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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.

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

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I. INTRODUCTION

This reply addresses the Brief of Appellee Ferry County, referred to as the County Response Brief, and the Brief of Respondent, State of Washington, Department of Commerce (Commerce), referred to as the Commerce Response Brief. As this reply will show, the Court should reverse the Growth Management Hearings Board's Final Decision and Order (FDO) and remand it back to the Board for action consistent with the Growth Management Act (GMA).

II. 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. 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 "at the least," the GMA, the Ferry County comprehensive plan goals, the guidelines adopted by Commerce, and Ferry County "policies mean that a local government cannot decline to designate the land that its criteria show should be designated, when that potentially jeopardizes

a critical component of the jurisdiction's principal agricultural industry.”¹
So the County’s failure to designate land meeting its criteria as Agricultural Resource Land (ARL) violated the GMA and the Board erred in upholding the County’s failure to designate this farmland.² Further, a designation of ARL under Ferry County’s criteria “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”³

As the CFOFC Brief of Appellants documented, the Board again erred by upholding Ferry County’s designation of only 3,344.98 acres of agricultural lands of long-term commercial significance that are not state or federal grazing land.⁴ This fails to protect critical components of the agricultural industry including the livestock producers and the crop producers.

Ferry County argues that CFOFC conflates the GMA natural resource goal and the requirement to designate natural resource lands and that the

¹ *Concerned Friends of Ferry Cty. v. Ferry Cty.*, 191 Wn. App. 803, 834, 365 P.3d 207, 222 (2015) review denied, 185 Wn.2d 1030, 377 P.3d 724 (2016).

² *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 834, 365 P.3d at 222 – 23.

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

⁴ AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016).

GMA goals do not independently create substantive requirements.⁵ But this Court held that the designation of agricultural lands has to comply with the GMA’s natural resource industry goal in RCW 36.70A.020(8) read together with the other GMA provisions and a Ferry County comprehensive plan goal and policy.⁶ For example, this Court wrote that the “minimum guideline ...” in WAC 365-190-050(5) requires “maintaining and enhancing the economic viability of the agricultural industry ...” when designating agricultural resource lands (ARL).⁷ The *Concerned Friends of Ferry County* approach is consistent with the State Supreme Court’s *Soccer Fields* decision which held that when read together the GMA natural resources industry goal in RCW 36.70A.020(8), the requirements to designate agricultural land in RCW 36.70A.170, and the requirements to conserve agricultural land in RCW 36.70A.060(1) “evidence a legislative mandate for the conservation of agricultural land.”⁸ The Washington State Supreme Court’s *Quadrant Corp.* decision recognized the validity of this approach writing that in the *Soccer Fields* decision the “court considered both the goals and the requirements of the GMA in determining whether allowing active recreation on designated agricultural lands violated the

⁵ Ferry County Response Brief pp. 22 – 23.

⁶ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 833 – 34, 365 P.3d at 222.

⁷ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 833, 365 P.3d at 222.

⁸ *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000).

GMA.”⁹ This allowed the *Soccer Fields* court to discern the legislature’s intent.¹⁰ So rather than disapproving of this Court’s approach in the *Concerned Friends of Ferry County* decision, the *Quadrant Corp.* decision recognized its validity.¹¹

Commerce claims CFOFC’s use of the land in farms acreage is misleading because it does not include the 478,968 acres of public land the County has designated ARL. In a similar argument, Ferry County claims to have designated 64 percent of its land in farms as ARL by including the federal forest lands in its calculations. But none of the National Forest grazing lands that Ferry County and Commerce include in their arguments and calculations are included in the Census of Agriculture land in farms acreage.¹² As the definition of land in farms states “[a]ll grazing land, except land used under government permits on a per-head basis, was included as ‘land in farms’ provided it was part of a farm or ranch.”¹³ The National Forest land in Ferry County is used under government permits

⁹ *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 246, 110 P.3d 1132, 1143 (2005).

