

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

Court of Appeals No. 35569-8-II

FUTUREWISE AND FRIENDS OF PIERCE COUNTY, Appellants,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD, et al., Respondents.

**FUTUREWISE AND FRIENDS OF PIERCE
COUNTY'S OPENING BRIEF**

Alexandria K. F. Doolittle
Keith Scully
Attorneys for Futurewise and Friends
of Pierce County

Alexandria K. F. Doolittle, WSBA #36332
Attorney at Law
1026 32nd Avenue East
Seattle, Washington 98112
206.550.5199

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STATEMENT OF THE CASE

Prior to November 9, 2004, Pierce County protected its farmland in accordance with the Growth Management Act (GMA) by designating areas of land as agricultural.¹ These designated agricultural areas contained farms and other agricultural enterprises of varying sizes: some existed on large parcels of land, or on several small parcels operated together.² Others, such as honeybee operations, berries, organic vegetables and others, were on considerably smaller parcels.

Particular areas were designated as agricultural by looking to several factors found in the GMA, including the nature of the soil. Soil quality and land capability are classified by the U.S. Department of Agriculture and reflected through soil maps in published soil surveys.³ Those maps reflect “soil units” of at least five acres in size; every parcel of land, no matter how big or how small, has the quality of soil contained therein measured on the maps in one or more soil units.⁴

On November 9, 2004, the Pierce County Council adopted Ordinance No. 2004-87s, amending the County’s Comprehensive Plan.⁵ Among other things, Amendment 2 of that ordinance (“Amendment 2”) performed a reclassification of natural resource areas including

¹ CP 16 at AR 52 at Tab 364. Amendment 2 to Pierce County Ordinance No. 2004-87s, *Agricultural Policies and Agricultural Resource Lands Designations* (hereafter “Amendment 2”).

² CP 16 at AR 52 at Tab 335. November 8, 2004 Letter from 1000 Friends of Washington to the Honorable Harold Moss, Pierce County Councilmember.

³ CP 16 at AR 52 at Tab 95. Letter from Tim Trohimovich to Calvin Goings with attachment of USDA Natural Res. Conservation Serv., *Soil Survey Geographic Database for Pierce County Area*, Washington – WA653 1-11 of 11.

⁴ Id.

⁵ CP 16 at AR 52 at Tab 364. Amendment 2.

agricultural lands.⁶ Amendment 2 provides that all parcels of land under five acres were excluded from the agricultural land designation.⁷

Amendment 2 reads, in pertinent part:

19A.30.070(B)(3)

3. Designation of Agricultural lands of "long-term commercial significance" requires consideration of 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(10)). WAC 365-190-050 prescribes the minimum guidelines for identifying agricultural lands of long-term commercial significance and said minimum guidelines shall be considered in designating land as Agricultural Resource Land, including the following:

...

(1) Minimum parcel size. The threshold size used as a basis for the designation of Agricultural Resource Lands is 5 acres or larger in size because soils data is most reliable at this size. Options for including parcels below the 5-acre threshold are provided in community planning processes, see 19A.30.070 C. or the Comprehensive Plan Amendment process.

This Amendment cuts holes in otherwise agricultural areas, leaving hundreds of parcels and thousands of acres unprotected, yet still surrounded by agricultural land.⁸ The net effect of Amendment 2 contradicts the recommendation of the County's own consultant and goals,

⁶ Id.

⁷ The ordinance has a provision for redesignating these small parcels of land as agricultural, but it is dependent on a private property owner choosing to initiate and participate in a community planning process, the result of which would not be determinative until the County Council passed an ordinance ratifying the process's decision.

⁸ CP 16 at AR 52 at Index No. 335. USDA National Agricultural Statistics Service. 2002 Census of Agriculture: Washington State and County Data, Volume 1, Geographic Area Series Part 47, p. 241 (Jun. 2004); CP 16 at AR 52 at p. 35. Prehearing Brief for Petitioner Futurewise.

and causes damage to the economic sustainability of the remaining farms by bringing them into conflict with commercial and residential use on the small parcels now excluded from consideration as agricultural land.⁹

Futurewise and Friends of Pierce County (Futurewise and Friends) filed a timely petition with the Central Puget Sound Growth Management Hearings Board (Board) for review of Pierce County's Comprehensive Plan and Urban Growth Areas on February 2, 2005.¹⁰ On August 4, 2005, the Board affirmed Amendment 2 and held that the five-acre threshold was not clearly erroneous given that the average farm size in Pierce County is much larger than the threshold, and that the threshold "correlated well to the accuracy" of the soil survey.¹¹ Futurewise and Friends filed a motion for reconsideration, which the Board denied.¹²

Futurewise and Friends then filed a timely petition for judicial review in the Thurston County Superior Court.¹³ On October 24, 2006, the Superior Court upheld the Board's decision.¹⁴ On November 16, 2006, Futurewise and Friends filed a timely Notice of Appeal seeking judicial review by this court.

⁹ CP 16 at AR 52 at Tab 335.

¹⁰ Futurewise and Friends petitioned for review of several different errors in the Comprehensive Plan. Only this one issue is present on appeal.

¹¹ CP 16 at AR 81. City of Bonney Lake v. Pierce County, Nos. 04-3-0007c & 05-3-0016c, Order Finding Compliance and Final Decision and Order at *19 (CPSGMHB Aug. 4, 2006)

¹² CP 16 at AR 83. Motion for Reconsideration for Petitioner Futurewise (Aug. 16, 2005), CP 16 at AR 84, Order Denying Reconsideration (Aug. 31, 2005).

¹³ CP 16 at AR 85. Futurewise & Friends of Pierce County's Petition for Judicial Review of an Administrative Decision, Declaration of Service for Petitioner Futurewise (Sept. 29, 2005).

