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Case No. 53038-4-II

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

CONCERNED FRIENDS OF FERRY COUNTY and FUTUREWISE,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF COMMERCE,
FERRY COUNTY, and the GROWTH MANAGEMENT HEARINGS
BOARD,

Respondents.

**BRIEF OF APPELLANTS
CONCERNED FRIENDS OF FERRY COUNTY & FUTUREWISE**

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I. INTRODUCTION

The Washington State “Supreme Court has held that ‘[w]hen read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land.’ *King County v. Cent. Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 562, 14 P.3d 133 (2000).”¹ Agriculture is one of Ferry County’s largest industries.² To maintain and enhance the economic and other benefits of agriculture, the Growth Management Act (GMA, chapter 36.70A RCW) requires Ferry County to designate and conserve agricultural lands of long-term commercial significance.³

The GMA also required the State of Washington, Department of Commerce (Commerce) to determine if Ferry County’s adoption of Ferry County Ordinance No. 2016-04 complied with the requirements to designate and conserve agricultural lands of long-term commercial significance.⁴ As this appellant’ brief will show, the Growth Management

¹ *Concerned Friends of Ferry Cty. v. Ferry Cty.*, 191 Wn. App. 803, 814, 365 P.3d 207, 213 (2015) *review denied*, 185 Wn.2d 1030, 377 P.3d 724 (2016).

² Administrative Record page number (AR) 000264, Zulauf & Starr, *Soil Survey of North Ferry Area, Washington Parts of Ferry and Stevens Counties* p. *1 (Sept. 1979); AR 000273, Campbell & Aho, *Soil Survey of Colville Indian Reservation, Washington, Parts of Ferry and Okanogan Counties* p. 26 (2002).

³ RCW 36.70A.020(8); RCW 36.70A.060(1)(d)(i); RCW 36.70A.040(4); RCW 36.70A.060; RCW 36.70A.170.

⁴ RCW 36.70A.060(1)(d)(i).

Hearings Board (Board) erred in concluding that Commerce’s Determination of Compliance complied with the GMA.

II. ASSIGNMENTS OF ERROR, ISSUES, AND BRIEF ANSWERS

Assignment of Error 1: The Board erred in “find[ing] ... that Commerce’s factual findings are supported by substantial evidence in the record” for the findings in assignments of error 1 through 5.⁵

Assignment of Error 2: The Board erred in upholding the accuracy of the finding “that Ferry County’s” designation of “2,939.98 acres of private land used for agricultural purposes” was “based on the County’s accurate implementation of the ... criteria and point system”⁶

Assignment of Error 3: The Board erred in finding that “Ferry County’s primary agricultural product is livestock (cattle)”⁷

Assignment of Error 4: The Board erred in finding that the county “designated Agricultural Resource Lands based on revised criteria to protect the long-term viability of the County’s commercially significant agricultural industry ...”⁸

⁵ AR 001817, *Concerned Friends of Ferry County and Futurewise v. State of Washington, Department of Commerce and Ferry County*, EWRGMHB Case No. 17-1-0003, Final Decision and Order (Oct. 17, 2017), at 10 of 12, hereinafter FDO.

⁶ AR 001815 – 16, FDO, at 8 – 9 of 12.

⁷ AR 001816, FDO, at 9 of 12.

⁸ AR 001816, FDO, at 9 of 12.

Assignment of Error 5: The Board erred in finding that “[u]sing the U.S. Agricultural Census report for Ferry County, there are 25,215 acres as privately held ‘land in farms’ under non-timber agricultural use located outside of the Colville Indian Reservation – the County lacks regulatory authority on the Indian Reservation.”⁹

Issue 1: Are the findings of fact in assignments of error 1 through 5 supported by evidence that is substantial when viewed in light of the whole record before the court as required by RCW 34.05.570(3)(e)? No.

Assignment of Error 6: The Board’s conclusion that Commerce’s Determination of Compliance for the designation of agricultural lands of long-term commercial significance complies with the GMA and WAC 365-190-050(5) was an erroneous interpretation or application of the GMA or its implementing regulations violating RCW 34.05.570(3)(d).¹⁰

Issue 2: Did the Board erroneously interpret or apply the GMA in concluding that Commerce’s Determination of Compliance for the designation of agricultural lands of long-term commercial significance complied with the GMA and its implementing regulations? Yes.

Assignment of Error 7: The Board’s conclusion that it “cannot review any issues falling outside of Commerce’s scope of review and

⁹ AR 001816, FDO, at 9 of 12.

¹⁰ AR 001814 – 18, FDO, at 7 – 11 of 12.

determination” is an erroneous interpretation or application of the GMA violating RCW 34.05.570(3)(d).¹¹

Issue 3: Did the Board erroneously interpret or apply the GMA in concluding that it cannot review any issues falling outside of Commerce’s scope of review and determination and did Ferry County fail to conserve its newly designated agricultural land? Yes.

III. FACTS

The market value of agricultural products sold by Ferry County farmers and ranchers increased from \$2.9 million in 2007 to \$5.3 million in 2012, an 83 percent increase.¹² Compare this increase with the 34 percent increase for Washington State.¹³ In Ferry County the majority of the market value of the agricultural products sold, 54 percent, came from crop sales.¹⁴ Livestock sales totaled \$2,451,000, with cattle and calve sales making up \$1,914,000.¹⁵

Between 2007 and 2012, the land in farms in Ferry County increased from 749,452 acres to 792,250 acres.¹⁶ In Ferry County in 2012, 8,137 acres

¹¹ AR 001812, FDO, at 5 of 12; AR 001818, FDO, at 11 of 12.

¹² AR 000446, US Department of Agriculture (USDA) National Agricultural Statistics Service (NASS), *2012 Census of Agriculture County Profile Ferry County – Washington (WA)* p. *1 enclosed in Appendix A.

¹³ AR 000444, USDA NASS, *2012 Census of Agriculture State Profile Washington* p. *1.

¹⁴ AR 000446, USDA NASS, *2012 Census of Agriculture County Profile Ferry County – WA* p. *1.

¹⁵ AR 000446 – 47, *Id.* at pp. *1 – 2.

¹⁶ AR 000446, *Id.* at p. *1.

grew hay, haylage, grass silage, and greenchop, all of which can be used to feed livestock.¹⁷

Despite this strong growth in the market value of agricultural products and the land in farms, Ferry County only designated 3,344.98 acres of agricultural lands of long-term commercial significance that are not state or federal grazing land in Ordinance No. 2016-04.¹⁸ This is 41 percent of the hay growing land and less than a half of a percent of the land in farms.¹⁹

The Growth Management Act (GMA), in RCW 36.70A.040(2)(b)(i), authorized Ferry County to “adopt a resolution removing the county and the cities located within the county from the requirements to plan under ...” RCW 36.70A.040. If the requirements of the GMA were met after the adoption of the resolution, Ferry County would become a partial planning county.²⁰ “At the time Ferry County Resolution 2014-20 [Ferry County’s resolution of partial planning] was adopted (September 22, 2014), the County was not in compliance with RCW 36.70A.060, RCW 36.70A.170, and RCW 36.70A.172” for the designation and protection of fish and

¹⁷ AR 000447, *Id.* at p. *2.

¹⁸ AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016). The 3,344.98 acres consists of 405 acres designated because it is subject to a long-term conservation easement and 2939.98 acres designated using the county’s point system. *Id.*

¹⁹ *Id.*; AR 000446 – 47, USDA NASS, *2012 Census of Agriculture County Profile Ferry County – WA* pp. *1 – 2.

²⁰ RCW 36.70A.040; RCW 36.70A.060.

wildlife habitat.²¹ Therefore, RCW 36.70A.060(1)(d)(i) required Ferry County to apply for a determination of compliance from the State of Washington, Department of Commerce before it could become a partial planning county.

On December 15, 2015, this court found that Ferry County's designation of agricultural lands of long-term commercial significance violated the GMA.²² Ferry County adopted Development Regulations Ordinance No. 2016-04 on August 8, 2016 to bring the designation of agricultural lands of long-term commercial significance into compliance with the GMA.²³ Commerce considered Ordinance No. 2016-04 as part of its review of Ferry County's application for a determination of compliance.²⁴ Commerce approved a determination of compliance for both fish and wildlife habitat designation and conservation and the designation of agricultural resource lands of long-term commercial significance.²⁵ The Concerned Friends of Ferry County and Futurewise (CFOFC) appealed Commerce's determination of compliance for the designation and

²¹ *Concerned Friends of Ferry County v. Ferry County*, GMHB Case No. 97-1-0018c, Order of Abeyance [Fish and Wildlife Habitat Conservation Areas] (Feb. 19, 2015), at 7 of 8, 2015 WL 999270, at *5.

²² *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 835, 365 P.3d at 223.

²³ AR 000056, Ferry County Development Regulations Ordinance No. 2016-04 p. *48 (Aug. 8, 2016); AR 000058, Findings of Fact and Conclusions of the Ferry County Board of Commissioners Regarding Adoption of Amendments to the Comprehensive Plan and Development Regulations p. *1.

²⁴ AR 000065 – 67, State of Washington Department of Commerce, Determination of Compliance - Ferry County pp. *3 – 5 (Feb. 28, 2017).

²⁵ AR 000065 – 67, *Id.*

conservation of agricultural lands of long-term commercial significance to the Growth Management Hearings Board (Board).²⁶

IV. ARGUMENT

A. The Board erroneously interpreted or applied the GMA in concluding that Commerce’s Determination of Compliance for the designation of agricultural lands complied with the GMA and implementing regulations and the findings of fact are not supported by substantial evidence. (Issues 1 [Assignments of Error 1, 3, 4, & 5] & 2 [Assignment of Error 6])

1. Standard of Review

On appeal, the appellate court reviews “the Board’s decision, not the superior court decision affirming it.”²⁷ The State Supreme Court has stated the standard of review for appeals of Board decisions:

¶ 14 Courts apply the standards of the Administrative Procedure Act [APA], chapter 34.05 RCW, and look directly to the record before the board. *Lewis County*, 157 Wn.2d at 497, 139 P.3d 1096; Specifically, courts review errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) *de novo*. *Thurston County*, 164 Wn.2d at 341, 190 P.3d 38. Courts review challenges under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence by determining whether there is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.”²⁸

“Under the judicial review provision of the APA, the ‘burden of demonstrating the invalidity of [the Board’s decision] is on the party

²⁶ AR 001810, FDO, at 3 of 12.

²⁷ *Lewis Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 497, 139 P.3d 1096, 1100 (2006).