¹⁰ *Id.*

¹¹ *Id. accord Stevens Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 163 Wn. App. 680, 691 – 92, 262 P.3d 507, 512 – 13 (2011).

¹² Administrative Record page number (AR) 000403, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* p. B-13 (May 2014); AR 001371, *Forest Plan Revision, Colville & Okanogan-Wenatchee National Forests May 2009 Briefing: Rangelands and Forest Plan Revision* p. 2 of 2.

¹³ AR 000403, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* p. B-13 (May 2014) emphasis added.

which specify the number of animals that can be grazed.¹⁴ So it is not included in the land in farms acreage.

In fact, Ferry County has only designated 0.42 percent of the 792,250 acres of land in farms in the County and no final Board or court decision has determined otherwise.¹⁵ This Court also concluded that “the designation of federal grazing lands is of no effect in determining whether the County’s designation of ARL complied with the GMA.”¹⁶ So Commerce’s and Ferry County’s attempt to include the National Forest grazing land in their calculations of the percentage of land in farms the County has designated as ARL is not supported by substantial evidence and is an erroneous interpretation of the GMA.

Commerce and the County argue that CFOFC is seeking to relitigate previously decided issues as to whether the land in farms figure includes federal grazing land or whether there are just 25,215 acres of privately-owned farmland in the County. But as we have seen, this Court concluded “the designation of federal grazing lands is of no effect in determining

¹⁴ AR 001371, *Forest Plan Revision, Colville & Okanogan-Wenatchee National Forests May 2009 Briefing: Rangelands and Forest Plan Revision* p. 2 of 2.

¹⁵ AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016); 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); *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 818, 365 P.3d at 215.

¹⁶ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 832, 365 P.3d at 222 underlining added.

whether the County’s designation of ARL complied with the GMA.”¹⁷

Further CFOFC properly assigned error to the challenged “facts” at issue in the 2015 decisions.¹⁸ That the Court of Appeals did not need to decide these factual issues in deciding the earlier Ferry County agricultural lands designation case did not uphold the Board’s findings in the earlier appeal.¹⁹

Ferry County’s Brief, on pages 13 and 14, argues that the County only needs to designate enough land to grow hay for the cattle that graze on federal and state land and overwinter in the county. Commerce makes a similar argument claiming that “this Court has already determined that a focus on lands used for hay and forage production was compliant with the GMA.”²⁰ While this Court did fault Ferry County for failing to designate enough land to grow hay for the cattle industry, this Court did not direct Ferry County to only designate sufficient land on which to grow hay to sustain the cattle grazed on state and federal land.²¹ What this Court held was that Ferry County “designation of ARL [agricultural resource lands] conflicted with the GMA, implementing WAC rules, and the comprehensive plan and was clearly erroneous.”²² The County did not meet the “minimum guideline of maintaining and enhancing the economic

¹⁷ *Id.* underlining added.

¹⁸ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 818, 365 P.3d at 215.

¹⁹ *Id.*

²⁰ Commerce Response Brief p. 25.

²¹ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 831 – 34, 365 P.3d at 221 – 22.

²² *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 834, 365 P.3d at 222 – 23.

viability of the agricultural industry, set out in WAC 365-190-050(5).”²³ As the CFOFC Brief of Appellants documented, the Board erred including Commerce’s determination of compliance meet the GMA provisions.

Commerce claims “[n]either the Courts nor the Board has ever held that a county must designate all of the agricultural lands of long-term significance”²⁴ But this Court has held that the GMA “goals, guidelines, and policies mean that a local government cannot decline to designate the land that its criteria show should be designated, when that potentially jeopardizes a critical component of the jurisdiction's principal agricultural industry.”²⁵ Ferry County failed to comply with this requirement.

Commerce claims, without any citation to the record, that “Ferry County’s stated goal was to identify and designate the most productive and suitable farmland to ensure hay production was available to support the cattle industry.”²⁶ But 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.²⁷

²³ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 833, 365 P.3d at 222.

²⁴ Commerce Response Brief p. 29.

²⁵ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 834, 365 P.3d at 222.

