

resource lands of long-term commercial significance, and whether the application of those criteria to approximately 5000 acres complied with the Act.

1000 Friends also challenged several map amendments.² The focus of 1000 Friends' challenge was the de-designation of 291 acres from an agricultural resource land classification to a rural designation. 1000 Friends also challenged application of the density provisions in the existing zoning code to the new areas designated as rural. There were numerous intervenors on behalf of the County for each of the challenged actions.

The Board found that the County's notice and public participation procedures **did not comply** with the Act. The County never stated in its notices that it was not only considering changing the criteria it used for identifying and designating agricultural resource lands of long-term commercial significance, but that it was also considering the designation of approximately 5000 acres as Rural Farms – an agricultural resource land designation. The Board also found the County had not followed, and **did not comply** with, the Act's criteria for identifying and designating agricultural resource lands of long-term commercial significance. The County's designation criteria relied primarily on soils data and did not include two of the required components for determining long-term commercial significance – proximity to population areas and possibility of more intensive use. Orton Farms successfully demonstrated that the County had not conducted any analysis that applied the statutory criteria in evaluating the lands it designated. The text and map amendments challenged by Orton Farms were found to be **noncompliant** with the agricultural resource land provisions of the Act. The Board also entered a **determination of invalidity** for substantial interference with the public participation goal pertaining to both the text and map amendments.

Similarly, the Board found that the County's de-designation of 291 acres of agricultural resource land to rural **did not comply** with the goals and requirements of the Act. 1000 Friends successfully demonstrated that the County ignored the statutory criteria for designating agricultural resource lands and erroneously based its decision to de-designate 291 acres on the land owner's intent to no longer farm the land. The Board repeated the holdings of the Redmond Court that land owner intent or current use are not conclusive in the designation process. The Board also entered a **determination of invalidity** pertaining to the properties affected by this map amendment.

The Order **remands** the noncompliant and invalid Amendments, sets forth a compliance schedule, and establishes a compliance hearing date for early 2005.

² One challenged amendment, pertaining to an expansion of the City of Bonney Lake's UGA, though originally consolidated in this case, was segregated, settled and ultimately dismissed.

I. BACKGROUND³

On November 18, 2003 Pierce County (the **County**) completed its 2003 annual Plan amendment cycle by adopting Ordinance No. 2003-103s (the **Ordinance**). The Ordinance amended Pierce County's GMA Comprehensive Plan (the **Plan**), by adopting text amendments [denoted as "T" Amendments], amendments to the County's Future Land Use Map (FLUM) [denoted as "M" Amendments] and revisions to the County's various urban growth areas (**UGA**) boundaries [denoted as "U" Amendments]. The Ordinance was signed by the Pierce County Executive on December 1, 2003. The Ordinance was subsequently published.

The Board received two timely petitions for review (**PFRs**) challenging the County's adoption of certain amendments within Ordinance No. 2003-103s. The first PFR was filed by Orton Farms LLC, Riverside Estates Joint Venture and Knutson Farms Inc. (hereafter **Orton Farms**). Orton Farms challenged 1) whether the County's adoption of the agricultural related Plan amendments and designations (Amendment T-8 and any associated map amendments – ultimately M-12) comply with the agricultural resource land provisions of the Growth Management Act (**GMA** or **Act**); and 2) whether the County's adoption of the agriculture related amendments complied with the notice and public participation requirements of the Act.

The second PFR was filed by 1000 Friends of Washington and Friends of Pierce County (hereafter **1000 Friends**). 1000 Friends challenged whether 1) the County's expansion of the Bonney Lake UGA (Amendments U-5, U-6, U-7, U-8 and U-9) complied with the UGA provisions of the Act; 2) whether the redesignation of several agricultural resource lands to rural designations (Amendment M-10) complied with the agricultural resource land provisions of the Act; and 3) whether the densities permitted in the rural designations for the newly designated areas were urban and noncompliant with the urban and rural lands provisions of the Act.