¹⁴ CP 38. Futurewise, and Friends of Pierce County v. CPSGMHB, Cause No. 05-2-01959-7, Order Affirming Final Decision of Central Puget Sound Growth Management Hearings Board.

ISSUE STATEMENTS AND ASSIGNMENTS OF ERROR

Issue 1: The Growth Management Act mandates preservation of Agricultural Land. The County enacted a blanket exclusion of agricultural parcels under five acres. Did the Superior Court err in affirming the Board's finding that this arbitrary exclusion of agricultural land complied with the Growth Management Act?

Errors of Law

1. The Superior Court erred in finding that Petitioners had not met the burden of proving that the Board's final decision and order did not comply with the Growth Management Act.
2. The Superior Court erred in finding that the Board did not erroneously interpret or apply the law when it concluded that Amendment 2 in Pierce County Ordinance No. 2004-87s complied with RCW 36.70A.020(8), .030(2) and (10), .040, .050, .060, .170, and .177(1).
3. The Superior Court erred in finding that petitioners had not been substantially prejudiced by the Board's actions.
4. The Superior Court erred in finding that the Board's final actions were supported by substantial evidence.

Issue 2. Counties must designate agricultural land according to the Growth Management Act. The County excluded parcels under five acres. Did the Board err in finding that the County's designation of agricultural lands complied with the GMA?

Errors of Law

1. The Board erred in finding that the County designated agricultural lands in Amendment 2 in compliance with the GMA and WAC definitions of "Agricultural Land" and "Long-Term Commercial Significance," and the mandate to conserve agricultural land.
2. The Board erred in concluding that the County's use of a minimum parcel size of five acres is within the County's discretion.
3. The Board erred in concluding that the County did not err in including a threshold parcel size as part of the Agricultural Resource Lands designation criteria.
4. The Board erred in dismissing the petition for review of Amendment 2.

5. The Board erred in denying the Motion for Reconsideration.

Issue 3: Findings of fact must be supported by substantial evidence. The Board affirmed Amendment 2 based on a belief that soil maps are only accurate above five-acre parcels, even though the maps demonstrate the qualities of all soil, regardless of parcel size. Did the Board err in finding that Amendment 2 coordinated well to the accuracy of the soil survey?

Errors of Fact

1. The Board erred in relying on the County's stated rationale for the five-acre parcel minimum, that the parcel size correlated to the accuracy of the soil maps.

SUMMARY OF THE GROWTH MANAGEMENT ACT

This section summarizes the key provisions of the GMA applicable to this case. More detail is given of provisions at issue in this case in subsequent subsections of the argument.

“The Legislature adopted the GMA to control urban sprawl”¹⁵

The GMA was enacted in two parts by the 1990 and 1991 legislatures. It has been amended every year since then.

The GMA includes goals and requirements.¹⁶ These goals “shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.”¹⁷ The GMA has stated 13 goals.¹⁸

These goals require both substantive and procedural compliance.¹⁹

¹⁵ King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 138 Wn.2d 161, 167, 979 P.2d 374, 377 (1999).

¹⁶ RCW 36.70A.320(3).

¹⁷ RCW 36.70A.020.

¹⁸ RCW 36.70A.020.

¹⁹ RCW 36.70A.290(2); and Thurston County v. Cooper Point Ass'n, 148 Wn.2d 1, 14, 57 P.3d 1156, 1163 (2002).

The Board is required to consider both goals and the specific requirements in determining whether a plan complies with the GMA: ‘The board shall find compliance [with GMA] unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the *goals* and requirements of this chapter.’ RCW 36.70A.320(3) (emphasis added [by the Court of Appeals]).²⁰

There is no state or local agency to oversee local government compliance with the goals and requirements of the Growth Management Act:

[T]he GMA does not require state administrative approval of local plans and regulations. Thus, local fidelity to GMA goals is not systematically enforced, but depends upon appeals to the Growth Boards and the courts.²¹

Under this system, citizen groups and plain citizens, such as Futurewise and Friend of Pierce County, bear the brunt of assuring that city and county comprehensive plans comply with the Growth Management Act. Futurewise was in fact formed to help effectively implement the GMA. The GMA created three Growth Management Hearings Boards to hear and decide appeals alleging that the comprehensive plans, development regulations, and shoreline master programs are not in compliance with the GMA.²² Pierce County is within the jurisdiction of the Central Puget Sound Growth Management Hearings Board.²³ The members of the Board are appointed by the Governor to six-year terms. The boards

²⁰ Low Income Housing Institute v. City of Lakewood, 119 Wn.App. 110, 115 -- 16, 77 P.3d 653, 655 (2003).

²¹ Richard L. Settle, Washington’s Growth Management Revolution Goes to Court, 23 SEATTLE U. L. REV. 5, 48 -- 49 (1999).

²² RCW 36.70A.280.

²³ RCW 36.70A.250(1)(b).

operate under rules of practice and procedure adopted through notice and comment rule-making.²⁴

STANDARD OF REVIEW

This court sits in the same position as the superior court and thus directly reviews the Board's Final Decision and Order and the ruling on the Motion for Reconsideration. City of Redmond v. Central Puget Sound Growth Management Hearings Board, 138 Wn.2d 38, 45 (1998) citing Tapper v. Employment Security Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). In this case there are both questions of fact and questions of law at issue. The burden of demonstrating the invalidity of the Board's decision is on the party asserting the invalidity. RCW 34.05.570(1)(a).

The standard of review for the Board's findings of fact is whether substantial evidence supports those findings. RCW 34.05.570(3)(e). Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order."²⁵ The County's agricultural designation, and the Board's decision to support this designation, is based entirely on an error of fact.

Interpretation and application of a statute is inherently a question of law. The standard of review for the Board's conclusions of law is *de novo*. RCW 34.05.570(3)(d).²⁶ The reviewing court is the "final arbiter"

²⁴ RCW 36.70A.270(7).

²⁵ King County, 142 Wn.2d at 553.