²⁶ Commerce Response Brief p. 16.

²⁷ AR 001377, *Ferry County Comprehensive Plan* p. 7-22 (Sept. 24, 2012).

Neither of these goals is limited to supporting the cattle industry. Indeed, the first goal refers to “agricultural resource-based industries” not just the cattle industry.²⁸ Further, the first goal directs the County to enhance the agricultural resource-based industries. By only designating the equivalent of 41 percent of the 8,137 acres of forage-land used for hay, grass silage, and greenchop production, Ferry County did not enhance the livestock or the crop industries.²⁹ The County omitted all but 5.2 percent of 63,778 acres in Ferry County in the farm and agricultural land current use taxation program.³⁰ Ordinance No. 2016-04 failed to conserve any of the 540,605 acres of nonfederal pastureland on which Ferry County’s cattle industry depends.³¹

Commerce argues that the Board has no authority determine if Ferry County complied with GMA provisions not listed in RCW 36.70A.060(1)(d)(i). That is incorrect. Since a timely appeal was filed, the

²⁸ AR 001377, *Id.*

²⁹ AR 000447, USDA NASS, *2012 Census of Agriculture County Profile Ferry County* p. *2.

³⁰ AR 000450, Washington State Department of Revenue Research and Fiscal Analysis Division, *Property Tax Statistics 2015* p. 34 (Nov. 2015); AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016).

³¹ 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; AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016).

Board was required to review Commerce’s decision on the amendments the County adopted to comply with the GMA requirements in RCW 36.70A.060(1)(d)(i). In conducting this review, 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 ...” for those amendments. The GMA must be read as a whole.³² For example, Ferry County’s agricultural lands designations must be consistent with the definition of “agricultural land” in RCW 36.70A.030(2). Commerce’s argument fails to read the GMA as a whole. In addition, Commerce never identifies the GMA provisions it believes CFOFC argued that were inconsistent with RCW 36.70A.060(1)(d)(i) and related provisions of the GMA.³³

Perhaps Commerce was claiming that the CFOFC argument that Ferry County has not conserved its ARL was untimely. But the CFOFC appeal was timely.³⁴

The County Response Brief, on pages 7 and 8, claims that the Board declined to consider whether Ferry County Ordinance 2016-04 complies

³² *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238 – 39, 110 P.3d 1132, 1139 – 40 (2005).

³³ Commerce Response Brief p. 31.

³⁴ AR 000227, *Concerned Friends of Ferry County v. State of Washington, Department of Commerce, and Ferry County*, Eastern Washington Region Growth Management Hearings Board (EWRGMHB) Case No. 17-1-0003, Order Denying Motion to Dismiss (July 10, 2017), at 5 of 6.

with the GMA without any citation to the record. But the Board concluded that “[t]o the extent that Commerce reviewed and relied upon certain portions of Ferry County Ordinance 2016-04 in making its Determination of Compliance, it would be appropriate to address those portions of Ordinance 2016-04 considered by Commerce in rendering its Determination of Compliance.”³⁵

2. 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])

The CFOFC Brief of Appellants documented that Ferry County chose to base its designation of agricultural lands of long-term commercial significance on just on 38 producers who hold state or federal grazing permits or who are on the Cattlemen’s Association list³⁶ rather than the 104 farms in Ferry County that raise cattle.³⁷ While Commerce and Ferry County explain how the County did their survey, they never explain why the County chose to ignore the other 66 farms raising cattle and the future needs of the agricultural industry.³⁸ By failing to accommodate existing and

³⁵ AR 000227, *Id.* at 5 of 6.

³⁶ 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.

³⁷ 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).

³⁸ Commerce Response Brief p. 22; County Response Brief pp. 19 – 20.

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. The Board erred in upholding Commerce’s and the County’s decisions.