The Board consolidated the two PFRs, held the prehearing conference (**PHC**) and issued the Prehearing Order (**PHO**). At the PHC, and in the PHO, the Board granted Intervenor status to the Washington State Department of Community, Trade and Economic Development (**CTED**), 1000 Friends, the City of Bonney Lake, the Sumner School District No. 320 and The Buttes, LLC (**The Buttes**). CTED and 1000 Friends intervened on behalf of the County regarding the agricultural land issues in the Orton Farms portion of the case. The Buttes intervened on behalf of the County regarding the redesignation of agricultural resource lands to rural lands issues in the 1000 Friends portion of the case. The City of Bonney Lake and Sumner School District No. 320 intervened on behalf of the County regarding the Bonney Lake UGA expansion issue. This issue, the Bonney

³ See Appendix A – Procedural History for specific dates and details on the filings in this matter.

Lake UGA expansion issue, was ultimately separated from this consolidated case and set on a separate schedule.⁴

Pursuant to motions filed, the Board issued an Order admitting 7 supplemental exhibits to the record; allowance was made for rebuttal evidence. However, there were no dispositive motions filed in this matter. Prior to the hearing on the merits (**HOM**) the Board established a schedule for argument and set the location for the HOM for a Pierce County location. All prehearing briefs (**PHB**), responses (**Response**) and replies (**Reply**) were timely filed.

On June 17, 2004, the Board held the HOM at the Sumner City Hall Council Chambers, 1104 Maple Street, Sumner, Washington. Board members Edward G. McGuire, Presiding Officer, and Bruce C. Laing were present for the Board. Petitioners Orton Farms, LLC, Riverside Estates Joint Venture and Knutson Farms Inc., were represented by William T. Lynn. Petitioners 1000 Friends and Friends of Pierce County were represented by Tim Trohimovich, John T. Zilavy and Tim Allen. Respondent Pierce County was represented by M. Peter Philley. Intervenor CTED was represented by Alan D. Cosey. Intervenor 1000 Friends was represented by John T. Zilavy and Tim Trohimovich. Intervenor The Buttes LLC was represented by William T. Lynn. Court reporting services were provided by Terilynn Pritchard of Byers and Anderson Inc. Anna Graham [Pierce County] also attended. Approximately 15 persons attended and observed the HOM. The HOM convened at 9:30 a.m. and adjourned at approximately 3:00 p.m. A transcript of the proceedings was ordered by the Board (**HOM Transcript**).

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

All Petitioners challenge Pierce County's adoption of several 2003 Plan amendments, as adopted by Ordinance No. 2003-103s. Pursuant to RCW 36.70A.320(1), Pierce County's Ordinance No. 2003-103s is presumed valid upon adoption.

The burden of proof is on Petitioners to demonstrate that the actions taken by the County are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

⁴ The matter was captioned *1000 Friends of Washington v. Pierce County – City of Bonney Lake and Sumner School District No. 320 – Intervenors (1000 Friends III)*, CPSGMHB Case No. 04-3-0015. The only Legal Issue in this new case is Legal Issue 5 – the Bonney Lake UGA Expansion Issue. Several settlement extensions were granted. Additionally, the intervention of the City of Bonney Lake and Sumner School District No. 320 was transferred to the new matter. Hence, they did not participate further in this proceeding. On June 8, 2004, the County Council passed Ordinance No. 2004-37 which repealed the Bonney Lake UGA expansion amendments; on June 28, 2004, the County Executive signed the Ordinance; on July 6, 2004 the Board received a motion from Petitioner asking that the matter be dismissed in light of the adoption of Ordinance No. 2004-37; and on July 7, 2004, the Board issued an Order of Dismissal in the matter.

