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No.: 53038-4-II

Thurston County Superior Court Case No.: 17-2-06109-34
Eastern Growth Management Hearings Board, Case No. 17-1-0003

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF COMMERCE and FERRY COUNTY,

Petitioner,

v.

CONCERNED FRIENDS OF FERRY COUNTY, FUTUREWISE, and the GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

FERRY COUNTY'S PETITION FOR REVIEW BY THE SUPREME COURT

Peter G. Scott, WSBA No. 31712
Peter G. Scott, Law Offices, PLLC
682 South Ferguson Avenue
Suite 4
Bozeman, MT 59718-6491
(406) 585-3295
(406) 585-3321
Email: peter@scott-law.com
Attorneys for Ferry County

Tim Trohimovich, WSBA No. 22367
816 Second Avenue, Suite 200
Seattle, WA 98104
(206) 343-0681 Ext. 102
Email: tim@futurewise.org
Attorney for Concerned Friends of Ferry County and Futurewise

Ms. Heather A. Carter
Assistant Atty. General
Post Office Box 40109
Olympia, WA 98504-0109
(360) 586-6474
Email: heathers1@atg.wa.gov
Attorney for State of Washington Department of Commerce

Ms. Kristen K. Mitchell
Senior Counsel
Post Office Box 40100
Olympia, WA 98504-0100
(360) 753-6200
(360) 664-0228 (fax)
kristenm1@atg.wa.gov
Attorney for State of Washington Department of Commerce

Ms. Lisa Petersen
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7676
Attorney for Growth Management Hearings Board

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Ferry County, a Washington State governmental agency by and through its attorney of record, Peter G. Scott, WSBA #31712.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals Unpublished Decision, Cause No. 53038-4-II (May 12, 2020). A copy of the decision is in the Appendix A

III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals have subject matter jurisdiction to review a county legislative act taken in a compliance action that was dismissed without appeal for lack of subject matter jurisdiction, and for which timely review was not sought?

2. Does the Court of Appeals' unpublished decision improperly expand the scope of the compliance issue identified in *Concerned Friends of Ferry County v. Ferry County* ("CFOFC I")?[1]

3. Does the Court of Appeals' unpublished decision comply with public policy mandating discretion be afforded to local governments in planning for future growth?

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[1] 191 Wn. App. 803, 365 P.3d 207 (2015)

IV. STATEMENT OF THE CASE

1. Eastern Growth Management Hearings Board Case No. 01-1-0019.

In *CFOFC I,* the Court of Appeals reviewed the Board's Final Decision and Order ("FDO") issued in Eastern Growth Management Hearings Board ("EWGMHB" or "Board") Case No. 01-1-0019. The Court of Appeals repeatedly found that "***[c]attle ranching*** is Ferry County's major agricultural industry."[2] No other type of livestock is discussed in the opinion. The Court then found "hay production is an essential element of the County's major agricultural industry" (i.e., cattle ranching).[3] The Court reasoned that no evidence supported the Board's conclusion that $327,000 in annual sales of hay was "so small as not contribute in any significant way to the needed winter supply of hay."[4] The Court upheld the criteria used by the County to identify agricultural resource land ("ARL").[5] In reviewing criteria 6, "proximity to markets," the Appellate Court addressed arguments related to the transportation of cattle and hay.[6] It upheld the designation of more than 479,000 acres of ARL, noting that 99% was not suitable for hay production.[7] The Appellate Court also found the "criteria, in other words,

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[2] 191 Wn. App. at ¶3, ¶28, ¶54, ¶71 (*emphasis* supplied)
[3] Id. at ¶28.
[4] Id. at ¶29.
[5] Id. at ¶32.
[6] Id. at ¶¶52-54.
[7] Id. at ¶76.

were the tools most suited to identifying land suitable for hay production."[8]

The holding of *CFOFC I* states,

> Declining to designate any of the land that qualifies under the criteria, especially when that overlooks a critical component of the County's principal agricultural industry, does not meet the GMA's goal of maintaining and enhancing productive agricultural industries or the minimum guideline of maintaining and enhancing the economic viability of the agricultural industry, set out in WAC 365–190–050(5).[9]

On remand the County enacted Ordinance 2016-04 to address the compliance issue identified in *CFOFC I.* Ordinance 2016-04 is presumed valid.[10] Futurewise and CFOFC requested a compliance hearing. The Board determined it did not have subject matter jurisdiction to review Ferry County Ordinance 2016-04 for compliance with the Growth Management Act ("GMA") and dismissed the case.[11] In dismissing EWGMHB Case No. 01-1-0019, the Board ruled,

> Mandatory authority from the Supreme Court holds that if a tribunal lacks jurisdiction over a proceeding, it **"may do nothing other than enter an order of dismissal."**[12]

No appeal was taken from dismissal of EWGMHB Case 01-1-00019 and the case was closed. Under GMA, review of a legislative action requires the filing

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[8] Id. at ¶78
[9] Id at ¶79.
[10] RCW 36.70A.320(1).
[11] Certified Record ("CR") 000138.
[12] CR 00138 citing *Crosby v. Spokane County,* 137 Wn.2d 296, 301 (1999) [emphasis added]. *See* also *Griffith v. City of Bellevue,* 130 Wn.2d 189, 196 (1996) (**emphasis** original).

