Schroader, Kathy

From: David McDonald <david@mcdonaldpc com>
Sent: Tuesday, March 29, 2016 9 20 AM
To: Orjiako, Oliver, Schroader, Kathy
Cc: Boldt, Marc, Olson, Julie (Councilor), Stewart, Jeanne, Cook, Christine
Subject: Re FDO Karpinski v Clark County
Attachments: Orjiako-Ltr-160329-Karpinski v Clark Co pdf

Dr. Orjiako

Attached is a letter to the CP update regarding the above referenced case that was referenced by a citizen at the March 22, 2016 public comment and in which at least two councilors expressed some interest

Thank you for submitting it to the record

Best Regards,

David T McDonald

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March 29, 2016

Mr. Oliver Orjiako, Director
Clark County Community Planning
1300 Franklin Street
3rd Floor
Vancouver, Washington 98660

RE: *Karpinski v. Clark County*

Via pdf and e-mail to Oliver.Orjiako@clark.wa.gov

Dear Dr. Orjiako:

In her March 22, 2016 testimony before the Councilors, CCCU representative Carol Levanen referenced a Final Decision and Order (FDO) from the Western Washington Growth Hearings Board (the FDO can be found here http://www.gmhb.wa.gov/LoadDocument.aspx?did=146). I found it odd that CCCU would rely on that decision because it held that the county placed too heavy reliance on economic development over preservation of agricultural lands of long term commercial significance (ALLTCS). I went back and read the FDO along with the court opinions and the final FDO on Remand. I agree with Ms. Levanen that it is an important case but not for the reasons she may believe. The FDO that she quoted from in her public testimony found that the County's de-designation process for ALLTCS was flawed, and the GHB invalidated the county ordinances that de-designated over 2500 acres of agricultural lands. At bottom, the hearings board and the court chastised the county for failing to protect ALLTCS.

First, this case, like many, has a long history (*see* case details here http //www gmhb wa gov/CaseDetail aspx?cid=92). The case was originally appealed to the WWGMHB (GMHB) and on May 14, 2008, the GMHB issued the Final Decision and Order (FDO) that Ms. Levanen appeared to reference in her Tuesday comments. The Final FDO On Remand was issued on March 11, 2014.

Second, throughout the entire process, the GMHB and the Courts recognized the importance of designating agricultural lands of long term significance and emphasized that extra scrutiny should be applied to any matrix or formula used to de-designate ALLTCS. In its original FDO the GMHB noted:

> The pressure to convert these lands (ALLTCS), especially in areas impacted by population growth and development, is even more prevalent today. The Board recognizes that the counties and cities of Washington face a multitude of difficult and demanding challenges when determining how their communities will grow. But, these challenges must be addressed within the mandates of the GMA so as to serve the "public's interest in the conservation and the wise use of our lands. ***Washington's limited, irreplaceable agricultural lands are at the forefront of this mandate, with cities and counties discretionary planning choices confined so as to prevent the further demise of the State's ability to provide food for its citizens.***
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> FDO dated May 14, 2008 at page 33 (emphasis supplied).

After recognizing that the county had adopted a de-designation process "To assist them in their de-designation process the County developed a principle/values statement that put economic development as its primary goal to increase the tax bases of the county, city, and school districts", the GMHB chastised the County for giving equal weight to the economic development Goal in its de-designation formula. The GHB (and subsequently the courts) rejected giving equal weight to the economic development goal and held the following:

> Neither the economic development goal nor the recreational goal direct action as the agricultural conservation goal does. Nor does the economic development goal have any corresponding requirements. Also, the economic development goal stresses that growth should be encouraged in areas "experiencing insufficient economic development growth, all within the capacities of the state's natural resources, public services, and public facilities.
>
> ***Therefore, in using its discretion to balance the agricultural and economic development goals, the County's economic development goals cannot outweigh "the duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry"***
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> FDO at 36-37 (emphasis supplied)

The GMHB found that "the Supreme Court held that the GMA creates a mandate to designate agricultural lands because the Act includes goals with directive

language and specific requirements. ***The Board finds that the GMA economic development goal cannot supersede the agricultural mandate defined by the Supreme Court."*** FDO at page 2 (emphasis supplied).

Then after the case had gone through the courts, the GMHB relied on the Court of Appeals opinion and the held the following:

> Moreover, the County's overtly heavy reliance on economic factors when deciding whether land has long-term agricultural commercial significance runs afoul of several of the GMA's planning goals – namely, the County's duty to "designate and conserve agricultural lands." *Soccer Fields*, 142 Wn.2d at 558 (analyzing the GMA's "[n]atural resource industries" planning goal – RCW 36.70A.020(8)). In addition, the County's emphasis on economic factors violates RCW 36 70A.020(5), which requires counties to "[e]ncourage economic development . . . *within the capacities of the state's natural resources*, public services, and public facilities" (emphasis added).
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> Final Decision and Order on Remand Dated March 11, 2014 at page 33

The GMHB also should be noted that one Councilor has repeatedly stated that if land lies "fallow" then it is not meeting the requirements of the GMA. The FDO completely rejects that idea by stating:

> Petitioners point out, and the Report confirms, that farm income is a measure of owner intent. The Board agrees and recognizes that an owner of a farm that has prime soils or has been historically farmed may have a myriad of reasons for not producing a significant income. Using farm income as a measure of whether agricultural land is primarily devoted to agricultural products speaks to owner intent rather than whether the land is "used or capable of being used for production based on land characteristics". This prong speaks to land characteristics" not economic function Farm income is not a measure that meets the second prong of the Supreme Court test. While landowner intent can be considered, according to the Supreme Court, as described supra, this factor is not determinative when designating agricultural land
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> FDO on Remand at page 47.

Therefore, if a landowner has land that is "used or capable of being used for production based on land characteristics" but does not use/is not using it to generate income, the failure to generate income (i.e allows the land to lie fallow) the GMA still requires that it protected as agricultural land. The "protection/conservation" thread continues throughout the opinion and the FDO concluded as to another parcel that "de-designating agricultural land to increase the tax base of a city, does not address the needs of the agricultural industry, and ignores the conservation mandate established by the Supreme Court" and "the de-designation of this area...does not comply with RCW 36.70A.170(1) and RCW 36.70A.020 (8)". FDO at p 51.

The end result of *Karpinski v. Clark County* cited by Ms. Levanen is that 1) once lands are designated as agricultural lands, they are to be protected and need to go through an intensive de-designation process before being removed from the agricultural land inventory, 2) population growth is to be centered in urban areas that can more effectively and efficiently provide capital services and not in rural areas and resource lands and 3) when allocating population growth, protection of agricultural lands of LTCS is paramount and not superseded by consideration of economic factors.

Also, there is no evidence that allowing for lower minimum lot sizes in the rural area is necessary or will promote affordable housing as that term has been defined under the GMA and other statutory schemes. *See* MRSC links above.

I hope the Councilors find this of assistance. As always, I am happy to provide any follow-up should anyone have any question regarding the facts and legal analysis set forth in our comments.

Sincerely,

David T. McDonald
Attorney for Friends of Clark County