²⁸ *Kittitas Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193, 1198 (2011).

asserting the invalidity.”²⁹ In this case the CFOFC. “Substantial weight is accorded to a board’s interpretation of the GMA, but the court is not bound by the board’s interpretations.”³⁰

RCW 36.70A.280(1) provides in relevant part that “[t]he growth management hearings board shall hear and determine only those petitions alleging either: ... (f) That a department determination under RCW 36.70A.060(1)(d) is erroneous.” RCW 36.70A.060(1)(d)(i) required Commerce to find “that the county’s development regulations, including development regulations adopted to protect critical areas, and comprehensive plans are in compliance with the requirements of this section [RCW 36.70A.060], RCW 36.70A.040(4), 36.70A.070(5), 36.70A.170, and 36.70A.172.” RCW 36.70A.300(1) requires that the “board shall issue a final order that shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter”

2. Key Rules for Interpreting Statutes, Ordinances, and Regulations.

“The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature.” [King County, 142 Wn.2d at 555, 14

²⁹ *Thurston Cty. v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7 – 8, 57 P.3d 1156, 1159 – 60 (2002).

³⁰ *Thurston Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008).

P.3d 133.] To discern legislative intent, ‘the court begins with the statute’s plain language and ordinary meaning,’ but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole. *Id.* at 555, 560, 14 P.3d 133.”³¹ Courts “interpret local ordinances and codes as we interpret statutes, employing the general rules of statutory construction.”³² Those same “[r]ules of statutory construction apply to administrative rules and regulations.”³³

3. The Board’s FDO violated the *Concerned Friends* court of appeals decision and related goals, requirements, and regulations because Ferry County only designated 3,344.98 acres of agricultural lands of long-term commercial significance that are not state or federal grazing land. (Issues 1 [Assignments of Error 1, 4, & 5] & 2 [Assignment of Error 6]))

In the *Concerned Friends of Ferry County v. Ferry County* decision, this court held that:

¶ 80 RCW 36.70A.020 states that the goals it lists “shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.” The comprehensive plan’s goal of maintaining and enhancing agricultural industries in the County and its policy of maintaining a critical mass of commercially significant agricultural land are consistent with and implement the GMA goal. Thus, they supply the frame for

³¹ *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238 – 39, 110 P.3d 1132, 1139 – 40 (2005) some internal quotations and citations omitted.

³² *Washington Shell Fish, Inc. v. Pierce Cty.*, 132 Wn. App. 239, 253, 131 P.3d 326, 333 (2006) *review denied* *Washington Shell Fish, Inc. v. Pierce Cty.*, 158 Wn.2d 1027, 152 P.3d 347 (2007).

³³ *Overlake Hosp. Ass’n v. Dep’t of Health of State of Washington*, 170 Wn.2d 43, 51 – 52, 239 P.3d 1095, 1099 (2010).

judging whether a designation of ARL is consistent with the GMA, as well as with the comprehensive plan. The minimum guideline of WAC 365–190–050(5) also supplies guidance for determining GMA compliance. At the least, those goals, guidelines, and policies mean that a local government cannot decline to designate the land which its criteria show should be designated, when that potentially jeopardizes a critical component of the jurisdiction’s principal agricultural industry. For that reason, the County’s designation of ARL conflicted with the GMA, implementing WAC rules, and the comprehensive plan and was clearly erroneous. The Board erred in upholding it.

¶ 81 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 [Agricultural Resource Lands] 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.³⁴

Breaking down the goals, requirements, and regulations this court relied on, RCW 36.70A.020(8), the natural resource industries goal, calls on the *Ferry County Comprehensive Plan* and development regulations to “[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the

³⁴ *Concerned Friends of Ferry Cty. v. Ferry Cty.*, 191 Wn. App. 803, 834 – 35, 365 P.3d 207, 222 – 23 (2015) footnote omitted.

conservation of productive forestlands and productive agricultural lands, and discourage incompatible uses.” To maintain is to “preserve from failure or decline ...”³⁵ Enhance means to “ADVANCE, AUGMENT, ELEVATE, HEIGHTEN, INCREASE ...”³⁶

The *Ferry County Comprehensive Plan* has two agricultural lands of long-term commercial significance goals:

1. Maintain and enhance the agricultural resource-based industries in the county and provide for the stewardship and productive use of agricultural resource lands of long-term commercial significance.
2. To conserve agricultural lands for continued agricultural use, regardless of designation or soil types.³⁷

RCW 36.70A.040(4)(d) provides that Ferry County “shall adopt ... development regulations that are consistent with and implement the comprehensive plan ...” RCW 36.70A.070 requires an “internally consistent” comprehensive plan. RCW 36.70A.130(1)(d) provides in full that “[a]ny amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive

³⁵ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1362 (2002). When the legislature has not defined a term “used in the GMA,” the courts “apply its common meaning, which may be determined by referring to a dictionary.” *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132, 1140 (2005). The supreme court cited to Webster’s Third New International Dictionary. *Id.*

³⁶ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 753 (2002) small capitalization in the original.

³⁷ AR 001377, *Ferry County Comprehensive Plan* p. 7-22 (Sept. 24, 2012).

plan.” “County development regulations must also comply with the requirements of the GMA. See RCW 36.70A.130(1)(a)”³⁸

RCW 36.70A.050(3) provides in relevant part that the minimum guidelines for agricultural lands adopted by the State of Washington Department of Commerce “shall be minimum guidelines that apply to all jurisdictions ...” RCW 36.70A.170(1) provides in relevant part that on or before September 1, 1991, Ferry County “shall designate where appropriate: (a) Agricultural 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”

The Board “shall consider the criteria adopted by the department under RCW 36.70A.190(4).”³⁹ WAC 365-190-050 is adopted under the authority of RCW 36.70A.050 and RCW 36.70A.190.⁴⁰

WAC 365-190-050(5) provides in full that:

When applying the criteria in subsection (3)(c) of this section [the long term commercial significance criteria], the process 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; and to retain supporting agricultural businesses, such as processors, farm suppliers, and equipment maintenance and repair facilities.

³⁸ *Kittitas Cty.*, 172 Wn.2d at 164, 256 P.3d at 1203.

³⁹ RCW 36.70A.320(3).

⁴⁰ AR 001386 – 88, Wash. St. Reg. 10-22-103.

In response to the court of appeals' decision, Ferry County designated 3,344.98 acres of agricultural lands of long-term commercial significance that are not state or federal grazing land.⁴¹ By any measure, this designation fails to comply with the court of appeals decision and the goals, requirements, and regulations cited above.

Ordinance No. 2016-04 ignored the court of appeals warning "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 guidelines 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"⁴² *Ferry County Comprehensive Plan* Policy 7.4.30 2 provides:

2. Designate sufficient commercially significant agricultural and forest land to ensure the County maintains a critical mass of such lands for present and future use.⁴³

⁴¹ AR 000037, *Ferry County Development Regulations Ordinance No. 2016-04* p. 29 (Aug. 8, 2016).

⁴² *Concerned Friends of Ferry Cty.* 191 Wn. App. at 834–35, 365 P.3d at 223.

⁴³ AR 001375, *Ferry County Comprehensive Plan* p. 7-20 (Sept. 24, 2012).

Ferry County has not designated sufficient agricultural land to accommodate current hay production, let alone existing and future agricultural uses.⁴⁴

Ordinance No. 2016-04 omitted from the designation of agricultural lands of long-term commercial significance much of the land currently farmed in the county and identified by the Washington State Department of Agriculture.⁴⁵ Ordinance No. 2016-04 omitted much of the 6,000 acres of alfalfa hay land harvested in 2013, the latest data available for alfalfa.⁴⁶ Ordinance No. 2016-04 only designated the equivalent of 41 percent of the 8,137 acres of forage-land used for hay, grass silage, and greenchop production.⁴⁷ Ordinance No. 2016-04 omitted all but 5.2 percent of 63,778 acres in Ferry County in the farm and agricultural land current use taxation program.⁴⁸ Ordinance No. 2016-04 failed to conserve any of the 540,605 acres of private pastureland on which Ferry County's cattle industry

⁴⁴ AR 000447, USDA NASS, *2012 Census of Agriculture County Profile Ferry County* p. *2.

⁴⁵ AR 000420 – 24, Washington State Department of Agriculture (WSDA), *2015 WSDA Agricultural Land Use* maps pp. 1 – 5; AR 000057, *Ferry County Comprehensive Plan* Future Land Use Map Agricultural Land of Long-Term Commercial Significance.

⁴⁶ AR 000417, USDA NASS Northwest Regional Field Office, *2015 Washington Annual Statistical Bulletin* p. 44 (October 2015).

⁴⁷ AR 000447, USDA NASS, *2012 Census of Agriculture County Profile Ferry County* p. *2.

⁴⁸ AR 000450, Washington State Department of Revenue Research and Fiscal Analysis Division, *Property Tax Statistics 2015* p. 34 (Nov. 2015).

depends.⁴⁹ Ordinance No. 2016-04 only designated 0.42 percent of the 792,250 acres of land in farms in Ferry County.⁵⁰

These tiny percentages of the County’s farm and ranch land will not “[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries” and maintain a critical mass of farmland as GMA Goal 8 and the *Ferry County Comprehensive Plan* require.⁵¹ Ordinance No. 2016-04 did not designate “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 WAC 365-190-050(5) requires.

Peer-reviewed studies show that the critical mass effect is real and the “decline of the agricultural support sectors will, in turn, make farming more costly.”⁵² “[L]and use policies that aim at slowing down urbanization and

⁴⁹ AR 000330, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* Table 8. Farms, Land in Farms, Value of Land and Buildings, and Land Use: 2012 and 2007 p. 277 (May 2014); AR 000057, *Ferry County Comprehensive Plan* Future Land Use Map Agricultural Land of Long-Term Commercial Significance; AR 000506 – 47, “Recommended Designations of Agricultural Lands of Long-Term Commercial Significance” pp. 1 – 42.

⁵⁰ AR 000330, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* Table 8. Farms, Land in Farms, Value of Land and Buildings, and Land Use: 2012 and 2007 p. 272 (May 2014).

⁵¹ RCW 36.70A.020 “(8) 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.” AR 001375 & AR 001377, *Ferry County Comprehensive Plan* p. 7-20 & p. 7-22 (Sept. 24, 2012).

