

NO. 39546-1-II

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

CLARK COUNTY WASHINGTON, CITY OF LA CENTER, GM
CAMAS LLC, MACDONALD LIVING TRUST, & RENAISSANCE
HOMES,

Respondents,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, JOHN KARPINSKI, CLARK COUNTY NATURAL
RESOURCES COUNCIL, & FUTUREWISE,

Appellants.

**REPLY BRIEF OF APPELLANTS
KARPINSKI, CCNRC & FUTUREWISE**

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I. INTRODUCTION

Appellants Futurewise, Karpinski, and CCNRC (“Futurewise”) appeal the decision of the Clark County Superior Court which reversed in part and affirmed in part a decision of the Western Washington Growth Management Hearings Board (“Board”). Clark County Washington, City of La Center, GM Camas LLC, MacDonald Living Trust, and Renaissance Homes (collectively “Respondents”) took appeal from the Board’s decision to the Superior Court. On review, the Superior Court found that the Board had erred in finding the County out of compliance with respect to the de-designation of areas WB, CB, LB-1, LB-2, LE, VA, and VA-2. The Superior Court affirmed the Board with respect to the remaining de-designated areas, BC, VB, and portions of RB-2.

Futurewise appealed to this Court arguing in its opening brief that because there was no evidence before the Superior Court that the Board’s Order was “not supported by evidence that is substantial when viewed in light of the whole record before the court,”¹ the court erred in reversing the decision of the Board. Respondents filed response briefs to which Futurewise now replies.

¹ RCW 34.05.570(3)(e).

II. ARGUMENT IN REPLY

A. STANDARDS OF REVIEW FOR THE BOARD AND COURT.

Each of the Respondents extensively briefs the standards of review applicable to the Growth Management Hearings Boards' original decision and, to a lesser extent, the standard applicable to the Superior Court and this Court on review. Futurewise cited the standard of review the Board was required to apply, as stated in *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 14 P.3d 133 (2000), in its opening brief. That case was cited by two of the Respondents, as well. *King County* holds that a Growth Management Hearings Board must find a legislative action in compliance with the Growth Management Act, unless the action is clearly erroneous in view of the entire record before the Board. *King County*, 142 Wn.2d at 552. Futurewise agrees that this is the standard of review the Board was required to apply.

Respondents also cite to *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005), essentially for the proposition that “deference 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*, 154, Wn.2d at 238. Again, Futurewise agrees that

the standard of review on appeal is governed by the GMA as supplemented by the APA and that the GMA supersedes the APA's agency-deference standard in some respects. Respondents go too far, however, to the extent they urge that the deference owed to the County by the Board in GMA² supersedes any deference due to the Board by a reviewing court under APA.

The Respondents' assertions (explicit and implicit) that on review this Court must accord deference to County planning decisions, rather than to the Growth Board's decisions, is an inaccurate (or at least incomplete) description of the standard of review. Applying the standard of review on appeal is a two-step process, rather than the either-or process suggested by Respondents. It is not the case that *Quadrant* alters the balance between the APA and GMA for purposes of review, requiring near absolute deference to the County's decisions by this Court, as the Respondents suggest. Although counties have a "broad range of discretion"³ in choosing policy tools to carry out the GMA goals and requirements, "the deference ends when it is shown that the county's actions are in fact a

² See RCW 36.70A.320.

³ *Quadrant*, 154 Wn.2d at 236, (quoting RCW 36.70A.3201).

‘clearly erroneous’ application of the GMA.” *Quadrant*, 154 Wn.2d at 238.

Thus a reviewing Court must make the preliminary determination of whether the Board applied the correct standard of review. It is only in the event that, as a first step, a reviewing court finds a Growth Board’s ruling failed to apply this “more deferential standard of review” to a county’s action that the Board is not entitled to deference from that court. *Id.* If the Board did apply the correct standard, the Board is entitled to deference. Since *Quadrant*, the Supreme Court has again described the deference to be granted to Growth Management Hearings Boards’ decisions:

¶8 The legislature intends for the Board “to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of” the GMA. RCW 36.70A.3201. But while the Board must defer to Lewis County’s choices that are consistent with the GMA, the Board itself is entitled to deference in determining what the GMA requires. This court gives “substantial weight” to the Board’s interpretation of the GMA. *Soccer Fields*, 142 Wn.2d at 553, 14 P.3d.

Lewis County v. W. Wash. Growth Mgmt. Hearings Bd., 157 Wn.2d 488, 498, 139 P.3d 1096, 1100 (2006) (footnote omitted).

Respondents’ basic argument with respect to the applicable standards of review is that so long as there is *any evidence* tending to

support the County's actions, the Board was obliged to defer to the County, and this Court is obliged to reverse the Board's failure to do so.

