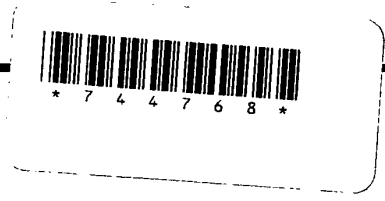
Schroader, Kathy



From: Cook, Christine
Sent: Thursday, September 17, 2015 1:40 PM
To: Orjiako, Oliver; Schroader, Kathy
Subject: Next appeal docs-- for the record
Attachments: 99.08.04.Nichols II Opinion and Partial Judgment.pdf; 99.08.09.Bennett-Opinion.pdf; 99.08.27.Bennett-Proposed Judgment.pdf

Follow Up Flag: Follow up
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I think I have the filed Bennet judgment from Aug. 27, 1999. As you can see, this is just a proposed judgment. I will need to look for it, and that won't happen today.

Chris

Christine M. Cook
Sr. Deputy Prosecuting Attorney
x4775

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

CLARK COUNTY CITIZENS UNITED, INC., Petitioner, vs. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, a Washington Agency, Respondent.	NO. 99-2-02394-7 RULING ON MOTION FOR JUDGMENT ON THE PLEADINGS

Petitioner, Clark County Citizens United, (CCCU), has sought review of one aspect of a Compliance Order issued on May 11, 1999 by the Western Washington Growth Management Hearings Board (The Board). The Compliance Order directed Clark County to reconsider its classification of 3500 acres of land as not being "agricultural resource land" as defined by the Growth Management Act (GMA), RCW 36A.70.

Under the GMA, land is agricultural resource land if it is "land primarily devoted to the commercial production of . . . (various agricultural products) . . . and that has long-term commercial significance for agricultural production." RCW 36.70A.030(2).

The county's designation of the 3500 acres in question applied a definition of the term "devoted to the commercial production," which was subsequently rejected by the State Supreme Court in Redmond v. Growth Hearings Board. 136 Wn.2d 38, ____ P.2d ____, 1998. Therefore, The Board, in its Compliance Order, directed that the county review its designation in light of the Redmond decision. Having done so, The Board interpreted Redmond as limiting the factors the county or The Board may consider in determining whether land has long-term commercial significance. The pertinent language in Redmond is the following:

> "In addition to the statutory factors enumerated in RCW 36.70A.030(10), in WAC 365-190-050, the State Department of Community Trade and Economic Development, the agency charged by RCW 36.70A.170(2) with providing guidelines cities must consult in designating natural resource lands, provides 10 factors for "classifying agricultural lands of long-term significance for the production of food or other agricultural products." WAC 365-190-050 states:
>
> (1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United States Department of Agricultural Soil Conservation Service as defined in Agriculture Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider 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 and their compatibility with agricultural practices;
> (g) Intensity of nearby land uses;
> (h) History of land development permits issued nearby;
> (i) Land values under alternative uses; and
> (j) Proximity of markets.

These factors, in addition to the statutory factors offer ready guidance in determining if land has "long-term significance" for agricultural production."

The Board held that a concept referred to as "commercial liability" cannot be considered as a factor in designating whether or not land has long-term commercial significance." The parties to this action do not readily agree on what the term "commercial viability" means. Petitioner argues that it could be nothing more than shorthand for the commercially oriented factors already set out above. Respondent Clark County Natural Resources Council, the only adverse respondent to appear at the hearing on August 6, 1999, argues that commercial viability encompasses a potential myriad of irrelevant factors, such as the ability of current owners of land to earn a living wage from their land, via agriculture.

I. PROCEDURE

This action was commenced as a petition for review of administrative agency action, as authorized by RCW 34.05.510. While the above statute and others dealing with judicial review contemplate a review on the administrative record, "Ancillary procedural matters before the reviewing court . . . are governed, to the extent not inconsistent with this chapter, by court rule." RCW 34.05.510(2).