⁵² AR 000441, Wu, Fisher, and Pascual, *Urbanization and the Viability of Local Agricultural Economies* 87 LAND ECONOMICS 109, p. 124 (Feb. 2011). This paper was peer-reviewed. *Id.*

farmland loss, such as exclusive farm-use zoning . . . , can reduce the degradation of agricultural infrastructure and the cost of farming”⁵³

Ferry County certainly did not designate all the agricultural lands of long-term commercial significance as RCW 36.70A.170(1) requires. Take hay production for example. This court concluded that hay production had long-term commercial significance in Ferry County.⁵⁴ “[T]he United States Forest Service permits only seasonal grazing on federal forest lands, not hay cultivation.”⁵⁵ Ferry County Ordinance No. 2016-04 provides that “Long-Term Commercial Significance means the land is capable of producing the specified natural resources at commercially sustainable levels for at least the twenty-year planning period, if adequately conserved.”⁵⁶ In 2007, 90 Ferry County farms produced hay or its equivalents on 6,784 acres.⁵⁷ By 2012, the number of Ferry County farms producing hay or its equivalents increased to 120 and the acreage on which hay was harvested increased to 8,137 acres.⁵⁸ Production increased too, from 13,620 tons in 2007 to 17,935 tons in 2012,

⁵³ AR 000441, *Id.*

⁵⁴ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 816 – 18, 365 P.3d at 214 – 15.

⁵⁵ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 831, 365 P.3d at 221; AR 001371, *Forest Plan Revision, Colville & Okanogan-Wenatchee National Forests May 2009 Briefing: Rangelands and Forest Plan Revision* p. 2 of 2.

⁵⁶ AR 000014, Ferry County Development Regulations Ordinance No. 2016-04 p. 6 (Aug. 8, 2016).

⁵⁷ AR 000345, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* Table 26. Field Seeds, Grass Seeds, Hay, Forage, and Silage: 2012 and 2007 p. 351 (May 2014).

⁵⁸ AR 000345, *Id.*

and the yield per acre increased by almost ten percent.⁵⁹ If the rate of increase in hay production continues over 20 years from 2007, Ferry County will need 12,196 acres in hay production.⁶⁰ But Ferry County has only designated 3,344.98 acres of agricultural lands of long-term commercial significance that are not state or federal grazing land, less than a third of the 20-year projection and much less than half of the 2007 or 2012 acreage.⁶¹ The designation of agricultural lands that the Board's FDO approved will not maintain and enhance the economic viability of the agricultural industry in the county over the long term as WAC 365-190-050(5) and the County comprehensive plan require.⁶² The FDO misinterpreted or misapplied the GMA.

The Board's FDO quoted Commerce's conclusion that Ferry County had "designated Agricultural Resource Lands based on revised criteria to protect the long-term viability of the County's commercially significant agricultural industry."⁶³ But as was documented above, the County has only designated the equivalent of 41 percent of the 8,137 acres of forage-land used for hay,

⁵⁹ AR 000345, *Id.*

⁶⁰ AR 000345, *Id.*

⁶¹ AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016).

⁶² AR 001375 & AR 001377, *Ferry County Comprehensive Plan* p. 7-20 & p. 7-22 (Sept. 24, 2012); AR 1815 – 19, FDO, pp. 8 – 12 of 12.

⁶³ AR 001816, FDO, at 9 of 12 citing [AR 000067] State of Washington Department of Commerce, *Determination of Compliance - Ferry County* p. *5 (Feb. 28, 2017).

grass silage, and greenchop production.⁶⁴ The County has not designated enough land to maintain the existing hay production let alone the long-term needs of the County's growing and commercially significant agricultural industry. As was also documented above, both land in farms and land in hay production have increased over the last five years in Ferry County.⁶⁵ The Board's conclusion misinterpreted and misapplied the GMA and is contrary to the evidence in the record violating RCW 34.05.570(3)(d) and (e).

The Board attempted to justify the small acreages designated by finding that there only 25,215 acres of privately held land in farms under non-timber agricultural use located outside of the Colville Indian Reservation.⁶⁶ But the Census of Agriculture does not state that there are only 25,215 acres of privately held land in farms outside the reservation.⁶⁷ And the county calculations based on the Census of Agriculture and other sources overstate the farmland on the reservation and the farmland used for forestry.⁶⁸

⁶⁴ AR 000447, USDA NASS, *2012 Census of Agriculture County Profile Ferry County – WA* p. *2; AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016).

⁶⁵ AR 000446, USDA NASS, *2012 Census of Agriculture County Profile Ferry County – WA* p. *1; AR 000345, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* Table 26. Field Seeds, Grass Seeds, Hay, Forage, and Silage: 2012 and 2007 p. 351 (May 2014).

⁶⁶ AR 001816, FDO, at 9 of 12.

⁶⁷ AR 000446 – 47, USDA NASS, *2012 Census of Agriculture County Profile Ferry County – WA* pp. *1 – 2; AR 000318 – 000363, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* pp. *1 – 388 (May 2014).

⁶⁸ AR 000011, Ferry County Development Regulations Ordinance No. 2016-04 p. 3 (Aug. 8, 2016); AR 000450, Washington State Department of Revenue Research and Fiscal Analysis Division, *Property Tax Statistics 2015* p. 34 (Nov. 2015); AR 000272, Campbell & Aho, *Soil Survey of Colville Indian Reservation, Washington, Parts of Ferry and*

Finally, Ferry County has authority over some land in the reservation and has designated land within the reservation as agricultural land.⁶⁹

4. The Board’s FDO violated the GMA because Ferry County based the designation of agricultural land on just 37 percent of the farms and ranches that had cattle in Ferry County. (Issues 1 [Assignments of Error 1, 3, & 4] & 2 [Assignment of Error 6])

Ferry County chose to base its designation of agricultural lands of long-term commercial significance on just 37 percent of the cattle operations. Instead of basing the designation on the 104 farms in Ferry County that maintain an inventory of cattle or the 75 farms that sold cattle and calves in 2012,⁷⁰ the County based its designations on 38 producers.⁷¹ By failing to accommodate existing and future cattle producers, Ordinance No. 2016-04 did not designate “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 WAC 365-190-050(5) requires.

Okanogan Counties p. 25 (2002). The figures from the soil survey are for both Ferry and Okanogan counties.

⁶⁹ AR 000057, *Ferry County Comprehensive Plan Future Land Use Map Agricultural Land of Long-Term Commercial Significance*.

⁷⁰ AR 000332, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* Table 11. Cattle and Calves – Inventory and Sales: 2012 and 2007 p. 292 (May 2014); AR 000326, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* Table 2. Market Value of Agricultural Products Sold Including Direct Sales: 2012 and 2007 p. 247 (May 2014).

⁷¹ AR 000026, *Ferry County Development Regulations Ordinance No. 2016-04* p. 18 (Aug. 8, 2016); AR 000059, *Findings of Fact and Conclusions of the Ferry County Board of Commissioners Regarding Adoption of Amendments to the Comprehensive Plan and Development Regulations* p. *2.

The second problem is that Ferry County only considered a minority of a minority of the agricultural industry in designating agricultural lands of long-term commercial significance. Cattle and calve sales made up 36 percent of the market value of agricultural products sold in Ferry County in 2012.⁷² Ferry County did not consider the 64 percent of the county’s agricultural industry, by sales volume, not producing cattle.⁷³ This includes crop sales of \$2,880,000, 54 percent of the agricultural products sold, and the over half million dollars generated by other livestock sales.⁷⁴ So the Board’s finding that “Ferry County’s primary agricultural product is livestock (cattle) ...” is simply wrong.⁷⁵ The GMA, in RCW 36.70A.170(1), requires the designation of agricultural land of long-term commercial significance, not just cattle operations. Omitting sectors responsible for 64 percent of the county’s agricultural industry by sales volume violates RCW 36.70A.170(1).⁷⁶

A third problem with the County’s approach is that private and federal grazing land may not be available every year. For example, because of recent fires on public and private grazing land, Okanogan County farmers

⁷² AR 000446 – 47, USDA NASS, *2012 Census of Agriculture County Profile Ferry County* pp. *1 –2.

⁷³ AR 000446 – 47, *Id.* pp. *1 –2.

⁷⁴ AR 000446 – 47, *Id.* pp. *1 –2.

⁷⁵ AR 001816, FDO, at 9 of 12.

⁷⁶ AR 000446 – 47, USDA NASS, *2012 Census of Agriculture County Profile Ferry County* pp. *1 –2.

do not have the grazing land they need and, consequently, at least one county producer is having to graze some of their cattle outside of Okanogan County.⁷⁷ Ferry County also experienced wildfires in 2015 that killed livestock and damaged the federal forest land used for grazing.⁷⁸ Ferry County, by failing to designate and protect private grazing land, is setting up its agricultural industry for a loss of grazing land and cattle production. Again, Ordinance No. 2016-04 did not designate “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 WAC 365-190-050(5) requires.

A fourth problem with Ferry County’s approach is that it is based on a static number, 2,989 cattle estimated to be overwintered by 38 producers that held federal or state leases in 2016.⁷⁹ But the inventory of cattle changes over time. In 2007, 98 Ferry County farms had an inventory of 4,126 cattle and calves.⁸⁰ In 2012, this increased to 104 farms with 4,344

⁷⁷ AR 000468 – 69, Dan Wheat, *Okanogan ranchers looking for Grazing* Capital Press pp. 2 – 3 of 6 (Dec. 18, 2015).

⁷⁸ AR 000473 – 74, Erica Curless, *Ranchers face loss of livestock, livelihoods in Washington fires* The Spokesman Review pp. 1 – 2 of 10 (Aug. 30, 2015).

⁷⁹ AR 000026, Ferry County Development Regulations Ordinance No. 2016-04 p. 18 (Aug. 8, 2016); AR 000059, Findings of Fact and Conclusions of the Ferry County Board of Commissioners Regarding Adoption of Amendments to the Comprehensive Plan and Development Regulations p. *2.

⁸⁰ AR 000332, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* Table 11. Cattle and Calves – Inventory and Sales: 2012 and 2007 p. 292 (May 2014).

cattle and calves.⁸¹ During this same period, the number of farms selling cattle and calves increased from 71 to 75 and the value of cattle and calves sold increased from \$1,649,000 to 1,914,000.⁸² By freezing the amount of designated farmland based on the number of cattle in the county at one point in time, Ferry County fails to “maintain and enhance the economic viability of the agricultural industry in the county over the long term ...” as WAC 365-190-050(5) and the county comprehensive plan require because the County does not allow for growth in cattle production.⁸³ To enhance means to increase.⁸⁴

This error is compounded because Ferry County did not base its acreage calculations on the 4,344 cattle and calves held by 104 farms in the county in 2012 or the total cattle inventory in 2016.⁸⁵ Instead, Ferry County focused only on the 2,989 cattle overwintered by 38 producers that hold federal or state leases.⁸⁶ A plan to contract the industry from 104 farms to

⁸¹ AR 000332, *Id.* p. 292.