of a Petition for Review within sixty days of enactment.[13] For partial planning counties an action must be filed in Superior Court.[14] No action for review of Ordinance 2016-04 was timely filed.[15]

2. Eastern Growth Management Hearings Board Case No. 17-1-0003.

On April 27, 2017, Futurewise and the CFOFC petitioned the Eastern Washington Growth Management Hearings Board ("Board") to review a Determination of Compliance made by the Washington State Department of Commerce ("Department") for GMA compliance.[16] A new case Hearings Board case was opened as EWGMHB Case No. 17-1-0003. The same Petition also sought review of Ferry County Ordinance 2016-04.[17] Petitioners stated,

> On August 8, 2016, Ferry County adopted Ordinance 2016-04 designating agricultural lands of long-term commercial significance. A true, correct, and complete copy of Ordinance 2016-04 with its map and findings of fact is in Tab 2016-04 attached to this petition for review.

Thus, it is undisputed that the Petition for Review in EWGMHB Case 17-1-0003 exceeded 60 days required for review of Ordinance 2016-04. The County (and the Department) opposed the Petition for Review of Ordinance

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[13] See also RCW 36.70A.290(2).
[14] See *Crosby* infra
[15] CR 001570.
[16] CR 001810 (FDO, Case No. 17-1-0003)
[17] CR 00002.

2016-04 based on the final unappealed ruling in EWGMHB Case 01-1-00019, and because no timely action for review of Ordinance 2016-04 was filed following adoption on Auguste 8, 2016. [18]

The Board agreed and limited its review to the Determination of Compliance. In the FDO, the Board reviewed the Department's actions and ruled that the Department's findings were supported by substantial evidence in the record and concluded that the Determination of Compliance was not clearly erroneous.[19]

On appeal, it is the Board's action that is reviewed under the Administrative Procedures Act (RCW 34.05, "APA"), not the Department's and not the County's.[20] Relief from the FDO may only be granted if the challenging party satisfies the burden of proving the FDO is invalid under one or more of several APA standards.[21]

The Standards of Review applied by the Court of Appeals in its unpublished opinion ("CFOFC II") states, "we will reverse an agency decision that is erroneous in its interpretation or application of the law, is not based on substantial evidence, or is arbitrary or capricious."[22] The Court of Appeals did not conclude that the Board's decision was arbitrary or

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[18] CR 91; CR 103.
[19] CR 001817-18.
[20] RCW 36.70A.300(5) citing RCW 34.05.514.
[21] RCW 34.05.570(3)
[22] Unpublished Opinion at 6.

capricious. It did not conclude that the FDO was not based on substantial evidence. The Court of Appeals concluded that the Board's decision was erroneous, because the Department's Determination of Compliance was erroneous; and, according to the Court of Appeals, the Determination of Compliance was erroneous because the County failed to comply with GMA. Thus, it cannot reasonably be contested that the holding of *CFOFC II* rests on the Court's improper review of Ferry County Ordinance 2016-04.

For example, *CFOFC II* says "[t]he County and the Department interpreted [*CFOFC I*] too narrowly. First, the County did not consider any livestock other than cattle."[23] This clearly expands the scope of the compliance issue identified in *CFOFC I.* As shown above, the only compliance issue addressed in *CFOFC I* was the County's failure to designate any ARL identified by the GMA compliant criteria found to identify land "most suitable for hay production." The Appellate Court expressly found that $327,000 in annual hay sales was not too small to "contribute in any significant way to the needed winter supply of hay."[24] Cattle is the only type of livestock discussed.

The Department determined that the County satisfied that compliance issue by designating a critical mass of ARL for hay production

[23] Unpublished Opinion at 13.
[24] CFOFC I at ¶ 29.

and granted the Determination of Compliance. The Board ruled that the Determination was supported by substantial evidence. Now the Appellate Court says ARL must satisfy *all of the winter need* for *all types of livestock.* Simply stated, *CFOFC II* moves the goal posts and lays waste to a very substantial outlay of public resources.

The Supreme Court should accept review to consider and determine whether the Court of Appeals lacked subject matter jurisdiction to review Ordinance 2016-04 and whether its unpublished opinion improperly expanded the scope of the compliance issue requiring Department determination.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review because *CFOFC II* conflicts with Supreme Court decisions limiting subject matter jurisdiction for review of County legislative actions. It also conflicts with scope of the compliance issue identified the published *CFOFC I* decision. In the alternative, public interest will be served by clear guidance regarding public policy mandating discretion for local planning.

1. CFOFC II conflicts with Supreme Court Decisions Limiting Hearings Board Jurisdiction to Legislative Actions Taken By Local Governments that Plan under RCW 36.70A.040. In the Absence of a Valid Action Ordinance 2016-04 is Presumed Valid and the Court of Appeals Lacks Subject Matter Jurisdiction to Review the Ordinance.

In *Moore v. Whitman Cty.*, the Supreme Court unequivocally held that Board jurisdiction is limited to legislative acts by Counties "that are required or choose to plan under RCW 36.70A.040."[25] In *Wenatchee Sportsmen Ass'n v. Chelan County,* the Supreme Court held "[i]f a GMHB does not have jurisdiction to consider a petition, it must be filed in superior court under [Land Use Protection Act]."[26] In 2014, the County resolved to undertake partial planning pursuant to RCW 36.70A.040.[27] Under the GMA, Ordinance 2016-04 is presumed valid, subject to judicial review.[28] Futurewise and CFOFC did not file a timely petition for review of Ordinance 2016-04 before the Board and did not seek review by any Superior Court.

