BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

GEORGE F. HUDSON and NASH HUBER,	)	
	)	
Petitioners,	)	No. 96-2-0031
	)	
vs.	)	FINAL DECISION
	)	AND ORDER
CLALLAM COUNTY,	)	
	)	
Respondent.	)	
	)	

SYNOPSIS OF THE ORDER

Under the Growth Management Act (GMA, Act) a county's comprehensive plan and implementing development regulations (DRs) are presumed valid. It is the Petitioners' burden to come forward with a preponderance of the evidence to rebut that presumption. In this case, the Petitioners have overcome that burden.

The County designated agricultural lands of long-term commercial significance (agricultural lands/ designated lands) in an amendment to the Sequim-Dungeness Regional Plan (Plan) on July 9, 1996. In the amendment, the County readopted the preexisting land use map and underlying residential densities within the designated lands without reviewing them for consistency with the agricultural designation. The designated lands are not protected from urban development and conflicting uses by the present land use map or DRs. The County has erroneously interpreted and applied Sections 36.70A.020(2), .020(8), .010, .040, .060, .070, .110, and .120 of the Act.

PROCEDURAL HISTORY

The procedural history is included by reference and attached as Appendix I.

FINDINGS OF FACT

Findings of fact adopted pursuant to RCW 36.70A.270(6) are included by reference and attached as Appendix II.

DISCUSSION AND CONCLUSIONS

We dealt with Issues 3.1(a) and 3.2(a) in our March 21, 1997, Order Denying Dispositive Motion.

Issue 3.1(b)

Does the Plan Section 31.03.230 fail to conserve designated agricultural resource lands with an agricultural overlay using underlying zoning densities and allowing residential density of 1 dwelling unit (du) per 5 acres in violation of RCW 36.70A.020(8), .020(9), .040 (3), .060, .070, .120?

Petitioners contended that RCW 36.70A.020(8), .040, and .060 require the County to designate and conserve agricultural lands of long-term commercial significance. On November 7, 1995, the previously adopted interim agricultural designations lapsed and all agricultural lands reverted to rural residential designations. On July 9, 1996, the County amended the comprehensive plan and designated agricultural lands of long-term commercial significance. In that amendment, the agricultural overlay was created but the underlying rural residential densities were readopted. This action created an inherent conflict between the agricultural land designation and the underlying land use map and zoning map densities which permitted those lands to be developed at densities of 1 du per 1, 2.4, and 4.8 acres.

In its reply brief, the County refuted the Petitioners' claim that GMA requires the conservation of agricultural lands at the comprehensive plan stage:

> "…The Legislature did not determine that Comprehensive Plans must conserve or protect agricultural lands. The Legislature did not determine that counties must impose minimum lot sizes on agricultural lands……. Instead, the Legislature left it to the counties to determine for themselves, in ways that reflect local community needs and pressures, appropriate measures to *encourage* conservation of agricultural lands and maintain and enhance natural resource *industries*." Co. Brief p. 34

The County further stated:

> "GMA does not mandate 'conservation' of agricultural lands past the interim stage. As this Board has recognized, the County has discretion at the Comprehensive Plan stage to balance that goal with competing interests of the other 12 planning goals. Clallam County did that and adopted appropriate provisions to maintain and enhance productive agriculture, encourage conservation of agricultural lands, and discourage incompatible uses." Co. Brief p. 19 & 20

The County contended it had done what it was required to do at the comprehensive plan stage by considering appropriate goals and fulfilling the spirit and intent of the Act.

Petitioners countered:

> "The County's assertion that 'GMA does not mandate conservation of agricultural lands past the interim state' flies in the face of the GMA…… Every Hearings Board has likewise interpreted the Act to require the conservation of agricultural lands…… A contrary interpretation would render meaningless the Act's requirement to designate and conserve interim resource lands since there would be no point in setting aside such lands if final designations were not required to also conserve them. The County errs in asking the Board to interpret the GMA so as to render a part of it meaningless." Pet. Brief p. 10

Petitioners further countered that Goal 8 requires the County to "maintain and enhance" agricultural industry and charged that the County misstated the requirements of RCW 36.70A.020(8) which states:

> "Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses."

The County replied:

> "…. it is beyond a County's legislative powers to guarantee that a private sector industry will continue in the County. A County cannot order an industry to be profitable, or prohibit businesses from leaving the area. The County can only adopt provisions that it determines are appropriate to provide for and support productive natural resource industries."