²⁶ See also King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 553, 14 P.3d 133 (2000); City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 45, 959 P.2d 1091 (1998); Lewis County v. Western Washington Growth Management Hearings Board, 157 Wn.2d 448, 497 139 P.3d 1096 (2006).

of state law, and “conclusions of state law entered by an administrative agency or court below are not binding on this court.” Leschi Improvement Council v. Wash. State Highway Comm’n, 84 Wn.2d 271, 286, 525 P.2d 774, 804 P.2d 1 (1974).²⁷ Although the Board should be granted some deference by a reviewing court, that deference is not unlimited. The Supreme Court explained the application of RCW 34.05.570(3)(d), and what is required when determining whether the agency has erroneously interpreted or applied the law:

[W]e accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency’s interpretation of a statute. As we stated in Overton v. Wash. State Econ. Assistance Auth., 96 Wash.2d 552, 555, 637 P.2d 652 (1981):

Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency’s construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review....

We also recognize the countervailing principle that it is ultimately for the court to determine the purpose and meaning of statutes, even when the court’s interpretation is contrary to that of the agency charged with carrying out the law.²⁸

Pierce County may argue that their decision is entitled to deference under the GMA and that the County should be accorded unlimited discretion. However, the Court of Appeals recently addressed this issue:

While the [county] is correct that RCW 36.70A.320(1) requires “boards to grant deference to counties” in their

²⁷ Id.

²⁸ City of Redmond, 136 Wn.2d 38 at 46.

development plans, such deference is not unbounded. The GMA itself limits a [county's] discretion. As our State Supreme Court recently stated,

Local governments have broad discretion in developing [comprehensive plans] and [development regulations] tailored to local circumstances.” *Diehl*, 94 Wn. App. At 651. Local discretion is bounded, however, by the goals and requirements of the GMA. In reviewing the planning decisions of local governments, the Board is instructed to recognize “the broad range of discretion that may be exercised by counties and cities *consistent with the requirements of this chapter*” and to “grant deference to counties and cities in how they plan for growth, *consistent with the requirements and goals of this chapter.*” RCW 36.70A.3201 (emphasis in original).²⁹

The Board has incorrectly interpreted or applied the law involving Pierce County’s designation of agricultural land. Specifically, the County’s exclusion of parcels under five acres in size is not only based on an error of fact, but is in violation of several provisions of the GMA. Furthermore, the County’s decision to exclude Prime Farmland from consideration for agricultural designation proves failure by the county to fulfill the requirements to designate and conserve agricultural land.

ARGUMENT

Pierce County has made an effort to realize the unique importance of agricultural lands in Pierce County.³⁰ Unfortunately, the County’s decision to exclude parcels of land smaller than five acres from its agricultural designation is based on the mistaken belief that there is no

²⁹ *King County*, 142 Wn.2d 543.

³⁰ RCW 36.70A.060. “Each County that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under 36.70A.170.”

accurate means for determining the quality of the soil within those small parcels. Even if the County had not made this error of fact, the exclusion of these parcels without regard to the other criteria that must be considered for designation of agricultural lands violates the Growth Management Act.

A. Pierce County must protect agricultural land in accordance with the GMA's mandates.

A county regulated under the GMA must designate as agricultural lands that are:

[N]ot already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products[.]³¹

A county's determination of whether land should be designated as agricultural *must* be formed through consideration of mandatory criteria, it *must* be compelled by the conservation mandate of the GMA, and *must* be consistent with the Growth Management Act's planning goals.³²

According to these goals, the GMA works to (1) provide economic opportunity to all citizens of the state; (2) maintain, enhance, conserve, protect, and discourage uses incompatible with agricultural lands; and (3) reduce sprawl.³³ These goals are to be used to guide local governments when they are making land use planning decisions. The county did not accurately consider the proper criteria, did not fulfill its obligation to conserve agricultural land, and did not meet the goals of the GMA. The Board erred in failing to find so, and the Superior Court's failure to

³¹ RCW 36.70A.170(1)(a).

³² RCW 36.70A.020.

³³ RCW 36.70A.020 §§(5), (8), and (2).

recognize the Board's error substantially prejudiced Futurewise and Friends of Pierce County.

B. The County did not consider the proper criteria in determining the designation of agricultural land. The Board erred when it found otherwise.

Agricultural land is land:

(a) not already characterized by urban growth (b) that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, *and (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses. We further hold that counties may consider the development-related factors enumerated in WAC 365-190-050(1) in determining whether Lewis County's 2003 ordinances complied with RCW 36.70A.170(1).*³⁴

To qualify as agricultural land of long-term commercial significance, land must therefore satisfy three prongs: it must *not already be characterized by urban growth*, it must be *primarily devoted to commercial agricultural production*, and it must have *long-term commercial significance* for agricultural production.³⁵ Because Pierce County unconditionally omitted parcels smaller than five acres based on a misinterpretation of the soil survey, the County did not consider any of the appropriate criteria for those small parcels. Additionally, the County's consideration of capacity and productivity of the land in Amendment 2 is

³⁴ Lewis County v. Western Washington Growth Mgmt. Hearings Bd., 157 Wn.2d 448, 502 139 P.3d 1096 (2006) (Underline emphasis added); see also City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 959 P.2d 1091 (1998).

³⁵ Id.

inaccurate. It is incomplete and inaccurate. The Board erred in supporting this GMA violation.

- 1. Parcels less than five acres that are *not currently characterized by urban growth* fulfill the threshold requirement in the definition of agricultural land.**

The County is required to designate agricultural land that “is not already characterized by urban growth” and that has long-term commercial significance.³⁶ The County cannot remove agricultural land that is not characterized by urban growth without first applying statutory and WAC criteria to determine whether it has long-term commercial significance for agricultural production.³⁷ However, this is exactly what Pierce County did. Parcels five acres or less are found throughout the entire agricultural area within Pierce County. These parcels meet the first prong of the agricultural land definition.