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the action taken by [Pierce County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find the County’s actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201, the Board will grant deference to the County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not consistent with the requirements and goals of the GMA.” *Cooper Point Association v. Thurston County*, No. 26425-1-II, 108 Wn.App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

In affirming the *Cooper Point* court, the Supreme Court stated:

Although we review questions of law *de novo*, we give substantial weight to the Board’s interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed “[I]t is well settled that deference [to the Board] is appropriate where an administrative agency’s construction of statutes is within the agency’s field of expertise . . .

Thurston County v. Western Washington Growth Management Hearing Board, Docket No. 71746-0, November 21, 2002, at 7.

III. BOARD JURISDICTION, PRELIMINARY MATTERS AND PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that the PFRs filed by Orton Farms and 1000 Friends were timely filed, pursuant to RCW 36.70A.290(2); all the Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction, pursuant to RCW 36.70A.280(1)(a), over the challenged ordinance, which adopts the County’s 2003 Plan amendments.

B. PRELIMINARY MATTERS

Several preliminary matters were addressed by the Board at the beginning of the HOM. The following recaps the oral rulings issued at the HOM.

CTED's Response brief was received one day after the filing deadline established in the PHO. However, when the Board received it, it was accompanied by an affidavit from the messenger service indicating that the package had been temporarily misplaced, and when it was recovered it was delivered. The untimely filing was due to an error by the messenger service. Due to the circumstances, the Board **deems the filing as timely** and noted that it will be considered in the Board's deliberations.

Attached to The Buttes Response brief were partial transcripts from the recording of the October 29, 2003 meeting of the Planning and Environment Committee of the County Council. Since there were no objections to the veracity of the transcripts, the Board accepted them as **HOM Ex. 1** (Tab 11, The Buttes Response) and **HOM Ex. 2** (Tab 12, *Id.*)

Attached to the Orton Farms PHB, under Tab 13, is a map compiled from information obtained from the Pierce County Assessor Treasurer's website (source data is also attached). Orton Farms noted that in its "Order on Motions to Supplement the Record" the Board allowed rebuttal evidence, from the same source as the admitted supplemental exhibits. Orton Farms PHB, at 9, footnote 21. The Board accepts this offering as rebuttal evidence; the map at Tab 13 and accompanying data are denoted as **HOM Ex. 3**.

Attached to 1000 Friends Reply, under Tab A, is an unsigned Draft "Order on Dispositive Motions" from the Eastern Washington Growth Management Hearings Board (EWGMHB) in Case No. 04-1-0002, *1000 Friends of Washington v. Chelan County*. On June 16, 2004, the Board received in its Seattle office, copies of the signed version of this Order and an updated slip opinion. The Board construes this submittal as a request to take official notice which the Board will do. The Board takes notice of the signed June 10, 2004 "Order on Dispositive Motions" in *1000 Friends of Washington v. Chelan County*, EWGMHB Case No. 04-1-0002. This item is denoted as **HOM Ex. 4**. The Board also takes notice of a new slip opinion in *Whidbey Environmental Action Network v. Island County (WEAN)* – slip opinion 2004 WL 1240505 (Wash. App. Div. 1). This item replaces Tab 7 in 1000 Friends Response. This item is denoted as **HOM Ex. 5**.

Prior to the hearing, the Board requested that the County provide a large scale copy of its FLUM for the entire County for display purposes. The County provided a copy of its FLUM entitled Land Use Designations, Adopted October 28, 2003 – Ord. # 2003-93S2, Effective December 15, 2003. This item is denoted as **HOM Ex. 6**. The County also provided a large scale map of Amendment M-12, now entitled,⁵ Prime Agricultural Lands within the Alderton – McMillan – Riverside Area [Rural Farm Land Use Designation Map]. The map shows rural parcels with 50% or more area of prime agricultural soil and minimum lot size of 2.5 acres. This item is denoted as **HOM Ex. 7**. Finally, Orton Farms provided a demonstrative exhibit of the chronology of events leading to the adoption of the T-8 and M-12 Amendments. Both Orton Farms and Pierce County

⁵ Amendment M-12 was entitled "2003 Proposed Area-wide Map Amendment – Amendment #M-12," the map shows the Proposed Rural Farm Designation.

devote substantial pages in their respective briefing to outlining a “Chronology” of events. The dates and events portrayed on the demonstrative exhibit are undisputed in the briefing by the parties. Therefore, this item is denoted as **HOM Ex. 8**.