⁸² AR 000326, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* Table 2. Market Value of Agricultural Products Sold Including Direct Sales: 2012 and 2007 p. 247 (May 2014).

⁸³ AR 001375 & AR 001377, *Ferry County Comprehensive Plan* p. 7-20 & p. 7-22 (Sept. 24, 2012).

⁸⁴ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 753 (2002).

⁸⁵ AR 000332, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* Table 11. Cattle and Calves – Inventory and Sales: 2012 and 2007 p. 292 (May 2014).

⁸⁶ AR 000026, Ferry County Development Regulations Ordinance No. 2016-04 p. 18 (Aug. 8, 2016); AR 000059, Findings of Fact and Conclusions of the Ferry County Board of Commissioners Regarding Adoption of Amendments to the Comprehensive Plan and Development Regulations p. *2.

38 producers dependent on federal and state grazing leases will not “maintain and enhance the economic viability of the agricultural industry in the county over the long term ...” as WAC 365-190-050(5) and the County comprehensive plan require.⁸⁷

B. Are the findings of fact in assignments of error 1, 2, and 4 not supported by evidence that is substantial when viewed in light of the whole record before the court violating RCW 34.05.570(3)(e) and are the conclusions based on them erroneous interpretations or applications of the GMA violating RCW 34.05.570(3)(d)? (Issues 1 & 2)

1. Standard of Review

“[C]ourts review errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) de novo. ... Courts review challenges under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence by determining whether there is ‘a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.’”⁸⁸ “[T]he ‘burden of demonstrating the invalidity of [the Board’s decision] is on the party asserting the invalidity.’”⁸⁹ “Substantial weight is accorded to a board’s interpretation of the GMA, but the court is not bound by the board’s interpretations.”⁹⁰

⁸⁷ AR 001375& AR 001377, *Ferry County Comprehensive Plan* p. 7-20 & p. 7-22 (Sept. 24, 2012).

⁸⁸ *Kittitas Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193, 1198 (2011).

⁸⁹ *Thurston Cty v. Cooper Point Ass'n.*, 148 Wn.2d at 7 – 8, 57 P.3d at 1159 – 60.

⁹⁰ *Thurston Cty.*, 164 Wn.2d at 341, 190 P.3d at 44.

2. Key Rules for Interpreting Statutes, Ordinances, and Regulations.

“The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature.’ [*King County*, 142 Wn.2d at 555, 14 P.3d 133.] To discern legislative intent, ‘the court begins with the statute’s plain language and ordinary meaning,’ but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole. *Id.* at 555, 560, 14 P.3d 133.”⁹¹ “[A] court must not add words where the legislature has chosen not to include them.”⁹² Courts “interpret local ordinances and codes as we interpret statutes, employing the general rules of statutory construction.”⁹³ Those same “[r]ules of statutory construction apply to administrative rules and regulations.”⁹⁴

3. The Board made an error of fact and error of law in finding that Ferry County accurately implemented its point system because the County incorrectly applied the soils criteria. (Issues 1 [Assignments of Error 1 & 2] & 2)

The Board’s second factual error was in upholding the accuracy of Commerce’s finding “that Ferry County’s” designation of “2,939.98 acres

⁹¹ *Quadrant Corp.*, 154 Wn.2d at 238 – 39, 110 P.3d at 1139 – 40 some internal quotations and citations omitted.

⁹² *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598, 601 – 02 (2003) accord *Protect the Peninsula's Future v. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 959, 970, 344 P.3d 705, 710 (2015).

⁹³ *Washington Shell Fish, Inc.*, 132 Wn. App. at 253, 131 P.3d at 333.

⁹⁴ *Overlake Hosp. Ass'n*, 170 Wn.2d at 51 – 52, 239 P.3d at 1099.

of private land used for agricultural purposes” was “based on the County’s accurate implementation of the ... criteria and point system”⁹⁵ Ferry County’s outside council confirmed that when designating agricultural lands using the point system, the county only rated prime farmland soils, not all soils with a land capacity rating of II, III, and IV.⁹⁶ The land capability classification of a soil is determined by the United States Department Agriculture (USDA) and “shows, in a general way, the suitability of soils for most kinds of field crops.”⁹⁷ Prime farmland soils are a separate USDA classification system and identify one of several kinds of important farmland soils.⁹⁸

However, the “Criteria for Designating Agricultural Lands of Long-Term Commercial Significance in Ferry County, Washington” in Ordinance No. 2016-04 uses the land capability class I through IV ratings to give points to various soils in the county and does not limit points to prime farmland soils that have those land capability class ratings.⁹⁹ This is the

⁹⁵ AR 001815 – 16, FDO, at 8 – 9 of 12.

⁹⁶ AR 000456, Peter Scott Letter to Futurewise p. 4 (July 16, 2016).

⁹⁷ AR 000265, Zulauf & Starr, *Soil Survey of North Ferry Area, Washington Parts of Ferry and Stevens Counties* p. *2 (Sept. 1979); AR 000274 & AR 000276, Campbell & Aho, *Soil Survey of Colville Indian Reservation, Washington, Parts of Ferry and Okanogan Counties* p. 429 & p. 431 (2002).

⁹⁸ AR 000277, Campbell & Aho, *Soil Survey of Colville Indian Reservation, Washington, Parts of Ferry and Okanogan Counties* p. 432 (2002).

⁹⁹ AR 000027 – 37, Ferry County Development Regulations Ordinance No. 2016-04 pp. 19 – 29 (Aug. 8, 2016).

point system the Growth Management Hearings Board and the Court of

Appeals upheld in earlier cases. As the Board wrote:

As contemplated by WAC 365-190-050(3), Ferry County uses the U. S. Department of Agriculture system of soil classification, Classes I through IV when designating suitable Agricultural Resource Lands.²¹

²¹ Ferry County Ordinance No. 2013-05, Section 9.00, pp. 20-22.¹⁰⁰

This court also concluded that the County based its point system on the land capability classification rating, not some combination of the land capability classification rating and prime farmland soils. As this court wrote:

¶ 36 This criterion assigns points to parcels based on the particular classes of soils they contain under the United States Department of Agriculture’s soil classification system. Parcels consisting entirely of “Class II” soils receive six points, and those consisting of “Class III” soils receive four points. Parcels consisting of “Class IV” soils, including soils that qualify as Class III only if irrigated, qualify for two points if the parcels have irrigation. Parcels consisting of different classes of soils receive points in proportion to the relative area of each class.¹⁰¹

¹⁰⁰ *Concerned Friends of Ferry County v. Ferry County*, GMHB Case No. 01-1-0019, Order Finding Compliance [Agricultural Resource Lands] (Feb. 14, 2014), at 12 of 16 accessed on April 1, 2019 at: <http://www.gmhb.wa.gov/Global/RenderPDF?source=casedocument&id=3490> reversed on other grounds *Concerned Friends of Ferry Cty. v. Ferry Cty.*, 191 Wn. App. 803, 365 P.3d 207 (2015).

¹⁰¹ *Concerned Friends of Ferry Cty. v. Ferry Cty.*, 191 Wn. App. 803, 819, 365 P.3d 207, 215 (2015).

Basing the agricultural lands designations in Ordinance No. 2016-04 on soils that are required to be both prime farmland soils and land capability class I through IV (or class 1 through 4) soils is inconsistent with the point system in Ordinance No. 2016-04 and the court of appeals decision. This violates the requirement to designate agricultural land in RCW 36.70A.170(1)(a).

In response to a request for information on how the farmland in Ferry County was rated, Futurewise received a USDA *Prime Farmland List* for the North Ferry Area from 2/15/2005.¹⁰² This is the list of soils Ferry County used in designating agricultural lands of long-term commercial significance.¹⁰³ The *Prime Farmland List* from 2/15/2005 omits 53 soils from North Ferry County with land capability class II (or 2), III (or 3), and IV (or 4) ratings that are not prime farmland soils.¹⁰⁴ These soils total

¹⁰² AR 00502, USDA *Prime Farmland List North Ferry Area Washington* p. 1 (2/15/2005).

¹⁰³ AR 000459, Futurewise Letter to Ferry County Board of County Commissioners p. 2 (July 27, 2016); AR 000456, Peter Scott Letter to Futurewise p. 4 (July 16, 2016).

¹⁰⁴ Soil Map Unit 215, class III nonirrigated and irrigated, 58 acres; Soil Map Unit 257, class III nonirrigated, 297 acres; Soil Map Unit 263, class IV nonirrigated, 126 acres; Soil Map Unit 266, class IV nonirrigated, 20 acres; Soil Map Unit 268, class IV nonirrigated, 19 acres; Soil Map Unit 288, class IV nonirrigated, 5 acres; Soil Map Unit 391, class IV nonirrigated, 10 acres; Soil Map Unit AIE, class IV nonirrigated, 7,418 acres; Soil Map Unit AnC, class III nonirrigated and irrigated, 1,349 acres; Soil Map Unit BmD, class nonirrigated III and irrigated IV, 1,540 acres; Soil Map Unit BsD, class III nonirrigated and IV irrigated, 300 acres; Soil Map Unit CdB, class II nonirrigated and irrigated, 236 acres; Soil Map Unit ChA, class IV nonirrigated and irrigated, 731 acres; Soil Map Unit ChC, class IV nonirrigated and irrigated, 270 acres; Soil Map Unit CoE, class IV nonirrigated, 4,912 acres; Soil Map Unit DaB, class IV nonirrigated and class VI irrigated, 1,708 acres; Soil Map Unit DnD, class IV nonirrigated and class VI irrigated, 1,259 acres; Soil Map Unit DoD, class IV nonirrigated, 2,832 acres; Soil Map Unit GdD, class IV nonirrigated and class VI irrigated, 5,294 acres; Soil Map Unit HdC, class III