Relying on *Moore*, *Crosby v. Spokane County*[29] and *Griffith v. City of Bellevue,*[30] the Board dismissed EWGMHB Case No. 01-1-0019 for want of jurisdiction.[31] Futurewise and CFOFC did not appeal from that dismissal. By statute, Ordinance 2016-04 is valid. Under Supreme Court authority it cannot be reviewed.

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[25] 143 Wn.2d 96, 100, 18 P.3d 566, 568 (2001).
[26] 141 Wash.2d 169, 178, 4 P.3d 123 (2000).
[27] CFOFC II at 3.
[28] RCW 36.70A.320(1).
[29] 137 Wn.2d 296, 301 (1999)
[30] 130 Wn.2d 189, 196 (1996)
[31] CR 00138

In EWGMHB Case No. 17-1-0003, the Board again declined to review Ordinance 2016-04 for want of jurisdiction. The Board reviewed the Department's Determination of Compliance in which the Department determined the County "designated a critical mass of commercially significant agricultural resource lands."[32] The Board ruled that the Department's findings were supported by substantial evidence in the record and concluded that Futurewise and CFOFC failed to satisfy their burden of proving the Department's action was clearly erroneous.

Under the APA, Futurewise and CFOFC have the burden of proving the Board's FDO is invalid.[33] The Superior Court affirmed the FDO. The Court of appeals reversed. In doing so the Court did not find that the Board's FDO failed to comply with any law or was not supported by substantial evidence. Instead the Court of Appeals undertook to review of Ordinance 2016-04 and concluded that the County did not comply with GMA.[34] Based on that the Court concluded that the Department erred. Based on that the Court concluded that the Board erred. It is clear that the Court of Appeal decision is based on review of Ordinance 2016-04. The Supreme Court should accept review because the Court of Appeals lacked

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[32] CFOFC II at 6.
[33] RCW 34.05.570(3)
[34] CFOFC II at 14.

jurisdiction to review Ordinance 2016-04 and its decision conflicts with the holdings of *Moore*, *Wenatchee Sportsman*, *Crosby*, *and Griffith*, supra.

2. *CFOFC II* Conflicts with the Published Decision of the Court of Appeals in CFOFC I by Relying on Dicta to Expand the Scope of the Compliance Issue to Include Matters Not Addressed in the Record.

The Court of Appeals appears to believe that because the Board reviewed the Department's Determination of Compliance, and because the Department determined that the County designated a critical mass of commercially significant ARL, this somehow creates subject matter jurisdiction for the Court of Appeals to review the County's legislative action. It does not. As explained, in the absence of proof by Futurewise or CFOFC that the Board's FDO is invalid, the Board's decision must be affirmed.

Instead of reviewing the Board's action, the Court of Appeals found the Department and the County interpreted *CFOFC I* too narrowly.[35] Even if that were true—it is not—the interpretation of the Department and the County are not at issue in a case challenging the Board's FDO. Nowhere does the Court of Appeals identify an error by the Board or any findings that are not supported by substantial evidence.

[35] CFOFC II at 13.

The Supreme Court should accept review, because *CFOFC II* contradicts the published decision in CFOFC I. As summarized above, in *CFOFC I* the Court of Appeals found the County non-compliant for failing to designate *any* ARL from fee land identified as "most suitable for hay production" and that in so doing had failed to "meet the GMA's goal of maintaining and enhancing productive agricultural industries."[36] The only industry discussed in the decision was the livestock industry and the only livestock discussed is cattle, which is identified four times as the County's major agricultural industry.

In *CFOFC II* the Court of Appeals expands the scope of its prior decision, explaining:

> we did not limit our decision solely to hay production but viewed hay production as an example of a critical component of the principal agricultural industry that could not be ignored.[37]

Respectfully, *CFOFC I* addresses the County's failure to designate any of the 2,816 acres identified by GMA compliant criteria as "most suited for hay production" to support the Cattle Industry.[38] It says nothing about the need to support any livestock other than cattle and it says nothing about

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[36] 191 Wn. App. at ¶ 79.
[37] CFOFC II at 12.
[38] CFOFC I at ¶ 78.

needing to designate ARL for anything other than hay production to support the cattle industry.

The Court of Appeals (and Futurewise and CFOFC) make much of "guidance to the County" cautioning that designation of more acres does not assure compliance.[39] Dicta; sort of a 'word to the wise,' but not a holding. The issue addressed by the Determination of Compliance is whether the County designated a critical mass of commercially significant ARL. Nothing in *CFOFC I* says a "critical mass" must include ARL for industry sectors that are not addressed in the decision. The Department found the County designated a critical mass. The Board reviewed the Determination of Compliance and found the decision was supported by substantial evidence and not clearly erroneous.[40] The Appellate Court did not find any error in the Board's action. Instead it moved the goal posts and found the County's action does not comply with GMA base on review of an Ordinance that is not properly before the Court. Because *CFOFC II* conflicts with *CFOFC I*, the Supreme Court should accept review.