Petitioners responded that the County had ignored the interpretation of this requirement by the Hearing Boards. They pointed out that in Achen, et. al., v. Clark County, et. al., WWGMHB 95-2-0067 Final Order, this Board had ruled that the purpose of Goal 8 was to conserve a land base of sufficient size and quality to maintain and enhance natural resource industries.

Petitioners also quoted the Eastern Board's Final Order in Save Our Butte Save Our Basin, et. al., v. Chelan County, EWGMHB 94-1-0015:

> "The required level of protection is compromised if either insufficient lands are 'designated' or if development regulations fail to adequately protect these lands."

The County explained its situation:

> "The central fact in this case is that the Sequim-Dungeness Valley, where the agricultural resource lands are located is already characterized by an established pattern of 1-, 2.5-, and 5-acre lots. APP. A On this record, 1- to 5-acre lots are appropriate in the agricultural zone." Co. Brief p. 30

The County explained that agriculture was relatively insignificant in Clallam County and could be more significant to the citizens of the County as open space than as agriculture. Conservation of agricultural lands is of more benefit to the public than to the remaining farmers. The County further explained that much of the decline in the industry had predated GMA and that it had designated lands already in small lots because they were still being used for agricultural purposes.

Given that background the County stated:

> "As a matter of equity, as supported by the record, the County carried forward the existing densities as underlying densities to be afforded to all the designated agricultural lands. The County is mindful that one of the goals of the GMA is to protect property rights. RCW 36.70A.020(6). Given existing established pattern of 5, 2.5- and 1-acre lots in the agricultural zone, it would not be fair for the County to penalize the owners of larger parcels in the area who are surrounded by smaller parcels. *See* AG 126, S-DRP at 22; CW287, FEIS at 61. The County's use of 5-acre, 2.5 acre and 1-acre lots to maintain and enhance agriculture has been effective and is within its discretion under the GMA." Co. Brief p. 32

Petitioners replied that the County's "too broke to fix" arguments did not justify a failure to conserve and that the County was required to conserve the "minuscule" amount designated. They further contended that the County should be required to work harder since so much break up has already been allowed, paralleling this case to the Achen case. They also challenged the County's statement that its use of 4.8, 2.4, and 1 acre lots has been effective in maintaining and enhancing agriculture. They pointed out several items in the records which contradict that statement.
The 1992 Final Report of the Agricultural Resource Lands Task Force Exhibit AG-25 states:

LOSS OF AGRICULTURAL RESOURCE LAND THROUGH INCOMPATIBLE DEVELOPMENT

"The 1955 Census of Agriculture showed that Clallam County had 75,254 acres of farmland in 1954. The census reveals that this resource base had dropped to 28,170 acres by 1978. Loss of resource land has continued into the 1980's with the total resource dropping to 26,574 acres by 1987. Much of the loss of agricultural resource land can be directly tied to residential development. Short platting and large lot subdivisions of resource lands in prime agricultural areas has resulted in parcel sizes that are not usable for commercial agriculture. The table (Table 1) below reveals that over 5100 acres of land in prime agricultural areas of the Dungeness Valley has been lost to commercial agriculture through short platting over the last ten years.

TABLE 1
AGRICULTURAL RESOURCE LAND LOSS FROM SHORT PLATS
(1980-1991)

	LOTS	ACRES	TOWNSHIP	RANGE
	867	1427	30	3
	12	12	31	3
	1675	2567	30	4
	142	266	31	4
	518	892	30	5
TOTALS	3214	5164		

Additional loss of agricultural resources results from large lot subdivisions which are not currently regulated under the county subdivision code. Records since 1988 show over 2,300 acres lost in the Dungeness Valley to agricultural production through this process.

AGRICULTURAL LAND LOSS THROUGH LARGE LOT SUBDIVISION
(1988-1991)

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LOTS	ACRES	TOWNSHIP	RANGE
94	771	30	3
0	0	31	3

	103	701	30	4
	9	50	31	4
	93	788	30	5
TOTALS	299	2310		

> Clallam County has three rural residential zoning districts. These districts have minimum lot sizes of 4.8, 2.4, and 1 acre. The Agricultural Resource Task Force determined early in its meeting that a minimum size for an economically viable farm was 15 acres. Existing zoning makes no provision and provides no incentives for continued commercial agricultural land use." (emphasis added)

The June 16, 1995, Final Environmental Impact Statement for the Clallam County Comprehensive Plan CW-287 states at p. 60:

> "No Action Alternative - current trends on resource lands would continue. The greatest threat to resource lands is the conversion of these lands to residential or other non-resource uses. Loss of commercially significant agricultural lands in the Sequim-Dungeness area could result in the loss of the agricultural industry in Clallam County."
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Despite these and other examples of the ineffectiveness of the existing zoning in conserving agricultural land, the County readopted the preexisting underlying rural residential densities on the land use map and zoning map in its July 9, 1996, Plan amendment.