Commerce argues that CFOFC is challenging the County’s criteria by arguing that the Ferry County ARL criteria should not be limited to cattle industry. CFOFC is not challenging the criteria, only their application. And Ferry County’s criteria are not limited to the cattle industry.³⁹ While some criteria do reference “grazing and hay production” they are not limited to those agricultural products.⁴⁰ In fact, Ferry County’s ARL designation does not protect the cattle industry by, for example, failing to designate and conserve any of the 540,605 acres of the non-federal pastureland on which Ferry County’s cattle industry depends.⁴¹

Commerce argues that cattle ranching was Ferry County’s major agricultural industry because the sale of cattle and calves constitute the largest agricultural commodity group by value. But the total value of crops

³⁹ AR 000027 – 37, Ferry County Development Regulations Ordinance No. 2016-04 pp. 19 – 29 (Aug. 8, 2016).

⁴⁰ AR 000033, Ferry County Development Regulations Ordinance No. 2016-04 p. 25 (Aug. 8, 2016).

⁴¹ 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.

is larger still at \$2,880,000.⁴² Commerce also points out that the largest area of crop land by acres is forage-land used for hay, grass silage, and greenchop production. That is true, but as the CFOFC Brief of Appellants documented Ordinance No. 2016-04 only designated the equivalent of 41 percent of the 8,137 acres of forage-land.⁴³ This is not maintaining and enhancing the agricultural industry as the Ferry County Comprehensive Plan and WAC 365-190-050(5) require.⁴⁴

To the extent that Commerce's Response Brief, on pages 26 to 28, and the County's Response Brief on page 14 argue that this Court's statements on the County's major agricultural industry, the amount of privately-owned farm land, and the county's rank in agricultural sales control, these arguments fail. The law of the case doctrine only applies to legal principles and jury instructions as to the law that were not objected to, not statements of fact.⁴⁵ The parties asserting *res judicata* or collateral estoppel must establish that the required elements are met.⁴⁶ Commerce and the County never attempted to prove the elements.

⁴² AR 000446 – 47, USDA NASS, 2012 Census of Agriculture County Profile Ferry County pp. *1 – 2.

⁴³ AR 000447, USDA NASS, 2012 Census of Agriculture County Profile Ferry County p. *2; AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016).

⁴⁴ AR 001377, *Ferry County Comprehensive Plan* p. 7-22 (Sept. 24, 2012).

⁴⁵ *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844, 848 – 49 (2005).

⁴⁶ *Stevens Cty. v. Futurewise*, 146 Wn. App. 493, 503, 192 P.3d 1, 6 (2008); *Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262 – 63, 956 P.2d 312, 316 (1998).

Rather the record shows that between 2007 and 2012, the land in farms in Ferry County increased from 749,452 acres to 792,250 acres and the land in farms does not include any National Forest grazing lands.⁴⁷ As the definition of land in farms states “[a]ll grazing land, except land used under government permits on a per-head basis, was included as ‘land in farms’ provided it was part of a farm or ranch.”⁴⁸ The National Forest land in Ferry County is used under government permits which specify the number of animals that can be grazed.⁴⁹ Similarly the record shows that there are many more acres of private farmland than the county’s old estimates. For example, in 2015, 63,778 acres of private land in Ferry County was enrolled in the farm and agricultural land current use taxation program.⁵⁰ The most recent Board FDO did not find that viable crop is quite limited.⁵¹ In 2012, Ferry County did not rank last in the value of agricultural products sold.⁵²

⁴⁷ AR 000446, USDA NASS, *2012 Census of Agriculture County Profile Ferry County – WA* p. *1; AR 000403, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* p. B-13 (May 2014); AR 001371, *Forest Plan Revision, Colville & Okanogan-Wenatchee National Forests May 2009 Briefing: Rangelands and Forest Plan Revision* p. 2 of 2.

⁴⁸ AR 000403, USDA NASS, *2012 Census of Agriculture Washington State and County Data Volume 1* p. B-13 (May 2014) emphasis added.

⁴⁹ AR 001371, *Forest Plan Revision, Colville & Okanogan-Wenatchee National Forests May 2009 Briefing: Rangelands and Forest Plan Revision* p. 2 of 2.