C. PREFATORY NOTE

This is a consolidated case challenging Pierce County’s adoption of its 2003 Plan amendments. The initial challenges involved 8 Legal Issues relating to the County’s adoption of Ordinance No. 2003-103s. Four issues were posed by Orton Farms in its PFR [Agricultural Resource Land Designation Issues and Notice – Legal Issues 1-4.] and four issues were raised by 1000 Friends in its PFR [Bonney Lake UGA Expansion Issue and Redesignation of Agricultural Resource Lands to Rural-10 – Legal Issues 5-8.⁶]. *See* PHO, at 9-10. However, on May 12, 2004, pursuant to a stipulation of the parties, the Bonney Lake UGA expansion issue [Legal Issue 5] was separated from this matter and scheduled for a later hearing under a separate case title and number. *See* footnote 2, *supra*. Consequently, this case will only deal with the Orton Farms Legal Issues and the remaining 1000 Friends Legal Issues. This FDO addresses the Orton Farms Legal Issues first, and then the remaining 1000 Friends Legal Issues.

Under the Orton Farms Legal Issues, the Board first addresses Legal Issue 4, pertaining to notice and opportunity for public participation; then the Board discusses Legal Issues 1 through 3 together, since they all relate to the GMA’s goals and requirements for the designation of agricultural resource lands. Under the remaining 1000 Friends Legal Issues, the Board first addresses Legal Issue 6, then Legal Issue 7. Invalidity is addressed last.

One final note, on May 12, 2004, Board Member Joseph W. Tovar withdrew from this proceeding, pending the expiration of his term on June 30, 2004. Mr. Tovar did not participate in the Board’s deliberations. However, the Board’s newest member,⁷ Margaret Pageler, read the briefing and the HOM Transcript and participated in the Board’s deliberations.

IV. LEGAL ISSUES AND DISCUSSION

A. ORTON FARMS LEGAL ISSUES

Legal Issue No. 4 **[Notice and Public Participation]**

The Board’s PHO set forth Legal Issue No. 4

⁶ Legal Issue No. 8 as posed in the 1000 Friends PFR requested a determination of invalidity.

⁷ Board Member Pageler’s term commenced on July 1, 2004.

4. Did Pierce County (the **County**) violate the GMA's notice and public participation requirement for comprehensive plan amendments, including RCW 36.70A.035, .130 and .140, in adopting Ordinance No. 2003-103s (the **Amendments** – specifically the agricultural resource land amendments T-8 and M-12)? [Based upon, and intended to reflect, Orton Farms PFR, paragraph 20, at 6-7.]

Applicable Law

RCW 36.70A.035(1) provides in relevant part:

The public participation requirements of this chapter *shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals*, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include:

...

(b) *Publishing notice in a newspaper* of general circulation in the county, city or general area where the proposal is located or that will be affected by the proposal. . .

...

(e) *Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.*

(Emphasis supplied.)

RCW 36.70A.130(2)(a) provides in relevant part:

Each county and city shall establish and broadly disseminate to the public a public participation program *consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are to be considered* by the governing body of the county or city no more frequently than once every year. . .

(Emphasis supplied.)

RCW 36.70A.140 provides in relevant part:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for *early and continuous public participation* in the development and amendment of

comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services and consideration and response to public comments. . . .

(Emphasis supplied.)

The Board has rendered numerous decisions interpreting the GMA's notice and public participation requirements. See CPSGMHB Digest of Decisions 1992-2004 (Updated to April 4, 2004) [See particularly Keywords: Notice and Public Participation].