nonirrigated and class IV irrigated, 753 acres; Soil Map Unit HgC, class III nonirrigated and class IV irrigated, 438 acres; Soil Map Unit HmC, class III nonirrigated and class IV irrigated, 303 acres; Soil Map Unit HmD, class IV nonirrigated and class VI irrigated, 742 acres; Soil Map Unit HuC, class III nonirrigated and class VI irrigated, 236 acres; Soil Map Unit KaC, class III nonirrigated and class VI irrigated, 2,619 acres; Soil Map Unit KeC, class III nonirrigated, 2,349 acres; Soil Map Unit KoC, class III nonirrigated and class IV irrigated, 821 acres; Soil Map Unit KoO, class IV nonirrigated and class VI irrigated, 1,630 acres; Soil Map Unit KrC, class III nonirrigated and class IV irrigated, 596 acres; Soil Map Unit MkC, class III nonirrigated and class IV irrigated, 1,293 acres; Soil Map Unit MtB, class II nonirrigated and irrigated, 495 acres; Soil Map Unit MtD, class IV nonirrigated and class VI irrigated, 315 acres; Soil Map Unit MvC, class III nonirrigated and class IV irrigated, 3,305 acres; Soil Map Unit MvD, class IV nonirrigated and class VI irrigated, 4,597 acres; Soil Map Unit MwD, class III nonirrigated and class IV irrigated, 607 acres; Soil Map Unit NeE, class IV nonirrigated and class VI irrigated, 5,103 acres; Soil Map Unit NID, class IV nonirrigated and class VI irrigated, 57,650 acres; Soil Map Unit NoE, class IV nonirrigated and class VI irrigated, 18,119 acres; Soil Map Unit OIE, class IV nonirrigated, 9,532 acres; Soil Map Unit OpE, class IV nonirrigated, 5,687 acres; Soil Map Unit OrE, class IV nonirrigated, 2,507 acres; Soil Map Unit PaC, class III nonirrigated, 1,293 acres; Soil Map Unit ReC, class III nonirrigated and class IV irrigated, 540 acres; Soil Map Unit ReE, class IV nonirrigated and class VI irrigated, 821 acres; Soil Map Unit Rs, class IV nonirrigated and class IV irrigated, 1,675 acres; Soil Map Unit ScC, class III nonirrigated and class IV irrigated, 405 acres; Soil Map Unit SIC, class IV nonirrigated and class IV irrigated, 1,978 acres; Soil Map Unit StC, class III nonirrigated and class IV irrigated, 337 acres; Soil Map Unit StD, class IV nonirrigated and class VI irrigated, 326 acres; Soil Map Unit TaD, class IV nonirrigated, 2,540 acres; Soil Map Unit TtD, class IV nonirrigated and class VI irrigated, 14,275 acres; Soil Map Unit WgC, class IV nonirrigated and class IV irrigated, 7,081 acres; Soil Map Unit WgE, class IV nonirrigated and class VI irrigated, 1,461 acres; AR 001171, AR 001176, AR 001178, AR 001180, AR 001184, AR 001190, AR 001192, AR 001193, AR 001194, AR 001202, AR 001204, AR 001205, AR 001209, AR 001210, AR 001212, AR 001214, AR 001215, AR 001217, AR 001219, AR 001231, AR 001242, AR 001245, AR 001246, AR 001247, AR 001250, AR 001255, AR 001256, AR 001258, AR 001259, AR 001261, AR 001273, AR 001285, AR 001286, AR 001289, AR 001290, AR 001292, AR 001296, AR 001298, AR 001303, AR 001305, AR 001308, AR 001310, AR 001311, AR 001321, AR 001322, AR 001326, AR 001331, AR 001337, AR 001339, AR 001340, AR 001342, AR 001355, AR 001366, AR 001367, USDA Natural Resources Conservation Service, *Map Unit Description (WA) North Ferry Area, Washington* p. 10, p. 15, p. 17, p. 19, p. 23, p. 29, p. 31, p. 32, p. 33, p. 41, p. 43, p. 44, p. 48, p. 49, p. 51, p. 53, p. 54, p. 56, p. 58, p. 70, p. 81, p. 84, p. 85, p. 86, p. 89, p. 94, p. 95, p. 97, p. 98, p. 100, p. 112, p. 124, p. 125, p. 128, p. 129, p. 131, p. 135, p. 137, p. 142, p. 144, p. 147, p. 149, p. 150, p. 160, p. 161, p. 165, p. 170, p. 176, p. 178, p. 179, p. 181, p. 194, p. 205, p. 206 (09/24/2015); AR 000498 – 501, USDA Natural Resources Conservation Service, *Acreage and Proportionate Extent of the Soils North Ferry Area, Washington* pp. 1 – 4 (09/24/2015); AR 000502, USDA *Prime Farmland List for the North Ferry Area* p. 1 (2/15/2005).

180,813 acres.¹⁰⁵ None of these soils were considered for designation as agricultural lands of long-term commercial significance but these soils meet the soil criteria in Ordinance No. 2016-04.¹⁰⁶

For example, Soil Map Unit 215 (Boesel-Muckamuck complex, 0 to 8 percent slopes) has a land capability class, both non-irrigated and irrigated, of III but is not a prime farmland soil and is not on the *Prime Farmland List* from 2/15/2005.¹⁰⁷ Soil Map Unit AIE (Aits loam, 15 to 35 percent slopes) has a land capability class, non-irrigated, of IV. Soil Map Unit AIE is also a “farmland of statewide importance.”¹⁰⁸ Soil Map Unit AIE is also not on the *Prime Farmland List* from 2/15/2005.¹⁰⁹ While Soil Map Unit 215 only covers 58 acres of North Ferry County, AIE covers 7,418 acres.¹¹⁰

Many soils on the Colville Indian Reservation with land capability classes of II, III, and IV are not included on *USDA Prime Farmland List for the North Ferry Area* from 2/15/2005.¹¹¹ These soils were not considered

¹⁰⁵ *Id.*

¹⁰⁶ AR 000028 – 31, Ferry County Development Regulations Ordinance No. 2016-04 pp. 20 – 23 (Aug. 8, 2016).

¹⁰⁷ AR 001171, USDA Natural Resources Conservation Service, *Map Unit Description (WA) North Ferry Area, Washington* p. 10 (09/24/2015); AR 000502, *USDA Prime Farmland List for the North Ferry Area* p. 1 (2/15/2005).

¹⁰⁸ AR 001193, USDA Natural Resources Conservation Service, *Map Unit Description (WA) North Ferry Area, Washington* p. 32 (09/24/2015).

¹⁰⁹ AR 000502, *USDA Prime Farmland List for the North Ferry Area* p. 1 (2/15/2005).

¹¹⁰ AR 000498, USDA Natural Resources Conservation Service, *Acreage and Proportionate Extent of the Soils North Ferry Area, Washington* p. 1 (09/24/2015).

¹¹¹ AR 000580 – 001140, USDA Natural Resources Conservation Service, *Map Unit Description (WA) Colville Indian Reservation (parts of Ferry and Okanogan Counties)*,

for designation as agricultural lands of long-term commercial significance even though they meet the soils criteria in Ordinance No. 2016-04.¹¹²

In addition, of the 55 prime farmland soils within the Colville Indian Reservation, only three are on the USDA *Prime Farmland List* for the North Ferry Area from 2/15/2005.¹¹³ The county concedes it did not consider the other 52 prime soils on the Colville Indian Reservation even though it designated agricultural land on the reservation.¹¹⁴ Limiting the soils considered to only those on the list also undercounted prime farmland soils in addition to not rating the land capability class II through IV soils that are not prime farmland soils.

If Ferry County had considered all of the land capability class II through IV soils as Ordinance No. 2016-04 requires and then properly considered the other criteria in the ordinance, the County should have designated the land CFOFC recommend for designation.¹¹⁵

Washington pp. 1 – 561; AR 000502, USDA *Prime Farmland List for the North Ferry Area* p. 1 (2/15/2005).

¹¹² AR 000028 – 31, Ferry County Development Regulations Ordinance No. 2016-04 pp. 20 – 23 (Aug. 8, 2016).

¹¹³ AR 00502, USDA *Prime Farmland List North Ferry Area Washington* p. 1 (2/15/2005); AR 000277 – 78, Campbell & Aho, *Soil Survey of Colville Indian Reservation, Washington, Parts of Ferry and Okanogan Counties* pp. 432 – 33 (2002).

¹¹⁴ AR 000456, Peter Scott Letter to Futurewise p. 4 (July 16, 2016); AR 000057, *Ferry County Comprehensive Plan Future Land Use Map Agricultural Land of Long-Term Commercial Significance*.

¹¹⁵ AR 000506 – 47, “Recommended Designations of Agricultural Lands of Long-Term Commercial Significance” pp. 1 – 42; AR 000282 – 310, “Lot Sizes within Recommended Agricultural Designation Areas Version 2” pp. 1 – 29; AR 000314 – 17, Ferry County Soil Symbols maps; AR 000420 – 24, Washington State Department of Agriculture, *2015 WSDA Agricultural Land Use* maps p. 1 – 5; AR 001382, *Ferry County*

The Board did not address the fact that Ferry County’s designation criteria use land capability class I through IV ratings to give points to various soils in the county.¹¹⁶ Instead the Board wrote that “the record plainly shows that Commerce reviewed the County’s actions in light of specific consideration of the classification of prime and unique farmland soils as mapped by the Natural Resources Conservation Service, in accordance with WAC 365-190-050(3)(c).”¹¹⁷ WAC 365-190-050(3)(c) provides in relevant part that “counties ... should consider the following nonexclusive criteria, as applicable: (i) The classification of prime and unique farmland soils as mapped by the Natural Resources Conservation Service” Ferry County chose not to include prime farmland soils in the criteria adopted by Ordinance No. 2016-04.¹¹⁸ In addition, WAC 365-190-050(3)(b)(ii) provides:

(ii) In determining whether lands are used or capable of being used for agricultural production, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Natural Resources Conservation Service as defined in relevant Field Office Technical Guides. These eight classes are incorporated by the United States Department of Agriculture into map units

Comprehensive Plan Urban Growth Area & Rural Service Areas map; AR 001383, Republic Urban Growth Area map; AR 000503, Wild West Farm and Garden webpage; AR 000489, Hang ’em High Custom Meat Cutting webpage; AR 497, Northeast Tri County Health District Farmers Market webpage.

¹¹⁶ AR 000027 – 37, Ferry County Development Regulations Ordinance No. 2016-04 pp. 19 – 29 (Aug. 8, 2016).

¹¹⁷ AR 001817, FDO, at 10 of 12.

¹¹⁸ AR 000028 – 31, Ferry County Development Regulations Ordinance No. 2016-04 pp. 20 – 23 (Aug. 8, 2016).

described in published soil surveys, and are based on the growing capacity, productivity and soil composition of the land.

So, Ferry County was required to use the land-capability classification system in designating agricultural land and based its point system on that system.¹¹⁹ Ordinance No. 2016-04 provides: “Using the U.S. Department of Agriculture system of classification, Classes I through IV have been determined to possess the appropriate characteristics that could make them suitable for Agricultural Lands of Long-Term Commercial Significance designation as required by WAC 365-190-050(3)(b)(ii) and WAC 365-190-050(3)(c)(i).”¹²⁰ Ordinance No. 2016-04 then goes on to describe Classes I through IV soils and the points awarded to the different soil classes.¹²¹ Nowhere in this discussion are prime farmland soils mentioned.¹²²

But when the County designated agricultural land, Ferry County ignored its own point system adopted by Ordinance No. 2016-04 and only rated soils that were both prime farmland soils and soils with land capability classifications of I through IV.¹²³ As the County’s outside counsel wrote:

¹¹⁹ AR 000027 – 37, Ferry County Development Regulations Ordinance No. 2016-04 pp. 19 – 29 (Aug. 8, 2016).