⁵⁰ AR 000449 – 50, Washington State Department of Revenue Research and Fiscal Analysis Division, *Property Tax Statistics 2015* p 31 & p. 34 (Nov. 2015).

⁵¹ AR 001808 – 19, FDO, at 1 – 12 of 12.

⁵² AR 000447, USDA NASS, *2012 Census of Agriculture County Profile Ferry County – WA* p. *2.

This Court should not rely on out-of-date figures from the earlier appeal when more recent data is in the record.

We do agree that this Court's *Concerned Friends of Ferry County* decision is controlling legal authority.⁵³ The earlier Board decision is not, especially since that decision was overruled.⁵⁴ The question for the Board's findings of fact is not whether some previous Board decision committed the same error of fact thereby excusing the current error, but whether the findings are supported by substantial evidence in the record.⁵⁵

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. 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)

CFOFC argued on pages 24 through 33 of its Brief of Appellants that Ferry County misapplied the criteria in Ordinance No. 2016-04 when the

⁵³ *Am. Disc. Corp. v. Shepherd*, 129 Wn. App. 345, 355, 120 P.3d 96, 102 (2005), *aff'd* 160 Wn.2d 93, 156 P.3d 858 (2007).

⁵⁴ *Miotke v. Spokane Cty.*, 181 Wn. App. 369, 377–82 fn. 7, 325 P.3d 434, 438 – 41 fn. 7 (2014); *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 835, 365 P.3d at 223. The earlier Board case, which is closed, was *Concerned Friends of Ferry County v. Ferry County*, EWRGMHB Case No. 01-1-0019, Order Finding Compliance [Agricultural Resource Lands] (Feb. 14, 2014), at 16 of 16 accessed on May 24, 2019 at: <http://www.gmhb.wa.gov/Global/RenderPDF?source=casedocument&id=3490>.

⁵⁵ *Kittitas Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193, 1198 (2011).

County designated agricultural land. Both Ferry County and Commerce argue that CFOFC is challenging the designation criteria this Court upheld. The CFOFC is not challenging the criteria, rather CFOFC is challenging the County's application of the criteria in designating ARL. Commerce recognized that this "Court only faulted the County for failing to designate lands according to its criteria" citing the *Concerned Friends* opinion at 833.⁵⁶ Commerce also wrote that this "Court required that Ferry County not merely designate the acres identified in the prior process, but review the designation to ensure compliance with the GMA requirements and the County planning policies and comprehensive plan."⁵⁷

Unfortunately, Ferry County failed in these duties. Neither Ferry County nor Commerce deny that rather than rating all land capability class II through IV soils for designation as agricultural lands of long-term commercial significance as Ordinance No. 2016-04 requires,⁵⁸ Ferry County only rated the prime farmland soils identified in the North Ferry area soil survey.⁵⁹ As the CFOFC Brief of Appellants documented, this Court concluded that Ferry County's soil criterion requires rating all land capability class II through IV soils, not just those that are both prime

⁵⁶ Commerce Response Brief p. 17.

⁵⁷ Commerce Response Brief pp. 20 – 21.

⁵⁸ AR 000028 – 31, Ferry County Development Regulations Ordinance No. 2016-04 pp. 20 – 23 (Aug. 8, 2016).

⁵⁹ County Response Brief pp. 6 – 7.

farmland and land capability class II through IV.⁶⁰ But the County only rated the prime farmland soils with land capability class II through IV soils, misapplying the criterion.⁶¹

Commerce and Ferry County responded that the soils criteria did not change. That is true, that is why only rating the prime soils that also have a land capability class of II through IV is inconsistent with the soils criterion.⁶²

Ferry County argues, without any citation to authority, that CFOFC raised this before the Court of Appeals when arguing the case that led to the 2015 decision. CFOFC challenged the points given to various soils, not the County's failure to properly apply the point system and to rate all land capability II through IV soils.⁶³

Both Commerce and Ferry County point to a whereas in Ordinances 2013-05 and 2016-04 citing 21,360 acres of prime farmland soils found in North Ferry County as evidence the County has always only rated prime farmland soils when determining agricultural lands of long-term commercial significance. But neither that whereas nor the preceding whereas say that Ferry County uses prime farmland soils in designing

⁶⁰ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 819, 365 P.3d at 215.