Discussion

The Action:

Ordinance No. 2003-103s adopted numerous text (T), map (M) and urban growth area (U) amendments to the Pierce County Comprehensive Plan. However, the focus of the notice and public participation challenge alleged by Orton Farms relates to the adoption of text amendment "T-8" and map amendment "M-12." Amendment T-8 made numerous changes to the policy language within the Agricultural section of the County's plan. These changes included changes to the criteria⁸ the County uses for identifying and designating agricultural lands of long-term commercial significance. M-12 designated approximately 5000 acres⁹ in the Cascade Corridor – Puyallup Valley¹⁰ as Rural Farms – an agricultural resource land designation.

Position of the Parties:

Orton Farm's argument on this issue is short and sweet. Petitioners claim that the County failed to provide adequate public notice of the radical changes that occurred to T-8 and M-12 as those amendments evolved and were adopted; and that the "general notice" provided by the County was not adequate. Orton Farms PHB, at 15-17.

At the HOM, the County noted that the process involved here is a legislative process, not a judicial matter which typically involves more rigorous notice requirements. The County contends that, within the legislative context, it did comply with the notice and public participation requirements of the Act. The County argues that this legislative amendment process involved: 1) the Pierce County Farm Advisory Commission (FAC),

⁸ The designation criteria are set forth in "T-8's" amendments to LU-Ag Objective 15 and perhaps LU-Ag Objective 16A.

⁹ See HOM Transcript, at 48-49.

¹⁰ This area is generally referring to land along the Puyallup River Valley between the Cities of Orting and Sumner. However, the Puyallup Valley extends to Commencement Bay at the City of Tacoma.

various Community Planning Advisory Commissions (**PACs**), the Planning Commission (**PC**), the Council's Planning and Environment Committee (**P&EC**) and the County Council (**Council**); 2) took approximately a year to complete; involved numerous meetings, scores of people; and 3) each reviewing body gave adequate notice of the County's schedule and process. The County supports its contention with a 30 page chronology of dates, meetings, documents, testimony and letters provided during the process. County Response, at 3-34; and 46-52.

In reply, Orton Farms asserts that: 1) the limited public notices were not reasonably calculated to inform interested landowners of the affects of T-8, and thus interfered with public participation during the amendment process; and 2) the information disseminated to the public concerning T-8 was extremely limited, and different than the amendments ultimately adopted. Orton Farms Reply, at 4-19.

Chronology:

The Board discussion will begin with a chronology of the notices and hearings that led to the adoption of Amendments T-8 and M-12. The following chronology is generally based upon HOM Ex. 8, but is verified and supplemented by the statement of the facts and chronologies presented in briefing by both Orton Farms and Pierce County. Additionally, specific Record Exhibits are cited. See HOM Ex. 8; Orton Farms PHB, at 3-9; and County Response, at 3-34, (emphasis *[italics]* in the Chronology, *infra*, is supplied by the Board).

- **November 15, 2002** - Application for T-8 submitted, by the County on behalf of the FAC, for consideration during the 2003 annual Plan amendment cycle. *“This proposal [amendment] would add policies to the Land Use Element of the Comprehensive Plan to address issues relating to agriculture, and concerns raised by the Farm Advisory Commission. . . .The proposed amendment would put forward policies that would be of benefit to efforts to preserve and encourage agriculture.* Ex. I.R.8.a, at 2.
- **February 25, 2003** – Council Resolution R2003-8s adopted, which identifies amendments to be considered during the 2003 Plan amendment cycle. *“Amend Plan to address recommendations of Farm Advisory Commission and recently adopted right-to-farm legislation.”* Ex. I.L.2 R2003-8s, Ex. “B,” at 2.
- **April 16, 2003** – **Notice of Planning Commission review** of proposed 2003 Plan amendments is published. Ex. II.A.9.e
- **May 7, 2003** – Staff Report to Planning Commission includes text of proposed Amendment T-8 and description of proposed changes:
 - *Develop a transfer of development rights program;*
 - *Implement anti-nuisance right-to-farm rules;*
 - *Continuing support for PCFAC, Conservation District and WSU Extension;*