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[39] CFOFC II at 13, quoting CFOFC I at ¶ 81.
[40] CR 001817-18.

3. Review of CFOFC II is Merited Based on the Substantial Public Interest in Ensuring that Public Policy Mandating Bottom Up Local Planning is Observed and Protected.

In the event the Supreme Court concludes that the *CFOFC II* opinion does not conflict with existing Supreme Court jurisdictional authority, and that *CFOFC II* does not expand the scope of the holding in *CFOFC I*, review is merited to address the substantial public interest in the administration of public policy that mandates discretion for legislative actions of local governments when planning and directing future growth and development.

The record reflects that Ferry County ranks near the bottom (35 of 39) in total agricultural production.[41] The Board found, and the Appellate Court did not disagree, that substantial evidence in the records shows the County's viable crop land is "quite limited due to poor soils, severe winters, short growing season, and sparse rainfall.[42] Nothing in the record and no finding by County, the Department, the Board, the Superior Court, or the Court of Appeals suggests that development in Ferry County poses a threat to the existing limited agricultural industry.

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[41] CR 000131
[42] CFOFC I at ¶ 60.

The exercise of local discretion under GMA requires balancing goals that are inherently in conflict.[43] Broadly speaking, *CFOFC I* called upon the County to balance the designation of ARL against competing development interests. No finding by the County, Department, Board, Superior Court, or Appellate court so much as suggests development activity poses any threat to agriculture in Ferry County. In other words, nothing presented in this case shows that the County failed to harmonize the designation of ARL with any other GMA goal based on local circumstances. Yet, Futurewise and CFOFC appear to believe that more ARL is needed to preserve agriculture in Ferry County. But that is not their call, or the courts' in the absence of any findings.

The Legislature recognized that planning under GMA is burdensome for small rural counties and amended GMA to allow for partial planning.[44] Ferry County adopted a partial planning resolution in Sept. 2014, divesting the Board of jurisdiction.[45] At that time, Ferry County was fully compliant with GMA.[46] In 2015, the Court of Appeals reversed the FDO in EWGMHB Case No. 01-1-0019, holding that the

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[43] *Lewis Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 511, 139 P.3d 1096, 1107 (2006) ("The GMA was to be a "bottom-up" approach, allowing local cities and counties the authority to make decisions based on their local needs in order to harmonize and balance the 13 statewide planning goals").
[44] RCW 36.70A.040(2)(b).
[45] CR 001809.
[46] CR 000139.

County's failure to designate any 2,818 acres of the fee land identified as best suited for hay production did not comply with the Act.[47] On remand, the County designated more than 2,900 acres of fee land as ARL. Now, somehow that is not a 'critical mass.'

The Board found substantial evidence in the record supports the Department's decision to grant Ferry County partial planning status.[48] The Court of Appeals simply reweighed evidence considered by the County and came to a different conclusion. For example, after affirming in *CFOFC I* that cattle production is the major agricultural industry in Ferry County, requiring designation of ARL to maintain hay production, the Court of Appeals now says the County failed to consider other forms of livestock.

This is the classic example of one in authority telling another to "go get a rock. . . no not that rock." GMA is supposed to be "bottom-up" planning with discretion afforded to local government. The Court of Appeals' decision typifies a top-down system to compel regulation that local government found to be unnecessary based on local circumstances. Again, no finding shows agriculture in Ferry County is threatened. To the contrary, the 2012 census cited by the Court of Appeals shows

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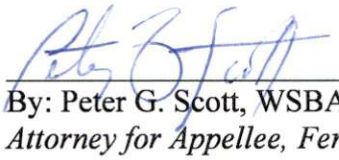
[47] CFOFC I at ¶ 78.
[48] CR 001817.

improvements in most areas including a 4% increase in farm size and a 34% increase in the market value of agricultural products between 2007 and 2012.[49] Despite this, the Court concluded that the County failed to strike the balance needed maintain and enhance agricultural activity. The Court of Appeals erred. Review of CFOFC II will serve the substantial public interest in judicial administration of public policies that mandate discretion be afforded to local governments in planning for growth.

VI. CONCLUSION

For the reasons specified above, Ferry County respectfully petitions for review of the Court of Appeals unpublished opinion.

Respectfully submitted this 11th day of June, 2020.



By: Peter G. Scott, WSBA No.: 31712
Attorney for Appellee, Ferry County

[49] CR 000132.

CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 11th day of June, 2020, the undersigned caused the electronic original and true and correct copies of the foregoing Brief of Appellee, Ferry County, to be served on the persons listed below in the manner shown:

Court of Appeals, Division II 950 Broadway Suite 300, MS TB-06 Tacoma, WA 98402-4454	Electronic original
Mr. Tim Trohimovich Futurewise 816 Second Avenue, Suite 200 Seattle, WA 98104 (206) 343-0681 x 118 tim@futurewise.org *Attorney for Futurewise*	X____ By United States Mail Postage Prepaid _____ Legal Messenger or Hand Delivery _____ By Federal Express or Overnight Mail Prepaid X____By Email or the Washington Appellate court e-file system
Ms. Heather A. Carter Assistant Atty. General PO Box 40109 Olympia, WA 98504-0109 (360) 586-6474 heathers1@atg.wa.gov *Attorney for State of Washington, Department of Commerce*	X____ By United States Mail Postage Prepaid _____ Legal Messenger or Hand Delivery _____ By Federal Express or Overnight Mail Prepaid X____By Email or the Washington Appellate court e-file system