We agree with Petitioners' analysis and conclude that the County has erroneously interpreted the Act in claiming that the GMA does not mandate conservation of designated agricultural lands past the interim stage. One of the cornerstones of the Act is the long-term conservation of natural resource lands. RCW 36.70A.040 and .060 require the County to conserve designated agricultural lands. There is no indication that this requirement ends when a comprehensive plan is passed. The process of balancing goals at the comprehensive plan stage must not include abandoning the conservation of designated agricultural lands. The reliance on underlying rural residential densities and allowed uses and the use of an optional agricultural overlay zoning category do not ensure conservation and do not comply with the Act. We will discuss the use of the agricultural overlay further under Issue 3.3.

We acknowledge the County's concern of unfairly penalizing the owners of large parcels in the area. However, the County must use other means to achieve equity than a continuation of pre-GMA policies and small lot zoning which have allowed a 90 percent decrease in agricultural lands

in Clallam County.

One of the major reasons for the enactment of the GMA was to stop the conversion of natural resource lands into sprawling low-density development. Densities within designated agricultural resource areas must not interfere with the primary use of these lands for the production of food, other agricultural products, or fiber. It is obvious that new lots of 1, 2.4, and 4.8 acres threaten continued use and existence of such lands for resource production. We agree with the Eastern Board's statement about the effects of small acre zoning on agricultural lands in Chelan:

> "The effect of such zoning…..is to remove farmland from production and allow non-farm development adjacent to viable farming operations everywhere. Allowing small acre development in agricultural resource lands fails to conserve these lands in two ways. First, the land used for development is taken out of production, and second, the effects of non-compatible uses on existing farms weakens them."

GMA requires a comprehensive plan to be internally consistent. RCW 36.70A.070 states:

> "The plan shall be an internally consistent document and all elements shall be consistent with the future land use map."

When the County passed the July 9 amendment to the Plan, which designated final agricultural lands of long-term commercial significance, it had the obligation to ensure that other elements of its Plan, including its land use map, were made consistent with the agricultural designations in the amendment. This did not happen. Policies of 31.03.230, especially .230(3), (4), and (8), and the readopted underlying land use map densities are not consistent with the agricultural designation amendment.

The County ignored its 1992 Task Force Report which stated that existing zoning provided no incentives for continued commercial agricultural land use. It also ignored its 1995 Final Environmental Impact Statement which stated that the "no action alternative" would continue the trend of conversion of agricultural lands to residential or other non-resource uses and loss of agricultural industry in Clallam County. Instead, the County chose to readopt the preexisting underlying land use map and zoning map rural residential densities for the designated agricultural lands.

Section 31.03.230 of the Plan and the Plan land use map are inconsistent with the July 9, 1996, Plan amendment, fail to conserve designated agricultural resource lands and fail to comply with the

Act.

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Issue 3.2 (b)

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Does the Sequim-Dungeness Plan section 31.03.230 create or promote urban growth on agricultural resource lands with an agricultural overlay using underlying zoning densities, and allowing residential density of 1 du per 5 acres, in violation of RCW 36.70A.010; .020 (8); .040; .060; .110; .170?

Petitioners argued:

> "The GMA prohibits new urban growth outside of Urban Growth Areas (UGAs). RCW 36.70A.110(1). The Act requires local jurisdictions to maintain natural resource industries, such as agricultural industries through the conservation of productive agricultural lands and the discouragement of incompatible uses on these lands. Clallam County has allowed urban growth to occur on designated agricultural resource lands in violation of RCW 36.70A.020 (8), .060, and .110(1).
>
> All agricultural resource lands in Clallam County are zoned at lot sizes of 5 acres and smaller, creating urban growth on resource lands. According to the Sequim-Dungeness Regional Plan, zoning code and zoning map, designated agricultural lands are identified with an "agricultural overlay." AG 126; AG-184 (zoning code) at 33.07.010; zoning map. The agricultural overlay districts are outlined in light green on the zoning map. The agricultural lands within these agricultural overlays are governed by the "underlying zoning" shown on the zoning map. The zoning inside of the agricultural overlay districts consists of R1, R2, and R5 zones, allowing 1 acre, 2.4 acre and 4.8 acre minimum lot sizes respectively. Every Growth Management Hearings Board case examining similar density development has concluded that such densities are urban and not permitted on resource or rural lands."