⁶¹ AR 000456, Peter Scott Letter to Futurewise p. 4 (July 16, 2016).

⁶² AR 000027 – 37, Ferry County Development Regulations Ordinance No. 2016-04 pp. 19 – 29 (Aug. 8, 2016).

⁶³ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 819 – 21, 365 P.3d at 215 – 16.

agricultural of long-term commercial significance.⁶⁴ The 21,360 acres of prime farmland soils “whereas” instead concludes that “this figure of prime soil acreage is not useful in substantiating acres used for agricultural activity ...”⁶⁵

Neither Commerce nor Ferry County deny that the USDA *Prime Farmland List* for the North Ferry Area from 2/15/2005 was used to rate the soils in designating agricultural lands of long-term commercial significance.⁶⁶ Neither Commerce nor Ferry County deny that 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.⁶⁷ These soils total 180,813 acres.⁶⁸ 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. 2016-04.⁶⁹

⁶⁴ AR 001654, Ferry County Development Regulations Ordinance No. 2016-04 p. 3 strike through version; AR 001696, Ferry County Development Regulations Ordinance No. 2016-04 p. 3 (Aug. 8, 2016).

⁶⁵ AR 001654, *Id.*; AR 001696, *Id.*

⁶⁶ AR 00502, USDA *Prime Farmland List North Ferry Area Washington* p. 1 (2/15/2005); 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).

⁶⁷ See CFOFC Brief of Appellants pp. 27 – 29.

⁶⁸ *Id.*

⁶⁹ AR 000028 – 31, Ferry County Development Regulations Ordinance No. 2016-04 pp. 20 – 23 (Aug. 8, 2016).

Neither Commerce nor Ferry County deny that the *Prime Farmland List* from 2/15/2005 omits 52 of the prime farmland soils within the Colville Indian Reservation.⁷⁰ The County concedes it did not consider the 52 prime soils on the Colville Indian Reservation even though it designated agricultural land on the reservation.⁷¹ So even if the County's criterion used prime farmland soils, the County failed to properly apply that criterion.

Commerce and Ferry County argue that CFOFC is arguing that the County's criteria for designating ARL are erroneous. That is not true, we are arguing that the County erroneously applied the criteria.

2. 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)

CFOFC's Brief of Appellants documented, on pages 34 through 39, that Parcel Number 44004110001000 on Fourth of July Creek Road scored enough points to be designated ARL. Commerce claims that this is not correct because it does not account for the timbered acres on the parcel.⁷² But the County's own Assessor's data for the parcel shows a Department of

⁷⁰ 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).

⁷¹ 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*.

⁷² Commerce Response Brief p. 19 citing AR 1476, but Commerce probably meant to cite to AR 001477. Neither AR 001476 or 001477 identify how many acres were “timbered.”

Revenue Code of “83 Resource Agriculture Current Use” and a “yes” for current use taxation status and that the parcel is 198 acres so it qualifies for the taxation and parcel size points.⁷³ The County’s aerial image for Parcel Number 44004110001000 shows that the parcel is farmed.⁷⁴ Further, neither the parcel size criterion nor any of the other point system criteria exclude timberland, and how could they as most of the ARL the County has designated is National Forest land.⁷⁵ Commerce also claims that because the farm and garden store, the meat cutting business, and the farmers market are “not commercial slaughterhouses” they do not meet the proximity to market criteria. But criterion six says nothing about commercial slaughterhouses, only “[a]ccessibility to market[s] ...” and “support services.”⁷⁶ Ordinance No. 2016-04 does say that “cattle sales are 79% of sales therefore are a majority of sales within Ferry County. The cattle market is Davenport, WA.”⁷⁷ But cattle sales only made up 36 percent of the market value of

⁷³ AR 000484, Ferry County MapSifter Assessor’s data for Parcel Number 44004110001000 p. 1 of 2; Mr. Scott’s letters include no supporting evidence documenting his claims and do not cite to any criteria showing that timbered land is excluded from the parcel size or the current use taxation criteria. AR 001460 – 63; AR 001476 – 77.