While "Judicial review of disputed issues of fact . . . must be confined to the agency record . . . "RCW 34.05.558, it is clear that the relief sought by petitioner in this matter is interpretation of a statute, and therefore not dependent on a factual record. Petitioner's motion is one for judgment on the pleadings, which is appropriate on a pure

issue of law. "The court shall grant relief from an agency order . . . if it determines that . . . the agency has erroneously interpreted or applied the law." RCW 34.05.070(3)(d).

As indicated above, only one adverse respondent has participated in this motion. The party most involved, The Board, through the Attorney General, has communicated to petitioner that it declines to participate, and therefore has made no argument to this court. I conclude that this lack of participation indicates a willingness to be bound by this court's decision.

One further procedural issue remains. RCW 34.05.570(d) provides: "The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of."

Respondent CCNRC argues that the case is not justiciable, as not being ripe; that is that petitioner's motion is premature. How Clark County will interpret The Board's decision is not yet known, and how The Board will view Clark County's future action is not yet known.

The problem with this approach is that it may lead to repetitive rounds of seriation review. If this court can interpret the Redmond decision so as to provide direction to the county and The Board, all parties will benefit, in terms of time and money spent on this issue.

II. RULING

My ruling is as follows: The Redmond decision, as demonstrated in footnote 7 at 131 Wn.2d 53,54, purports to offer guidance on the procedure of determining whether or not land has long-term commercial significance, even though that issue was not before the court. The court makes it clear that its apparent dictum is intended to be binding.

Clearly, however, the issue of whether or not the county or The Board may consider factors other than those set forth in statute or WAC was not decided in Redmond, because that issue was not addressed.

Perhaps the problem in this case is the vagueness of the term "commercially viable." It cannot be rationally disputed that "farm land" which is incapable of being operated other than at a financial loss has no long-term commercial significance. If no one (as opposed to the current owners only) can feasibly continue to farm certain land, it is difficult to see how designation as agricultural resource land will further purposes of the Growth Management Act. As the Supreme Court stated in Redmond: "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." 136 Wn.3d at 47.

The determination, then, that land has long-term agricultural significance, must necessarily take in account the concept of whether or not the totality of circumstances do or do not render it unfeasible or prohibitively impractical to use certain land for agricultural purposes.

One of the factors contained in WAC 365.190.050 is: "(i) land values under alternative uses." In considering land values under alternative uses, it is implicit that a comparison be made of such values with the value of said land under agricultural use. A determination of the value of land for agricultural use must take into account the potential productivity of the land in terms of commercial gain.

ORDER

To the extent that potential for commercial gain is reflected in the term commercial viability, and to the extent that such concept affects land valuation, and other

factors set out expressly in the Redmond decision, such concept may be considered in the designation of whether or not land has long-term commercial significance.

DATED this 9 day of August 1999.

JUDGE ROGER A. BENNETT

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR CLARK COUNTY

CLARK COUNTY, a municipal corporation, Petitioner, v. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, Respondent.	Case No. 98-2-02032-0 PROPOSED PARTIAL JUDGMENT

This matter having come on regularly before the above-entitled Court for review of a decision of the Western Washington Growth Management Hearings Board following a remand to said Board in Superior Court Cause No. 96-2-05498-8; and the Court having heard argument of counsel, considered the certified administrative record, and previously issued the Court's written Opinion; and the County having requested that judgment now be entered on fewer than all the issues decided by the Court so that it may gain the benefit of those issues adjudged below while undertaking settlement discussions on other issues without the parties being faced with appeal deadlines; now, therefore,

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IT IS ORDERED, ADJUDGED and DECREED that the determination of invalidity contained in the Western Washington Growth Management Hearings Board February 5, 1998 Compliance Order and Order of Invalidity, as reaffirmed in its April 30, 1998 Order on Reconsideration, in Achen v. Clark County, WWGMHB No. 95-2-0067, is hereby overturned and overruled.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that because this Partial Judgment disposes of fewer than all the claims presented herein, it is not an appealable judgment under RAP 2.2(d).

ENTERED this _____ day of August, 1999.