The County responded:

> "The Legislature did not prohibit 'urban growth' outside the UGAs. It merely stated that 'growth' which is not a defined term can occur outside UGAs only if it is not 'urban in nature', another undefined term….. Lot sizes of 1 acre, 2.5 acres, or 5 acres are not 'urban in nature' if they are not accompanied by urban uses."

The County's response indicates they have made another erroneous interpretation of the Act. RCW

36.70A.110 states:

> "Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature."

We have consistently held that Section 110 prohibits new urban growth outside the UGAs. As we found in the previous issue, Section 31.03.230 and the Plan land use map create inappropriate growth on agricultural resource lands. Whether the densities are called "urban", "suburban", or "rural residential", they are inappropriate and are in violation of the Act when located in resource lands.

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Issue 3.3

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Did the County fail to adopt development regulations to protect designated agricultural resource lands of long-term commercial significance as required by RCW 36.70A.020(8); .040 (3); .060; .120?

The County pointed out that this is not a failure to act issue; it does have some DRs in place to conserve agricultural lands. These include a right to farm ordinance, a 50 foot setback requirement for lots abutting the agricultural zones, a cluster development ordinance which saves 70 percent of land for agriculture and taxation protections for agricultural lands. In addition, the County appointed a committee to study agricultural lands and are currently reviewing their report and finding additional ways to protect the designated lands.

Petitioners responded that not only are these DRs insufficient but the cluster ordinance and other County DRs actually prevent the County from conserving agricultural lands. They pointed out that .040(3)(d) requires counties' DRs to be consistent with the comprehensive plan. The County has jumbled its agricultural resource lands and rural lands by zoning the two types or areas exactly the same in violation of 36.70A.070(5). Examples given by Petitioners included: (1) The DRs allow incompatible uses on agricultural lands by permitting all uses permitted in the underlying residential zones. (2) R1 zone permits planned unit developments. (3) All three underlying zones allow duplexes. (4) Many conditional uses are allowed which are incompatible with production of food and fiber. Petitioners asked us to merely look at the zoning map and Plan map to see that agricultural overlays abut urban residential high and rural village zones. They showed that there is no gradual transition from agriculture to high density which will result in encroachment,

incompatible uses, and complaints. They contended that, when added to high densities within agricultural overlays and vested 5 acre platting in 30-40 percent of designated agricultural lands, conservation appears to be non-existent.

Petitioners contended that Section 33.07.010 of the zoning code openly characterizes maintaining agricultural lands in the agricultural overlays as "optional"; a clear violation of the Act's mandate to conserve agricultural lands. Furthermore, the act of appointing another committee to study agricultural lands does not satisfy the Act's requirement to conserve agricultural lands. They further contended that the County must take positive action to conserve agricultural lands and protect them from encroachment and development. Petitioners quoted the comments of Senior Planner Rich James at the July 9, 1996, County Commissioners Meeting, AG-185, to support their position:

> "I would like to encourage you to go ahead with this because one of the policies that is contained in here is that we would continue to seek out innovative financing mechanisms. I don't think this ordinance before you today is the final solution either. It just gets us to a point that we are in a better position with the Growth Hearings Board, but the actual policies contained in it are like an unfinished agenda. I do think that the Board could take action on this and say let's move proactively to the point where we are actually protecting these lands."

We commend the County for its right to farm ordinance which has a 600 foot notice provision - double that required by the Act. We also commend the County for its efforts to provide taxation relief for those in agriculture. As we discussed under Issue 3.1(b), DRs must be made consistent with the designating amendment, assure conservation of those designated lands, and shield them from conversion and incompatible uses. Many of the DRs currently in place are inconsistent with the agricultural designation and fail to adequately conserve or protect agricultural resource lands of long-term commercial significance as required by .020(8); .040(3); .060; and .120.

The County misinterpreted the requirements to conserve designated lands through adoption of appropriate DRs. Section 33.07.010 of the County zoning code states:

> "AGRICULTURAL OVERLAY (A). The purpose of the agricultural overlay is to provide properties identified as agricultural lands of long-term commercial significance an <u>optional</u> development pattern which maintains agricultural lands." (emphasis added)

This misinterpretation may stem from the County's erroneous interpretation of its obligation to

conserve beyond the interim stage, discussed in Issue 3.1(b). Requirements of .020(8), .040, and .060 are not optional; they are mandatory and are not only interim requirements.

Section 33.07.010 goes on to say:

> "1. Allowed Land Uses: The land uses allowed in the underlying zoning districts are allowed outright in the agricultural overlay…."

