BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

ACHEN, et.al.,	)	No. 95-2-0067
	)	(POYFAIR REMAND)
Petitioners,	)	COMPLIANCE
	)	ORDER
vs.	)	
CLARK COUNTY, et.al.,	)	
Respondents,	)	
and	)	
CLARK COUNTY SCHOOL DISTRICTS, et.al.,	)	
Intervenors.	)	

PROCEDURAL HISTORY

In the September, 1995 Final Decision and Order (FDO) we upheld Clark County's designation of approximately 35,000 acres of land as resource lands (RLs) under the Growth Management Act (GMA,Act). The County had designated this acreage as "agri-forest", a hybrid designation involving both agricultural and forest lands classifications. We also upheld the County's public participation process used to develop and designate those agri-forest lands. Petitioners North Lackamas Corporation (N. Lackamas) appealed the agri-forest designation of its property to Superior Court under cause #95-2-05636-7.

Petitioner Clark County Citizens United, Inc., Michael Achen and Kathryn Achen (CCCU) appealed the County's agri-forest designation and the rural activity centers designations to Superior Court under cause #96-2-00080-2. In both cases Judge Poyfair reversed the FDO upholding the County's actions. In both the N. Lackamas and CCCU appeals the court held that

we had erred in finding the County's public participation process in compliance with the GMA and had erred in finding that the agri-forest designations throughout the county complied with the GMA. In both cases the Superior Court concluded that there was "no substantial evidence in the record" to support the agri-forest designation anywhere in the county. Additionally, in the CCCU appeal the court concluded that the County's actions with regard to the rural activity centers violated the "planning goal requiring a variety of residential densities." For reference purposes, this portion of the entire case was referred to as the Poyfair remand.

On August 11, 1997, after a hearing, we issued an order of remand in this case. As noted in that order, the remand was the result of the Superior Court reversal of part of the FDO dated September 20, 1995, and the reconsideration order dated December 6, 1995. At the request of petitioners, the compliance hearing was delayed and held on March 10, 1999. Board Member Eldridge was unable to attend that hearing, but has listened to the tapes and reviewed all of the written material.

Two initial matters require discussion. On March 2, 1999, petitioners filed a motion to supplement and/or clarify the record. At the March 10, 1999, hearing we clarified that exhibits 233, 236, 237 and 242 remained part of our record for purposes of this compliance hearing. We noted that the August 20, 1998 letter from Mr. Karpinski to us was already part of our record. The orders in both Superior Court cases, as well as the transcript of Judge Poyfair's oral ruling of February 21, 1997, had become part of our record for this compliance hearing. We denied the other requests to supplement the record.

The second initial issue involves the claim of CCCU that jurisdiction had not properly been invoked because a petition for review was required. The County did not join CCCU's motion to dismiss.

The Superior Court orders of April 4, 1997, and June 11, 1997, remanded the agri-forest designation and existing rural towns and villages issues to us. After a hearing in which CCCU participated we entered our remand order on August 11, 1997. That order provided that Clark County was not in compliance with the Act and the matter set forth in CCCU's Superior Court appeal was "remanded to Clark County *to achieve compliance* consistent with earlier orders of

the Board as modified by the Superior Court orders referenced above which are incorporated herein" (emphasis supplied). Under RCW 36.70A.300(3)(b) we extended the period of time for compliance because of the unusual scope and complexity of the issues. CCCU did not object at that time to use of the compliance process.

Although there is some ambiguity in the Act as to situations where a previous ruling has been made by a Growth Management Hearings Board, the 1997 amendments to RCW 36.70A.330 allowing additional hearings for noncompliance, along with the August 11, 1997 order of remand in this case lead to the inescapable conclusion that jurisdiction did attach in this instance. The compliance process was the appropriate one for the County to use and for us to review these issues. CCCU's motion to dismiss is denied.

As a result of the remand, the County engaged in an extensive public participation process as to both the rural activity centers issue and the agri-forest designation issue. There was no challenge to those processes. Petitioners Clark County Natural Resource Council, et al., (CCNRC) directed their challenges to the substantive outcome of both issues. Original petitioners N. Lackamas and CCCU supported the County's actions. Participant Lewis River Land Company, LLC (LRLC) also supported the County's actions in designating its property other than RL. Those 4 groups will hereafter generally be referred to as respondents.