⁷⁴ AR 000483, Ferry County MapSifter aerial image of Parcel Number 44004110001000.

⁷⁵ AR 000027 – 38, Ferry County Development Regulations Ordinance No. 2016-04 pp. 19 – 30 (Aug. 8, 2016).

⁷⁶ AR 000033, Ferry County Development Regulations Ordinance No. 2016-04 p. 25 (Aug. 8, 2016).

⁷⁷ AR 000038, Ferry County Development Regulations Ordinance No. 2016-04 p. 30 (Aug. 8, 2016).

agricultural products sold by Ferry County farms and ranches in 2012.⁷⁸

Further, nothing in this statement limits markets to “commercial slaughter houses.” The meat cutting business, farmers market, and farm store are markets and support services in Ferry County.⁷⁹

However, even taking away the two points for criteria five and six, this farmland still scores 4.8 points exceeding the four points Ferry County claims to have used to designate agricultural lands of long-term commercial significance.⁸⁰ The Board erred in concluding that Ferry County accurately implemented its point system.⁸¹

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])

Both Ferry County and Commerce argue that the Board could not consider whether Ferry County has conserved its agricultural lands of long-term commercial significance. But RCW 36.70A.060(1)(d)(i) required Commerce to “find[] that the county’s development regulations ...” “assure[d] the conservation of agricultural ... resource lands designated

⁷⁸ AR 000447, USDA NASS, *2012 Census of Agriculture County Profile Ferry County* p. *2.

⁷⁹ 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.

⁸⁰ CFOFC’s Brief of Appellants pp. 34 – 39; AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016).

⁸¹ AR 001816, FDO at p. 9 of 12.

under RCW 36.70A.170” as RCW 36.70A.060 mandates. The Board was required to review compliance with RCW 36.70A.060.⁸²

As the CFOFC Brief of Appellants documented, while Ordinance No. 2016-04 adopted a new future land use map for the comprehensive plan,⁸³ it failed to adopt a zoning map that zoned the newly designated areas Agricultural Lands of Long-Term Commercial Significance.⁸⁴ Contrary to Commerce’s argument, the agricultural lands development regulations only apply to lands zoned as agricultural lands. Most tellingly, Commerce never cites to a zoning map that zoned the land designated ARL by the comprehensive plan’s Future Land Use Map in 2016.⁸⁵ 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.”⁸⁶ Because the County never amended its zoning maps,

⁸² RCW 36.70A.280(1)(f); RCW 36.70A.060(1)(d); RCW 36.70A.300(1).

⁸³ AR 000057, *Ferry County Comprehensive Plan Future Land Use Map Agricultural Land of Long-Term Commercial Significance*.

⁸⁴ AR 000038 – 39 & 000055, *Ferry County Development Regulations Ordinance No. 2016-04* pp. 30 – 31 & “Maps” (Aug. 8, 2016).

⁸⁵ Commerce Response Brief pp. 31 – 32.

⁸⁶ *Stafne v. Snohomish Cty.*, 174 Wn.2d 24, 31, 271 P.3d 868, 871 – 72 (2012) underlining added.

the agricultural lands designated in 2016 are still zoned Rural permitting 2.5 acre lots.⁸⁷

The County argues that since this Court’s 2015 decision only addressed the County’s failure to designate agricultural land, the Board could not have considered whether Ferry County has conserved the land the comprehensive plan designated ARL as RCW 36.70A.060 requires. But this Court’s decision recognized Ferry County’s duty to under the GMA to “adopt development regulations ... to assure the conservation of” these ARL. RCW 36.70A.060(1).⁸⁸ Also, “[t]he ultimate purpose of designating ARL under the GMA is to conserve these lands. RCW 36.70A.020, .060(1).”⁸⁹ Having designated an additional 2,939.98 acres,⁹⁰ the County was required to conserve the land “to maintain and enhance the agricultural industry.”⁹¹

Commerce asserts that RCW 36.70A.060(1)(d) limited the issues the Board could consider to the issues addressed in Commerce’s Determination of Compliance. But nothing in RCW 36.70A.060(1)(d) limits the Board’s review to issues decided by Commerce.

