

Case No. 46305-9-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

CONCERNED FRIENDS OF FERRY COUNTY AND FUTUREWISE,

Petitioners,

v.

FERRY COUNTY AND
THE GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

**CONCERNED FRIENDS OF FERRY COUNTY'S AND
FUTUREWISE'S SUPPLEMENTAL BRIEF**

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TABLE OF CONTENTS

<u>Topic</u>	<u>Page Number</u>
Table of Authorities	ii
I. Introduction	1
II. Argument.....	1
1. Does Table B of Ordinance 2013-05 (AR 6374-6376) show the application of the Ordinance’s criteria that gain or lose a parcel points or that disqualify a parcel from consideration as agricultural resource land of long-term commercial significance.	1
2. In Table B, what threshold does the phrase “Does not meet threshold” refer to?	2
3. Immediately after Table B (AR 6376) is the statement: “The last column was used as the final criteria in determining Agriculture Land of Long-Term Commercial Significance.” The last column ends with the sum, 2,816.85 acres. Does that mean that application of the criteria, both those dealing with points and those excluding land, indicate that 2,816.85 acres qualifies as Agriculture Land of Long-Term Commercial Significance? If not, please explain why not.	2
4. What was the County’s methodology/reasoning to only designate 405 acres of private land?	3
5. Related to Question 4, it appears that the 405-acre designation would not qualify under the criteria, since it doesn’t meet the 500-acre block size minimum. Instead, the 405-acre designation appears to be a “prescriptive designation” of land subject to long-term conservation easements, consistently with p. 30 of the Ordinance (AR 6376). If so, does that mean that the County designated no private land that met the point criteria and exclusionary criteria?.....	5
6. Did the County exclude rented lands from the “Predominate [sic] Parcel/Farm Ownership) Size?” If the answer is “yes,” please explain and identify any evidence in the record to support the rented lands exclusion. If the answer is “no,” please explain what lands were considered in this category.	7
7. What is the meaning or significance of the 4/4/13 dates in Table B? 8	8
Certificate of Service	1

TABLE OF AUTHORITIES

<u>Authority</u>	<u>Page Number</u>
Cases	
<i>Kittitas Cnty. v. E. Washington Growth Mgmt. Hearings Bd.</i> , 172 Wn. 2d 144, 256 P.3d 1193 (2011).....	8
Statutes	
RCW 36.70A.070.....	8
RCW 36.70A.130.....	5
Other Authorities	
BLACK’S LAW DICTIONARY (Fifth Edition: 1979)	8

I. INTRODUCTION

On June 24, 2015, the Court of Appeals issued an order requesting supplemental briefing in this case to address seven questions. The Concerned Friends of Ferry County and Futurewise (Concerned Friends) submit this supplemental brief in response to the Court's order.

II. ARGUMENT

- 1. Does Table B of Ordinance 2013-05 (AR 6374-6376) show the application of the Ordinance's criteria that gain or lose a parcel points or that disqualify a parcel from consideration as agricultural resource land of long-term commercial significance.**

Yes, the record demonstrates that Table B shows the application of the ordinance's criteria. Ferry County Development Regulations Ordinance No. 2013-05, in referring to Table B, states that "[t]he last column was used as the final criteria in determining Agricultural Land of Long-Term Commercial Significance."¹ The far right column of Table B has as part of one of its headings "5 points & above ..."² Ordinance No. 2013-05 also states "5 points or above: Ag land of long-term commercial significance unless challenged[.]"³ So the "total acreage" of 2,816.85 acres in the far right column at the bottom of Table B qualified as agricultural

¹ Administrative Record (AR) 6376, Ferry County Development Regulations Ordinance No. 2013-05 p. 30.

² AR 6374, *Id.* at p. 28.

³ AR 6377, *Id.* at p. 31.

lands of long-term commercial significance based on Ferry County's point system.⁴

The lands in Table B do not include the lands subject to state and federal grazing leases.⁵ They are in addition to the total acres of land in Table B.⁶

2. In Table B, what threshold does the phrase “Does not meet threshold” refer to?

The Concerned Friends' were unable to identify any definition or explanation of “threshold” in Ferry County Development Regulations Ordinance No. 2013-05.⁷ However, in the transcript of the Compliance Hearing the Growth Management Hearings Board held on December 20, 2013, the Attorney for Ferry County explained “threshold” referring to Table B “[o]n page 28, the top of the chart, the threshold is where it says 5 points and above ...”⁸ So the threshold is apparently scoring five or more points.

3. Immediately after Table B (AR 6376) is the statement: “The last column was used as the final criteria in determining Agriculture Land of Long-Term Commercial Significance.”

⁴ AR 6376, Ferry County Development Regulations Ordinance No. 2013-05 p. 30.

⁵ Transcript of Proceedings December 20, 2013, *Concerned Friends of Ferry County v. Ferry County*, Case Nos. 97-1-0018c, 01-1-0019, and 11-1-0003 p. 95. (The Board did not give “Bates Numbers” to the transcript in the record.)