- *Remove “no density incentive” provisions;*
- *Add limited accessory commercial uses on agriculturally designated lands;*
- *Add objective to ensure regulations are in place to maintain vitality of the agricultural industry;*
- *Add policies to encourage farming throughout the County not just in rural areas;*
- *Add policies to streamline permitting*
- *Add policies to allow activities associated with farming;*
- *Add additional policies to promote marketing, limited flexibility in commercial uses, improve permitting system, expand tax incentive program, and create a lease-back program. Ex. I.M.20, at 1-8.*
- **May 7, 2003** – 1000 Friends of Washington provides letter to Planning Commission and testifies proposing “*clarifying amendments to the designation criteria of agricultural lands of long-term commercial significance and other policies, and recommend that the county designate and zone additional farmland Agriculture. . .*” Ex. I.H.8.a, at 1.
- **May 13-27, 2003** – Community Planning Advisory Commissions (PACs) meet to provide input on T-8, as referenced in May 7, 2003 Staff Report. All PACs support proposed amendment. Ex I.H.8.f; Ex. I.D.11.¹¹
- **July 16, 2003** – Combined Staff Report and Draft Supplemental Environmental Impact Statement was released and submitted to Planning Commission. The items from the May 7, 2003 Staff Report, *supra*, are the *only amendments discussed in the impact analysis of the DSEIS*. Ex. I.N.1, at 131-139; and County Response, footnote 8, at 15.
- **July 22, 2003** – A Draft Supplemental Staff Report #4 was sent to the Planning Commission, commenting on the T-8 proposal. In that report, staff commented that “*Staff agrees that [the 10-acre minimum lot size for designation to agricultural lands] could be decreased.*” Staff also indicated that the PCFAC was considering the proposals offered in the 1000 Friends May 7, 2003 letter and they would be brought to the Council’s Planning and Environment Committee. Ex. I.M.4, at 2.
- **July 22, 2003** – Planning Commission revises, and unanimously adopts T-8: *deleting reference to the 10-acre minimum lot size; adding reference to USDA, NRCS soil conservation system as a criterion for designation; and eliminating the addition of agricultural lands to UGAs*. Ex. II.A.9.k, at 1-2.
- **September 17, 2003** – **Notice of PCFAC regular meeting** on September 22, 2003 is published. Ex. II.A.9.l.
- **September 22, 2003** – PCFAC supports initial changes and apparently in partial response to 1000 Friends May 7, 2003 letter, recommends additional changes, including:

¹¹ The Peninsula and Summit View Advisory Commission recommendations are attached to the May 14, 2003 minutes of the PC. No exhibit numbers are given.

