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COURT OF APPEALS
DIVISION II

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

Court of Appeals No. 35569-8-II

FUTUREWISE AND FRIENDS OF PIERCE COUNTY, Appellants,
v.
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD, et al., Respondents.

**REPLY BRIEF OF FUTUREWISE AND FRIENDS
OF PIERCE COUNTY**

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ARGUMENT

King County v. CPSGMHB, 142 Wn. 2d 543, 558, 14 P.3d 133

(2000) establishes that the “overall purposes and parameters for designating agricultural resource lands.”¹ The Supreme Court stated,

The agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses.

For reasons explained below, and in the Opening Brief of Futurewise and Friends of Pierce County, the County is not in compliance with the Supreme Court’s framework, or with the GMA. We respectfully request that this court (1) recognize that the Central Growth Management Hearings Board erred when it failed to recognize that the County based its agricultural designation on an error in fact, a misinterpretation of the accuracy of the soil survey; and (2) the Board erred when it did not accurately interpret the GMA’s requirement to designate, conserve, and protect agricultural land.

¹ Orton Farms v. Pierce County, CPSGMHB Case No. 04-3-0007, Final Decision and Order (August 2, 2004).

A. The Board’s determination that the County’s threshold five-acre parcel size correlated well to the accuracy of the soil survey is based on an error in fact.

The County’s decision to omit parcels under five acres from being considered for designation as agricultural land was based on an error of fact. Amendment 2 in relevant part reads:

Minimum parcel size. The threshold size used as a basis for the designation of Agricultural Resource Lands is 5 acres or larger in size because soils data is most reliable at this size.²

The County states that additional reasons for omitting small parcels are found in the County’s Findings (**Findings**).³ Specifically, the County’s Findings, found in Amendment 2 Exhibit K, address the five-acre threshold for agricultural lands designation:

“[t]he County also chose to *consider* parcels that are five acres or larger in size based on the purity of map units explained in the Soil Survey Manual. Due to the minimum delineation size by map scale, soil class is more accurately determined using a scale 1:24,000 (approximately five acres).”⁴

These are excellent explanations for why Pierce County chose to use the map that they used, because **soil class** is more accurately delineated in a map with smaller, and thereby more pure, soil mapping units. Indeed, utilizing a map with a larger mapping unit scale would provide a less

² CP 16 at AR 52 at Tab 364. Amendment 2.

³ Brief of Respondent Pierce County, at 12.

⁴ CP 16 at AR 2383 Exhibit K to the Ordinance (emphasis added).

accurate depiction of **soil class**. But, it does not logically follow that the County should exclude parcels under five acres from even being considered for agricultural designation.

A mapping unit is different than a parcel of land. Parcels of land are not created based on soil mapping units. Mapping units are not created based on parcel size. The only “correlation” between the two is that they are both boundaries established on the land. There is no commonality between a five-acre parcel and a five-acre soil mapping unit. One five-acre parcel could be included in two separate mapping units. Additionally, five one-acre parcels could be included in one single soil mapping unit. Under Pierce County’s Agricultural Lands Designation, regardless of whether that single mapping unit delineates those five one-acre parcels as Prime Farmland, all of those one acre parcels are automatically excluded from being considered in the County’s agricultural designation simply because they are small. This is evidenced by Amendment 2 quoted above because the County chose to “consider” only those parcels that are five acres and bigger.⁵

Additionally, it is not true that the soil map is not accurate for parcels smaller than five acres. A soil mapping unit is considered accurate for all of the land included in that soil unit.⁶ Regardless of the size of the lot or lots included in that unit, the delineation, or demarcation, of soil

⁵ Id.

⁶ CP 16 at AR 52 at Tab 335. The Metadata is attached to the letter identified by this index number from 1000 Friends of Washington to the Honorable Harold Moss, Pierce County Council (November 8, 2004).

class included in that mapping unit is accurate for the entire unit.⁷ It is factually erroneous to state that a mapping unit is not accurate for parcels smaller than five acres. Those parcels under five acres, regardless of soil content, regardless of proximity to population, regardless of whether they are devoted to agriculture, were categorically excluded from analysis according to Pierce County's criteria. The Board's holding, that the threshold five-acre parcel size required for consideration of agricultural designation "correlated well to the accuracy" of the soil survey is erroneous because there is no correlation, other than size, between a five-acre mapping unit and a five acre parcel of land. Together, the language of Amendment 2, the metadata, and the County's explanation that they relied on the Soil Survey Manual to determine the scale of mapping units prove that the Board's conclusion that the County's five acre threshold correlates well to the accuracy of the soil data is an error in fact. Thurston County Superior Court should have found that the Board's decision was based on an error in fact.