⁶ *Id.*

⁷ AR 6352 – 77, Ferry County Development Regulations Ordinance No. 2013-05 pp. 6 – 31.

⁸ Transcript of Proceedings December 20, 2013, *Concerned Friends of Ferry County v. Ferry County*, Case Nos. 97-1-0018c, 01-1-0019, and 11-1-0003 p. 95. Page 28 of the Ferry County Development Regulations Ordinance No. 2013-05 is at AR 6374.

The last column ends with the sum, 2,816.85 acres. Does that mean that application of the criteria, both those dealing with points and those excluding land, indicate that 2,816.85 acres qualifies as Agriculture Land of Long-Term Commercial Significance? If not, please explain why not.

Yes, for the reasons explained under question 1, the record shows that the 2,816.85 acres qualifies as Agriculture Land of Long-Term Commercial Significance based on the County's criteria. These criteria are listed on pages AR 6364 through 6372 of Ferry County Development Regulations Ordinance No. 2013-05 under the heading "Criteria for Designating Agricultural Lands of Long-Term Commercial Significance in Ferry County, Washington" and are also summarized in "Section 9.01 Designations" on pages AR 6376 and 6377.

4. What was the County's methodology/reasoning to only designate 405 acres of private land?

The Concerned Friends do not know. Ferry County Comprehensive Plan provisions "7.4.30" through "7.4.34" do not mention conservation easements as a designation criterion.⁹ Neither does the point system in Ordinance No. 2013-05.¹⁰ The only reference is in Ordinance No. 2013-05 on AR 6376. There is no methodology or criterion on that

⁹ AR 6341 – 43, Ferry County Ordinance No. 2013-03 *Ferry County Comprehensive Plan and the Curlew Lake Sub Area Plan* pp. *2 – 4.

¹⁰ AR 6364 – 77, Ferry County Development Regulations Ordinance No. 2013-05 pp. 18 – 31.

page, only a reference to “Comprehensive Plan Policy 7.4.30 (5).” But Comprehensive Plan Policy “7.4.30 (5)” provides in full that:

5. Access to private properties through Agricultural Lands of Long-Term Commercial Significance, Forest Lands of Long-Term Commercial Significance, and Mineral Lands of Long-Term Commercial Significance shall not traverse through such lands unless subject to an easement, or shown on maps of the Ferry County Public Works Department or Forest Service Maps of the Colville National Forest, dated 1992.¹¹

Reading Comprehensive Plan Policy “7.4.30 (5)” as a whole, we see that it is not referring to conservation easements, but to access easements.

Further, Comprehensive Plan Policy “7.4.30 (5)” does not instruct the County to designate lands subject to easements as agricultural lands of long-term commercial significance, only to let private properties have access through those agricultural, forest, and mineral resource lands.

So comprehensive plan provides no support for designating agricultural lands purely on the basis of being encumbered with a conservation easement.¹² But the development regulations provide that they are subject to “prescriptive designation.”¹³ The substitution of the inconsistent criteria in the development regulations for the criteria in

¹¹ AR 6342, Ferry County Ordinance No. 2013-03 *Ferry County Comprehensive Plan and the Curlew Lake Sub Area Plan* p. *3.

¹² AR 6341 – 43, Ferry County Ordinance No. 2013-03 *Ferry County Comprehensive Plan and the Curlew Lake Sub Area Plan* pp. *2 – 4.

¹³ AR 6376, Ferry County Development Regulations Ordinance No. 2013-05 p. 30.

Comprehensive Plan Policies “7.4.30 7 and 9” and provision “7.4.31” is inconsistent with and fails to implement the comprehensive plan in violation of RCW 36.70A.130(1)(d) .

5. **Related to Question 4, it appears that the 405-acre designation would not qualify under the criteria, since it doesn’t meet the 500-acre block size minimum. Instead, the 405-acre designation appears to be a “prescriptive designation” of land subject to long-term conservation easements, consistently with p. 30 of the Ordinance (AR 6376). If so, does that mean that the County designated no private land that met the point criteria and exclusionary criteria?**

The record shows that Ferry County did not designate any agricultural lands of long-term commercial significance using its point system including the exclusionary criteria.¹⁴ The Concerned Friends read the point system as requiring 500 acres to be designated as agricultural lands of long-term commercial significance.¹⁵ The 405 acres alone cannot meet the block criterion. The 405 acres could not have met the block criterion by adjoining state or federal grazing land because Ferry County does not count any of the designated state or federal grazing land when calculating the 500-acre block size. This is shown by the Ferry County Board of Commissioners exclusion of a 99-acre parcel and a 40-acre parcel that the Planning Commission recommended be designated as

¹⁴ AR 6376 – 77, Ferry County Development Regulations Ordinance No. 2013-05 pp. 30 – 31.