As provided for in RCW 36.70A.320, amendments to the comprehensive plan (CP) and or development regulations (DRs) are presumed valid. It is the petitioners' burden in this case CCNRC to show that the County's action was clearly erroneous in view of the entire record and in light of the goals and requirements of the Act.

RURAL ACTIVITY CENTERS

In dealing with the remand concerning rural densities relating to small towns, Clark County appointed a task force to review the rural activity center designations in its original CP. In addition to the Court's remand determination the County directed the task force to review the previous designations in light of the 1997 amendments to RCW 36.70A.070(5).

The task force reviewed the six rural center designations and boundaries and issued a majority

and minority report. The staff compiled an extensive process summary and criteria analysis in its March 11, 1999, report (Ex. 433) and the Board of County Commissioners (BOCC) discussed and analyzed each area before reaching its determination.

CCNRC challenged portions of each of the new designations. It is sufficient to say that after extensive review of the challenges, the maps and the record that Clark County complied with the requirements of RCW 36.70A.070(5) by starting at the correct beginning point, adopting appropriate criteria, applying those criteria on a consistent basis and providing a record that clearly showed its work "to minimize and contain existing areas of more intensive development." *Wells v. Whatcom County*, #97-2-0030c. CCNRC has not sustained its burden of showing the County's action was clearly erroneous.

RESOURCE LANDS DESIGNATIONS

Two preliminary matters must be addressed prior to applying the record to determine if the County's actions complied with the Act. CCNRC contended that the County's decision "eliminated 99%" of the RLs previously set forth in the agri-forest designation. Respondents correctly observed that since the Superior Court found no substantial evidence to support the County's prior RL designation, the County necessarily started this remand process with the 35,000 acres as a clean slate. We agree with respondents. The proper issue for us to decide is whether petitioners have met their burden under the clearly erroneous standard to demonstrate that the County did not comply with the Act in the new designations.

The second preliminary matter involves the proper interpretation of *Redmond v. Growth Hearings Bd.* 136 Wn.2d at 38 (1998) (*Redmond*) which all parties agree impacts the decision in this case. As so often happens, one party reads the case too expansively (CCNRC) while the other parties (respondents) read the case too minimally.

In analyzing *Redmond* the respondents and CCNRC all agreed that the answer to the specific issue addressed in the case of whether the owners' current or intended use of land was a conclusive factor in determining if property is "agricultural land" under RCW 36.70A.030(2) is no. The case went on to say that such current or intended use was a factor *to be considered* in deciding whether land was properly designated "agricultural land." Respondents would have us

end the inquiry at that point, but Justice Talmadge's opinion (p.53 n.7) pointed out that *Redmond* was accepted by the Court specifically to clarify the definition of "agricultural land" under GMA. The issue was briefed and argued by the parties and is not dictum. Rather, at p.42 the Court characterized the term "agricultural lands" as a "statutory term of art." The Court noted that the statutory definition of agricultural lands found at RCW 36.70A.030(2) involves the concepts of both "primarily devoted to" and "long term commercial significance." Long term commercial significance is further defined at RCW 36.70A.030(10).

At p.47 the Court noted that RCW 36.70A.020(8), .060(1) and .177 evidenced the Legislature's stated goal of maintaining and enhancing agricultural lands. Justice Talmadge pointed out that the significance of agricultural land preservation in the GMA was shown by the sequencing or timing of key actions mandated in the statute. By September 1, 1991, Clark County was required under the GMA to designate such agricultural lands and enact DRs to conserve them. It did not do so until December, 1994.

Beginning at p.49 the Court restated that the issue in the case involved the proper definition of "agricultural land." The term "primarily devoted to" was argued by the land owners to mean in actual commercial production versus the city's argument that the phrase meant to set apart for a specific purpose or use. At p.52, while observing at n.6 that the GMA definition of "agricultural land" was ambiguous, the Court specifically held that 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…". This holding is the same as the one in our FDO in 1995, which upheld the County's action as to RLs.

After clarifying the definition of the phrase "primarily devoted to" the Court then went on to discuss the term "long-term commercial significance for agricultural production" beginning at p. 54. The Court held that under the statutory definition of that term a local government "must evaluate growing capacity, productivity, and soil composition, proximity to population areas, and the possibility of more intensive uses of the land in question…" RCW 36.70A.030(10). In addition, the Court cited WAC 365-190-050 and stated that the factors contained therein, in addition to the statutory factors, "offer ready guidance in determining if land has 'long-term commercial significance' for agricultural production."