Ms. Kristen K. Mitchell Senior Counsel PO Box 40100 Olympia, WA 98504-0100 (360) 753-6200 (360) 664-0228 (fax) kristenm1@atg.wa.gov *Attorney for State of Washington, Department of Commerce*	X____ By United States Mail Postage Prepaid _____ Legal Messenger or Hand Delivery _____ By Federal Express or Overnight Mail Prepaid X____ By Email or the Washington Appellate court e-file system
Ms. Lisa Petersen Assistant Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 (206) 464-7676 *Attorney for Growth Management Hearings Board*	X____ By United States Mail Postage Prepaid _____ Legal Messenger or Hand Delivery _____ By Federal Express or Overnight Mail Prepaid X____ By Email or the Washington Appellate court e-file system

Signed and Certified this 11th Day of June, 2020.

Diana Seyrau

Scott | Law

APPENDIX "A"

Filed
Washington State
Court of Appeals
Division Two

May 12, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CONCERNED FRIENDS OF FERRY COUNTY and FUTUREWISE, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF COMMERCE, FERRY COUNTY, and the GROWTH MANAGEMENT HEARINGS BOARD, Respondents.	No. 53038-4-II UNPUBLISHED OPINION

MELNICK, J. — Concerned Friends of Ferry County and Futurewise (collectively, Futurewise) challenge an order of the Growth Management Hearings Board (the Board) upholding a determination of compliance addressing the designation of agricultural resource lands (ARL) issued by the Department of Commerce (the Department).

Futurewise argues that Ferry County's designation of minimal ARL violates the decision issued by this court in *Concerned Friends of Ferry County v. Ferry County*[1] and that the County inaccurately implemented the criteria for identifying ARL. Futurewise also contends that the Board erred in limiting its scope of review to the determination of compliance. Because Ferry County failed to comply with *Concerned Friends* in designating ARL, we reverse.

[1] 191 Wn. App. 803, 365 P.3d 207 (2015).

FACTS

The Growth Management Act (GMA) requires, in part, that all counties in Washington designate "[a]gricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products." RCW 36.70A.170. These lands are known as agricultural resource lands (ARL). Counties must then "adopt development regulations . . . to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170." RCW 36.70A.060.

In 2014, the Washington Legislature amended the GMA to allow counties that did not meet certain population thresholds to "opt out" of the GMA's full planning requirements. LAWS OF 2014, ch. 147, § 2. Ferry County qualified.

In order to "opt out" the County had to adopt a "resolution for partial planning." RCW 36.70A.040(2). If a county was not in compliance with certain GMA planning requirements[2] at the time of the resolution, it had to remedy the noncompliance and then apply for a determination of compliance from the Department. RCW 36.70A.060(1)(d)(i). Once it adopted the opt out resolution and obtained a determination of compliance, the County became exempt from full GMA planning. RCW 36.70A.040(2).

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[2] Specifically, RCW 36.70A.060 (natural resource lands and critical areas development regulations); RCW 36.70A.040(4) (summary of requirements for counties electing to plan under the GMA, *inapplicable here*); RCW 36.70A.070(5) (a plan for rural development, *inapplicable here*); RCW 36.70A.170 (designation of natural resource lands and critical areas); and RCW 36.70A.172 (best available science to be used in designation and protection of critical areas, *inapplicable here*).

Ferry County adopted a resolution of partial planning in 2014.[3] While it worked to obtain a determination of compliance for other noncompliance issues, we decided *Concerned Friends of Ferry County v. Ferry County*. 191 Wn. App. 803, 365 P.3d 207 (2015). In *Concerned Friends*, we determined that the County failed to comply with the GMA requirement of designating ARL. 191 Wn. App. 807-08. We remanded the case to allow the County to come into compliance. The County postponed seeking a determination of compliance from the Department.

Ordinance 2016-04

In March 2016, the County adopted Ordinance 2016-04 in an attempt to remedy the outstanding noncompliance issue identified in *Concerned Friends*, the failure to designate a "critical mass" of ARL.

Ordinance 2016-04, section 9, entitled "Agricultural Lands of Long-term Commercial Significance," recited background and analysis information about ARL. Certified Record (CR) at 24. Relying on a 2007 census of agriculture, it stated that the County conducted a survey of its agricultural industry and determined that the only product produced in commercially significant quantities was livestock, particularly cattle. The County found that livestock "exceed[ed] the value of all other commodities by an order of magnitude." CR at 25. It also stated that hay production, while not independently commercially significant, was a significant accessory to the cattle and livestock industry. Therefore, "[w]hen considering the suitability of the land and the needs of the industry Ferry County focused principally on the needs of the livestock industry." CR at 25.

[3] No county other than Ferry County adopted a resolution of partial planning; therefore, it is the only county to apply for a determination of compliance. The period designated for counties to "opt-out" by adopting a resolution for partial planning ended in December 2015. RCW 36.70A.040(2)(b)(i).

The County then determined the "critical mass" of land for hay production needed to support the cattle industry by using agricultural census data, land productivity data, and industry standards for daily hay demand to maintain cattle weight in winter. The County surveyed 38 grazing leaseholders and determined that the total number of cattle that are overwintered in the County on public grazing lands was 2,989. It then determined that 2,959 acres are needed to produce the amount of hay sufficient to support 2,989 cows over the winter.

