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Clark Worth, Barney & Worth Inc.

FROM: Eric Eisemann, E² Land Use Planning, LLC

CC: ARL Project Team

DATE: June 7, 2016 - Revised

SUBJECT: *A Fresh Look at Pierce County Agriculture*
Technical Memorandum #2 – Review of Washington Growth Management Hearings Board Decisions

Introduction

A multi-disciplinary team led by Barney & Worth, Inc. is taking *A Fresh Look at Pierce County Agriculture*. Members of the team bring extensive agricultural, scientific, legal, and economic expertise to the project.

The Washington State Growth Management Act (GMA) requires counties to designate Agricultural Resource Lands (ARL), which “have long-term significance for the commercial production of food or other agricultural products”. Pierce County places a high priority on protecting commercially viable agricultural lands, and has established these criteria for Agricultural Resource Lands (ARLs):

- Located outside Urban Growth Areas (UGAs)
- Five acres or greater
- Contain 50% or more “prime farmland” soils
- Grass/legume production yield of 3.5 tons per acre or greater
- 50% of abutting parcels larger than 1 acre
- Landowner may request the designation

The consultant team is analyzing the current condition of Pierce County’s agriculture sector and evaluating the effectiveness of the County’s zoning regulations for protecting agricultural lands. The County’s current ARL criteria will be revisited, with consideration given to alternatives. A series of technical memoranda are being prepared to illuminate different aspects of farmland protections.

The purpose of this technical memorandum is to review the statutory basis for ARL designation criteria and applicable case law determination by Washington Growth Management Hearings Board (WGMHB) and Washington courts.

ARL Case Law Foundation

This memorandum is based upon a close reading of the GMA statutes and case law relating to designation of Agricultural Resource Lands (ARL). In *Friends of Pierce County v Pierce County the Growth Management Hearing Board*, the Central Puget Sound Region Board describes the statutory basis for the ARL designation process as refined by case law.¹

Over the years, the courts have helped solidify our understanding of the ARL designation requirements and process. We know:

- There is a legislative mandate to conserve land devoted to agricultural production.²
- Land may be devoted to agriculture if it is used or capable of being used for agricultural production.³
- The State Supreme Court has formulated a three-part definition of land of long-term commercial significance based on whether the land:
 - 1) Is not characterized by urban development,
 - 2) Is devoted to agricultural production, and
 - 3) Has long-term commercial significance for agriculture.⁴
- Jurisdictions must consider factors such as soil, growing capacity, productivity, and whether the land is near population areas or more vulnerable to more intense use.⁵
- These factors are minimum guidelines and they may allow for regional variation.⁶
- Analysis of agricultural lands must be done on a county-wide or area-wide basis, not a parcel-by-parcel basis.⁷
- While the decisions of local jurisdictions deserve discretion, such discretion is not boundless as the decisions must conform to the GMA and the court may conduct a critical review of County actions.⁸

ARL Legal Basis

“On or before September 1, 1991, each county, and each city, shall designate where appropriate: Agricultural lands that are not already characterized by urban growth and that

1 *Friends of Pierce County, et al., City of Bonney Lake, and Marilyn Sanders, et al., v. Pierce County*, Case No. 12-3-0002c, at 27 (2012).

2) *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000).

3 *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 53, 959 P.2d 1091, 1998 Wash.

4 *Friends of Pierce County*, FDO at 27 citing *Lewis County v. Western Washington Growth Management Hearings Bd.*, 157 Wn.2d 488, 502, 139 P.3d 1096, 1103 (2006).

5 *Lewis County v. Western Washington Growth Management Hearings Bd.*, 157 Wn.2d 488, 502, 139 P.3d 1096, 1103 (2006).

6 *Manke Lumber Co., Inc. v. Diehl*, 91 Wn. App. 793, 805, 959 P.2d 1173, 1180 (1998).

7 *Friends of Pierce County, et al. v Pierce County*, WGMHB Case No. 12-3-0002c (July 09, 2012).

8 See, *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000); See also, *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).

have long-term significance for the commercial production of food or other agricultural products.”⁹

The State Legislature adopted thirteen planning goals to guide the development and adoption of comprehensive plans and development regulations of counties and cities that plan under RCW **36.70A.040**.¹⁰ Goal Eight of the Washington Growth Management Act (GMA), the natural resource industries goal, requires jurisdictions planning under the GMA to:

Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.¹¹

The Washington Supreme Court found that the GMA creates a legislative mandate to designate natural resource lands.¹²

There are three types of natural resource lands: agricultural lands, forest lands, and mineral resource lands.¹³ The GMA requires counties to conserve agricultural land in support of agriculture as an industry and to discourage land uses incompatible with that industry.¹⁴ Therefore, jurisdictions planning under the GMA must adopt regulations to conserve natural resource lands.¹⁵

The GMA defines Agricultural land as:

[L]and primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW **84.33.100** through **84.33.140**, finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production.¹⁶

To determine whether agricultural land has long-term commercial significance for agricultural production, the Washington Supreme Court established a three-part test. 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

9 RCW 36.70A.170, <http://apps.leg.wa.gov/RCW/default.aspx?cite=36.70A.170>

10 RCW 36.70A.020 <http://app.leg.wa.gov/RCW/default.aspx?cite=36.70A.020>

11 RCW 36.70A.020(8).

12 *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000).