- 2. Parcels under five acres are *primarily devoted to agricultural production*. The Board erred by not finding so.**

The small parcels excluded from agricultural designation by Pierce County are “primarily devoted to agricultural production.” The Washington State Supreme Court in City of Redmond v. Western Washington Growth Management Hearings Board focused specifically on what it means for land to be *primarily devoted to* agriculture:

Land is “devoted to” agricultural use under RCW 36.70A.030 if it is in an *area* where the land is actually

³⁶ Id.

³⁷ Id. at 504-5. Additionally, RCW 36.70A.050 provides guidelines to classify agricultural lands. These guidelines are established by CTED.

used or capable of being used for agricultural production. Indeed, support for this definition of “devoted to” is found in dictionary treatment of the term. One of the primary meanings of “devote” is to “set apart or dedicate by a solemn or formal act.” The land in this case was set apart for agricultural use by longstanding zoning. While the land use on the particular parcel and the owner’s intended use for the land may be considered along with other factors in the determination of whether a parcel is in an area primarily devoted to commercial agricultural production, neither current use nor land owner intent of a particular parcel is conclusive for purposes of this element of the statutory definition.”³⁸

a. Area-wide Analysis

When determining whether this prong is fulfilled, the Court’s definition requires that the focus be the *area* that holds the parcel, and whether it is used or is capable of being used for agricultural production.³⁹ The Court reiterated this by stating “the Legislature intended the land use planning process of GMA to be area-wide in scope when it required development of specific plans for natural resource lands and, later, comprehensive plans.”⁴⁰ Pierce County did not utilize an area-wide approach.

In the present case, many of the parcels in question in Pierce County are actively being farmed. As the maps for the Puyallup Valley show,⁴¹ farming is continuous in this area, not spotty. Parcels that are five acres or less are located all throughout the agricultural areas of Pierce County. A November 8, 2004 letter

³⁸ City of Redmond, 136 Wn.2d at 53. (Emphasis added.)

³⁹ *Id.* emphasis added.

⁴⁰ City of Redmond, 136 Wn.2d at 52.

⁴¹ CP 16 at AR 52 at Tab 95. Letter from Tim Trohimovich to Calvin Goings with attachments. (Map attached to this brief for ease of reference as Exhibit A).

to the Pierce County Council identifies the problem with the five-acre minimum:⁴²

A fifth problem with this criterion is that farms are often made up of multiple parcels of land. Some of these are smaller than five acres, but this criterion will exclude them. For example, in the Puyallup River Valley south of Sumner parcels 0520304002 and 0520304033 are one acre in size, but according to the Pierce County Assessor-Treasurer records enclosed with our July 7, 2004 letter to the Planning Commission these parcels are being farmed and are in the Agricultural Current use taxation program. The farm these parcels are a part of is larger than 100 acres, but under this criterion some of the farm fields will not be protected. In the real property information submitted with the original of this letter are additional fields and farms which are smaller than five acres but also for farming. This is a widespread problem.

A sixth problem is that it is common for farm dwellings to be on smaller separate parcels. This is done so that family members working on the farm can own their own home separate from the farm for financing or other purposes. The five acre lot criterion will often exclude these dwellings from the agricultural zone. Returning to the area south of Sumner, parcel 0520293049 is 0.41 acres, is owned by a family farmer, and is occupied by a single-family home. It is adjoining a large field. This is documented by the Assessor-Treasurer records enclosed with our July 7, 2004 letter to the Planning Commission.

Even if the parcels were not actively being farmed, Pierce County must still protect them if they are capable of being used for agricultural production.⁴³ In City of Redmond, land inside an urban growth area had been zoned as agricultural for a long time.⁴⁴ In planning under the GMA, the City of Redmond designated the property in question as agricultural

⁴² CP 16 at AR 52 at Tab 335.

⁴³ City of Redmond, 136 Wn.2d at 53.

⁴⁴ City of Redmond, 136 Wn.2d at 52.

against the opinion of the land-owners who intended to use the land for development instead of agricultural production.⁴⁵ The land-owners bought the land knowing it was zoned agricultural in hopes that at some future date the City would up-zone the property for more intensive development.⁴⁶ The Court felt strongly that the GMA was created in part to address this very pressure:

In the normal course, as economic conditions changed with the growth of the City, they might have reaped the rewards of developing their land. But the GMA changed the normal course. The GMA sought to control and regulate growth, and specifically emphasized the protection of natural resource lands, including agricultural land. The Legislature hoped to preserve agricultural land near our urban centers so that freshly grown food would be readily available to urban residents and the next generation could see food production and be disabused of the notion that food grows on supermarket shelves.⁴⁷

The Supreme Court's area-wide approach supports the requirements of RCW 36.70A.060(1)(a), and precludes Pierce County from addressing agricultural lands on a parcel-by-parcel basis. This violation should have been recognized by the Board and the Superior Court.

b. Incompatible Uses

Pierce County's exclusion of parcels under five acres is especially problematic because it allows incompatible uses next door to cropland.

The designations and regulations adopted according to the GMA:

“[S]hall assure that the uses adjacent to agricultural... lands shall not interfere with the continued use, in the accustomed manner and in accordance with best

⁴⁵ Id. at 43-5.

⁴⁶ Id. at 57.

⁴⁷ Id. at 57-8.

management practices, of these designated lands for the production of food, [and] agricultural products...”⁴⁸

Additionally, one of the 13 goals of the GMA is to “[m]aintain and enhance natural resource-based industries, including productive timber, agricultural and fisheries industries. Encourage the consideration of productive forest lands and the productive agricultural lands, and discourage incompatible uses.”⁴⁹ The County’s plan cuts holes in the area designated largely as agricultural and fails to discourage incompatible uses. This puts pressure on adjoining agricultural land to succumb to pressures to urbanize and violates the County’s obligation to assure the prevention of such incompatible uses that is contained in RCW 36.70A.060(1).