¹²⁰ AR 000028, Ferry County Development Regulations Ordinance No. 2016-04 pp. 20 (Aug. 8, 2016).

¹²¹ AR 000028 – 31, Ferry County Development Regulations Ordinance No. 2016-04 pp. 20 – 23 (Aug. 8, 2016).

¹²² *Id.*

¹²³ AR 000502, USDA *Prime Farmland List for the North Ferry Area* p. 1 (2/15/2005); AR 000456, Peter Scott Letter to Futurewise p. 4 (July 16, 2016).

“The County then applied additional scoring criteria per the method already reviewed and approved by both the Hearings Board and the Court of Appeals to rank lands where those prime soils are found.”¹²⁴ Therefore, the Board made an error of fact in upholding the accuracy of Commerce’s finding “that Ferry County’s” designation of “2,939.98 acres of private land used for agricultural purposes” was “based on the County’s accurate implementation of the ... criteria and point system ...”¹²⁵ Essentially the Board rewrote Ordinance No. 2016-04 to include the requirement that designated agricultural lands had to be both prime farmland soils and Class I through IV (1 through 4) soils. This the Board cannot do.¹²⁶

Further, the County’s agricultural lands designation in its comprehensive plan and development regulations were inconsistent violating RCW 36.70A.040(4)(d) which requires that the development regulations are to be consistent with and implement the comprehensive plan. But the FDO ignored the inconsistency and in doing so misinterpreted and misapplied the GMA.

¹²⁴ AR 000456, Peter Scott Letter to Futurewise p. 4 (July 16, 2016) underlining added. Contrary to Mr. Scott’s claim in the letter that the percentages of land in capability classes II, III, and IV are prime farmland soils that also have those land capability classes, Ordinance No. 2016-04 only states that they are land capability class I through IV soils. AR 000030 – 31, Ferry County Development Regulations Ordinance No. 2016-04 pp. 22 – 23 (Aug. 8, 2016).

¹²⁵ AR 001815 – 16, FDO, at 8 – 9 of 12.

¹²⁶ *Rest. Dev., Inc.*, 150 Wn.2d at 682, 80 P.3d at 601 – 02 *accord Protect the Peninsula’s Future*, 185 Wn. App. at 970, 344 P.3d at 710.

4. The Board made an error of fact and law in finding that Ferry County accurately implemented its point system because the County’s application of the criteria was incomplete and inaccurate. (Issues 1 [Assignments of Error 1 & 2] & 2)

In addition to using incomplete soils data, other incomplete or inaccurate data was used to rate farm and ranch land. For example, Parcel Number 44004110001000 is located near Danville in Ferry County. The following table evaluates this property against the County’s point system based on the evidence in the record.

Criterion	Points
Factor 1: Land Already Characterized by Urban Growth, that is in an Urban Growth Area or Rural Service Area. ¹²⁷	This area is not in an Urban Growth Area or a Rural Service Area. ¹²⁸
Factor 2: Land Primarily Devoted to Commercial Production based on soil	The vast majority of the property has Mires loam (symbol Mo) and Mires gravelly loam (symbol Mp) soils. ¹³⁰ South of July Creek

¹²⁷ AR 000028, Ferry County Development Regulations Ordinance No. 2016-04 p. 20 (Aug. 8, 2016).

¹²⁸ AR 001379, *Ferry County Comprehensive Plan* Future Land Use Map NW 1/4 Page 1; AR 1384, Danville Rural Service Area Township 40 N. Range 34 E.W.M. Sections 3 and 4 [map].

¹³⁰ AR 000314 – 17, Ferry County Soil Symbols maps; AR 000553 Ferry County Soil Symbols Enlargement 4; AR 001280 – 81, USDA Natural Resources Conservation Service, *Map Unit Description (WA) North Ferry Area, Washington* pp. 119 – 120 (09/24/2015). The soils maps were prepared by Futurewise using USDA Natural Resources Conservation

Criterion	Points
survey data or aerial photographs showing current use. ¹²⁹	Road are small areas of Chesaw gravelly loamy sand, 45 to 65 percent slopes (symbol CeF), Chesaw stony sandy loam, 0 to 45 percent slopes (symbol CIE), Mires gravelly loam (symbol Mp) soils, and Torboy cobbly sandy loam, 25 to 65 percent slopes (symbol TuF). ¹³¹ Mo and Mp have non-irrigated and irrigated land capability classes of III. ¹³² They

Service geographic information system (GIS) data. A more detailed look at these soils can be found in the Ferry County Soil Symbols Enlargement maps, AR 000549 – 579. All sets of maps show the “Recommended Designations of Agricultural Lands of Long-Term Commercial Significance” outlined in red and the soils for those areas. The soils are represented by a soil symbol, two or three letters for most of the soils north of the Colville Indian Reservation (a few soils use a three-digit number as a symbol) and a two- or three-digit number within the reservation. The *Map Unit Description (WA) North Ferry Area, Washington*, AR 001162 – 1368, shows the soil characteristics by map unit, that is soil type, including their land capability rating and whether the soil is a prime farmland soil for the part of the county north of the Colville Indian Reservation. The *Map Unit Description (WA) Colville Indian Reservation (parts of Ferry and Okanogan Counties), Washington*, AR 000580 – 1161, shows the same information for the parts of the county within the Colville Indian Reservation.

¹²⁹ AR 000028, Ferry County Development Regulations Ordinance No. 2016-04 p. 20 (Aug. 8, 2016).

¹³¹ AR 000314 – 17, Ferry County Soil Symbols maps; AR 000553 – 54, Ferry County Soil Symbols Enlargements 4 and 5; AR 001208, AR 001211, AR 001281, AR 001357, USDA Natural Resources Conservation Service, *Map Unit Description (WA) North Ferry Area, Washington* p. 47, p. 50, p. 120, p. 196 (09/24/2015); AR 000282, Lot Sizes within Recommended Agricultural Designation Areas Version 2 p. 1.

¹³² AR 000316 – 17, Ferry County Non-Irrigated Soil Capability Classes map pp. *1—2; AR 000314 – 15, Ferry County Irrigated Soil Capability Classes map pp. *1 – 2; AR 000553 – 54, Ferry County Soils Symbols Enlargements 4 and 5. These maps were prepared by Futurewise using USDA Natural Resources Conservation Service geographic information system (GIS) data. AR 001280 –81, USDA Natural Resources Conservation Service, *Map Unit Description (WA) North Ferry Area, Washington* pp. 119 – 120 (09/24/2015).

Criterion	Points
	<p>are also “[p]rime farmland if irrigated” soils¹³³ and they are irrigated and used for agriculture.¹³⁴ CeF has a non-irrigated capability class of VII, CIE has a non-irrigated capability class of VI, and TuF has a non-irrigated capability class of VI.¹³⁵</p> <p>In addition, aerial photographs of the farm show it is actively farmed with irrigation improvements, establishing its current use as farmland.¹³⁶ So it meets both the soils survey criterion and the alternative current use criterion.</p>

¹³³ AR 000314 – 17, Ferry County Soil Symbols maps; AR 000553 – 54, Ferry County Soil Symbols Enlargements 4 and 5; AR 001280 –81, USDA Natural Resources Conservation Service, *Map Unit Description (WA) North Ferry Area, Washington* pp. 119 – 120 (09/24/2015).

¹³⁴ AR 000483, Ferry County MapSifter aerial image of Parcel Number 44004110001000; AR 000483, Ferry County MapSifter Assessor’s data for Parcel Number 44004110001000 p. 1 of 2; AR 000420, Washington State Department of Agriculture, *2015 WSDA Agricultural Land Use* map p. 1. AR 000425, the Washington State Department of Agriculture Agricultural Land Use webpage, explains how the land use data is gathered.

¹³⁵ AR 000314 – 17, Ferry County Soil Symbols maps; AR 000553 – 54, Ferry County Soil Symbols Enlargements 4 and 5; AR 001208, AR 001211, AR 001357, USDA Natural Resources Conservation Service, *Map Unit Description (WA) North Ferry Area, Washington* p. 47, p. 50, p. 196 (09/24/2015).

¹³⁶ AR 000483, Ferry County MapSifter aerial image of Parcel Number 44004110001000.

Criterion	Points
Criteria One: Soil Classification. ¹³⁷	Class III soils both non-irrigated and irrigated make up 90.4 percent of the property and all of the property north of Fourth of July Creek Rd. ¹³⁸ +3.8 points.
Factor 3: Long-Term Commercial Significance	
Criteria Two: Tax Status. ¹³⁹	Enrolled in the agriculture tax program. ¹⁴⁰ +1 point.
Criteria Three - Availability of Public Services. ¹⁴¹	“[N]o additional numerical scores were assigned. ¹⁴² 0 points.
Criteria Four - Proximity to an Urban Growth Area. ¹⁴³	More than five miles from Republic. ¹⁴⁴ +1 point.

¹³⁷ AR 000028 – 31, Ferry County Development Regulations Ordinance No. 2016-04 pp. 20 – 23 (Aug. 8, 2016).

¹³⁸ AR 001470, Futurewise Letter to Ferry County Board of County Commissioners p. 6 (July 27, 2016); AR 000314 – 17, Ferry County Soil Symbols maps and insets 4; AR 000553 – 54, Ferry County Soil Symbols Enlargement 4 and 5; AR 001208, AR 001211, AR 001281, AR 001357, USDA Natural Resources Conservation Service, *Map Unit Description (WA) North Ferry Area, Washington* p. 47, p. 50, p. 120, p. 196 (09/24/2015); AR 000282, Lot Sizes within Recommend Agricultural Designation Areas Version 2 p. 1.

¹³⁹ AR 000031, Ferry County Development Regulations Ordinance No. 2016-04 p. 23 (Aug. 8, 2016).

¹⁴⁰ AR 000484, Ferry County MapSifter Assessor’s data for Parcel Number 44004110001000 p. 1 of 2.

¹⁴¹ AR 000031 – 32, Ferry County Development Regulations Ordinance No. 2016-04 pp. 23 – 24 (Aug. 8, 2016).

¹⁴² AR 000032, *Id.* at p. 24.