In conducting this survey, 23 of the 38 grazing leaseholders responded. Using this data, the County estimated the number of cattle owned by the leaseholders that did not respond to the survey. However, the 2012 United States Department of Agricultural (USDA) Census reported 94 farms that maintained an inventory of "beef" cattle and 75 farms that sold cattle and calves in Ferry County in 2012. The County's survey did not consider farmers who do not pasture their cattle on public grazing lands. The calculations did not consider the industry as a whole.

The Ordinance established a process for the identification and designation of ARL. To identify ARL, the County considered whether the land was already characterized by urban growth and whether the land was primarily devoted to the production of commercial agricultural products. If it was not, then it could not be designated as ARL. Finally, the County considered whether the land had long-term commercial significance for agricultural production.

The Ordinance prescriptively designated as ARL: 459,545 acres of federal grazing allotments, 19,423 acres of state land leased for grazing, and 405 acres of privately held land subject to long-term conservation easements. The Ordinance designated an additional 2,939 acres of land as ARL by using the methodology described above. That acreage is almost the exact number of acres calculated to grow enough hay to support 2,989 cattle overwintered by grazing leaseholders in the County.

In August 2016, after adopting Ordinance 2016-04, the County applied to the Department for a determination of compliance. The County identified the outstanding issue of noncompliance as its "failure to designate a critical mass of commercially significant agricultural resource lands." CR at 65.[4]

In February 2017, the Department issued a determination of compliance. The determination stated that "[t]he scope of Commerce review is limited to the outstanding findings of noncompliance established in" *Concerned Friends*. CR at 64. The Department only considered the "statement of issues[] identified in Ferry County's letter to Commerce." AR at 64. The determination stated in relevant part:

> Ferry County's action addressed the concerns identified by the Court of Appeals and designated [ARL] based on revised criteria to protect the long-term viability of the County's commercially significant agricultural industry. . . . . The County engaged in a defensible process to ensure that sufficient privately-owned land is designated . . . and the designation is based on an accurate implementation of the criteria upheld by the Court and the [Board]. The County considered the goals and policies of the GMA, and complied with our agency's guidelines specified in WAC 365-190-050.

CR at 67.

Futurewise filed a petition for review to the Board. The Board issued a Final Decision and Order (FDO). The FDO first discussed the Board's jurisdiction. Stating in relevant part:

> By operation of law, Ferry County's 2014 removal from full planning under RCW 36.70A.040 changed the [Board]'s ability to hear and decide appeals of Ferry County's legislative actions. In [*Moore v. Whitman County*, 143 Wn.2d 96, 100, 18 P.3d 566 (2001)], the Supreme Court held that the [Board]'s subject matter jurisdiction is "limited to those counties that are required or choose to plan under RCW 36.70A.040."

[4] The Department considered two other issues of noncompliance involving wildlife habitat. Futurewise does not contest the finding of compliance for those two issues.

> RCW 36.70A.260(1)(b) and RCW 36.70A.060(1) use the same words "required or choose to plan under RCW 36.70A.040." . . . Ferry County does not fully plan under RCW 36.70A.040. Thus, the [Board] lacks jurisdiction to hear and decide appeals of Ferry County's legislative actions.

Clerk's Papers (CP) at 15; CR at 1809.

The FDO then stated that the Board had jurisdiction to hear and decide appeals of the Department's determination of compliance. But "on appeal, the [Board] cannot review any issues falling outside of Commerce's scope of review and determination . . . [which] was limited to: '***Failure to designate a critical mass of commercially significant agricultural resource lands***.'" CP at 17; CR at 1812.

Finally, the FDO stated that the petitioner's challenge to the County's zoning regulations were outside the scope of review because the Department did not consider it. It concluded that the Department's determination of compliance was not clearly erroneous.

Futurewise appealed the Board's FDO to the Superior Court, which affirmed the Order. Futurewise appeals.

ANALYSIS

I. STANDARD OF REVIEW

"On appeal, we review the Board's decision, not the superior court decision affirming it." *Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006). We apply Administrative Procedure Act (APA)[5] standards directly to the record before the Board. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Under the APA, we will reverse an agency decision that is erroneous in its interpretation or application of the law, is not based on substantial evidence, or is arbitrary or capricious. RCW

[5] Ch. 34.05 RCW.

34.05.570(3). The party asserting error has the burden of demonstrating the invalidity of the Board's action. RCW 34.05.570(1)(a); *King County*, 142 Wn.2d at 553.

We review the Board's legal conclusions de novo, while giving substantial weight to the Board's interpretation of the GMA. *Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008). However, the GMA requires us to give even greater deference to county planning decisions that are consistent with its goals. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005).

II. SCOPE OF REVIEW.

Futurewise argues that the Board erroneously interpreted the GMA by concluding that it could not consider issues beyond the scope of Commerce's determination of compliance. It contends that there is nothing in the GMA or the Department's regulations that limit the Board's review. Therefore, Futurewise argues that the Board is required by statute to review whether Ferry County failed to conserve the newly designated ARL.