These holes reduce the productivity of agricultural lands and exposes the properties adjoining agricultural land to hazards from normal agricultural operations such as odors, noise, dust, and overspray. As the record in this case reflects, “[a]t the Planning Commission hearing on amendments to the development regulations for farmland, several farmers testified that adjoining residential development has interfered with normal farming practices.”⁵⁰ One of the reasons that farmland is converted to other uses in situations similar to Pierce County is the impermanence syndrome. The impermanence syndrome is:

[C]haracterized by the belief among farmers that agriculture in their area has limited or no future and that

⁴⁸ RCW 36.70A.060(1)(a).

⁴⁹ RCW 36.70A.020(8).

⁵⁰ CP 16 at AR 52 at Tab 335.

urbanization will absorb the farm in the not-too-distant future. It is manifested by disinvestment in farming inputs, the sale of farmland tracts for hobby farm or acreage development, and shifting crops from those requiring labor or capital intensity, such as berries and orchards, to those requiring little labor or investment, such as pasture or annual crops. The result can be vast areas of underutilized and idled land near and between urban areas. It seems for every acre of prime farmland that is urbanized, up to another acre becomes idled due to the impermanence syndrome. When farmers become uncertain about the future viability of agriculture in their area, farmland production falls and so does farming income. Ultimately, the critical mass of farming production needed to sustain the local farming economy collapses. The ultimate purpose of a farmland preservation scheme, in the opinion of several researchers, is to remove the impermanence syndrome. This occurs only when all speculation for nonfarm purposes is removed.⁵¹

The County's exclusion of parcels smaller than five acres from agricultural designation will perpetuate the impermanence syndrome and lead to a continuing loss of agricultural lands due to incompatible uses. This kind of result is inconsistent with the requirement that the County consider the area surrounding the land in question and the GMA's conservation mandate.⁵² The land in Redmond was found to have met the criteria of this definition, and so should the subject land in this case.

3. The Board erred in finding that the County correctly assessed the *long-term commercial significance* of agricultural lands.

As established above, there are three prongs to be met in order for land to be designated as agricultural. The land must not be characterized

⁵¹ CP 16 at AR 52 at Tab 95. Arthur C. Nelson. Preserving Prime Farmland in the Face of Urbanization: Lessons from Oregon, 58 Journal of the American Planning Association 467 p. 469 (1992) (footnotes omitted) included on the data CD enclosed with Letter from 1000 Friends of Washington to Honorable Calvin Goings (October 4, 2004).

⁵² King County, 142 Wn.2d at 560, 14 P.3d at 142.

by urban growth, it must be primarily devoted to the production of agriculture, and the land must have “long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses.”⁵³ The Court in Lewis County stated that counties may also consider the “combined effects of proximity to population areas and the possibility of more intensive uses of land as indicated by” the development-related factors enumerated in WAC 365-190-050(1).⁵⁴ The County’s analysis does not meet this standard.

The County did not consider the proper criteria when deciding to exclude small parcels from its agricultural designation. In fact, the only criteria considered in the County’s decision was the soil data, and the County misinterpreted that data. Consideration of growing capacity and productivity are completely absent from Amendment 2. For these reasons, the County’s agricultural designation is clearly erroneous and the Board’s decision should have reflected so.

a. The Board erred in concluding that Amendment 2 complied with the Growth Management Act even though Pierce County failed to analyze any of the GMA’s requirements for Agricultural Land.

The County’s decision to exclude parcels smaller than five acres is not supported by proper consideration of the required factors. Each designation decision done by the County must be based on the

⁵³ Lewis County, 157 Wn.2d 488 at 498-9.

⁵⁴ Id., at 498-9.

consideration of the above-stated criteria.⁵⁵ Under very similar facts, in Lewis County, the Western Board invalidated a blanket exclusion of five-acre farm centers and farm homes from designated agricultural lands, and the Supreme Court affirmed the Board's decision.⁵⁶ Lewis County's decision had nothing to do with a characteristic of farmland to be evaluated in determining whether such land has long-term commercial significance.⁵⁷ The Court explained that

[T]he problem with the county's approach is that any farmer could convert any five acres of farmland to more profitable uses, even if such conversion would remove perfectly viable fields from production. Thus it was clearly erroneous for Lewis County to exclude from designated agricultural lands up to five acres on every farm, without regard to soil, productivity, or other specified factors in each farm area.⁵⁸

The situation with Pierce County's exclusion of parcels under five acres is more egregious than the exclusion in Lewis County. In Lewis County, the County particularized "farm centers" as distinct from other lands because they were used for a different purpose than the actual growing fields. Here, there is no such distinction. In Pierce County, two identical fields are treated differently because the County made an error. Though the County may claim that its exclusion was based on soil data, the County's basis for the exclusion was an erroneous interpretation of the soil survey. This error of fact is discussed in detail below. The Court in Lewis County was uncomfortable with the idea that any five acres could

⁵⁵ Id. at 504-5.

⁵⁶ Id.

⁵⁷ Lewis County, 157 Wn.2d 488 at 505.

⁵⁸ Id. at 505-6.

be converted regardless of consideration of the necessary factors.⁵⁹ Pierce County has excluded *all* parcels smaller than five acres regardless of consideration of the necessary factors.⁶⁰ The Board should have found this exclusion of parcels smaller than five acres to be clearly erroneous because those parcels meet the definition of agricultural lands, and because the County did not consider all of the necessary factors when making a determination of agricultural designation.

b. Pierce County’s exclusion of parcels under five acres is based on an error of fact resulting in improper omission of agricultural lands from designation. Soil data is not most reliable at five-acres or larger.