¹⁴³ AR 000032, *Id.*

¹⁴⁴ AR 001382, *Ferry County Comprehensive Plan Urban Growth Area & Rural Service Areas map*; AR 001383, Republic Urban Growth Area map.

Criterion	Points
Criteria Five- Predominate Parcel/Farm (Ownership) Size. ¹⁴⁵	Parcel Number 44004110001000 is 197.96 acres. +1 point. ¹⁴⁶
Criteria Six - Proximity to Markets/Services. ¹⁴⁷	Within the 50 road mile standard for one point ¹⁴⁸ are Wild West Farm and Garden in Republic, WA which sells pasture seed, livestock supplies, and winter hay supplies. ¹⁴⁹ Also well within the 50 road mile standard is Hang 'em High Custom Meat Cutting in Republic. ¹⁵⁰ Also within 50 road miles is the farmer's market in Republic. ¹⁵¹ Meat including beef can be sold at the farmer's market. ¹⁵² +1 point.

¹⁴⁵ AR 000032 – 33, Ferry County Development Regulations Ordinance No. 2016-04 pp. 24 – 25 (Aug. 8, 2016).

¹⁴⁶ AR 000484, Ferry County MapSifter Assessor's data for Parcel Number 44004110001000 p. 1 of 2; AR 000033, Ferry County Development Regulations Ordinance No. 2016-04 p. 25 (Aug. 8, 2016).

¹⁴⁷ AR 000033, Ferry County Development Regulations Ordinance No. 2016-04 p. 25 (Aug. 8, 2016).

¹⁴⁸ *Id.*

¹⁴⁹ AR 001382, *Ferry County Comprehensive Plan Urban Growth Area & Rural Service Areas* map; AR 000503, Wild West Farm and Garden webpage.

¹⁵⁰ AR 000489, Hang 'em High Custom Meat Cutting webpage.

¹⁵¹ AR 497, Northeast Tri County Health District Farmers Market webpage.

¹⁵² AR 494, Northeast Tri County Health District (NETCHD) Farmer's Market Permit Information p. *4.

Criterion	Points
Land Use Settlement Patterns/Intensity of Nearby Land Uses. ¹⁵³	“[N]o additional numerical scores were assigned.” ¹⁵⁴ 0 point.
Criteria Seven - History of Nearby Land Uses. ¹⁵⁵	“[A]djacent to residential uses of land” so -1 point. ¹⁵⁶
Floodplain Coincidence. ¹⁵⁷	“[N]o additional numerical scores were assigned on this basis.” ¹⁵⁸ 0 points.
Block Group 100 acres or more. ¹⁵⁹	More than 100 acres. ¹⁶⁰
Total Points	6.8 points.

Parcel Number 44004110001000 exceeds the four points necessary for being designated as agricultural lands of long-term commercial significance.¹⁶¹ Failing to designate this land violates RCW

¹⁵³ AR 000033 – 34, Ferry County Development Regulations Ordinance No. 2016-04 pp. 25 – 26 (Aug. 8, 2016).

¹⁵⁴ AR 000034, *Id.* at p. 26.

¹⁵⁵ AR 000034, *Id.*

¹⁵⁶ AR 000483, Ferry County MapSifter aerial image of Parcel Number 44004110001000.

¹⁵⁷ AR 000034, Ferry County Development Regulations Ordinance No. 2016-04 p. 26 (Aug. 8, 2016).

¹⁵⁸ AR 000034, *Id.*

¹⁵⁹ AR 000034, *Id.*

¹⁶⁰ AR 000484, Ferry County MapSifter Assessor’s data for Parcel Number 44004110001000 p. 1 of 2.

¹⁶¹ AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016).

36.70A.170(1)(a)'s requirement to designate agricultural lands of long-term commercial significance.

RCW 36.70A.040(4)(d) requires that the development regulations are to be consistent with and implement the comprehensive plan. RCW 36.70A.070 requires an "internally consistent" comprehensive plan. RCW 36.70A.130(1)(d) provides in full that "[a]ny amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan." "County development regulations must also comply with the requirements of the GMA. See RCW 36.70A.130(1)(a)"¹⁶² The *Ferry County Comprehensive Plan* agricultural land of long-term commercial significance Goal 1 directs the County to "[m]aintain and enhance the agricultural resource-based industries in the county and provide for the stewardship and productive use of agricultural resource lands of long-term commercial significance."¹⁶³ *Ferry County Comprehensive Plan* Policy 7.4.30 2 provides: "Designate sufficient commercially significant agricultural and forest land to ensure the County maintains a critical mass of such lands for present and future use."¹⁶⁴ The County's failure to designate this land is inconsistent with the

¹⁶² *Kittitas Cty.*, 172 Wn.2d at 164, 256 P.3d at 1203.

¹⁶³ AR 001377, *Ferry County Comprehensive Plan* p. 7-22 (Sept. 24, 2012).

¹⁶⁴ AR 001375, *Ferry County Comprehensive Plan* p. 7-20 (Sept. 24, 2012).

comprehensive plan goal and policy. Failing to designate this land and other erroneously excluded land will not maintain and certainly will not enhance the agricultural resource-based industries in the county. Failing to designate this and other erroneously excluded land will not maintain a critical mass of land for present and future use. This violates the GMA.

In deciding whether to approve Ferry County’s application for a determination of compliance, Commerce was required to determine if the County complied with RCW 36.70A.170(1)(a)’s requirement to designate agricultural lands of long-term commercial significance.¹⁶⁵ Commerce concluded that Ferry County’s designation of agricultural lands of long-term commercial “is based on an accurate implementation of the criteria”¹⁶⁶ So did the Board.¹⁶⁷ But as was documented in Part IVB.2 above and this part, Ferry County’s application of the criteria did not include all Land Capability III and IV soils and did not accurately rate all areas. Commerce’s and the Board’s conclusions are not supported by substantial evidence and are an erroneous interpretation of the GMA. Contrary to Commerce’s and the Board’s conclusions that Ferry County’s process was defensible,¹⁶⁸ we see that it was not.

¹⁶⁵ RCW 36.70A.060(1)(d)(i).

¹⁶⁶ AR 000066 – 67, State of Washington Department of Commerce, *Determination of Compliance - Ferry County* pp. *4 – 5 (Feb. 28, 2017).

¹⁶⁷ AR 001816, FDO at p. 9 of 12.

¹⁶⁸ AR 000067, State of Washington Department of Commerce, *Determination of Compliance - Ferry County* p. *5 (Feb. 28, 2017); AR 001816, FDO at p. 9 of 12.

C. The Board erroneously interpreted or applied the GMA in concluding that it cannot review any issues falling outside of Commerce’s scope of review and determination and Ferry County failed to conserve its newly designated agricultural land. (Issue 3 [Assignment of Error 7])

1. Standard of Review

“[C]ourts review errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) de novo.”¹⁶⁹ “[T]he ‘burden of demonstrating the invalidity of [the Board’s decision] is on the party asserting the invalidity.’”¹⁷⁰

“Substantial weight is accorded to a board’s interpretation of the GMA, but the court is not bound by the board’s interpretations.”¹⁷¹

2. Key Rules for Interpreting Statutes and Regulations.

“‘The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature.’ [King County, 142 Wn.2d at 555, 14 P.3d 133.] To discern legislative intent, ‘the court begins with the statute’s plain language and ordinary meaning,’ but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole. *Id.* at 555, 560, 14 P.3d 133.”¹⁷² “[A] court must not add words where the

¹⁶⁹ *Kittitas Cty.*, 172 Wn.2d at 155, 256 P.3d at 1198.

¹⁷⁰ *Thurston Cty v. Cooper Point Ass’n.*, 148 Wn.2d at 7 – 8, 57 P.3d at 1159 – 60.

¹⁷¹ *Thurston Cty.*, 164 Wn.2d at 341, 190 P.3d at 44.

¹⁷² *Quadrant Corp.*, 154 Wn.2d at 238 – 39, 110 P.3d at 1139 – 40 some internal quotations and citations omitted.

legislature has chosen not to include them.”¹⁷³ These “[r]ules of statutory construction apply to administrative rules and regulations.”¹⁷⁴

3. The Board erroneously interpreted or applied the GMA in concluding it could not consider whether Commerce correctly approved Ferry County’s application for a determination of compliance when Ferry County had not conserved the newly designated agricultural land. (Issue 3 [Assignment of Error 7])

For the purposes of conserving agricultural lands of long-term commercial significance, Commerce was required to determine that Ferry County’s comprehensive plan and development regulations complied with RCW 36.70A.040(4) and RCW 36.70A.060.¹⁷⁵ Commerce concluded in its Determination of Compliance that “that Ferry County has addressed the outstanding issues of noncompliance and Ferry County’s Comprehensive Plan and development regulations are in compliance with the planning requirements of RCW 36.70A.060 [and] 36.70A.040(4)”¹⁷⁶ RCW 36.70A.300(1) required that the “board shall issue a final order that shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter” Neither RCW 36.70A.060(1)(d) nor WAC 365-199-040(1) limit the Board’s review of the

¹⁷³ *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598, 601 – 02 (2003) accord *Protect the Peninsula's Future v. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 959, 970, 344 P.3d 705, 710 (2015).

¹⁷⁴ *Overlake Hosp. Ass'n*, 170 Wn.2d at 51 – 52, 239 P.3d at 1099.

¹⁷⁵ RCW 36.70A.060(1)(d)(i).

¹⁷⁶ AR 000067, State of Washington Department of Commerce, *Determination of Compliance - Ferry County* p. *5 (Feb. 28, 2017).

determination of compliance to Commerce’s scope of review. Nor does any other provision of the GMA or Chapter 365-199 WAC.

The Board concluded that it “cannot review any issues falling outside of Commerce’s scope of review and determination,” but did not cite any authority for this proposition.¹⁷⁷ And as was noted above, **there is no authority limiting the Board’s review to Commerce’s scope of review.** Instead, RCW 36.70A.300(1) required that the Board’s “final order that shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter” This the Board did not do and that is why we are before the Court in this case.

RCW 36.70A.060 required Ferry County to “adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.” RCW 36.70A.040(4)(d) requires that the development regulations are to be consistent with and implement the comprehensive plan. While Ordinance No. 2016-04 adopted a new future land use map for the comprehensive plan,¹⁷⁸ it failed to adopt a zoning map that zoned the newly designated areas as Agricultural Lands of Long-Term Commercial

¹⁷⁷ AR 001812, FDO, at 5 of 12; AR 001818, FDO, at 11 of 12.

¹⁷⁸ AR 000057, *Ferry County Comprehensive Plan Future Land Use Map Agricultural Land of Long-Term Commercial Significance*.