13 RCW 36.70A.170(1). <http://caselaw.findlaw.com/wa-supreme-court/1410880.html>

14 *King County* at 556-57, 14 P.3d 133, 140 (2000).

15 RCW 36.70A.060(1).

16 RCW 36.70a.030(2) <http://app.leg.wa.gov/RCW/default.aspx?cite=36.70A.030>

(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.”¹⁷

The Legislature charged the Executive branch with developing a set of guidelines “to guide the classification of: (a) Agricultural lands.”¹⁸ The Washington Department of Commerce adopted rules, found in WAC 365-190-050, in fulfillment of that mandate.¹⁹ When classifying and designating agricultural resource land, “counties must approach the effort as a county-wide or area-wide process. Counties and cities should not review resource lands designations solely on a parcel-by-parcel process.”²⁰ These guidelines are “‘minimum guidelines’ (which) apply to all jurisdictions, but also ‘shall allow for regional differences that exist in Washington State.’”²¹

Once a county has designated ARLs it must adopt development regulations that assure the conservation of agricultural resource lands.”²² (Technical Memorandum #6 will address agricultural zoning regulations in Pierce County and other jurisdictions.)

ARL Designation Process

As described in the *Lewis County* cases, the GMA establishes three key factors to consider when designating agricultural land:

- Land not already characterized by urban growth,
- Whether the land is used or capable for being used for agriculture, and
- Whether the land has long-term commercial significance for agriculture.²³

The Washington Administrative Code (WAC) 365-190-050 provides minimum foundational guidelines for classifying and designating agricultural resource lands.²⁴

1. County-wide or area-wide process (WAC 365-190-050(1))

A county must approach the designation effort as an area-wide or county-wide process.²⁵ Jurisdictions “should not review resource lands designations solely on a parcel-by-parcel process.”²⁶ The concept of a county-wide process is fairly self-evident. The concept of an ‘area-wide’ process is more complex. The

17 *Lewis County v. Western Washington Growth Management Hearings Bd.*, 157 Wn.2d 488, 502, 139 P.3d 1096, 1103 (2006).

18 RCW 36.70a.050(1)(a) <http://app.leg.wa.gov/RCW/default.aspx?cite=36.70A.050>

19 WAC 365-190-050 <http://apps.leg.wa.gov/wac/default.aspx?cite=365-190-050>

20 WAC 365-190-050(1) <http://apps.leg.wa.gov/wac/default.aspx?cite=365-190-050>

21 *Manke Lumber Co., Inc. v. Diehl*, 91 Wn. App. 793, 805, 959 P.2d 1173, 1180 (1998).

22 WAC 365-190-050(2)

23 WAC 365-190-050(3) - <http://apps.leg.wa.gov/wac/default.aspx?cite=365-190-050>, See also, *Lewis County v. Western Washington Growth Management Hearings Bd.*

24 WAC 365-190-050 - <http://apps.leg.wa.gov/wac/default.aspx?cite=365-190-050>

25 WAC 365-190-050(1)

26 WAC 3665-190-050(1)

designation process and the de-designation process require a county-wide or area-wide review rather than an individual parcel review. In *“Friends of Pierce County, et al. v Pierce County”* the court explained, “GMA emphasis is broader than conservation of individual parcels of agricultural land on a site-specific basis. Rather, in order to preserve or foster the agricultural economy, as mandated by RCW 36.70A.020(8), .060, .120, and WAC 365-190-050(5), a county-wide or agricultural-area process is required.”²⁷

2. Characterized by urban growth (WAC 365-190-050(3)(a))

The universe of analysis is county-wide or area-wide. The geographic scope of analysis might be limited if the land is characterized by urban growth. For example, land which might contain prime farmland soils but is occupied by an urban center may be excluded from the scope of analysis.