This provision allows incompatible uses on agricultural lands by permitting all uses permitted in the underlying residential zones. Also, land uses allowed as conditional uses in the underlying zoning are allowed as conditional uses in the agricultural overlay.

A review of the Plan land use map and the zoning map indicate that the petitioners are correct in their assertion that high density zones abut agricultural overlay zones. Also within the agricultural overlays, many have at least two underlying density classifications, i.e., R2 and R5. The County stated that buffers only apply at the external borders of the agricultural overlay areas and not within them. There is no 50 foot buffer requirement between various densities within the agricultural areas nor between non agricultural uses and agricultural uses within the agricultural areas. The County also stated that there is no way to provide additional buffering between agricultural and high density zones. The requirement to conserve behooves the County to revisit these shortcomings and find ways to protect agricultural lands from conflicting uses.

Petitioners also claimed that the County's cluster provisions for agricultural lands creates forbidden new urban growth in designated agricultural areas. The County defended those provisions as a means to conserve 70 percent of the designated land for agricultural purposes.

The County's record contained evidence of serious concern about the potential impact of clusters on the viability of the remainder of agricultural land. Exhibit SQ-165, from a January 20, 1994, County report at p. 1 states:

> "During the public hearings and neighborhood meetings, concerns have been raised about the high densities allowed in the cluster from non-farmers--and farmers have raised concern about the true viability of using the remaining farmland for agricultural purposes. If cluster development patterns are going to work, then the density in the cluster cannot cause a drastic change in the character of the surrounding area and the remaining farmland has to be large enough to accommodate a true commercial farming operation."

Ordinance 598, the July 9, 1996, amendment to the Plan (AG-160) states:

> "Despite regulations, existing agricultural land can be converted, either by selling existing "vested" five acre survey developments, or clustering the development and converting at least 30% of the land.
>
> Interim cluster development regulations required large density incentives to encourage landowners to cluster development rather than sell five acre parcels. Issues relating to the densities allowed in agricultural cluster development and the viability of farming the remaining open space have been raised by the public and the agricultural community. If cluster development patterns are to succeed, the density in the cluster cannot cause a drastic change in the character of the surrounding area and the remaining farmland has to be large enough to be commercially viable."

The County's cluster provisions still allow a 70 percent density bonus with no cap and conversion of 30 percent of the land. Given the record in this case, a carefully crafted ordinance which severely limits the total number of dwelling units and resultant densities and allows a very small percentage of agricultural land to be converted might be found in compliance with the Act. However, as written, the agricultural cluster provisions permit urban growth in designated agricultural areas and do not comply with the Act.

The County must take positive action to conserve agricultural lands and protect them from encroachment and development.

Issue 3.4

Did the County fail to review Clallam County Code (CCC) sections 33.05.010; 33.07.010; 33.10.020; 33.10.030; 33.10.040; 33.10.050; 33.10.060; 33.23 to ensure consistency with the agricultural designations in the Sequim-Dungeness Plan and the future land use map pursuant to RCW 36.70A.060(3); .070; .120; .170?

Petitioners contended that on July 9, 1996, when the County adopted its agricultural designations, the County failed to review its zoning code for consistency with those designations. Instead, the County simply readopted use of the underlying residential densities. They argued that the County's failure to review its zoning code and upgrade it to carry out the agricultural designations contravened 36.70A.060(3) as well as goals (1), (2), and (8).

The County responded that it had reviewed the interim regulations when it originally passed the Plan and did not need to review before it adopted the designation on July 9, 1996.

When the amendment to the Plan was adopted, the County had an obligation under .060(3) to ensure consistency between the implementing DRs and the Plan amendment. We find no indication in the record that such a review took place before adoption of the final agricultural designations with underlying residential densities on July 9, 1996. Therefore, the County has failed to comply with the Act.

Issue 3.5

Do the County's development regulations, CCC sections 33.05.010; 33.07.010; 33.10.020; 33.10.030; 33.10.040; 33.10.050; 33.10.060; 33.23 fail to protect designated agricultural resource lands by allowing lot sizes as small as one-half acre, in violation of RCW 36.70A.020 (8); .040(3); .060; .120?

Issue 3.6

Do CCC sections 33.05.010; 33.07.010; 33.10.020; 33.10.030; 33.10.040; 33.10.050; 33.10.060; 33.23 create or promote urban growth on agricultural resource lands by allowing lot sizes as small as one-half acre in violation of RCW 36.70A.010; .020(8); .040; .060; .110; .170?