A. Legal Principles

A county that does not meet the population or growth threshold under RCW 36.70A.040(1) can elect to fully plan under the GMA. RCW 36.70A.040(2)(a). Those counties that are not obligated to, have not elected to fully plan or have opted out of planning are referred to as "partial planning counties." *Save Our Scenic Area v. Skamania County*, 183 Wn.2d 455, 459, 352 P.3d 177 (2015). A county that previously elected to fully plan under RCW 36.70A.040(2)(a) could adopt a "resolution for partial planning." RCW 36.70A.040(2)(b)(i).

"A county that adopts a resolution for partial planning under RCW 36.70A.040(2)(b) and that is not in compliance with the planning requirements of this section . . . at the time the resolution is adopted must . . . apply for a determination of compliance from the department finding that the

county's development regulations . . . and comprehensive plans are in compliance with the requirements of this section . . . [and] 36.70A.170." RCW 36.70A.060(d)(i).

In making the determination of compliance, the Department's regulations limit the scope of review to "outstanding findings of noncompliance established in an order from the [Board] or a court. Issues or provisions of the ordinance that were found in compliance, or were not timely challenged at the time of adoption, are not subject to review." WAC 365-199-040(2).

The Board had jurisdiction only over counties "that [were] required or choose to plan under [the GMA]" i.e. fully planning counties. *Moore v. Whitman County*, 143 Wn.2d 96, 100, 18 P.3d 566 (2001). "Challenges to [partial planning] counties' land use decisions under the GMA [were] filed in superior court." *Save Our Scenic Area*, 183 Wn.2d at 465. However, in 2014, the legislature amended the GMA to allow the Board to review a determination of compliance by the Department. LAWS OF 2014, ch. 147, § 2. Upon review, the Board decides whether the Department's grant or denial of a determination of compliance was erroneous. RCW 36.70A.280(f).

B. Board Review

The Board has jurisdiction to determine whether the Department's grant or denial of a determination of compliance is erroneous. RCW 36.70A.280, .060. The Board, therefore, correctly determined that it lacked subject matter jurisdiction to review the ordinance as a whole. Challenges to Ferry County's zoning ordinance should be brought directly in superior court. *See Save Our Scenic Area*, 183 Wn.2d at 456 ("Challenges to [partial planning] counties' land use decisions under the GMA are filed in superior court."). We conclude that the Board did not err in limiting its scope of review to the determination of compliance.

Here, the County adopted a resolution of partial planning in 2014. In 2015, this court issued *Concerned Friends*. In August 2016, the County sought a determination of compliance from the Department as required by RCW 36.70A.060(d)(i). Pursuant to WAC 365-199-040(2), the Department limited its review to "outstanding findings of noncompliance established in an order from the [Board] or a court." The County identified what it perceived to be the outstanding finding of noncompliance identified in *Concerned Friends* as the "[f]ailure to designate a critical mass of commercially significant agricultural resource lands." CR at 65.

The County's framing of the outstanding finding of noncompliance did not include the County's zoning regulations to conserve land designated as ARL. The Department accepted the County's framing of the issue and limited its scope of review to whether the County had remedied the noncompliance identified in *Concerned Friends*.

Futurewise petitioned the Board for review of the determination of compliance as required by RCW 36.70A.060(d)(iii). The Board concluded that the determination of compliance was not clearly erroneous. RCW 36.70A.280 and .060 charge the Board with determining whether the Department's determination was erroneous. The Board, therefore, correctly interpreted the law when it determined that the scope of review was limited to the Department's determination of compliance.

Therefore, we limit our scope of review to the whether the Board erred in upholding the determination of compliance.[6]

[6] Futurewise challenges various findings of fact in the Board's FDO. Because we reverse on other grounds, we do not address the challenges here.

III. DETERMINATION OF COMPLIANCE

Futurewise argues that the Board erroneously interpreted or applied the GMA in concluding that the Department's determination of compliance for the designation of ARL complied with the GMA and its implementing regulations. Futurewise contends that the County's designation of only 2,939 acres of land violated the *Concerned Friends* decision, related goals, requirements, and regulations. Futurewise also argues that the Board violated the GMA because the County based the designation of agricultural land on only 37 percent of the farms and ranches with cattle in the County.

A. Legal Principles

Under the APA, we will reverse an agency decision that is erroneous in its interpretation or application of the law, is not based on substantial evidence, or is arbitrary or capricious. RCW 34.05.570(3). "A finding is clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire record is left with the firm and definite conviction that a mistake has been committed. *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Local governments have broad discretion in developing development regulations tailored to local circumstances, but that discretion is bounded by the goals and requirements of the GMA. *King County*, 142 Wn.2d at 561. "[D]eference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general." *Quadrant Corp.*, 154 Wn.2d at 238.

The GMA requires that jurisdictions within its scope "designate where appropriate . . . [a]gricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products." RCW

36.70A.170(1)(a). Long-term commercial significance "includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land." RCW 36.70A.030(13).

The principal GMA goal served by designating and conserving ARL is that of RCW 36.70A.020(8), which states, "Maintain and enhance natural resource-based industries, including productive . . . agricultural . . . industries. Encourage the conservation of . . . productive agricultural lands, and discourage incompatible uses." "When read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land." *King County*, 142 Wn.2d at 562.