Notably absent from the appropriate consideration of "long-term commercial significance" which the Court characterized as both ambiguous and as a legislative term of art, was any consideration of whether the proposed "agricultural lands" were capable of sustaining economic sustenance to the owners of the property in question for any type of long-term, short-term, part-time or full-time commercial viability. We conclude under *Redmond* that such consideration of commercial viability is improper.

With regard to the instant case we agree with the characterization found in the brief of N. Lackamas and LRLC at p.5 that the Superior Court remand involved the issue of not one of having RLs with an improper label, but one that asked the question: are these properties properly designated RLs or not? That is the question that we address in this compliance order and is based upon the record developed by the County subsequent to our remand order. As we said in our first case, *CCNRC v. Clark County,* #92-2-0001, and consistently since that time, our review involves both the process used and the result obtained to determine if compliance with the GMA has been achieved.

The BOCC began its work regarding the 35,000 acres by appointing a 13-member task force composed of a variety of stakeholders with interest in this issue. The public participation process involved 17 different task force meetings at which public comment was solicited and received, four separate open house meetings resulting in written comment, two separate direct mailings to all property owners within the 35,000 acres, newsletters, press releases, ads and use of the County website. After the task force issued its final report to the planning commission (PC), the PC held a public hearing and issued a recommendation to the BOCC. The BOCC then held two public hearings on May 19, 1998, and May 28, 1998, and held four separate deliberative open meeting sessions. The public participation in this record was shown to be not only "early and continuous" but also extensive. The County should be justifiably proud of the manner in which it conducted this public participation process.

The process, however, was not without its potholes. As noted on p.6 of the County's brief:

> "As well illustrated by minutes for the 12/12/97 and 1/6/98 meetings, the Task Force

initially was badly split on application of designation criteria. Commissioner Morris then attended the 1/20/98 task force meeting. She indicated that the Task Force could either: (1) Reach a 75% consensus, in which case, its recommendations would likely be adopted; or (2) provide the BOCC with conflicting non-consensus recommendations, in which case, the BOCC would undertake initial as well as ultimate responsibility for designation…."

Thereafter the task force was able to reach 75% (10 votes) consensus on many, but not all, recommended designations. Of the 35,000 plus acres under consideration, fewer than 200 received RL designations.

In its final report the task force set forth its decision criteria and designation recommendations and the following statement of its overall rationale:

- "Generally recognized and maintained consistency with immediately surrounding lot sizes, referred to as "what is" in task force deliberations.

- Recognized pre-GMA designations, and limit (*sic*) associated down zoning.

- Generally utilize larger lot designations in the northern portions of the County than in the southern portion.

- Predominantly applied transitional designations, typically Rural 10, to properties which form a transition from resource designations to rural designations.

- Predominantly apply a Rural 10 designate (*sic*) to parcels adjacent to urban growth boundaries, in recognition that CTED documents suggest 10 acres as the minimum parcel size which can be easily converted to future urban use.

- Avoid isolated small areas of spot zoning.

- Consider on site uses, topography, and natural conditions.

- Avoid future land division on remainder lots from previous cluster developments."

The task force had been supplied with a series of maps (Ex. 235-247) and other materials noted in Ex. 84. The maps showed parcel size, agricultural or forest soil suitability, current and pre-GMA

zoning designations, current use taxation status, aerial photographs, pending plat or segregation requests, recent lot creation status, habitat areas, wetlands, steep slopes and utility lines. Ex.80 demonstrated that the task force also considered post-1990 parcels, land values under alternative uses and eco-system importance. Ex. 80 set forth the criteria (statutory, WAC, BOCC and task force,) that were considered by the individual members. Included was a staff report dated May 4, 1998 (Ex. 12), which pointed out that prior to GMA approximately 80% of the 35,000 acres had been designated in non-resource classifications. None of the approximately 7,000 acres of pre-GMA resource designation (35,000 x 20%) survived to become GMA-RL-designated areas.