_____
Honorable John Nichols
Clark County Superior Court Judge

Presented by:

_____
Richard Lowry, WSBA #4894
Of Attorneys for Petitioner Clark County

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cf

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR CLARK COUNTY

CLARK COUNTY, a municipal corporation, Petitioner, v. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, Respondent.	Case No. 98-2-02032-0 PARTIAL JUDGMENT

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FILED

AUG 2 0 1999

Jo Anne McCormick, Clerk, Clark Co.

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IT IS FURTHER ORDERED, ADJUDGED and DECREED that because this Partial Judgment disposes of fewer than all the claims presented herein, it is not an appealable judgment under RAP 2.2(d).

ENTERED this 20 day of August, 1999.

Honorable John Nichols
Clark County Superior Court Judge

Presented by:

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

CLARK COUNTY, a municipal Corporation, Petitioner, Vs. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD. Respondent.	)	NO. 98-2-02032-0 OPINION

FILED
JUL 02 1999
JoAnne McBride, Clerk, Clark Co.

This Court is entrusted with the task of reviewing the actions of the Western Washington Growth Management Hearings Board (WWGMHB), as they pertain to Clark County's enactment of their comprehensive plan and implementation of their interpretation of the State Growth Management Act (GMA). In this review, the Court is directed by what has become a virtual mantra in addressing this procedure. The most recent recitation is found at page 4 of Dawes v. Mason County, No. 22540-9-II, (Slip Op., March 5, 1999):

> Under the Administrative Procedure Act, this court may grant relief from "an agency order in an adjudicative proceeding" if the order is, among others, unconstitutional, exceeds the agency's authority or jurisdiction, erroneously interprets or applies the law, is not supported by substantial evidence, or is arbitrary or capricious. RCW 34.05.570(3).

The burden of proof is on Clark County as they are asserting the invalidity of the WWGMHB's order. City of Redmond v. CPSGMHB, 136 Wn.2d 38 (1998).

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The Board in reviewing the County's Comprehensive Plan may invalidate part or all of the plan if it determines that the "continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of the GMA". RCW 36.70A.302 (1)(b). [Emphasis added]. In this review process, the County's actions are deemed to be in compliance with the GMA unless it determines, after a review of the entire record, that the County's enactment is "clearly erroneous" in light of the goals and requirements of the GMA. RCW 36.70A.320 (3). As stated in this Court's previous opinion, this deference of validity to the County is not mere "lip service" but a vital element of the legislative intent in enacting the GMA. Recently in the case of Manke Lumber Co. v. Diehl, 91 Wn. App. 793, 803-4(1998); the Court of Appeals emphasized the necessity of local input:

> The GMA confers broad discretion on local governments making this determination. The Washington State Growth Strategies Commission's chair, in a cover letter, explained to Governor Gardner the rationale for conferring discretion on local governments as follows: "[O]ur strategy's success rests primarily on planning decisions being made at the local level and those plans being given a presumption of validity.. . . . The Commission believes the foundation blocks of a statewide growth strategy are local governments. Locally elected officials working with their citizenry are best able to tailor broad growth policies to their communities."
>
> * * *
>
> ...The state should not become an unwieldy layer of review and approval, but a facilitator and an arbiter for local government.
>
> In 1997, the Legislature reiterated its intention that, within the general GMA framework, local governments assume broad discretion in developing specific comprehensive plans tailored to local circumstances:

> ...The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, **the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.**
> RCW 36.70A.320 (1) (emphasis added).

The Act recognized the wide regional differences among counties. Thus "the Legislature left wide latitude to local governments to customize their comprehensive plans according to local growth patterns, resources, and needs. RCW 36.70A.010-901". Manke, 91 Wn.App. at 796.