We will deal with Issues 3.5 and 3.6 together. The issues here are the same as they were in 3.1 and 3.2 except that Issues 3.1 and 3.2 dealt with the Plan and 3.5 and 3.6 deal with the zoning code.

Petitioners' contentions on Issues 3.5 and 3.6 were similar to those in Issues 3.1(b) and 3.2(b). They demonstrated that the zoning map shows no designated agricultural resource land is zoned for densities lower than 1 du/4.8 acres. They claimed that this zoning of 1 du per 1, 2.4, and 4.8 acres effectively requires designated agricultural lands to be developed at urban densities which clearly violates .020(8), .040(3), and .060(1).
Petitioners also contended that the County's record showed that the current lot sizes from 1 to 4.8 acres fail to conserve agricultural lands. They pointed out that in 1992 the Clallam County

Agricultural Resource Lands Task Force recommended a 15 acre minimum lot size for designated agricultural lands. AG-125 at 3. In 1980, the first Clallam County Agricultural Advisory Committee recommended a minimum agricultural lot size of 20 acres. AG-19 at 19. Petitioners also quoted decisions of all three Growth Boards reinforcing their contention that lots of 5 acres and less clearly threaten the designated lands' ability to continue as food and fiber producing lands.

The County confirmed that under its zoning code, all of its designated agricultural resource lands have minimum parcel sizes of 4.8 acres or smaller. They also confirmed that at least 2,300 acres (of the 6,300) are now "vested" in subdivisions of 5 acres and smaller. The County contended, however, that it had conserved to the degree required at the comprehensive plan stage and that lots of 1 to 4.8 acres do not necessarily create urban growth.

For all the reasons stated under Issues 3.1(b) and 3.2(b), we find that the contested portions of the Clallam County zoning code fail to conserve designated agricultural resource lands and create inappropriate growth on resource lands in violation of the Act.

INVALIDITY

In this decision we have found that, as applied to designated agricultural lands, Section 31.03.230 of the Plan, the land use map, the zoning map and Sections 33.04, 33.05.010, 33.07.010, 33.10.020, 33.10.030, 33.10.040, and 33.23 of the zoning code do not comply with the Act. We now look again to the record and briefing to see if the continued validity of any of these violative provisions substantially interfere with the fulfillment of the goals of the Act.

In the Relief Sought sections of both their petitions, the Petitioners requested:

> "Invalidate the current regulations allowing high density development on agricultural resource lands;"

Petitioners did not specifically argue for an invalidity declaration in their briefing or oral arguments. We provided both parties an opportunity to address invalidity in post-hearing briefs.

The County protested our consideration of invalidity under these circumstances. WAC 242-02-5704 states:

> "A petitioner, or a moving party when a motion has been filed, shall submit a brief on each legal issue it expects a board to determine. Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue…."

This rule applies only to "issues." Invalidity is not a separate issue; it is part of the overall requested relief. The preferred method would be to argue invalidity in the prehearing briefs. Nonetheless, both parties submitted thorough arguments in the post-hearing briefs.

The County reminded us that we have consistently held that the petitioner bears the burden of showing that the standards for invalidity have been met and claimed that we had shifted the burden to the County in this case. We have not and will not shift the burden of proof in this case. In their prehearing briefs and at the hearing on the merits, the Petitioners showed by a preponderance of the evidence that the County is not in compliance with the Act. They also discussed at length the grievous nature of the thwarting of Goal 8 that the density provisions in designated agricultural areas allow.

One example of the evidence provided is exhibit AG-132. Notes from the October 7, 1996, Clallam County Agricultural Lands Advisory Committee. Those notes included a presentation by Bob Martin, Clallam County DCD Director:

> "Bob Martin presented a map showing the agricultural resource lands as determined in the Clallam County Comprehensive Plan. The total agricultural lands are approximately 6,200 acres. Of these 6,200 acres, 2,300 are already subdivided. Of the remaining 3,900 acres, 2,000 acres are in very large parcels that are not likely to be subdivided in the near future (e. g., Graysmarsh, Olympic Game Farm, etc.) That leaves 1,800 acres of agricultural lands that have not been subdivided into parcels of less than 15 acres, but that are very vulnerable to subdivision in the near term."

Later in the same meeting:

> "John McLaughlin then asked, 'What's different now than two years ago?' In otherwords, what has changed? The consensus seemed to be that there was more of a sense of urgency now to do something, since the remaining agricultural lands are disappearing very rapidly."

