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**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

JOHN E. DIEHL, KERRY HOLM, GORDON)
JACOBSON, and VERN RUTTER, individually,) No. 95-2-0073
and as members of the MASON COUNTY)
COMMUNITY DEVELOPMENT COUNCIL)
(MCCDC), a non-profit)
association,) ORDER ON THE
8TH)
Petitioners,) COMPLIANCE HEARING
) (CRITICAL AQUIFER
) RECHARGE AREAS,
) AGRICULTURAL
) RESOURCE LANDS),
) FINDING COMPLIANCE,
v.) PARTIAL
) NONCOMPLIANCE, AND
MASON COUNTY,) RESCINDING A FINDING
) OF INVALIDITY
Respondent,)
)
and)
)
PETER OVERTON, DONALD B. PAYNE,)
McDONALD LAND COMPANY, HUNTER)
CHRISTMAS TREES, HUNTER FARMS,)
SKOOKUM LUMBER COMPANY,)
MANKE LUMBER COMPANY and)
MASON COUNTY PRIVATE)
PROPERTY ALLIANCE (MCPPA),)
)
Intervenors.)
_____)

Synopsis Of The Order

We find Mason County in compliance with the Growth Management Act (GMA, Act) regarding

Critical Aquifer Recharge Areas (CARAs), as a result of its adoption of Ordinance 62-99. With the adoption of Ordinance 32-99, agricultural resource lands (ARLs), we find that Mason County no longer substantially interferes with the goals of the Act and we rescind our previous findings of invalidity regarding agricultural parcels smaller than 10 acres and densities in the ARLs of 1 dwelling unit (du) per 5 acres (ac). Mason County has precluded parcels smaller than ten acres in ARLs and has allowed densities of 1du/5ac in ARLs only under the clustering provisions allowed by the Act. Mason County, therefore, is also compliant with the Act regarding density and parcel size for ARLs. We further find Mason County in compliance regarding its review of potential agricultural lands with unique soils and with the requirements of the Act regarding buffer widths. RCW 36.70A.060.

Before we can reach a finding of compliance regarding designation of qualified lands not in current use, the record must clarify the definition of “surrounded by” in Ordinance 62-99 and must also contain an analysis regarding the reason for the division of potential ARL composed of “woodlots, housing lots, ponds, pastures and rangeland” into designated (2,030 acres) and undesignated (5,065 acres) areas. The County must also address the discrepancy of 310 acres in its ARL acreage total.

Procedural History

On July 29, 1999, the 8th compliance hearing in this case was held regarding critical aquifer recharge areas and agricultural resource lands. Present for the County was Deputy Prosecuting Attorney David St. Pierre and Mr. Bob Fink of the Department of Community Development. Petitioner John Diehl represented himself. All three Board members were present. Petitioner Mason County Community Development Council opted not to participate. In addition to the exhibits to the record provided June 23, 1999 by the County (items 1600 through 1620 and 1700 through 1728), the County also moved for admission of Exhibit 1621, (notes of a phone interview by Robert Fink with Doug Hasslen of the National Agricultural Statistics Service, July 2, 1997) and Exhibit 1622, (July 12, 1999 letter from the Natural Resources Conservation Service (NRCS) to Mason County). Petitioner Diehl moved for the addition of Exhibit 1623, (letter from NRCS to Mr. Diehl, July 26, 1999). The motions to add to the record were granted. The County also pointed out that index #1618 should be numbered 1617 and #1729 should be added (a letter from Department of Ecology to Robert Fink). We changed the index of the record accordingly.

During the proceedings the County asserted that the assessor's records showed that many of McDonald Land's parcels smaller than 10 acres were not actually in the open-space agriculture tax program, but were instead enrolled in a different tax program as forest lands. This argument was presented in a format heretofore not made available to Petitioner Diehl. He was allowed to submit a post-hearing response, which we received August 9, 1999.

Petitioner Diehl's July 23, 1999 motion to extend time to submit a reply brief was granted.

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Critical Aquifer Recharge Areas

In the February 8, 1999 stipulated order finding continuing noncompliance we found Ordinance 11-97 noncompliant and called upon the County to accomplish the following:

- (1) Classify and designate all Critical Aquifer Recharge Areas (CARAs) and make them subject to protective development regulations (DRs);
- (2) Map and adequately define CARAs;
- (3) Protect CARAs from poor management practices of existing agricultural, commercial and industrial development;
- (4) Prohibit the use of on-site septic systems at a density greater than 1 du/acre for lots vested after December 5, 1996;
- (5) Reduce the extent of administrative discretion and provide adequate monitoring procedures; and
- (6) Make the CARA Ordinance consistent with, and no less protective than that of the City of Shelton.

We received no briefs from petitioners, participants or intervenors regarding CARAs.