On March 31, 1998, (Ex. 122A) a 4-person group of task force members issued a "minority" report. The report criticized the proposed zoning (contended to be largely 20 and 10 acre parcels) from the task force report because the group did not "come to agreement on the fundamental requirements" of GMA. The minority report contentions concerning RLs were found largely under item 1 that criticized the task force majority because:

> "1. **They ignored and/or rejected the requirement that land can only be designated as resource land if it meets a strict test of being currently in that commercial resource use and has long term commercial significance for that resource use considering alternative uses.** The only realistic interpretation of long term commercial significance is that one can purchase such land for a price that allows a reasonable rate of return on the required investment.…"

At its meeting on April 28, 1998, the PC adopted this "minority" report and recommended the BOCC adopt designations for the 35,000 acres in accordance with that report. As noted by the County at p.8 of its brief, the 4 members who issued this report involved votes that "were often necessary to reach a 75% consensus on redesignations" (presumably the County meant initial designations) as required by the BOCC for the task force report to be accepted.

On May 8, 1998, a 3-person task force membership (whose votes were not necessary to reach the 10 vote consensus standard) issued an "alternative" report (Ex. 122B). This "alternative" complained that a 10 vote consensus for resource designation could never be reached because of the dismissal of "qualified parcels" because they were not "economically viable." At p.2 of the "alternative" report the 3-person group stated:

> "The "minority" position "litmus test" for resource designation does not meet the GMA or Clark County Code criteria. Their criteria states that resource "land can only be designated as resource land if it meets a strict test of being currently in that commercial resource use." The word "current" is not included in the GMA definition of resource lands. Repeatedly, when pointed out by us to the "minority group" that parcels were in "current use" taxation (a deferral of taxes by the landowner with the promise of keeping the land in resource use or face tax penalties), it was dismissed as irrelevant to use as evidence."

The alternative report contained attachments of maps and a summary that demonstrated that some 3,500 acres matched criteria for resource designation but were not so designated because of incorrect use of current use and commercial significance definitions.

The BOCC began its hearings May 19, 1998. It rejected the "minority" report as the recommendation from the PC and commenced its own public hearing which concluded May 28, 1998. The BOCC had four separate deliberative sessions prior to adoption of the ordinance. Essentially, the BOCC adopted the initial task force report although it heard 127 individual property owner requests to lower minimum lot size from the task force report. Some were granted, most were not. None of the requests involved consideration of designating any of the properties as RLs.

The respondents contended that the minority report's concept of "in actual current use" was rejected by the BOCC and thus was not a conclusive disqualification in violation of *Redmond*. There are three reasons why this contention is incorrect.

First, the BOCC did not specifically reject the minority report, but in fact, rejected the PC recommendation which used the minority report as its basis. We note that the minority report defined "primarily devoted to" in a current use determination. It also defined the second prong of the "agricultural lands" definition of long-term commercial significance as a "reasonable rate of return on investment." Both are incorrect under *Redmond.*

Secondly, insofar as the BOCC adopted the task force report where a 10 vote consensus was reached, the record is abundantly clear that no such consensus was ever reached without at least

one of the authors of the "minority" report concurring in the decision. Thus, the incorrect definitions were conclusively used to disqualify lands from RL designation.

Finally, the on-record statements of at least 2 of the 3 commissioners demonstrated their concurrence that a RLs designation was impossible unless the property was currently being used for agricultural or forest purposes. Ex. 7, the BOCC deliberations of June 22, 1998, includes comments from Commissioner Morris concerning the "alternative" report. As noted above, that report contended that since the word "current" was not found in either the GMA or the accompanying WACs it was not a necessary requirement for RL designation. Commissioner Morris rejected that position based upon a grammatical analysis set forth at p.20 as follows:

> "…So whether the word current is included in the language of the GMA or in the Washington Administrative Code, is not relevant because simple English language reads the present tense, which means it is now primarily devoted to, and that language is quite similar between ag and forest land…."

She went on at p.25 to discuss the term "primarily devoted to" commenting that: "I would say that in agriculture there should be evidence of cultivation, there should be equipment." Commissioner Morris discussed the long-term commercial significance prong of the "agricultural lands" definition at p.22, noting the alternative report determination that resource designation criteria of soils, activity, current use taxation, adequate parcel size, near population centers were considerations for determination of long-term commercial significance. She observed they were "not criteria for designation of the land," which was initially to determine whether or not resource land was being "currently used" as resource land. Commissioner Morris also commented at p.23 that there was "no link between our current use taxation code and our land use zoning code." She referred to "my rather liberal interpretation of "commercially viable" in determining current use" for taxation purposes.

Commissioner Gordon also expressed mystification of how a RL designation could occur without current use of the property as RL at p.31 involving a question to Deputy Prosecuting Attorney Lowry:

> "…If you've got some agricultural land that is, doesn't have any resource connected with it at all, I'm talking about agriculture and not timber, how can they, how can

> they rule the way they do when there's no agriculture being grown anyplace? I don't understand that."