B. The County's criteria for determining agricultural designations are not GMA compliant.

To qualify as agricultural land of long-term commercial significance, land must satisfy three prongs. Land must: *not already be characterized by urban growth*, be *primarily devoted to commercial agricultural production*, and have *long-term commercial significance* for

⁷ Id.

agricultural production.⁸ The last prong requires that land must have “long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses.”⁹ The Court in Lewis County stated that counties may also consider the “combined effects of proximity to population areas and the possibility of more intensive uses of land as indicated by “the development-related factors enumerated in WAC 365-190-050(1).”¹⁰

The Findings state that the County “chose to consider” only those parcels that are five acres or larger in size based on the purity of map units explained in the Soil Survey Manual.¹¹ This makes it clear that parcels under five acres were not even “considered” for designation as agricultural land.¹² It is not that the parcels were analyzed under the criteria provided by the County and then determined not to have met it. Rather, the criteria provides that parcels under five acres are not “considered,” or are categorically excluded, from agricultural designation. Pierce County categorically omitted parcels smaller than five acres based on the inaccurate assessment of the correlation between those parcels and soil mapping units, and did not consider any of the appropriate criteria for those small parcels.

⁸ Lewis County v. Western Washington Growth Management Hearings Board, 157 Wash.2d 448, 497 139 P.3d 1096 (Wash. 2006).

⁹ Lewis County, 157 Wn.2d 488 at 498-9.

¹⁰ Id., at 498-9.

¹¹ CP 16 at AR 2383 Exhibit K to the Ordinance.

¹² Id.

C. The Board's affirmation of the County's categorical exclusion of parcels under five acres is based on a wrongful interpretation of the GMA

Amendment 2 does not comply with the GMA as interpreted by the Supreme Court in Lewis County v. Western Washington Growth Management Hearings Board, 157 Wn.2d 448, at 504-6, 139 P.3d 1096 (2006). The Supreme Court established that "it was clearly erroneous for Lewis County to exclude from designated agricultural lands up to five acres on every farm, without regard to soil, productivity or other specified factors **in each farm area.**" According to Lewis County, every designation decision must be based on permissible criteria:

[10] While most of the county's designation decisions at least possibly could have been based on permissible criteria, we note one exception. In excluding "farm centers" and farm homes from designated agricultural lands, the county sought "to serve the farmer's non-farm economic needs." Serving the farmers "non-farm" economic needs is not a logical or permissible consideration in designating agricultural lands under the GMA. That is because it is a goal in and of itself, not a characteristic of farmland to be evaluated in determining whether such land has long-term commercial significance. A farmer's presumed need for "non-farm" income does not necessarily relate to soil, productivity or growing capacity under RCW 36.70.030(10), nor to proximity to population areas or the possibility of more intense uses of land. It has to do only with the farmer's bottom line. And while we share Lewis County's concern for the struggles farmers often face, we note that the GMA is not intended to trap anyone in economic failure, as evidenced by the mandate to conserve only those farmlands with long-term commercial significance. The problem with the county's approach is that any farmer could convert any five acres of farmland to more profitable uses, even if such conversion would remove perfectly viable fields from production. Thus it was clearly erroneous for Lewis County to exclude from designated agricultural lands up to five acres on every farm, without regard to soil, productivity or other specified

factors in each farm area. Accordingly, we affirm the Board's invalidation of the blanket exclusion of five-acre farm centers and farm homes from designated agricultural lands.