After we determine that the County has failed to comply, we look to the evidence in the record with a higher standard, focusing on elements of the Plan and DRs whose continued implementation most seriously threatens the County's future ability to adopt planning legislation which complies with the Act. Although many of the provisions are seriously flawed, we will only invalidate the most

egregious. We find that, as applied to designated agricultural lands, Plan Section 31.03.230(8) and Sections 33.10.020, .030, and .040 of the zoning code, which allow the creation of new lots of 5 acres and smaller, substantially interfere with Goal 2 and 8 of the Act.

There is a clear historical pattern of loss of agriculture to subdivision in this record. Even though the County submitted declarations showing that the rush to divide agricultural lands has subsided, the threat of a resurgence of such a rush due to the issuance of this decision is very real. We want to give the County the opportunity to bring itself into compliance. Such compliance will be impossible if some or most of the remaining agricultural acres have been converted to 5 acre and smaller lots during the remand period. Invalidation is a temporary, remedial measure which can be lifted as soon as the County takes action to comply with the Act.

ORDER

Having reviewed the record presented, having considered the oral and written arguments of the parties, and having deliberated on the matter, the Board enters the following Order:

Section 31.03.230 of the Plan; the Plan's land use map; Sections 33.05.010, 33.07.010, 33.10.020, 33.10.030, 33.10.040, and 33.23 of the zoning code; and the zoning map are remanded to the County to be brought into compliance within 180 days of the date of this order. In order to achieve compliance the County must:

1) Modify Section 31.03.230 of the Plan and the Plan's land use map to make them consistent with the July 9 designation of agricultural lands of long-term commercial significance.

2) Review the agricultural cluster provisions and either delete them or modify them to ensure that the resultant development does not constitute inappropriate growth, does not threaten the viability of remaining farmland, and only removes a small percentage of the land from ongoing agricultural usage.

3) Amend or replace the Agricultural Overlay Ordinance so that it is not optional and does not allow incompatible densities and uses on agricultural lands.

4) Review implementing DRs and make necessary changes and additions to ensure consistency with the agricultural designations, conservation of those designated lands, and protection from conversion and incompatible uses.

5) Review and modify densities on the zoning map to be consistent with the agricultural designations and the requirement to conserve these lands.

The following portions of the Sequim-Dungeness Plan and the Clallam County zoning code substantially interfere with Goals 2 and 8 of the Act, pursuant to RCW 36.70A.330(2).

1) Plan Section 31.03.230(8) Land Use Maps. Rural residential densities when applied to designated agricultural lands.

2) The following zoning code sections when applied to designated agricultural lands:
   a) 33.10.020 Rural Law (R5)
   b) 33.10.030 Rural Moderate (R2)
   c) 33.10.040 Rural (R1)

Findings of Fact and Conclusions of Law required by RCW 36.70A.300 are attached as Appendix III and incorporated herein by reference.

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

SO ORDERED this 15th day of April, 1997.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

Nan A. Henriksen
Board Member

_____

William H. Nielsen
Board Member

_____

Les Eldridge
Board Member

APPENDIX I

PROCEDURAL HISTORY

On September 5, 1996, we received a Petition for Review from George F. Hudson and Nash Huber. The petition challenged the Sequim-Dungeness Plan's alleged failure to protect designated agricultural lands. It also sought review of issues related to Clallam County's alleged failure to "adopt development regulations that protect its designated agricultural lands." This petition was assigned Case number 96-2-0028.

On October 21, 1996, we received another Petition for Review from George F. Hudson and Nash Huber. This petition challenged the County's zoning code and amendments published on September 26, 1996. The Parties also submitted a Motions and Stipulated Order to Consolidate the two petitions.

On October 22, 1996, we issued an Order of Consolidation and consolidated the petitions into Case number 96-2-0031.

On October 23, 1996, we issued a Prehearing Order setting forth a schedule for motions and briefing and a list of the legal issues to be decided.

On December 18, 1996, Clallam County filed a Motion to Dismiss Legal Issues 3.1 and 3.2 on the grounds that challenge on those issues were untimely.

On January 28, 1997, we issued a Notice of Hearing.

On March 6, 1997, we held a Hearing on the Motion and Hearing on the Merits at the John Wayne Marina in Clallam County.

On March 21, 1997, we issued an order denying the dispositive motion

APPENDIX II

FINDINGS OF FACT

1) Clallam County (County) has designated 6,300 acres of agricultural lands. Of these approximately 2,300 acres are already "vested" in small lot subdivisions of 5 acres or less.

2) All agricultural lands in the County are currently zoned for lot sizes between 1 and 5 acres.