Respondent Mason County requested that Ordinance 62-99, Ex. 1700, adopted June 22, 1999, be

found in compliance with the GMA. Having reviewed the Ordinance, we find Mason County in compliance with the GMA regarding CARAs.

Agricultural Parcels Smaller Than Ten Acres And Densities Of 1du/5ac

The County contended that it was now in compliance with the Act and that it no longer substantially interfered with the Act because division of ARLs into less than 10-acre lots is precluded. Under the Ordinance the minimum open-space agricultural parcel size must be no less than 10 acres after clustering. Only one residence, the “farm house”, is allowed on such a 10-acre parcel. Residential 1du/5ac clustering (25% of the total parcel) can only occur on land in addition to the minimum 10-acre agricultural parcel.

Petitioner Diehl contended that we found elements of Mason County Ordinance 15-97 to be noncompliant because, by allowing subdivision of ARLs into 10-acre parcels, the County had failed to establish regulations to maintain larger, more-useable parcels or to re-aggregate smaller parcels into larger units without rationale. Petitioner Diehl asserted that through the new Ordinance the County had still failed to provide a rationale for not considering re-aggregation or designation of the 6% of the 5,900 acres it maintained were in small lots. He further asserted that the allowed subdivision into parcels of marginal long-term commercial significance did not assure the conservation of designated land. He pointed out that the average farm in Mason County is 76 acres (Ex. 790) and that the ordinance allowed subdivision of a farm of this size into 10-acre tracts. He contended that we had found a 1 to 5 acre density non-compliant for rural areas as a “general prescription”. He argued that the clustering provisions of the Ordinance still allowed ARLs to be reduced to that density and thus still substantially interfered with the goals of the Act.

Petitioner argued that the least the County could do if it did not provide a re-aggregation ordinance in order to preserve the higher average acreage necessary for conservation of ARLs was to designate parcels below 10 acres which were contiguous to other ARLs.

Conclusion

If, in Petitioner Diehl’s scenario, all of the ARL acreage had been reduced to 10-acre parcels of agricultural land and if each had been clustered so that density was 1 to 5 throughout the

agricultural land area, then indeed his description of the agricultural lands' long-term commercial significance could be described as "marginal". That scenario is unlikely. We have often said that it is not within our authority to require the best possible plans and ordinances to meet the goals and requirements of the Act, but only to require that those goals and requirements be met, however marginally. We find the minimum parcel size of 10 acres and the associated possibility of a 1 to 5 density in some ARLs which are clustered to be in compliance with the Act and no longer to substantially interfere with the goals of the Act.

Unique Soils

Petitioner Diehl contended that the County's claim that there are no unique farmlands, based on a letter from the NRCS stating that there are currently no such lands mapped, was not evidence that unique farmlands do not exist.

The County contended that the NRCS has stated there are not unique farmland soils in Mason County and has repudiated the 1981 Soil Conservation Service Map showing unique farmlands.

Conclusion

In our previous order we required that the County demonstrate a consideration of unique soils or rationale for their exclusion as a designation criterion. The record contains three letters from Charles Natsuhara, Resource Soil Scientist of the NRCS. In each letter he stated that "there are currently no unique farmland soils in Mason County". He went on to explain how definitional changes led him to that conclusion. The County opted to rely upon Mr. Natsuhara's declaration as its response to our order. Petitioner has failed to show that the County was clearly erroneous in its reliance upon the NRCS statement and its earlier IRO review of ARLs as a basis for its decision as to the lack of unique farmland soils in Mason County. We find the County in compliance regarding this issue.

Qualified Lands Not In Current Use

Petitioner Diehl maintained that the County's ordinance disqualifies as possible ARLs all lands either not currently used for agricultural production nor so used in January of 1991. He contended that this was contrary to the State Supreme Court's decision in *City of Redmond v. Growth Hearings Bd.* 136 Wn.2d 38 (1998) because "properties having the characteristics of the

property at issue in *Redmond* would automatically be excluded from consideration for designation by the criteria of the County's ordinance."

Petitioner asserted that the County had performed no reexamination of all the other lands not currently farmed but having suitable soils and locations. Petitioner cited a "host of perspective ARL, including parcels whose owners advertise their land as a farm and who have been in business for a period of years". Mr. Diehl asserted that the County was allowing owners' intent to control whether land is designated.

The County responded that it had added two criteria in response to our remand; namely, lands in use as of January, 1991 and lands surrounded by ARLs. It contended that the addition of these two criteria based on information available, had resulted in the designation of an additional 1,099 acres of ARL bringing the total to 5,900 acres. The County pointed out that only 3,780 of the total were "croplands". According to the County, in so doing it had met the requirement to bring its agricultural resource land regulations "into compliance with the GMA regarding designation of qualified lands not in current use by the adoption of Ordinance 32-99." The County noted that "site-specific information on the use of land was primarily limited to the assessor's records, which identified land where the primary use.....was agricultural or where the land participated in the agricultural open-space tax program." The County maintained that this addressed the concerns that the designation or non-designation of the land was left to the whim of the property owner or that the owner removed his land from agricultural use to avoid being classified as ARL.