The Eastern Growth Management Hearings Board found Lewis County's omission of five-acre farm centers from agricultural designation "to be 'clearly erroneous' because it 'creates isolated pockets of inconsistent zoning in farmlands' and makes adjacent lands vulnerable to dedesignation."¹³ This finding was affirmed by the Supreme Court.¹⁴ Additionally, the Lewis County Court observed in footnote 14, "it is not necessarily error to assume that farms with meager income are likely to succumb to development pressures."¹⁵

Pierce County's implementation of a criteria that categorically excludes all parcels under five acres as a threshold matter, regardless of their soil content, proximity to population, or possibility of more intense uses, cuts holes in otherwise agricultural areas leaving hundreds of parcels and thousands of agricultural acres unprotected, yet still surrounded by agricultural land.¹⁶ Just as was done in Lewis County, the decision not to designate or even consider each of these small parcels as agricultural was made by Pierce County without regard to soil quality, proximity to population, or the possibility of more intense uses.

¹³ Lewis County, at 505, fn 15.

¹⁴ Id. at 505-10.

¹⁵ Id. at 505.

¹⁶ CP 16 at AR 52 at Index No. 335.

The County wrongly suggests that Futurewise and Friends have misrepresented Lewis County to the Court.¹⁷ This is not true. Indeed, there is at least one difference between the two cases. For example, Lewis County only dedesignated farm centers of up to five acres, and only when a farmer initiated that process,¹⁸ whereas Pierce County categorically excluded **every** parcel under five acres from designation regardless of all other factors. Additionally, in Lewis County the County's reason for allowing dedesignation of farm centers of five acres was to serve the farmers' non-farm economic needs, which the Court found to be wrongful because it was "not logical" and "did not necessarily relate to soil, productivity or growing capacity under RCW 36.70.030(10), nor to proximity to population areas or the possibility of more intense uses of land."¹⁹

In the present case, the County's three reasons for creating a minimum parcel size of five acres revolve around the idea that the soil data is most reliable at five acres.²⁰ As stated above, whereas this is a logical reason to utilize a particular size mapping unit, it is not logical to exclude parcels smaller than five acres for this reason. Like in Lewis County, Pierce County's reason for the criteria and the exclusion affirmatively does not relate to the soil productivity or growing capacity

¹⁷ Brief of Respondent Pierce County, at 42.

¹⁸ Lewis County, at 505.

¹⁹ Id.

²⁰ CP 16 at AR 52 at Tab 364. Amendment 2.

under RCW 36.70.030(10), nor to proximity to population areas or the possibility of more intense uses.

The County's five acre threshold contradicts Lewis County, RCW 36.70.030(10), and the recommendation of the County's own studies and goals, which show an upward trend in small productive farms.²¹ It also causes damage to the economic sustainability of the remaining farms in the agricultural area by bringing them into conflict with hundreds of pockets of commercial and residential use on the small parcels now designated as something other than agricultural land.²² The Board misinterpreted the GMA.

D. It is not within the County's discretion to utilize a parcel-by-parcel approach to designating agricultural land.

The Court of Appeals recently opined that:

While the [county] is correct that RCW 36.70A.320(1) requires "boards to grant deference to counties" in their development plans, such deference is not unbounded. The GMA itself limits a [county's] discretion. As our State Supreme Court recently stated,

Local governments have broad discretion in developing [comprehensive plans] and [development regulations] tailored to local circumstances." Diehl, 94 Wn. App. At 651. Local discretion is bounded, however, by the goals and requirements of the GMA. In reviewing the planning decisions of local governments, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities *consistent with the requirements of this chapter*" and to "grant deference to counties and cities in how they plan for growth, *consistent with*

²¹ CP 16 at AR Tab 66 at Exhibit 87. John W. Ladenburg, Pierce County Executive, *Summary of the Phase I Report to the Pierce County Council*, p. 1-2 (Sept. 30, 2004).

²² CP 16 at AR 52 at Tab 335.

the requirements and goals of this chapter.” RCW 36.70A.3201 (emphasis in original).²³

The County only has discretion to do what complies with the GMA as interpreted by the Board and the Courts of Washington.²⁴ Though the County’s decision to utilize a soil survey with a five acre mapping unit is within the County’s discretion, Pierce County does not have the authority to use a parcel-by-parcel designation criteria because that is inconsistent with the area-wide standard established in established in City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wn.2d 38, 52, 959 P.2d 1091 (1998), and because it creates incompatible uses with land that is designated as agricultural.²⁵

Pierce County argues that it is within their discretion to define, utilize, and weigh “predominant” parcel size however it chooses because there is little guidance on how the minimum guidelines are to be implemented.²⁶ The Board stated in its Final Decision and Order that “neither the Act nor the CTED criteria require or prohibit minimum parcel size” as criteria for designating agricultural land.²⁷ However, whereas the GMA does not explicitly state that you must not include a minimum parcel size, doing so is in direct conflict with the GMA and the courts’ mandate to protect against incompatible uses and to utilize an area-wide approach. The Board has made an error in interpreting the GMA.