Urban growth is “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 designated pursuant to RCW 36.70A.170. When allowed to spread over wide areas, urban growth typically requires urban governmental services.”²⁸

Characterized by urban growth refers to “[L]and having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.”²⁹ More intense urban growth may be incompatible with agriculture: “[U]rban growth 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 designated pursuant to RCW 36.70A.170.18.”³⁰

Factors used to determine whether land is characterized by urban growth include: access to public facilities and services, access to transportation, parcel size, the presence of transmission lines and pipelines, and uses of land.³¹

3. Land currently used or capable of being used for agricultural productions (WAC 365-190-050(3)(b))

If land is not characterized by urban growth it might be or might not be capable of being used for agricultural purposes. Agricultural land, by definition, is devoted to commercial production. To determine whether land is devoted to agricultural use the analysis looks at whether the land is used or capable of being used for agricultural production.³² However, an owner’s current use of the land and/or

27 *Friends of Pierce County, et al. v Pierce County*, WGMHB Case No. 12-3-0002c (July 09, 2012)

<http://www.gmhba.wa.gov/LoadDocument.aspx?did=3025>

28 RCW 36.70A.030 – Definitions, <http://apps.leg.wa.gov/rcw/default.aspx?cite=36.70A.030>

29 RCW 36.70A.030 – Definitions, <http://apps.leg.wa.gov/rcw/default.aspx?cite=36.70A.030>

30 *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 234, 110 P.3d 1132, 1137 (2005).

http://www.legaleagle.com/decision/20051242110P3d1132_11140/QUADRANT%20CORP.%20v.%20STATE,%20GROWTH%20MANAGEMENT%20HEARINGS%20BD

31 WAC 365-196-310(4)(c)(iii) - <http://apps.leg.wa.gov/wac/default.aspx?cite=365-196-310>

32 *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.* 136 Wn.2d 38, 56 (1998).

an owner's intent for future use is not a conclusive determination of whether land qualifies for ARL designation.³³ If land is not devoted to commercial production that fact does not mean the land is not capable of future productive use.

Whether land is capable of being used for agricultural production is based primarily on its physical and geographic characteristics.³⁴ Land enrolled in federal conservation reserve programs is recommended for designation. Jurisdictions are required to use the land-capability classification system of the United States Department of Agriculture Natural Resources Conservation Service as defined in relevant Field Office Technical Guides.³⁵

Soils play a significant role in determining whether land is capable for agricultural uses. However, soil analysis alone cannot be the exclusive basis for determining land capability because some types of agricultural uses, such as chicken production, are not soil dependent. If a county failed to base its initial methodology on an evaluation of lands that are actually being used or are capable of being used for agriculture, "the County inappropriately narrowed the universe of land beyond that anticipated by the Legislature when it defined agricultural land."³⁶

4. Long-term commercial significance (WAC 365-190-050(3)(c))

Long-term commercial significance includes the "[G]rowing 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."³⁷

To determine whether land has long-term commercial significance for agriculture, WAC 365-193-050(3)(c) provides a list of recommended (not-mandatory) nonexclusive criteria.³⁸ The GMA does not assign or weight the factors; a jurisdiction has discretion regarding how to apply them. However, the factors must be evaluated in light of the GMA conservation imperative.³⁹

The factors, some of which have been the subject of litigation, include:

- i. *Prime and unique farmland soils as mapped by the Natural Resources Conservation Service;*
Failure to include unique soils as a criterion when considering long-term significance or providing a justification for why they were not considered violates the GMA.⁴⁰ However, as

33 *ICCGMC v. Island County* 98-2-0023 (FDO, 6-2-99); See also, *Benaroya I*, 136 Wn.2d at 53, 959 P.2d at 1097-98.

34 WAC 365-193-050(3)(b) - <http://apps.leg.wa.gov/wac/default.aspx?cite=365-190-050>

35 WAC 365-193-050(3)(b)(ii) - <http://apps.leg.wa.gov/wac/default.aspx?cite=365-190-050>

36 See, coordinated cases of *Hadaller, et al v. Lewis County*, Case No. 08- 2-0004, *Butler, et al v. Lewis County*, Case No. 99-2-0027, *Panesko, et al v. Lewis County*, Case No. 00-2-0031c, FDO and Compliance Order, at 29-30 (July 7, 2008).

37 RCW 36.70A.030 – Definitions, <http://apps.leg.wa.gov/rcw/default.aspx?cite=36.70A.030>

38 WAC 365-193-050(3)(c) - <http://apps.leg.wa.gov/wac/default.aspx?cite=365-190-050>

39 Coordinated Cases of *Hadaller, et al v. Lewis County*, Case No. 08-2- 0004, *Butler, et al v. Lewis County*, Case No. 99-2-0027, *Panesko, et al v. Lewis County*, Case No. 00-2-0031c, FDO and Compliance Order, at 46 (July 7, 2008).