So convinced of this proposition is the City of LaCenter that it claims:

It is immaterial that there is substantial evidence in the record that these areas have soils suitable for agriculture and are not adjacent to existing urban development. It does not matter that the record contains evidence supporting the GMHB's and appellants' view of where Clark County could have expanded LaCenter's UGA.⁴

This "any evidence in support" standard is not the standard established in *Quadrant and Lewis County*. Any evidence or even substantial evidence in support of the County's action is not sufficient for the Respondents to prevail; under *Lewis County*, it must be evidence demonstrating action which is "consistent with the requirements and goals of the GMA." The burden of demonstrating the invalidity of the Board's decision is on the party asserting the invalidity; in this case, the Respondents. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 7-8, 57 P.3d 1156 (2002), citing RCW 34.05.570(1)(a). In no event can a reviewing court weigh the evidence or substitute its view of the facts for that of the Board. *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 676, 929 P.2d 510, fn.9 (1997). So to prevail, the Respondents must demonstrate that the Board failed to

⁴ LaCenter's Response Brief at 4.

review the entire record for compliance with GMA and failed to defer fully to the County's policy choices, to the extent those choices were consistent with the requirements and goals of the GMA, along the way.

Respondents further point to the recent Supreme Court case of *Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 193 P.3d 1077 (2008) in support of "any evidence in support" argument that the Board cannot find a local jurisdiction out of compliance with the GMA, so long as the County had, in compliance with the GMA, considered evidence bearing on the factors lawfully relevant to the decision regarding agricultural designation. This proposition of law does not find support in the *Arlington* case, however.

Arlington held that the Hearings Board improperly dismissed "out of hand" analysis in the record in which the various WAC criteria were evaluated by a property owner's consultant. This consultant report provided evidence in the record to support the county's decision to redesignate agricultural resource land to commercial. The problem identified by the *Arlington* court was that the Board had dismissed evidence. There, Snohomish County passed an ordinance amending the comprehensive plan to change the designation and zoning of 110.5 acres of land to urban and general commercial. *Arlington*, 164 Wn.2d at 773.

The Board found the de-designation clearly erroneous, having dismissed evidence prepared by a property owner's consultant that the County had considered in making its determination, and the Supreme Court reversed, writing:

We find the Board erred in concluding the County committed clear error in determining the land in question has no long-term commercial significance for agricultural production. There is evidence in the record supporting the County's determination on this point, and the Board wrongly *dismissed* this evidence.

Id. at 782. (emphasis added).

The Board in this case, however, did not dismiss the evidence relied upon by the County in de-designating the agricultural lands at issue. On the Contrary, the Board explicitly stated in its Final Decision and Order that the "Board evaluated the County's decision from [the County's] Matrix and its deliberations." *Karpinski v. Clark County*, WWGMHB Case No. 07-2-0027, Amended Final Decision and Order (Jun. 3, 2008), at 3 (hereinafter FDO). The Board used the same evidence the County did. The Board did not, therefore, fail to defer appropriately to the evidence considered by Clark County in this case, as was the case in *Arlington*.

Futurewise freely concedes that where the Board undertook to substitute its view or preferred policy for that of the County, the Board should be reversed. But where the Board examined the entire record, applied the goals and requirements of the GMA to that record, and found the County's action to be clearly erroneous, the Board has not erred and is entitled to deference from this Court.

B. LANDOWNER INTENT AND "HIGHER USE" CANNOT PROVIDE A BASIS FOR DE-DESIGNATION.

As the Supreme Court has observed, "neither current use nor land owner intent of a particular parcel is conclusive for purposes of" determining whether land is devoted to agricultural use under RCW 36.70A.030. *City of Redmond*, 136 Wn.2d at 53. Respondents offer the lack of agricultural use on some of the parcels at issue as substantial evidence that they have no long-term commercial significance for agriculture. It is not surprising that the developer-Respondents who own portions of the lands at issue have non-agricultural uses in mind for the land. There is nothing nefarious about the desire to maximize return from a piece of land, but an owner's lack of interest in farming has nothing to do with the question of whether the land meets the definition of agricultural resource land. Allowing Respondents to control whether land

remains designated for agriculture by purchasing it and letting it sit fallow until the County accedes to their desire to develop it is contrary to the GMA's requirement that agricultural resource lands be preserved.

Similarly, the fact that a piece of land could be put to higher use is not a basis for de-designating it. Respondent MacDonald points out that the County's Issue Paper related to de-designation of the Washougal area assert that it

was determined that both these sub-areas would serve a higher purpose as employment land, which would create more jobs, increase the tax base for the City and benefit the School District.⁵

LaCenter advances a similar economic development basis for de-designation in its brief.⁶ But it goes without saying that "in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture." *City of Redmond*, 136 Wn.2d at 52. But this is not an exception to the GMA mandate to conserve agricultural land. *King County*, 142 Wn.2d at 562. So the Respondents' arguments that de-designation of the land at issue is a higher use is both unquestionably correct and misses the whole point that GMA

⁵ Brief of Respondent MacDonald at 10, citing Exhibit 6605.

⁶ LaCenter's Response Brief at 5-7.

requires designation and conservation of agricultural resource land for precisely this reason.

C. THE RESPONDENTS HAVE FAILED TO CARRY THEIR BURDEN BECAUSE THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE BOARD'S DECISION.