In enacting their CP, Clark County concluded that a 5-acre minimum lot size in rural areas adjacent to resource lands would not adversely impact the viability of these areas. The WWGMHB invalidated this portion of the CP, holding that a minimum lot size of more than 5 acres was necessary to comply with the guidelines of the GMA requiring a "variety of rural lands". In addressing rural lands the statute is very broad and confirms the large discretion given to the local authority. RCW 36.70A.070 (5) outlines that the "rural element" is that which is not urban. It goes on to state that "because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, ...". Subsection (b) permits rural development with forestry and agriculture along with a variety of rural densities including clustering, so long as they are not characterized by urban growth and are consistent with rural character. It is the Board's determination that this 5-acre minimum is not consistent with the rural character of the resource area.

The question then is whether a 5-acre minimum lot size is urban in nature.

> The GMA forbids growth that is "urban in nature" outside of the areas designated as UGAs. RCW 36.70A.110(2). Accordingly, "growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands . . ." is not allowed in areas designated as rural. RCW 36.70A.030

Dawes v. Mason County, No. 22540-9-II, at page 7 (Slip Op., March 5, 1999).

While the GMA does not prescribe a minimal lot size for urban areas, The Hearings Boards have determined that densities of 1 to 2.5 acre lot sizes are per se urban. See Bremerton v. GMHB, No. 95-3-0039. In Pilchuk-Newberg Organization v. Snohomish County, CPSGMHB No. 94-3-0018 at 864 (1995); it was held that a density of one dwelling unit per 5 acres outside the urban growth area did not constitute urban development. Also in Skagit Surveyors v. Friends, 135 Wn. 2d 542, 571 (1998) the dissent noted that 5 acre lot size was "a decidedly rural density".

Having met the requirement that a 5 acre minimum is not "urban in nature"; the county must also establish that such a lot size does not impact the viability of the resource lands. RCW 36.70A.020 (8) contains among the planning goals the following: "...Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses." [emphasis added] Reference is also made in RCW 36.70A.060 (1); to the premise that the forest, agricultural and resource lands in use are to be protected from any interference with their continued use.

The WWGMHB in its Order of February 5, 1998 at page 7, held that a larger than 5 acre lot size was:

> ... necessary to comply with the GMA requirement of a "variety of rural lands" and would have the added compliance effect of reducing increased urban and rural sprawl resulting from the high amounts of preexisting lots less than 5 acres in size. Additionally, the larger than 5-acre minimum lot sizes within the area north of the rural resource line also provide needed buffering for the area's resource designations. ...

The Act does not specifically use or address the necessity of "buffering". However, RCW 36.70A.060 (1); states that the land adjacent to agricultural, forest, or mineral resource lands shall not interfere with their continued use. The WWGMHB rather than address how the use would be interfered with, based its Order of Invalidity on the County's "failure to conserve its resource lands". (see page 19 of the Order on Reconsideration). The Board repeatedly felt that a 5-acre minimum would "urbanize" the rural areas. Ultimately at page 11 of the Compliance Order the WWGMHB held:

> The allowance and encouragement of "urban sized lots" abutting a resource zone is not in compliance with the Act.

The County responded to this concern for buffering by establishing setback requirements; landscape buffering; and the minimum rural lot sizes. The County further introduced evidence that 87% of the resource land acreage have minimum lot sizes of 20, 40, and 80 acres. Further, that increasing the minimum lot size to 10 acres would only affect 8% of lots within the 100 feet north of the resource line.

The Hearings Board also felt that the preexisting (prior to the adoption of the GMA) small lot sizes necessitated the increase of the minimum to more than 5 acres. Thus placed the burden on the County to rectify the prior proliferation of substandard lots. Recent decisions have held that pre-Act ordinances are not subject to board review. **Skagit Surveyors v. Friends**, 135 Wn. 2d 542 (1998). Further, the rights of the owners of these pre-existing lots were vested prior to the effect of the GMA. See, **Association of Rural Residents v. Kitsap County**, Slip Opinion #41281-7-I (March 29, 1999). As such, the County's hands were somewhat tied in attempting to rectify the situation. To mandate that the County must now increase the remaining rural lot sizes beyond 5 acres is beyond the parameters of the GMA.

The Hearings Board must give deference to the County's findings unless they are clearly erroneous.