40 *Diehl v. Mason County* 95-2-0073 (FDO, 1-8-96).

the Lewis County cases point out, soils are not the only method for classifying long-term significance because some types of agriculture are not soil dependent.

ii. Public facilities availability, including roads used in transporting agricultural products;

Transportation routes are essential for promoting commercial production. County or special district capital facilities plans will indicate areas of potential future conflict.

iii. Tax status, including the current use tax assessment, whether the optional public benefit rating system is used, and whether there is the ability to purchase or transfer land development rights;

Data from the county assessor's office will reveal information on the current use tax status of a parcel.

iv. Public services availability;

County and city comprehensive plans and capital facility plans forecast areas of more intensive future development. Some of these projected services, such as police, fire and emergency services are beneficial to long-term commercial agriculture. Although water is essential to agriculture, a requirement to hold water rights on agricultural land in order for these lands to be designated agricultural lands of long-term commercial significance is clearly erroneous.⁴¹

v. Relationship or proximity to urban growth areas;

Proximity to a UGA and future economic development is not a basis for not designating agricultural resource lands.⁴²

vi. Predominant parcel size;

Parcel size alone is not reflective of long-term commercial significance because it ignores commercial production capability on non-prime soils and may not consider the importance of the farm home on a small lot. The Central Board declined to establish a minimum parcel size for ARLs.⁴³ Parcel size itself does not correspond to farm size because it is not indicative of the amount of acreage that would be farmed together. If size is to be used as a factor in designating agricultural lands, farm size rather than parcel size is the relevant consideration.⁴⁴

vii. Land use settlement patterns and their compatibility with agricultural practices;

41 *Butler, et al. v. Lewis County*, WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance and Imposing Invalidity, February 13, 2004).

42 Coordinated cases of *Butler et al. v. Lewis County*, Case No. 99-2-0027c, *Panesko v. Lewis County*, Case No. 00-2- 0031c, and *Hadaller et al. v. Lewis County*, Case No. 08-2-0004c Compliance Order/FDO, at 3 (July 7, 2008).

43 *City of Gig Harbor et al v Pierce County*, CPSGMHB, Case No. 95-3-0016c, FDO, at 31 (1995).

44 *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (FDO, July 20, 2005).

Patterns of urban and rural development can be shown through aerial photographs and insurance maps, such as those produced by Sanborn.

viii. Intensity of nearby land uses;

More intense uses of the land may not be compatible with long-term agricultural production. For example, residential development is often not compatible with some agricultural practices.

ix. History of land development permits issued nearby;

County permits may reveal issuance of land use or building permits not compatible with agricultural production. Settlement patterns, intensity of uses, and permit history when taken together may reveal long term practices. However, these factors do not appear to be litigated.

x. Land values under alternative uses; and

Real estate sales and taxation data can reveal current and historic land prices. It is not uncommon for alternative uses to generate higher land values. However, this criterion is not determinative for determining long-term commercial significance.⁴⁵

xi. Proximity to markets.

Commercial agricultural production requires accessible markets. If such markets are accessible, long-term commercial significance might be viable.

A jurisdiction may consider other issues, such as food scarcity and preserving heritage or artisanal foods. The designation process must accomplish two goals:

- (1) designation of an amount of agricultural resource lands “sufficient to maintain and enhance the economic viability of the agricultural industry in the county over the long term”; and
- (2) retention of “supporting agricultural businesses, such as processors, farm suppliers, and equipment maintenance and repair facilities.”⁴⁶

If the designation process is conducted area-by-area, the end result must still secure long-term county-wide economic viability.

Identifying agricultural lands of local importance is an additional classification layer.⁴⁷ The administrative code does not provide further guidance for identifying locally important lands. Some jurisdictions use locally important lands in their calculus of how to secure long-term county-wide economic viability.

Once the designation process is complete and the lands are properly classified, a jurisdiction must adopt development regulations that “assure the conservation of agricultural resource lands of long-term commercial significance” consistent with WAC 365-196-815.⁴⁸ Conservation of ARLs can be secured

45 *City of Redmond v Central Puget Sound Hearings Bd.*, 136 Wn. 2nd 38, 52-53, 951 P.2nd 1091, 1097 (1998).

46 WAC 365-190-050(5)

47 WAC 365-190-050(6)

48 WAC 365-196-815 – Conservation of Natural Resource Lands, <http://apps.leg.wa.gov/wac/default.aspx?cite=365-196-815>

through “measures designed to assure” that such lands remain available for use in commercial production of the resource designated.⁴⁹ A jurisdiction must adopt regulations which (1) prevent conversion of agricultural land to a use that removes the land from resource production, and (2) assure that adjacent uses do not interfere with the continued of these designated lands for the production of food and agricultural products.”⁵⁰

49 WAC 365-196-815(1)(b) - <http://apps.leg.wa.gov/wac/default.aspx?cite=365-196-815>

50 WAC 365-196-815(1)(b)(i) and (ii) - <http://apps.leg.wa.gov/wac/default.aspx?cite=365-196-815>