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Washington State
Court of Appeals
Division Two

May 12, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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	No. 53038-4-II UNPUBLISHED OPINION

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

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

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

FACTS

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

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

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

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

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

Ordinance 2016-04

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

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

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

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

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

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

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

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

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

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

CR at 67.

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

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

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

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

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

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

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

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

ANALYSIS

I. STANDARD OF REVIEW

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

[5] Ch. 34.05 RCW.

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

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

II. SCOPE OF REVIEW.

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

A. Legal Principles

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

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

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

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

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

B. Board Review

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

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

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

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

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

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

III. DETERMINATION OF COMPLIANCE

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

A. Legal Principles

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

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

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

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

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

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

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

B. Concerned Friends

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

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

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

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

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

We concluded:

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

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

C. Ordinance 2016-04.

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

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

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

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

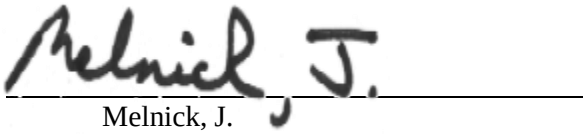
On remand from *Concerned Friends*, the County failed to comply with the GMA, applicable WAC's, its own comprehensive plan goals, and Natural Resource Policy goal. The Department, therefore, erred by making a determination of compliance.

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

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

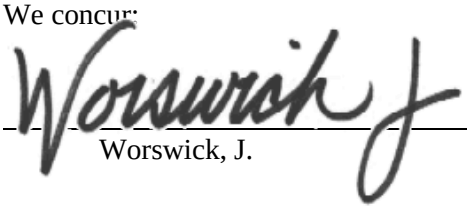
We reverse.

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

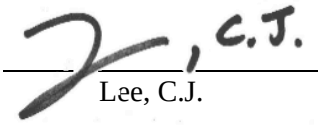


Melnick, J.

We concur:



Worswick, J.



Lee, C.J.