), but is denied pertaining to RCW 36.70A.172. The Board will hear argument under that provision.

Issue No. 4:

Under Issue No. 4, Petitioners claim the County failed to comply with RCW 36.70A.020(6) when it failed to establish a time limit in Section 9.04 of Ordinance #2008-02 for validation of point observations and/or polygon observations by the Washington State Department of Fish and Wildlife (WDFW).

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[26] Respondent's Motion to Dismiss at 4.

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Petitioners claim the County violates RCW 36.70A.020(6), but their brief fails to show how the County was arbitrary and discriminatory in its decision, both of which Petitioners must prove to claim a violation of the property rights goal.[27] Petitioners must also show they have a legally protected property right, not just a desire to develop to the highest economic potential or subdivide a property. The County's CAO, Section 10.02 Reasonable Use Exception, protects land owners from the unreasonable "application of these regulations"[28] and list four criteria an applicant must demonstrate to avoid a perceived economic or beneficial loss of their property.

Petitioners' issue pertains to Section 9.04 of the County's CAO, which relates to Mapped Priority Habitat Areas and Species Observation Areas. There is no requirement in the GMA for the establishment of a time limit to accomplish validating point or polygon areas by either the local jurisdiction or the state, and nothing was noted in either party's brief or in any of the exhibits provided by the parties. Counties and cities have a great deal of latitude in developing their regulations - within the parameters of the GMA. Setting a time frame to validate a point or polygon area is a local decision subject to the final adoption of the ordinance by the legislative body, which in this case is the Ferry County Board of County Commissioners (BOCC).

The County is required to designate and protect critical areas,[29] which include fish and wildlife habitat conservation areas.[30] This includes areas with which endangered, threatened, and sensitive species have a primary association, and habitats and species of local importance. The WDFW Priority Habitats and Species Program provides for comprehensive information about wildlife and fisheries predominately for land use planning

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[27] The Central Board in *Shulman* opined: In order for petitioners to prevail in this type of challenge, they must prove that the action taken by a city or county is ***both*** arbitrary and discriminatory. Showing either an arbitrary or discriminatory action is insufficient to overcome the presumption of validity that actions of cities and counties are granted by the Act. *Shulman v. City of Bellevue,* CPSGMHB Case No. 95-3-0076, FDO (May 13, 1996). Board emphasis.

[28] Petitioners Response to Motion to Dismiss, Exhibit A-1.

[29] RCW 36.70A.170 and .172.

[30] WAC 365-190-080(5).

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purposes.[31] This program includes several databases, one of which is the Priority Habitats and Species Database, which is an inventory of priority species use areas and habitats consisting of polygons and points that describe occurrences of priority habitats and species. All priority species mapped areas represent known use areas; they are not potential habitats. Priority species and habitats include endangered, threatened, and sensitive species.[32]

In its Seventh Order on Compliance, the Board found the County in non-compliance concerning Section 9.04 for placing the enforcement burden on WDFW:[33]

> (3) the County is out of compliance with the GMA for requiring WDFW, a state agency without authority to enforce local CAO provisions, to validate point observations and polygon observations in Ordinance 08-02, which would only then trigger protection measures.

This issue is on remand to the County under Case No. 97-1-0018. Subsequent corrective legislation can be challenged by Petitioners. But as to this issue in this petition, there is nothing in the record to indicate a time frame is required under the GMA. This would fall to local discretion and the County chose not to put this burden on WDFW or themselves.

Therefore, the County's motion to dismiss Issue No. 4 is **GRANTED**.

III. ORDER

The Board finds and concludes Ferry County has carried its burden of proof in part and, therefore, **GRANTS** dismissal of the following:

1. **Issue No. 1**. As stated under the Board's argument, the County is required to designate and protect critical areas and there is nothing in the GMA that requires the establishment of a threat to critical areas

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[31] *Ferry County*, 121 Wn. App. At 856-57, 90 P.3d at 702.
[32] Washington Department of Fish and Wildlife, *Priority Habitats and Species*, p. 1 (July 1999).
[33] *Concerned Friends of Ferry County, et al., v. Ferry County*, EWGMHB Case No. 97-1-0018, Seventh Order on Compliance (Feb. 13, 2009) at 20.

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prior to designation. As a matter of law, the GMA does not provide any remedy. Petitioners have failed to state a claim upon which relief can be granted.

2. **Issue No. 2**. As stated under the Board's argument, the County: (1) has considered and addressed RCW 36.70A.020(6); (2) is not required to act under RCW 36.70A.050; and (3) is required to designate and protect critical areas. There is nothing in the GMA which requires the establishment of a threat to the critical area prior to designation, therefore, Petitioners fail to state a claim upon which relief can be granted. Petitioner's "functions and values" argument relates to RCW 36.70A.172, which is not specified under Issue No. 2 and, therefore, not relevant to this issue [RCW 36.70A.290(1)].

3. **Issue No. 3 (in part)**. As stated under the Board's argument, the County's motion to dismiss is granted for argument pertaining to RCW 36.70A.020(6) for Petitioners' failure to brief this part of their issue and, thus, fail to state a claim upon which relief can be granted.

4. **Issue No. 4**. As stated under the Board's argument, there is nothing in the GMA which requires the County to set a time limit to validate point or polygon areas if necessary to issue a development permit. This is a local discretionary decision. As a matter of law, the GMA does not provide any remedy for this issue. Petitioners have failed to state a claim upon which relief can be granted.

The Board finds and concludes Ferry County failed to carry its burden of proof for the following issue, in part, and **DENIES** its motion to dismiss this portion of the issue:

1. **Issue No. 3 (in part)**. As stated under the Board's argument, the County's motion to dismiss is **DENIED** for argument pertaining to RCW 36.70A.172. This issue fulfills the requirements for a PFR under RCW

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36.70A.290(1) and, therefore, will be decided by this Board at the hearing on the merits.

SO ORDERED this 22nd day of April 2009.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
John Roskelley, Board Member

_____
Joyce Mulliken, Board Member

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Raymond L. Paolella, Board Member

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