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." English Bay Enterprises, Ltd. v. Island County, 89 Wn.2d 16, 21, 568 P.2d 783 (1977), quoting Ancheta v. Daly, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969).

Skagit County v. Dept of Ecology, 93 Wn.2d 742,748 (1980).

The County did present substantial evidence that the 5-acre minimum was not urban in nature and did not significantly impact the resource lands or the area adjacent to them. The case law is consistent that 5-acre parcels are rural in nature. The County further produced evidence that their regulations on buffering; reconfiguration of non-conforming lots; and setbacks were a reasonable alternative to the vague requirements of the GMA.

This same deference should be given to the County's policies on the Urban Reserve Areas. The fact that the Board, the county and even the Court may disagree over lot sizes and the URA is not enough to invalidate the County's decisions. So long as there is evidence that the County had a basis for its decision and that it complied with the GMA, that decision must be upheld. The County has presented such evidence.

The WWGMHB in its Order of Invalidity failed to apply the proper standard of review and this Order is not supported by evidence that is substantial when viewed in light of the whole record. This Court does not have confidence that the Board will give the County the deference required and any further remand for that purpose would cause unnecessary delay. Thus, the WWGMHB is directed to enter an Order finding that Clark County is in compliance with the GMA.

JOHN F. NICHOLS
SUPERIOR COURT JUDGE

THE HONORABLE ROGER A. BENNETT

FILED
AUG 27 1999
JoAnne McBride, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON IN CLARK COUNTY

CLARK COUNTY CITIZENS UNITED, INC., Petitioner, v. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, a Washington Agency, Respondent.	NO. 99-2-02394-7 [PROPOSED] FINAL ORDER AND JUDGMENT

This matter came on for hearing before the above-entitled Court on August 6, 1999, upon Petitioner's Motion for Judgment on the Pleadings. Petitioner, Clark County Citizens United, Inc. ("CCCU" herein), appeared by and through their attorneys of record, Lane Powell Spears Lubersky LLP and Glenn J. Amster and Peter Livingston; Respondent Western Washington Growth Management Hearings Board ("WWGMHB" herein), appeared by and through the Office of the Attorney General and Marjorie T. Smitch; additional party of record Clark County, appeared by and through the Office of the Prosecuting Attorney and Richard S. Lowry; additional parties of record Clark County Natural Resources Council, Vancouver Audubon Society, Loo-Wit Group Sierra Club and Coalition for Environmental Responsibility and Economic Sustainability (collectively "CCNRC" herein), appeared by and through their attorney John S. Karpinski; additional parties of record North Lackamas Corporation and Lewis River Land Company, appeared by and through their

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attorneys Horenstein Bremer, P.S. and Leanne M. Bremer; and additional party of record Rural Clark County Preservation Association ("RCCPA" herein), appeared by and through their attorney David T. McDonald, P.C.

The Court has considered the Motion for Judgment on the Pleadings, the Memorandum of CCNRC, et al. in Opposition to Motion for Judgment on the Pleadings, and the "Motion to Join" of RCCPA and Friends of the East Fork, as well as all the pleadings and exhibits filed herein, and the argument of counsel, and has taken the matter under consideration and entered a Ruling on Motion for Judgment on the Pleadings on August 9, 1999 ("Ruling" herein), which is attached hereto and incorporated herein by this reference; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that Petitioner's Motion for Judgment on the Pleadings is granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the Compliance Order entered by the WWGMHB in Achen et al. v. Clark County et al. (WWGMHB No. 95-2-0067) (Poyfair Remand) filed on May 11, 1999, is modified by this Court's Ruling; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall bear their own costs and attorneys' fees incurred herein.

Done in open Court this _____ day of . 1999.

The Honorable Roger A. Bennett

Presented by:

LANE POWELL SPEARS LUBERSKY LLP

By
Glenn J. Amster, WSBA No. 08372

By
Peter Livingston, OSBA No. 82324
Attorneys for Petitioner Clark County Citizens United, Inc.

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