3) The County lost over 7,400 acres of farm land to development between 1980 and 1991. Between 1955 and 1978, Clallam County lost over 47,000 acres of farm land to development, most of it in the Sequim-Dungeness Valley.

4) In early 1992, the Agricultural Lands Task Force issued its final report which recommended a minimum agricultural lot size of 15 acres.

5) On April 21, 1992, Clallam County adopted interim designations and regulations designating about 7,500 acres of lands as agriculture. The minimum agricultural parcel size was 15 acres under the interim ordinance. The interim ordinance also added cluster development provisions for agricultural resource lands.

6) On February 21, 1995, an emergency ordinance was adopted by the Board of Clallam County Commissioners (BOCC) establishing restraints on the vesting of development applications in the Sequim-Dungeness region pending completion of the Plan. The findings noted that a significant increase in subdivision applications had occurred during the past twelve months in that region.

7) On June 16, 1995, The County issued the Final Environmental Impact Statement (FEIS) for the Clallam County Comprehensive Plan. It stated that the "no action alternative" would continue current trends on resource lands and could result in the loss of the agricultural industry in Clallam County.

8) On June 27, 1995, the BOCC adopted Clallam County Comprehensive Plan, Ordinance 573.

9) Also on June 27, 1995, the County adopted three regional plans, including the Sequim-Dungeness Regional Plan (Plan), Ordinance 574.

10) Clallam County published no notice of these plans' adoption until March 3, 1996.

11) The Plan adopted the following policy with respect to designated interim agricultural lands:

> "The interim designation and regulation of agricultural lands shall sunset on November 7, 1995, unless a purchase of development rights program has been approved by the Board of Clallam County Commissioners and voters of Clallam County."

12) On November 7, 1995, the voters defeated the bond proposal to purchase development rights for farm lands. All land previously designated as agricultural reverted to rural residential designations.

13) On December 19, 1995, Ordinance 581 replaced the Clallam County zoning code pursuant to the revised comprehensive plan.

14) The new zoning code continued to allow cluster development on agricultural lands. It provided that residential density on agricultural lands is established by underlying zoning. It also stated that the purpose of the agricultural overlay districts was to provide an optional development pattern to maintain agricultural lands.

15) The new zoning code also established rural residential zones R1, R2, and R5, with minimum lot sizes of 1 acre, 2.4 acres and 4.8 acres respectively.

16) On March 11, 1996, Petitioners George F. Hudson and Nash Huber filed a petition for review with this Board requesting the county to designate agricultural lands as required by the

Act. Case #96-2-0005.

17) On July 9, 1996, the County enacted legislation to designate agricultural resource lands, change certain provisions of the Plan, and revise the zoning code. The County adopted an agricultural overlay to designate the agricultural lands of long-term commercial significance. Ordinance 598.

18) Also on July 9, 1996, the BOCC voted to established a new committee to explore ways to protect agricultural lands.

19) On July 30, 1996, Petitioners and the County agreed to a stipulated dismissal of Case 96-2-0005.

20) In August 1996, the County amended the zoning/land use map.

21) On September 26, 1996, the County published Notice of Adoption of Actions taken on July 9, 1996.

APPENDIX III

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INVALIDITY FINDINGS OF FACT

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Pursuant to RCW 36.70A.300 (2)(a)

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We incorporate the Findings of Fact under Appendix II and add the following:

22) RCW 36.70A.020(2) states:

"Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development."

23) RCW 36.70A.020(8) states:

"Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage

incompatible uses."

24) Goal 8 is not met if either insufficient lands are designated or if DRs fail to adequately protect the designated lands from conflicting uses.

25) In order to maintain and enhance natural resource based industries, densities within designated agricultural resource areas must not interfere with the primary use of those lands for the production of food, other agricultural products, or fiber. New lots of 1, 2.4, and 4.8 acres threaten continued use and existence of such lands for resource production.

26) Since 1987 agricultural lands in Clallam County have dropped from over 26,000 acres to just over 6,000 acres.

27) The 1992 Final Report of the Agricultural Resource Lands Task Force states:

> "…..Existing zoning makes no provision and provides no incentives for continued commercial agricultural land use."

28) Any Finding of Fact which is more properly a Conclusion of Law shall be deemed a Conclusion of Law.

CONCLUSIONS OF LAW

1) The Board has jurisdiction over the parties and subject matter of this case.

2) When applied to designated agricultural lands, Plan Section 31.03.230(8) and zoning code Sections 33.10.020, .030, and .040 substantially interfere with Goals 2 and 8 of the Act and are invalid under RCW 36.70.300 (2)(a).