The County’s decision to exclude small parcels from agricultural designation was based on a misinterpretation of the soil data, an error of fact. The first indicator in the analysis of whether land has long-term commercial significance is the soil content.⁶¹ The County’s agricultural designation excludes parcels smaller than five acres on the grounds that “soils data is most reliable for parcels five acres or larger.”⁶² This is simply untrue. The County misunderstands both the soil survey and its accuracy.

The USDA Natural Resource Conservation Survey has published Metadata for the Soil Survey Geographic (SSURGO) database for the

⁵⁹ Id.

⁶⁰ CP 16 at AR 52 at Tab 346. Amendment 2.

⁶¹ RCW 36.70A.170(1)(a), and 030(10).

⁶² CP 16 at AR 52 at Tab 346. Amendment 2.

Pierce County Area.⁶³ Natural Resource Conservation Survey (NRCS) conducted the soil surveys for Pierce County; the Metadata is the explanation for how the database should be used. When NRCS conducts a soil survey, it does not consider how the accuracy of its survey may affect the designation of agricultural lands under the GMA. NRCS conducts its survey on an area-wide basis using soil testing and statistical modeling. The scale of a particular soil survey is based on a *soil unit*, not on a particular parcel of land. The soil units for the agricultural areas are large, as demonstrated by the soils map for the Puyallup Valley.⁶⁴ It is not the size of the lot that is important for accuracy, it is the size of the *soil unit*. As long as the lot, even a very small lot, is within a soil-mapping unit the soil data is accurate for that lot. The County has misunderstood and misrepresented the application and accuracy of the soil survey.

The County also misinterpreted the Metadata's explanation of the accuracy of the soil survey. On page 4 of 11, the Metadata states: "Field investigations and data collection are carried out in sufficient detail to name map units and to identify accurately and consistently areas of about 4 acres."⁶⁵ Earlier on the same page the Metadata also provides that: "A map unit is a collection of areas defined and named in the same terms of

⁶³ CP 16 at AR 52 at Tab 335. The Metadata is attached to the letter identified by this index number from 1000 Friends of Washington to the Honorable Harold Moss, Pierce County Council (November 8, 2004).

⁶⁴ CP 16 at AR 52 at Tab 95. Letter from Tim Trohimovich to Calvin Goings with attachments. (Map attached to this brief for ease of reference as Exhibit A).

⁶⁵ CP 16 at AR 52 at Tab 95. Letter from Tim Trohimovich to Calvin Goings with attachments. The Metadata is attached to the letter identified by this index number. (November 8, 2004).

their soil and/or nonsoil areas.”⁶⁶ What this means is that the soil units are accurate to four acres. However, as stated above, a soil unit that is accurate to four acres is accurate for everything within that four-acre area. The Board’s affirmation of the County’s misunderstanding and misapplication of the soil survey is a clear error of fact in violation of RCW 34.05.570(3)(e). When the County designates lands on a parcel-level basis, its approach and result are incongruent with the NRCS soil survey. This is irrational and violates RCW 36.70A.030(10) and .170(1)(a).

c. The County failed to consider growing capacity when it excluded parcels under five acres from agricultural designation. The Board erred in finding otherwise.

Amendment 2 does not accurately address growing capacity.

Amendment 2 excludes prime farmland soil as classified by the Department of Agriculture. Under the GMA, growing capacity is a factor that must be considered in determining whether land meets the definition of agricultural land with long-term commercial significance.⁶⁷

There is no evidence of consideration of the growing capacity of any agricultural lands in Pierce County’s determination to exclude parcels under five acres. Further, exclusion of small parcels from the designation disregards the evidence of growing capacity found in the record. Pierce County is trending toward small, high-value farms. A consultant hired by Pierce County to study the County’s agricultural industry found:

⁶⁶ Id.

⁶⁷ RCW 36.70A.030(10).

Taking the place of large-scale wholesale agriculture [is] an influx of small, more intensive direct-marketing farming operations that are quite profitable and are likely to sustain themselves over time, especially given some encouragement and protection from the public sector. The transformation is currently incomplete. We still have many farmers struggling, with limited success, to compete at low intensity wholesale agriculture. At the same time, we have numerous examples of farms that have found ways to take advantage of the proximity of their marketplace to avoid the wholesale trap, to greatly increase their per-acre return, to provide values to their customers that are not found in nearby supermarkets, and to use alternative crop selection, crop production, marketing, distribution, and value-added strategies that greatly increase their profitability.⁶⁸

The evidence in the record shows that the growing capacity of small farms in Pierce County matches or surpasses those larger farms that are currently designated as agricultural resource land. Further, if these small parcels, which are located throughout the agricultural areas of Pierce County, are not correctly designated as agricultural like the area surrounding them, they will likely reduce the growing capacity of the entire agricultural area. Removing small farms from agricultural land protection is directly counter to the recommendation of the County's consultant to give "encouragement and protection" to small farms in Pierce County. The County excluded and ignored the evidence in the record relevant to growing capacity. This is a violation of RCW 36.70A.170(1), the GMA's mandate to designate agricultural land.

⁶⁸ CP 16 at AR Tab 66 at Exhibit 87. John W. Ladenburg, Pierce County Executive, *Summary of the Phase I Report to the Pierce County Council*, p. 1-2 (Sept. 30, 2004).

- d. Productivity of agricultural land was not addressed in the County’s decision excluding parcels under five acres in its agricultural designation. The Board erred in finding otherwise.**

The County must consider the productivity of the land as part of its determination of whether the land should be designated as agricultural.⁶⁹

The County incorporates a soil productivity factor in its designation of agricultural land, but then ignores their own standards by removing it from consideration for parcels smaller than five acres.⁷⁰ The Board’s conclusion that the County considered productivity is unsupported by the plain language of the statute.