⁸⁷ AR 000038 – 39 & 000055, Ferry County Development Regulations Ordinance No. 2016-04 pp. 30 – 31 & “Maps” (Aug. 8, 2016).

⁸⁸ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 814, 365 P.3d at 213.

⁸⁹ *Concerned Friends of Ferry Cty.*, 191 Wn. App. at 832, 365 P.3d at 222.

⁹⁰ AR 000037, Ferry County Development Regulations Ordinance No. 2016-04 p. 29 (Aug. 8, 2016).

⁹¹ *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 558, 14 P.3d 133, 141 (2000).

Ferry County argues that CFOFC did not file a timely appeal of Ordinance 2016-04. The 60-day period for filing a petition for review does not begin until the publication of a notice of adoption.⁹² Ferry County and Commerce have not produced a published notice of adoption that started the appeal deadline. So, this appeal of Ordinance 2016-04 is timely in that it was filed less than 60 days after the publication of a notice of adoption.

Ferry County argues the CFOFC commented on Commerce's and the County's Notice of Joint Public Hearing which listed as the only issue related to agricultural lands the County's "failure to designate a critical mass of commercially significant agricultural resource lands."⁹³ Commerce's and the County's notice set a March 22, 2016, deadline for public comments.⁹⁴ But Ferry County did not adopt Ordinance No. 2016-04 which failed to zone the ARL designated by the comprehensive plan's future land use map until August 8, 2016.⁹⁵ When CFOFC commented on the public notice the two organizations did not, and could have known, that Ferry County would designate ARL in the comprehensive plan without also

⁹² *Moore-Clark Co., Inc. v. Town of La Conner*, Western Washington Growth Management Hearings Board (WWGMHB) Case No. 94-2-0021, Order Regarding Dispositive Motions (Feb. 2, 1995), at 2, 1995 WL 903126, at *2; RCW 36.70A.290(2). There were formerly three Boards. The Western Board had jurisdiction over Western Washington counties and cities that planned under RCW 36.70A.040 outside of the Central Puget Sound counties.

⁹³ County Response Brief pp. 11 – 12.

⁹⁴ AR 001775, Department of Commerce and Ferry County Notice of Joint Public Hearing.

⁹⁵ AR 000056, Ferry County Development Regulations Ordinance No. 2016-04 p. *48 (Aug. 8, 2016).

zoning the land Agricultural Lands of Long-Term Commercial Significance. CFOFC could not have raised this issue in March. Further, Ferry County cites no GMA provision or regulation that required the CFOFC to raise this issue in March 2016.

Finally, it is important to recognize that the legislature conditioned Ferry County's ability to choose to become a partially planning county on the County's conservation of agricultural lands.⁹⁶ Counties that do not plan under RCW 36.70A.040 do not have to conserve agricultural lands, only designate them.⁹⁷ But Ferry County, as a partially planning county, has to conserve agricultural land showing a clear legislative intent to conserve the county's farm and ranch land. This the County failed to do.

III. CONCLUSION

The Board's FDO failed to correctly interpret the GMA and made findings that are not supported by substantial evidence. 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 June

2019,



Tim Trohimovich, WSBA No. 22367
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⁹⁶ RCW 36.70A.040(2)(c).

⁹⁷ RCW 36.70A.170(1); RCW 36.70A.060(1).

CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 5th day of June 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: **Reply Brief of Appellants Concerned Friends of Ferry County & Futurewise.**

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Signed and certified on this 5th day of June 2019,

Tim Trohimovich, WSBA No. 22367

FUTUREWISE

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