²³ King County, 142 Wn.2d 543.

²⁴ Id.

²⁵ CP 16 at AR 52 at Tab 335.

²⁶ Brief of Respondent Pierce County, at 37-40.

²⁷ CP 16 at AR 81. City of Bonney Lake v. Pierce County, Nos. 04-3-0007c & 05-3-0016c, Order Finding Compliance and Final Decision and Order at *19 (CPSGMHB Aug. 4, 2006).

The County does have discretion to define “predominant” as long as it is consistent with the provision of the GMA. But that is not the case here. To define agricultural land based on a particular parcel size, any size, is inconsistent with an area-wide approach.

The Washington State Supreme Court stated “the Legislature intended the land use planning process of GMA to be area-wide in scope when it required development of specific plans for natural resource lands and, later, comprehensive plans.”²⁸ The County argues that the area-wide approach is only applicable to the “primarily devoted to agricultural production” analysis required for establishing agricultural designation. However, if this were the case then the Court would not have stated that the entire planning process is to be based on an area-wide approach. Additionally, not taking an area wide approach almost guarantees incompatible uses next door to agricultural land. This is also a violation of the RCW 36.70A.020(8). Establishing incompatible uses all throughout the agricultural area is evidence that the County is in violation of the GMA. The result of utilizing this noncompliant parcel-by-parcel approach is that incompatible uses will spot the map, and that is a violation of the GMA conservation mandate discussed in Petitioner Futurewise and Friends Opening Brief.²⁹ Therefore, the County’s action is in violation of the GMA. Because the County has stepped outside the bounds of the

²⁸ City of Redmond, 136 Wn.2d at 52.

²⁹ Futurewise and Friends of Pierce County’s Opening Brief, at 26.

GMA, the County has also stepped outside the limits of its broad discretion.

The County also argues that it has authority to utilize any parcel size within the range of “predominant parcel size” (5-30 acres) as the threshold for agricultural designation.³⁰ It is possible that this is one reason why the legislature advocates for an area-wide approach instead of a parcel-by-parcel approach. Futurewise and Friends have consistently argued that basing an agricultural designation on a categorical exclusion of small parcels is wrong. Futurewise and Friends are not advocating that the county base its designation on a smaller parcel size, but that no criteria should establish a threshold parcel size, particularly if the reason for choosing that criteria is an error in fact as it was in this case. Not only is this an error in fact, additionally, cutting holes in an agricultural area to make way for inconsistent uses is inconsistent with the Supreme Court’s area-wide approach and with the GMA’s requirement to prevent inconsistent uses. No matter how much discretion the County is granted in interpreting the minimum guidelines, because the County’s criteria is inconsistent with the GMA, it is not valid. The Board should have found so, and the Superior Court should have found the Board’s decision invalid.

CONCLUSION

For the reasons set forth in this brief, Pierce County has violated the Growth Management Act. Futurewise and Friends of Pierce County have met their burden of proof, and have shown that they have been

³⁰ Brief of Respondent Pierce County, at 39.

substantially prejudiced by the Board's errors. Futurewise and Friends of
Pierce County respectfully request that the Board's decision be reversed
and remanded for further action in compliance with the GMA.

Respectfully submitted on this 30th day of March, 2007.



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Court of Appeals No. 35569-8-II

DECLARATION OF SERVICE

I, Alexandria Doolittle, certify that I am a resident of the State of Washington, residing or employed in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on March 30, 2007, and in the manner indicated below, I caused the following documents to be served on the following parties in the manner indicated:

1. REPLY BRIEF OF FUTUREWISE AND FRIENDS OF PIERCE COUNTY'S

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COURT OF APPEALS
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