- e. The County failed to consider the proximity to population areas and possibilities of more intense uses in excluding parcels under five acres from agricultural designation. The Board erred by not finding so.**

The County must consider 10 factors, not just parcel size, in evaluating whether to de-designate as agricultural a parcel that is in close proximity to population centers. The Court in Lewis County required counties to rely largely on WAC 365-190-050 to determine “the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

- (a) The availability of public facilities;
- (b) Tax status;
- (c) The availability of public services;
- (d) Relationship or proximity to urban growth areas;
- (e) Predominant parcel size;
- (f) Land use settlement patterns and their compatibility with agricultural practices;
- (g) Intensity of nearby land uses;

⁶⁹ RCW 36.70A.030(10); and Lewis County, 157 Wn.2d at 500-01.

⁷⁰ CP 16 at AR 52 at Tab 346. Amendment 2.

- (h) History of land development permits issued nearby;
- (i) Land values under alternative uses; and
- (j) Proximity of markets.”⁷¹

The County’s designation does walk through these indicators.

However, the only indicator that mentions a five acre threshold is “predominant parcel size,” and then only to establish that five acres is the minimum parcel size. A complete consideration of the required indicators was not done for parcels smaller than five acres. Pierce County set a five-acre threshold for considering whether parcels possess a “long-term significance for the production of food or other agricultural products.” Though the County may have discretion on how much weight to assign to each factor, it does not have the authority to forego the analysis altogether.⁷² This is clearly erroneous and the Board should have found so.

Furthermore, if proximity to population centers was the determinative factor in the County’s policy, presumptively all parcels, regardless of size, should have been excluded within a given area, rather than picking only the small ones. Finally, the County’s policy is countywide: not all of the parcels affected are in close proximity to population centers. The County’s blanket prohibition fails to meaningfully apply the standards of WAC 365-190-050 for the same reasons that Lewis County’s blanket provision was found clearly erroneous.

⁷¹ Lewis County, 157 Wn.2d at 501.

⁷² Id. at 506.

Moreover, consideration of predominant parcel size should not be confused with establishing a minimum parcel size. When a statute does not define the terms at issue, the court turns “to a standard dictionary to ascertain their plain and ordinary meaning.”⁷³ The first applicable definition of “predominant” in Webster’s Third New International Dictionary is “being most frequent or common.”⁷⁴ WAC 365-190-050(1) could have used the term “minimum lot size” or other similar terms, but it did not. The County read predominant to mean “minimum.” The County must both consider all of the necessary factors under the GMA, and be careful not to overstep its bounds by serving its own goal without meeting the GMA’s specific land designation requirements.⁷⁵ This is clearly erroneous and the Board should have found so.

C. Conservation Mandate

“When read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land.”⁷⁶

The Supreme Court has identified the reason for the conservation mandate:

The GMA set aside special land it refers to as 'natural resource lands,' which include agricultural, forest, and mineral resource lands. 'Natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource lands to

⁷³ Dep’t of Labor & Indus. v. Gongyin, 154 Wn.2d 38, 45, 109 P.3d 816, 819 (2005).

⁷⁴ PHILIP BABCOCK GOV, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (Merriam-Webster 2002).

⁷⁵ Lewis County, 157 Wn.2d at 506.

⁷⁶ King County, 142 Wn.2d at 562.

other uses or allowing incompatible uses nearby impairs the viability of the resource industry.'⁷⁷

Counties may choose how best to conserve designated lands as long as their methods are “designed to conserve agricultural lands and encourage the agricultural economy.”⁷⁸ As stated throughout this brief, the recommendation from the County’s own study was to encourage small farms.⁷⁹ Disregarding this recommendation, the County excluded parcels smaller than five acres from agricultural designation. Further, the County has not considered the impact this exclusion will have on the area around these small parcels. The County’s actions are clearly erroneous and do not work to conserve agricultural lands.

D. Futurewise and Friends of Pierce County have been substantially prejudiced by Amendment 2.

If this court determines an error occurred, Futurewise and Friends of Pierce County are entitled to relief if they have been “substantially prejudiced” by the action complained of.⁸⁰ Washington Courts have yet to definitively address the meaning of “substantial prejudice” under the APA in a published opinion.⁸¹ However, the GMA is based on the premise of health, safety, and welfare.⁸² Violating specific provisions and the goals

⁷⁷ City of Redmond, 138 Wn.2d at 47, quoting Richard L. Settle & Charles G. Gavigan, The Growth Management Revolution in Washington: Past, Present and Future, 16 U. Puget Sound L. Rev. 867, 907 (1993).

⁷⁸ RCW 36.70A.177(1).

⁷⁹ CP 16 at AR Tab 66 at Exhibit 87. John W. Ladenburg, Pierce County Executive, Summary of the Phase I Report to the Pierce County Council, p. 1-2 (Sept. 30, 2004).

⁸⁰ RCW 34.05.570(1)(d). See also Fife Enterprises v. Washington State Patrol, 113 Wn.App. 1011 (2002).

⁸¹ Children’s Hospital and Medical Center v. Washington State Dept of Health, 95 Wn.App. 858, 874, 975 P.2d 567 (1999).

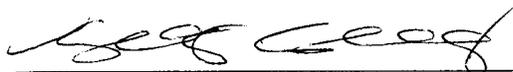
⁸² RCW 36.70A.010.

of the GMA is a threat to the health, safety, and welfare of Pierce County and the State of Washington. The loss of economic stability to the farming community, and in turn the state, affects the members of Futurewise and Friends of Pierce County because they are citizens of Pierce County and the State of Washington. The loss of hundreds of acres of farmland and entire small farms, and the logical resulting loss of local food sources does not only substantially prejudice Appellants, but it is irreparable. The number of small parcels that have been developed since the enactment of Amendment 2 is unknown, but they cannot be conserved once they have been lost. This has a substantial impact on the health and welfare of Pierce County and the State. Therefore, as citizens, Appellants are substantially prejudiced by the Board's error.

