Department of Revenue
Washington State

Property Tax Advisory

Property Tax Advisories are interpretive statements authorized by RCW 34.05.230.

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Establishing Additional Eligibility Requirements for the Current Use Program

In response to multiple inquiries from county officials and property owners as to whether assessors and county legislative authorities have the authority to establish additional eligibility requirements for the three current use classifications other than those allowed in chapters 84.34 RCW and 458-30 WAC, the Department of Revenue has issued this Property Tax Advisory.

Question: May counties adopt ordinances establishing eligibility requirements for the three current use classifications in chapter 84.34 RCW that are in addition to the eligibility requirements in state statute?

Answer: Counties may adopt ordinances that establish additional eligibility requirements for the "open space" and "timber land" classifications, but not for the "farm and agricultural land" classification. However, additional eligibility requirements for the open space and timber land classifications must not conflict with state law and not arbitrarily or capriciously restrict access to either classification.

Analysis:

Article XI § 11 of the Washington State Constitution ("Constitution") allows local governments to adopt regulations that are not in conflict with state law. It provides that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws."

Washington case law has established two tests to determine a local ordinance's validity with respect to state law. An ordinance is invalid if:

- it directly conflicts with a state statute[1]; or
- the Legislature manifests an intent to preempt the field/subject matter.[2]

Article VII § 11 of the Constitution allows three classes of land to qualify for current use valuation: open space land, farm and agricultural land, and timber land. Statutory criteria and procedures contained in

[1] *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009).

[2] *Id.* at 827.

chapter 84.34 RCW govern the three classifications of land. The Department of Revenue's analysis of the validity of local ordinances for the three classifications of land is discussed below.

Example One: The county legislative authority passes an ordinance adopting a Public Benefit Rating System (PBRS). The section on Farm and Agricultural Conservation Land in the ordinance states the following:

> "Farm and Agricultural Conservation Land" means:
>
> - Land that was either previously classified under RCW 84.34.020(2) (farm and agricultural land) that no longer meets the criteria of that subsection and is reclassified as open space land: or
> - Traditional farmland not classified under chapter 84.33 or 84.34 RCW that has not been irrevocably devoted to a use inconsistent with agricultural uses, and has a high potential for returning to commercial agriculture.
>
> Eligible lands must meet one of these definitions and return to commercial agricultural production within 10 years.

The county legislative authority approves and denies all open space land (which includes the farm and agricultural conservation land sub classification) applications. The decision to grant or deny the application is a legislative determination and is reviewable only for "arbitrary or capricious"[3] actions. (RCW 84.34.037(5)) In determining whether classification will be granted, the revenue loss or tax shift as well as the benefits from preserving or protecting environmental, scenic, or recreational resources must be considered. (RCW 84.34.037(2))

The county legislative authority may adopt a PBRS that establishes additional eligibility requirements for classifying property as open space land. (RCW 84.34.055) However, the additional requirements may not arbitrarily or capriciously restrict access to the open space land classification.

The eligibility requirement in this example which limits the amount of time a parcel can be classified as farm and agricultural conservation land may be permissible under RCW 84.34.037(4) as a condition of granting the open space land classification. This condition appears consistent with the intent that "farm and agriculture conservation land" have a high potential for returning to commercial agriculture as described in RCW 84.34.037(2)(c)(ii).

On the other hand, if land does not return to commercial agricultural production within the required period, the assessor could remove it from classification because the land did not meet the conditions of approval. An alternative to removing the land from classification could be reducing the benefit the parcel receives from being classified as farm and agricultural conservation land. This alternative may be more appropriate for land being preserved for long-term agricultural purposes instead of land that has a high potential of returning to commercial agricultural use within 10 years.

[3] "Arbitrary and capricious" has been defined as action which is willful and unreasoning, without consideration and in disregard of facts and circumstances. *See, Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 903 P.2d 433, *cert. denied*, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1995).