Much argument in this case has revolved around the Matrix developed by the County which summarized the evidence considered and relied upon by the County in making its de-designation decisions.⁷ RCW 36.70A.290 governs what constitutes the record before the Board and provides:

(4) The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

The Matrix in this case is part of the record and represents the clearest statement of the facts deliberated upon by the County and the conclusions the County reached after considering those facts. It was created by the County and used by the Board of County Commissioners during its deliberations. It is evidence which the Board was obliged to consider. Respondent Renaissance Homes laments that:

⁷ The Matrix is CP 24, Index 6605, Issue Paper 7, attachment A and is attached to Futurewise's opening brief as Exhibit "A."

The GMHB concluded that subarea VA was near the UGA, but not near areas characterized by urban growth. But the GMHB cites no authority for such a conclusion other than the matrix and a map.⁸

This is representative of the Respondents' general failure to carry their burden of proof and highlights the importance of the standard of review in this case.

There is substantial evidence supporting the Board's Decision. There is also evidence supporting the County's de-designation of agricultural resource lands. The Board's responsibility in this case was to review the entire record—all of that evidence—and determine whether the policy choices of the County were consistent with the requirements and goals of the GMA. Futurewise highlighted in its opening brief to this Court the substantial evidence, which is consistent with the requirements and goals of the GMA, establishing the lands at issue are agricultural resource lands of long term commercial significance, as defined by the GMA.

There is no question that if the GMA excepted from its mandate to designate and conserve agricultural resource lands those lands which

⁸ Brief of Respondent and Intervenor-Respondent Renaissance Homes & Birchwood Farms, LLC at 18, footnote omitted.

could be put to higher use, Respondents would prevail in this case. So too, if the GMA excepted from its mandate to designate and conserve agricultural resource lands those lands which were not presently in agricultural production, Respondents would prevail in this case.

But after reviewing the evidence, the Board found that in some instances, the decision of the County resulted from reliance upon impermissible factors. One example cited in Futurewise’s opening brief was that “unique economic development opportunities” was identified as a basis for de-designation. But diversifying economies or school district tax bases and similar factors that the County uses to justify its agricultural de-designations are not valid GMA agricultural lands designation criteria. *Lewis County*, 157 Wn.2d at 499-502. Nor are they Clark County agricultural lands designation criteria.⁹ In this way it is quite different than the land necessary to support the agricultural industry that Lewis County incorporated into their definition of agricultural land that they used to designate agricultural lands of long-term commercial significance. *Lewis County*, 157 Wn.2d at 499. Here the county never included such considerations in its criteria.

⁹ CP 24, Index 6512, *Clark County Comprehensive Plan 2004-2024: Chapter 3 Rural and Natural Resource Element* pp. 3-7 – 3-8.

Further, as the Western Board pointed out, there was nothing in the record showing how much land the City LaCenter or other jurisdictions needed for “unique economic development opportunities” or whether sites other than agricultural lands of long-term commercial significance had been considered. FDO at 67. So it does not even relate to the possibility of more intense uses of the land, one of the long-term commercial significance factors in RCW 36.70A.030(10), as there is no evidence showing a need for this land. Tellingly, in arguing about their economic need for the land the City of LaCenter cites nothing in the record to prove that claim.¹⁰

It is this type of error by Clark County that the Growth Management Hearings Board found to be clearly erroneous. As there is substantial evidence supporting the Board’s decision, the Board did not err.

D. THE BOARD CORRECTLY APPLIED THE CORRECT LAW.

The City of LaCenter argues that the Growth Board misinterpreted and misapplied the law.¹¹ Appellants have previously addressed the

¹⁰ LaCenter’s Response Brief at 34–35.

¹¹ LaCenter’s Response Brief at 19–32.

arguments relating the *City of Arlington* decision and the deference arguments showing they fail. The other arguments fail as well.

The Western Board carefully identified the relevant law, in this case the definition of agricultural land from the *Lewis County* decision, the GMA goals, the GMA definition of long-term commercial significance, and the CTED factors. FDO at 34 – 48. The Western Board then carefully applied the law to the factors of each of the areas at issue, the facts that Clark County developed and relied on. FDO at 48 – 70.

The City of LaCenter faults the board for focusing on soils and proximity to populated areas and urban development, arguing that the Board should have considered all of the WAC factors. But the board did consider the WAC factors including soil growing capacity and proximity to populated areas , which is specifically required by RCW 36.70A.030(10), tax status, water and sewer availability, existing uses, and the history of permits, all of which are factors included in WAC 365-190-050(1). FDO at 66; WAC 365-190-050(1).

In short, the Board correctly interpreted and applied the law. Again, the Board’s decision as to the areas at issue her must be affirmed.

III. CONCLUSION

For the foregoing reasons, and each of them, Appellants
Futurewise, Karpinski, and CCNRC respectfully request the Court affirm
the decision of the Western Washington Growth Management Hearings
Board, vacating the decision of the Superior Court.

DATED 14 January 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on this 14th day of January, 2010 he caused the following documents to be served on the following parties by regular U.S. Mail, postage prepaid: Brief of Appellants Karpinski, CCNRC, & Futurewise.

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A handwritten signature in black ink, appearing to read "Robert A. Beattey", written over a horizontal line.

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