CONCLUSION

For the reasons set forth in this brief, Pierce County has violated the Growth Management Act. Futurewise and Friends of Pierce County have been substantially prejudiced by the Board's errors and respectfully request that the Board's decision be reversed and remanded for further action in compliance with the GMA.

Respectfully submitted on this 31st day of January, 2007.

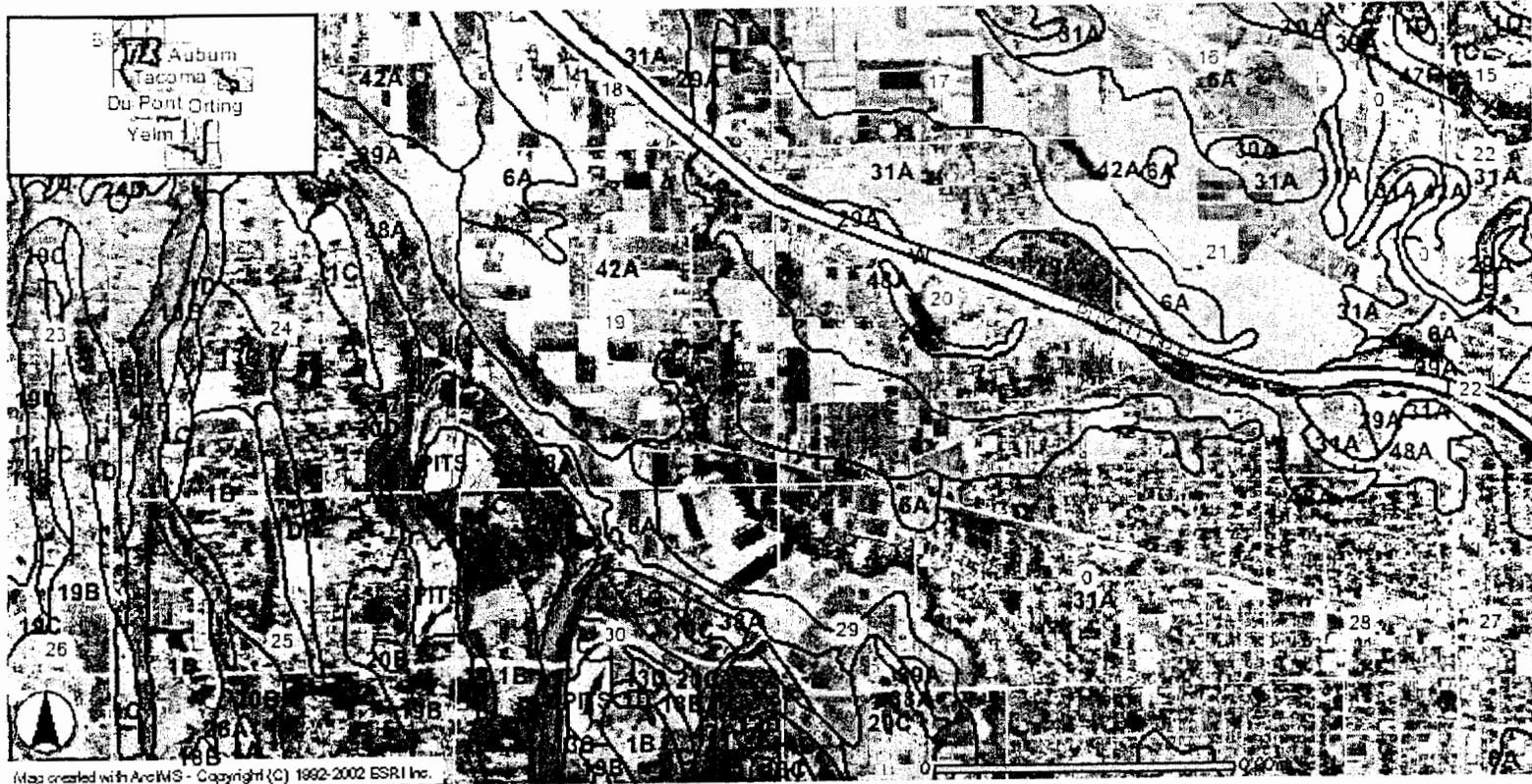


Alexandria K. F. Doolittle WSBA #36332

Keith Scully, WSBA # 28677

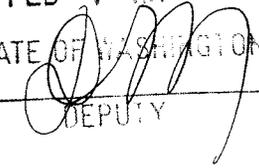
Attorneys for Futurewise and Friends of Pierce County

EXHIBIT A



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DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

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

FUTUREWISE AND FRIENDS OF PIERCE
COUNTY,

Appellants,

v.

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD, et al.,
Respondents.

Court of Appeals No. 35569-8-II

DECLARATION OF SERVICE

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

1. **FUTUREWISE AND FRIENDS OF PIERCE COUNTY'S OPENING BRIEF + ATTACHMENT**
2. **NOTICE OF CHANGE OF ADDRESSES FOR APPELLANTS' COUNSEL**

Court of Appeals for the State of Washington Division II

Mr. David Ponzoha, Clerk/Administrator
950 Broadway, Suite 300
Tacoma, Washington 98402-4454
Original + one copy via overnight mail

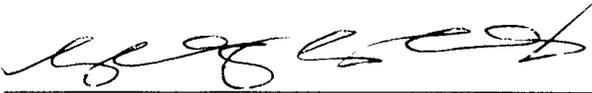
Central Puget Sound Growth Management Hearings Board

Ms. Martha P. Lantz
Assistant Attorney General, Licensing & Administrative Law Division
State of Washington
PO Box 40110
Olympia, Washington 98504-0110
Via email and first-class Post

Pierce County

Mr. M. Peter Philley & Mr. Gerald A. Home
Office of the Prosecuting attorney, Civil Divison
955 Tacoma Avenue South Suite 301
Tacoma, Washington 98402-2160
Via email and first-class Post

Respectfully submitted this 31st day of January, 2007.



Keith Scully
Attorney for Appellants