The County went on to identify another designated class of lands as those surrounded by agricultural use, even if those properties might not have prime agricultural soils or be used for agriculture. We questioned the County as to whether "surrounded" meant the dictionary definition (to enclose or combine on all sides) or whether it meant, rather, contiguous to or adjacent to agricultural lands. We also asked the County whether these "surrounded" lands could be in parcels smaller than 10 acres. The County's responses seemed to imply that "contiguous" equaled "surrounded" in the context of this ordinance. The County's representative, in response to questions, asserted that the land need not "entirely" be surrounded by agricultural land in order to qualify for designation under the section of the ordinance. The County could not confirm that

contiguous land was what was meant by “surrounded”, but instead remarked that in defining “surrounded” one must resort to “plain language” and “common sense”.

Conclusion

In its brief the County noted that of the approximately 5,900 designated ARL acres, 3,870 were “croplands”. The other 2,030 acres were identified as woodlands, housing lots, ponds, pasture or rangeland, not “croplands”. In addition to those designated 2,030 acres, there were 5,065 acres of woodlands, etc., that were not designated as ARL. It is unclear from the record why 2,030 acres consisting of “woodlands, housing lots, ponds, pasture or rangeland” were designated and why 5,065 were not.

The County’s response to questions regarding whether or not acres “surrounded” by agricultural lands would include those not entirely surrounded (including parcels of less than 10 acres) leaves the County’s interpretation of its ordinance so unclear that it fails to comply with the Act.

Further, the acreage numbers contain a discrepancy. For the 6th compliance hearing the record shows 4,491 acres designated. (Respondent’s Affidavit, Gary Yando, Director of Community Development October 21, 1998). Ordinance 32-99, Attachment A, Findings (pg 6) identifies 1,099 “additional acres” designated. The County Response Brief, July 16, 1999, pg. 5 at 2, notes a total of 5,900 acres designated.

The addition of 1,099 to 4,491 equals 5,590, 310 acres short of 5,900. The County must ascertain the correct number of designated ARL acres.

In order for us to determine whether the designation of additional agricultural resource lands and the inclusion of acreage surrounded by agricultural resource lands satisfies the requirement that qualified lands not in current use be included, the County must remove the ambiguity of its language. The record must show on what basis the woodlands, housing lots, ponds, pasture and rangeland category was divided into designated and non-designated lands. We have a firm and definite conviction that the County erred in not making the definition of “surrounded” clear, in failing to provide an analysis of the process by which some agricultural land was designated and some was not, and in failing to remove the 310-acre discrepancy in its figures.

Buffers

Petitioner Diehl maintained that Section .060 of the Act, which requires notice of designated agricultural resource land to impacted neighbors within 500 feet of such land, constitutes a “zone of incompatibility 500 feet wide”. He argued that the County’s range of 50 to 100 foot buffers for resource lands implies that counties must effectively address the inherent incompatibility of residential development within a 500 foot zone.

The County maintained that it has reexamined its buffer requirements and added a 100 foot buffer for ARLs in “UGAs, RACs and RCCs” and a 50 foot buffer from ARLs in rural areas. The County averred that it used Randall Arendt’s *Retaining Farmland and Farmers* as an expert reference source and reviewed the experience of Clallam County. The County further referenced background information, given to the agricultural lands sub-committee during 1997, which “showed that there was no reliable analysis to determine the best size of such buffers, but noted that the typical requirements reviewed and adopted elsewhere ranged from 50 to 100 feet separation.”

Conclusion

We agree with the County that there is no legislatively-determined mandatory buffer width. We conclude that the County was within its range of discretion in adopting the buffers in response to our remand, in which we stated that 5 to 20 foot buffers were inadequate. Petitioner has failed to meet his burden of demonstrating that the County was clearly erroneous in selecting the buffer widths it did from the range of options before it. We find the buffer requirements in compliance with the GMA.

ORDER

- ◆ We rescind our previous findings of invalidity regarding agricultural resource lands.
- ◆ We find the County in compliance regarding the issues delineated in our previous remand regarding agricultural resource lands with the following exceptions:
 - the County must demonstrate the rationale for designating some agricultural resource lands characterized by woodlands, housing lots, ponds, pasture or rangeland

and not others;

- the County must clearly define what it means by “surrounded” by agricultural land;
- and
- the County must recheck its designated ARL acreage for accuracy.

The County must bring these aspects of Ordinance 32-99 into compliance with the Act within 180 days of the date of this Order.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of the entry of this decision.

So ORDERED this 19th day of August, 1999.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

Nan A. Henriksen
Board Member

William H. Nielsen
Board Member