In contrast, if the county legislative authority passes an ordinance requiring all parcels be removed from classification after a 10-year period, *regardless of how the land is being used*, it could be considered arbitrary and capricious because land would be removed even if it is actively farmed or being preserved for future commercial agricultural use. Additionally, land used for commercial agriculture that cannot qualify for reclassification as farm and agricultural land under RCW 84.34.020(2) because it entered farm and agricultural conservation land as "traditional farmland," should not be removed simply because of a time limitation if it meets the other statutory requirements for classification.

Example Two: The county legislative authority passes an ordinance that requires a minimum parcel size of 10 acres for classification as open space land.

Open Space Land – RCW 84.34.020(1)
Although there is no minimum parcel size requirement under state law, a county may require a minimum parcel size to qualify as open space land. For this example, the intent of the minimum acreage requirement is to maximize the benefit to the public by granting classification to larger parcels, so this would fall within the discretion granted by the statute to consider public benefit when approving an application.

Farm and Agricultural Land – RCW 84.34.020(2)
Unlike the open space land classification, the county assessor approves and denies all applications for the farm and agricultural land classification. This difference, together with the fact that the definition of "farm and agricultural land" contains detailed and objective criteria for determining whether a property qualifies, indicates that counties may not adopt ordinances that establish additional eligibility requirements for the farm and agricultural land classification without conflicting with Article XI § 11 of the Washington Constitution.

If a county adopts an ordinance that places additional restrictions on the eligibility for the farm and agricultural land classification, then the ordinance is removing a benefit that is available under the state statute. As such, an ordinance with minimum acreage requirements would conflict with state statute and be considered invalid by Washington courts.

Thus, the Department takes the position that state law preempts counties from imposing additional eligibility requirements beyond those listed in state statute.

Timber Land – RCW 84.34.020(3)
The county legislative authority approves and denies all timber land applications. This discretion primarily involves whether the property is devoted to the growth and harvest of timber for commercial purposes. (RCW 84.34.020(3))

As with the application process for open space land, the granting or denial of an application for the timber land classification is a legislative determination and is reviewable only for arbitrary and capricious actions. (RCW 84.34.041(4))

The county legislative authority must act upon the application "with due regard for all relevant evidence and without any one or more items of evidence necessarily being determinative." (RCW 84.34.041(3)) [4] Thus, the application must be considered as a whole, in its entirety, as to whether the county believes the property is devoted primarily to the growth and harvest of timber for commercial purposes.

Accordingly, counties may restrict the approval of applications by enacting ordinances that require certain conditions be satisfied depending on the characteristics of the property or the information in the timber management plan as long as a single condition, by itself, is not determinative of whether the application is denied.

However, to reconcile this provision with the language in RCW 84.34.041(3), these conditions must be related to ensuring the property is devoted primarily to the growth and harvest of timber for commercial purposes. Consequently, the Department would consider conditions, such as an ordinance imposing minimum acreage requirements that differ from those allowed in state statute, to be invalid as it conflicts with state statute.

Example Three: The county legislative authority adopts an ordinance that states the following:

> Pursuant to RCW 84.34.020(3), the primary use of the property must be for the production of forest crops. To qualify for classification as timber land, the land cannot contain a residence if it is at least 5 but less than 20 acres. It is deemed that such land is being used primarily as a home site, and therefore does not comply with the intent and purpose of the timber land classification.

State law defines "timber land," in RCW 84.34.020(3), in part, as follows:

> "Timber land" means any parcel of land that is five or more acres or multiple parcels of land that are contiguous and total five or more acres which is or are devoted primarily to the growth and harvest of timber for commercial purposes. Timber land means the land only and does not include a residential home site.

Under state law, parcels that are less than 20 acres, but at least five acres, may be classified as timber land, even if there is a residence. The county ordinance, however, prohibits parcels smaller than 20 acres, with a residence, from qualifying for the timber land classification.

State law would allow a six-acre parcel of land with a one-acre home site to qualify for the timber land classification. If a parcel includes a home site, the home site acreage is excluded from the qualifying timber acreage.

The ordinance takes away a possibility that exists in state law; therefore, the Department would consider the ordinance to be invalid as it conflicts with the state statute.

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[4] However, see RCW 84.34.041(3) for three specific circumstances in which an application can be denied without regard to other evidence.