Significance.¹⁷⁹ So the newly designated agricultural lands retain their Rural zoning and can be subdivided into 2.5 acre lots.¹⁸⁰ If they were zoned Agricultural Lands of Long-Term Commercial Significance, the minimum lot size would be 20 acres and other protective requirements would also apply.¹⁸¹

The agricultural lands development regulations only apply to lands zoned as agricultural lands. As the Washington State Supreme Court wrote: “The comprehensive plan must include maps and ‘descriptive text covering objectives, principles, and standards used to develop the comprehensive plan.’ RCW 36.70A.070. These maps can include a future land use map depicting how property is designated in the jurisdiction; the designations guide how property may thereafter be zoned by the jurisdiction.”¹⁸² Because the County never amended its zoning maps, the agricultural lands designated in 2016 are still zoned Rural permitting 2.5 acre lots.¹⁸³

By failing to review Ferry County’s failure to zone the newly designated agricultural lands as Agricultural Lands of Long-Term Commercial

¹⁷⁹ AR 000038 – 39, Ferry County Development Regulations Ordinance No. 2016-04 pp. 30 – 31 (Aug. 8, 2016).

¹⁸⁰ AR 000048, *Id.* p. 40.

¹⁸¹ AR 000038, *Id.* p. 30.

¹⁸² *Stafne v. Snohomish Cty.*, 174 Wn.2d 24, 31, 271 P.3d 868, 871 – 72 (2012) underlining added.

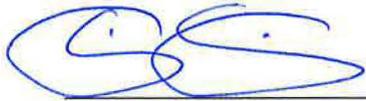
¹⁸³ AR 000038 – 39 & AR 000055, Ferry County Development Regulations Ordinance No. 2016-04 pp. 30 – 31 & “Maps” (Aug. 8, 2016).

Significance, the Board's FDO violated RCW 36.70A.040(4) and RCW 36.70A.060(1).

V. CONCLUSION

By failing to require compliance with the GMA and making findings that are not supported by substantial evidence, the Board's FDO violated the GMA. We respectfully request that this Court reverse the FDO and remand it back to the Board for action consistent with the GMA.

RESPECTFULLY SUBMITTED and signed on this 5th day of April 2019,



Tim Trohimovich, WSBA No. 22367
Attorney for the Concerned Friends of Ferry County and Futurewise

CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 5th day of April 2019, the undersigned caused an electronic original and true and correct electronic copies of the following document to be served on the persons listed below in the manner shown: **Brief of Appellants Concerned Friends of Ferry County & Futurewise and Appendix A.**

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Tacoma, WA 98402-4454
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- By Legal Messenger or Hand Delivery
- By Facsimile
- By Federal Express, UPS, or Priority Mail Express prepaid
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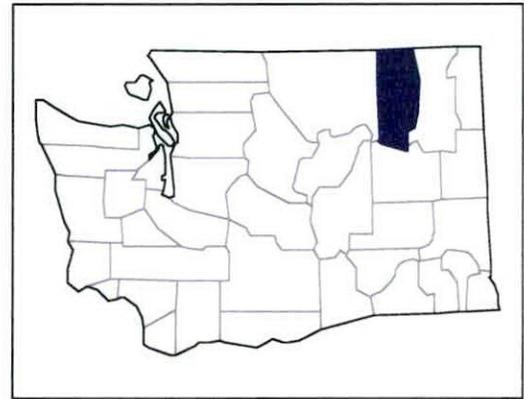
Signed and certified on this 5th day of April 2019,



 Tim Trohimovich, WSBA No. 22367

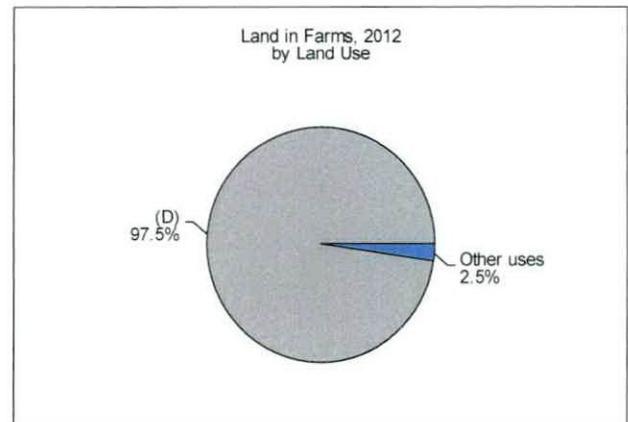
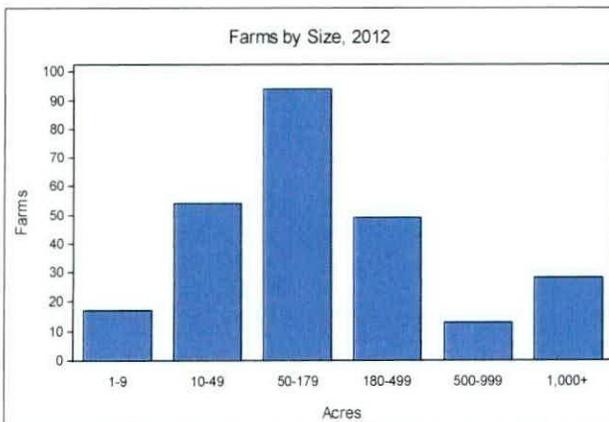
2012 CENSUS OF AGRICULTURE

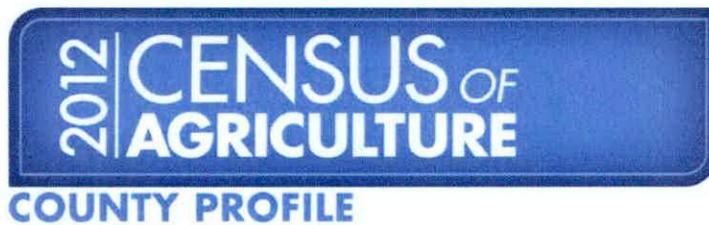
COUNTY PROFILE



Ferry County Washington

	2012	2007	% change
Number of Farms	255	232	+ 10
Land in Farms	792,250 acres	749,452 acres	+ 6
Average Size of Farm	3,107 acres	3,230 acres	- 4
Market Value of Products Sold	\$5,331,000	\$2,913,000	+ 83
Crop Sales \$2,880,000 (54 percent)			
Livestock Sales \$2,451,000 (46 percent)			
Average Per Farm	\$20,905	\$12,555	+ 67
Government Payments	\$159,000	\$73,000	+ 118
Average Per Farm Receiving Payments	\$4,690	\$3,300	+ 42





Ferry County – Washington

Ranked items among the 39 state counties and 3,079 U.S. counties, 2012

Item	Quantity	State Rank	Universe ¹	U.S. Rank	Universe ¹
MARKET VALUE OF AGRICULTURAL PRODUCTS SOLD (\$1,000)					
Total value of agricultural products sold	5,331	35	39	2,832	3,077
Value of crops including nursery and greenhouse	2,880	33	39	2,615	3,072
Value of livestock, poultry, and their products	2,451	36	39	2,715	3,076
VALUE OF SALES BY COMMODITY GROUP (\$1,000)					
Grains, oilseeds, dry beans, and dry peas	(D)	28	34	(D)	2,926
Tobacco	-	-	-	-	436
Cotton and cottonseed	-	-	-	-	635
Vegetables, melons, potatoes, and sweet potatoes	(D)	(D)	39	(D)	2,802
Fruits, tree nuts, and berries	731	27	39	573	2,724
Nursery, greenhouse, floriculture, and sod	41	36	38	2,271	2,678
Cut Christmas trees and short rotation woody crops	-	-	33	-	1,530
Other crops and hay	(D)	24	39	(D)	3,049
Poultry and eggs	17	33	39	2,127	3,013
Cattle and calves	1,914	29	39	2,355	3,056
Milk from cows	-	-	30	-	2,038
Hogs and pigs	30	28	37	1,626	2,827
Sheep, goats, wool, mohair, and milk	65	30	39	1,719	2,988
Horses, ponies, mules, burros, and donkeys	(D)	32	39	(D)	3,011
Aquaculture	(D)	22	34	(D)	1,366
Other animals and other animal products	9	35	39	2,257	2,924
TOP CROP ITEMS (acres)					
Forage-land used for all hay and haylage, grass silage, and greenchop	8,137	22	39	1,826	3,057
Wheat for grain, all	502	26	32	1,868	2,537
Spring wheat for grain	(D)	22	30	348	633
Apples	87	18	39	307	2,167
Winter wheat for grain	(D)	28	28	(D)	2,480
TOP LIVESTOCK INVENTORY ITEMS (number)					
Cattle and calves	4,344	30	39	2,467	3,063
Layers	1,050	31	39	1,824	3,040
Horses and ponies	766	26	39	1,553	3,072
Sheep and lambs	320	30	39	1,777	2,897
Goats, all	276	28	39	1,894	2,996

Other County Highlights, 2012

Economic Characteristics	Quantity	Operator Characteristics	Quantity
Farms by value of sales:		Principal operators by primary occupation:	
Less than \$1,000	96	Farming	133
\$1,000 to \$2,499	21	Other	122
\$2,500 to \$4,999	32	Principal operators by sex:	
\$5,000 to \$9,999	34	Male	174
\$10,000 to \$19,999	30	Female	81
\$20,000 to \$24,999	7	Average age of principal operator (years)	59.1
\$25,000 to \$39,999	8	All operators by race ² :	
\$40,000 to \$49,999	6	American Indian or Alaska Native	25
\$50,000 to \$99,999	2	Asian	6
\$100,000 to \$249,999	15	Black or African American	-
\$250,000 to \$499,999	4	Native Hawaiian or Other Pacific Islander	-
\$500,000 or more	-	White	400
Total farm production expenses (\$1,000)	5,897	More than one race	6
Average per farm (\$)	23,124	All operators of Spanish, Hispanic, or Latino Origin ²	4
Net cash farm income of operation (\$1,000)	553		
Average per farm (\$)	2,167		

See "Census of Agriculture, Volume 1, Geographic Area Series" for complete footnotes, explanations, definitions, and methodology.

- Represents zero. (D) Withheld to avoid disclosing data for individual operations.

¹ Universe is number of counties in state or U.S. with item. ² Data were collected for a maximum of three operators per farm.

FUTUREWISE

April 05, 2019 - 11:02 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53038-4
Appellate Court Case Title: Concerned Friends of Ferry County and Futurewise, Appellants v. Dept. of Commerce, Resp.
Superior Court Case Number: 17-2-06109-1

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Comments:

Certificate of service is attached to the brief.

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