¹⁵ AR 6364 – 72, *Id.* at pp. 18 – 26, and AR 6376 – 77, *Id.* at pp. 28 – 31.

agricultural lands of long-term commercial significance.¹⁶ These parcels abutted federal grazing allotments.¹⁷ Because Ferry County believed the state or federal grazing permits can be terminated at any time by the permit holder or the state or the federal government without notice to the County or adjoining land owners, “such lands are not contiguous for purposes of block size analysis.”¹⁸ However, the federal grazing permits have a ten-year term.¹⁹ These same grazing lands are designated as agricultural lands of long-term commercial significance despite the County’s concern over the possible termination of the permits.²⁰ How is it that these lands do qualify as agricultural lands of long-term commercial significance, but they do not qualify for the 500-acre block group? The distinction is not rational.

¹⁶ AR 6384 – 85, Findings of Fact and Conclusions of the Ferry County Board of Commissioners Regarding Adoption of Amendments to the Comprehensive Plan and Development Regulations p. *5 – 6 (Oct. 28, 2013)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ AR 6779, *Forest Plan Revision, Colville & Okanogan-Wenatchee National Forests May 2009 Briefing: Rangelands and Forest Plan Revision* p. 2 of 2.

²⁰ AR 6376, Ferry County Development Regulations Ordinance No. 2013-05 p. 30.

6. Did the County exclude rented lands from the “Predominate [sic] Parcel/Farm Ownership) Size?” If the answer is “yes,” please explain and identify any evidence in the record to support the rented lands exclusion. If the answer is “no,” please explain what lands were considered in this category.

Yes, the record shows that Ferry County excluded rented lands from the parcel size criterion. Ordinance No. 2013-05 states that “[f]arm size was determined by including all contiguous ownership as one farm.”²¹ Ordinance No. 2013-05 also provides that “[a]ll contiguous ownership was treated as one farm.”²²

The Concerned Friends are unaware of any evidence in the record justifying excluding rented land when determining the size of a farm. The Census of Agriculture includes rented land in its definition of land in farms.²³ “Rented land is especially important for commercial farming. Nationwide, about 40 percent of farmland is rented.”²⁴

Further, the state and federal lands that Ferry County designated as agricultural resource lands of long-term commercial significance were designated because they are leased for grazing or made available for

²¹ AR 6370, *Id.* at p. 24 emphasis added.

²² AR 6371, *Id.* at p. 25 emphasis added.

²³ AR 6415, United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture Washington State and County Data Volume 1 • Geographic Area Series • Part 47* p. B-14.

²⁴ AR 6519, Professor Tom Daniels, *What to Do About Rural Sprawl?* p. 1 Presented at the American Planning Association Conference, Seattle, WA. (April 28, 1999).

grazing under federal permits.²⁵ This is the same as renting grazing land for a ten-year term.²⁶ Including these rented lands as agricultural lands of long-term commercial significance while excluding other rented land is internally inconsistent in violation of the Growth Management Act (GMA).²⁷

7. What is the meaning or significance of the 4/4/13 dates in Table B?

The date 4/4/13 is apparently the date the County prepared the point system scores used in Ordinance No. 2013-05.²⁸

Respectfully submitted this 2nd day of July 2015.



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²⁵ AR 6364 – 77, Ferry County Development Regulations Ordinance No. 2013-05 pp. 18 – 31; AR 6779, *Forest Plan Revision, Colville & Okanogan-Wenatchee National Forests May 2009 Briefing: Rangelands and Forest Plan Revision* p. 2 of 2.

²⁶ AR 6779, *Forest Plan Revision, Colville & Okanogan-Wenatchee National Forests May 2009 Briefing: Rangelands and Forest Plan Revision* p. 2 of 2. A lease is “[a]ny agreement which gives rise to relationship of landlord and tenant (real property) ...” BLACK’S LAW DICTIONARY p. 800 (Fifth Edition: 1979). Rent is the “consideration paid for the use or occupation of property.” *Id.* at p. 1168.

²⁷ RCW 36.70A.070. “County development regulations must also comply with the requirements of the GMA. *See* RCW 36.70A.130(1)(a) (‘a county or city shall ... ensure the plan and regulations comply with the requirements of this chapter’).” *Kittitas Cnty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn. 2d 144, 164, 256 P.3d 1193, 1203 (2011).

²⁸ AR 6789, Ferry County’s 2013 Index to Compliance Report p. 2 listing as document 7 the “ALLTCS [Agricultural Lands of Long-Term Commercial Significance] Designation Point System Spreadsheet” dated 4/4/13.

CERTIFICATE OF SERVICE

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on July 2, 2015, I caused a PDF file of the original and true and correct copies of the following document to be served on the persons listed below in the manner shown: **Concerned**

Friends of Ferry County’s and Futurewise’s Supplemental Brief.

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Dated this 2nd day of July 2015.



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FUTUREWISE

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Transmittal Letter

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Comments:

Enclosed please find the Concerned Friends Supplemental Brief requested by the Court. Please contact me if you require anything else.

Sender Name: Tim Trohimovich - Email: tim@futurewise.org

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