Commissioner Gordon reemphasized his opinion that no current use equals no RL designation on p.22.

In a most unlucky instance of timing, shortly after the BOCC adopted its ordinance on July 28, 1998, the Supreme Court issued its decision in *Redmond*. In fairness to the BOCC, the staff, the task force members and the public during the time this issue was being discussed in Clark County, the proper definition of "primarily devoted to" and "long-term commercial significance" was far from clear. While we (apparently the "they" Commissioner Gordon was referring to) ruled in the FDO that current use and economic viability were not conclusive determinations, the decision issued by Judge Poyfair (including some intemperate and inaccurate language submitted by CCCU) called into question that determination. The County proceeded in good faith, albeit inaccurately, in determining that a lack of current resource use and lack of commercial viability on property conclusively disqualified the property from consideration as RL.

CCNRC has sustained its burden of proof under the clearly erroneous standard that the County used inappropriate criteria in failing to designate RLs and that the criteria that were used, were used inappropriately. CCNRC has not sustained its burden of proving that the County's actions substantially interfere with the goals of the Act.

Having sustained its burden of showing inappropriate considerations, under *Manke v. Mason County* 91 Wn.App.793 (1998) (*Manke*) CCNRC must also demonstrate from the record instances where RLs should have been designated if appropriate criteria had been used. As noted above, the assumption that the prior agri-forest designation satisfied this burden was incorrect because of Judge Poyfair's ruling. CCNRC's contention that 80% of the County was suitable for forest designation is simply too broad a sweep.

The maps and summary attached to the "alternative" report (Ex. 122B) showed at least 3,500 acres of potential RLs that were disqualified because they were not in current resource use or considered not to be long-term commercially significant. The burden of proof on CCNRC under *Manke* is satisfied as to the 3,500 acres.

We find that Clark County is not in compliance with the GMA as relates to the 3,500 acres. In order to comply with the Act, the County must review the 3,500 acres in light of the Supreme Court's holding in *Redmond* and the appropriate criteria stated therein to determine if RL designation is appropriate.

Pursuant to RCW 36.70A.270(6) Findings of Fact are attached hereto and incorporated by reference.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-830(2), a motion for reconsideration may be filed within ten days of issuance of this decision.

So ORDERED this 11th day of May, 1999.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Les Eldridge
Board Member

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Nan Henriksen
Board Member

DISSENTING OPINION

I agree with everything in the majority opinion. I would go farther and include the following in the remand.

The record did demonstrate (through examination of maps and staff reports) that approximately

7,500 acres of land containing parcels 20 acres or greater existed in Clark County at the time the review was taking place (Ex.12). The record also demonstrated that approximately 7,000 acres of land had been designated in resource zoning prior to the GMA. Apparently the task force concern about "down-zoning" was not correspondingly a concern about "up-zoning."

CCNRC contended that "current use, owner intent and parcelization" were not proper criteria when used conclusively. While CCNRC is correct as to the first two, it is glaringly incorrect to the issue of parcelization. The County has determined that, at a minimum, RL designations are ineffective without at least a 20 acre minimum lot size. The County observation that parcelization was a "legitimate and *major criteria*" (*sic*) (County br. p.11) goes too far. As demonstrated in this record, particularly through map Ex. 235 and the task force minutes, surrounding parcelization was too much of a major consideration. The task force would often disqualify areas from resource designation consideration based upon what the maps showed to be a very small number of lots under 20 acres in size. As the Supreme Court said in *Redmond*, a resource designation is an area-wide designation. The fact that there are nonconforming lots within and around the RL designation is not sufficient, in and of itself, to disqualify the area.

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William H. Nielsen
Board Member

APPENDIX I
FINDINGS OF FACT

1. This case resulted from a Superior Court reversal of the September 20, 1995 FDO and the remand order of August 11, 1997.

2. As part of the compliance process Clark County reviewed its rural centers and the 35,000 acres previously designated as agre-forest.

3. Petitioner did not show that Clark County's actions regarding the rural centers were clearly erroneous.

4. The task force, PC and BOCC all used incorrect definitions of agricultural lands.

5. The record revealed approximately 3,500 acres of candidate RL designations if the proper criteria and definitions had been used.

6. Clark County is in compliance except as to designation of the 3,500 acres.