In designating ARL, the GMA requires counties to consider the guidelines promulgated by the Department of Commerce. RCW 36.70A. 050, .170(1). These guidelines "shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state." RCW 36.70A.050(3).

WAC 365-190-050 sets out criteria for identifying ARL, the application of which "should result in designating an amount of agricultural resource lands sufficient to maintain and enhance the economic viability of the agricultural industry in the county over the long term." WAC 365–190–050(5).

B. Concerned Friends

In *Concerned Friends*, we held first that the Board's decision to uphold the criteria to identify ARL was not clearly erroneous or inconsistent with the GMA. 191 Wn. App. at 828. We recognized that the county has "unique features as an agricultural area of Washington State" and that the Board had "noted the substantial evidence in the record indicating that the County's viable

crop land is quite limited due to poor soils, severe winters, short growing season and sparse rainfall." *Concerned Friends*, 191 Wn. App. at 827. We also recognized that the County's main agricultural industry was livestock production. *Concerned Friends*, 191 Wn. App. at 807, 817, 826, 831.

However, we determined that the designation of ARL did not comply with the GMA because the County "designated none of the over 2,816 acres qualifying under its criteria and instead designated land more than 99 percent of which is not suitable for hay production." *Concerned Friends*, 191 Wn. App. at 833.

We stated that the County "cannot decline to designate the land that its criteria show should be designated, when that potentially jeopardizes a critical component of the jurisdiction's principal agricultural industry." *Concerned Friends*, 191 Wn. App. at 834. We concluded that the County did not "designat[e] an amount of agricultural resource lands sufficient to maintain and enhance the economic viability of the agricultural industry in the county over the long term," as required by WAC 365-191-050(5). *Concerned Friends*, 191 Wn. App. at 816. Nor did the County meet its own natural resource goal of "designat[ing] sufficient commercially significant agricultural land to ensure the County maintains a critical mass of such lands for present and future use." *Concerned Friends*, 191 Wn. App. at 833-34.

In *Concerned Friends*, we did not limit our decision solely to hay production but viewed hay production as an example of a critical component of the principal agricultural industry that could not be ignored.

We concluded:

> We add as guidance to the County that simply designating the 2,816 or more acres indicated by its criteria does not necessarily assure compliance with the GMA. Even though we have concluded that the individual challenged criteria are not clearly erroneous, a designation of ARL under them would still violate the GMA if it failed to meet the minimum guideline of WAC 365–190–050(5), the comprehensive plan goals of maintaining and enhancing productive agricultural industries, or the "critical mass" Natural Resource Policy of the comprehensive plan, each discussed above. We recognize the necessary imprecision in those goals and policies and the deference due local decisions in how to meet them. Nonetheless, these goals and policies must be honored in the designation of ARL.

Concerned Friends, 191 Wn. App. at 834–35.

C. Ordinance 2016-04.

The County and the Department interpreted *Concerned Friends* too narrowly. First, the County did not consider any livestock other than cattle. Ordinance 2016-04 and its predecessor 2013-05 both state that in "considering the suitability of land and needs of the industry Ferry County focused principally on the needs of the livestock industry." CR at 25 (emphasis added). Second, in determining the number of acres needed to grow hay to support cattle, the county surveyed 38 grazing leaseholders who pasture their cattle on public grazing lands, 23 of whom responded. However, the 2012 USDA agricultural census reported 92 farms maintained an inventory of "beef" cattle, and 75 farms sold cattle and calves in Ferry County in 2012. The County did not take into account farmers who do not pasture their cattle on public grazing lands so whatever calculations it made will not maintain the industry as a whole, but only for those 38, or possibly 23, grazing leaseholders.

The County cannot maintain the economic viability of the livestock industry as a whole by limiting the number of acres of ARL to only just enough to support the exact number of cattle overwintered on public grazing lands in 2016. This action does not account for any growth, or for

non-cattle livestock. Thus, the limitation is also contrary to the County's stated Natural Resource Policy goal to "[d]esignate sufficient commercially significant agricultural . . . land to ensure the County maintains a critical mass of such lands for present and future use." *Concerned Friends*, 191 Wn. App. at 832.

Second, the County only considered land important to hay production. In designating ARL, the County must "meet the minimum guideline of WAC 365–190–050(5), the comprehensive plan goals of maintaining and enhancing productive agricultural industries, or the "'critical mass' Natural Resource Policy of the comprehensive plan." *Concerned Friends*, 191 Wn. App. at 835. The County has determined that its productive agricultural industry is the livestock industry. It may be the case that the land needed to support that industry is only the land required to pasture/graze livestock and the land that is used to grow hay for the livestock to eat in the winter. However, in making its determination, the County must consider all livestock, not only the cattle owned by large scale producers.[7]

On remand from *Concerned Friends*, the County failed to comply with the GMA, applicable WAC's, its own comprehensive plan goals, and Natural Resource Policy goal. The Department, therefore, erred by making a determination of compliance.

Because the County did not remedy the noncompliance identified in *Concerned Friends*, the Board's FDO upholding the Department's determination of compliance was erroneous.

[7] At oral argument, the Department conceded that if the interpretation of *Concerned Friends* given to it by the County and the Department was too narrow because it only considered cows and not all livestock and only considered hay, reversal was appropriate.

We reverse.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Lee, C.J.

PETER G. SCOTT, LAW OFFICES, PLLC

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