- *Include full definition of agricultural land as defined in RCW 36.70A.030(2);*
- *Add policies to preserve the “critical mass of agricultural lands;”*
- *Prohibit development on class 1, 2w, or 3w soils within the Cascade Corridor-Puyallup Valley area, after a Purchase of Development Rights Program had been created;*
- *Create a Cascade Corridor-Puyallup Valley Area agricultural district;*
- *Add a policy “that ensures that all agricultural lands, not just ‘prime’ lands, are conserved and protected;”* [This item is cited in the County Response, at 19; however it does not appear in the noted exhibit.] Ex. I.R.8.j.
- **October 8, 2003** – County mails “**Pierce County Council Public Meeting Notice** – Proposed 2003 Comprehensive Plan Amendments” to approximately 2500 businesses and individuals. Provides time, location and topics for Planning and Environment Committee and Council hearings on all proposed amendments. Exs. V.B.88 and IV.C.27.
- **October 22 and 29, 2003** – Planning and Environment Committee meets and adopts amendments to Amendment T-8 that include:
 - *Creating the new Rural Farms land use designation, to be applied only in the valley between Sumner and Orting – no map is adopted.*
 - *Eliminating the minimum lot area criteria throughout the County, but requiring a 2.5-acre minimum lot size in the Cascade Corridor – Puyallup River Valley for designation as Rural Farm. Exs. V.B.88 and 91.*
- **October 15 and 29, 2003** – **Notice of County Council’s November 18, 2003 full Council review and hearing** on the 2003 proposed amendments is published. Ex. IV.C.27
- **November 3, 2003** - Final SEIS issued for 2003 Plan Amendments; it provides:
 - *The changes proposed by the Planning Commission would provide for additional land suitable for agriculture to be placed in the Agricultural designation and would limit conversion of agricultural land to other uses. It would also amend the criteria for identifying agricultural lands; specify that off-site density bonuses may be applied to maintain large minimum lot sizes; prohibit development on prime agricultural soils within the Cascade Corridor – Puyallup Valley area; allow limited commercial uses that are incidental to the primary agricultural use; and would not allow additional agricultural land in the UGA. These changes are intended to result in increased preservation of agricultural land. The proposed amendment could result in increased commercial development associated with agricultural uses in the area. Ex. III.B.4, at 7; (emphasis supplied).*

- **November 18, 2004** – County Council adopts Ordinance No. 2003-103s, including Amendments T-8 and M-12 [Designating land in the Cascade Corridor – Puyallup River Valley between the cities of Sumner and Orting as Rural Farm”]. Ex. I.V.C. I.; Ordinance No. 2003-103s.

Board Discussion:

The question for the Board is whether the published and mailed notices the County provided were reasonably calculated to provide notice to the public, including property owners, of the proposed amendments to the comprehensive plan.

In addressing adequate notice challenges in several prior cases this Board has stated: 1) “Publication of a Council Agenda with the notation ‘Revision to Critical Areas Ordinance’ *without describing the nature of the proposed changes* is insufficient notice. It would be difficult for a potentially interested member of the public to ascertain what the pending ordinance was proposing.” *Homebuilders Association of Kitsap County v. City of Bainbridge Island (Homebuilders)*, CPSGMHB Case No. 00-3-0014, Final Decision and Order, at 10-11, (emphasis supplied); and 2) “[E]ffective notice of an amendment to a Capital Facilities Element involving the addition or subtraction of facilities deemed ‘necessary for development’ or a change in a level of service (LOS) for a listed facility *must clearly and concisely describe the nature or magnitude of modifications being considered.*” *Jody L. McVittie v. Snohomish County (McVittie VI)*, CPSGMHB Case No. 01-3-0002, Final Decision and Order, at 9-10, (emphasis supplied).

In other words, the Board’s decisions have attempted to describe the minimum components of effective notice. At a minimum, the general nature and magnitude of the proposed amendments must be described. If amendments are to add, delete or strengthen/weaken existing policies that will affect existing designations, those factors should be so noted. If proposals involve changes to criteria or standards that will increase or decrease the amount of land designated, amount or type of development permitted, or the number of facilities affected, those aspects of the proposal should be so noted. If existing land use designations are potentially being changed, this should be so noted. These are the basic indicators for the Board in determining whether notice is reasonably calculated to inform the public of potential changes in a Plan or regulation. It is within this context that the Board reviews this issue.

To ascertain whether the notice provisions of the Act have been met by the County, the Board finds that the critical *published notices* and *mailed notices* related to the County’s review and adoption of the agricultural resource lands amendments [T-8 and M-12] are as follows. Published Notices were published in The Dispatch¹² and/or the News Tribune¹³ on:

¹² The Dispatch is the County’s legal newspaper of record.

¹³ The News Tribune is a newspaper of general circulation throughout Pierce County and the southern Puget Sound.

- 1) **April 16, 2003**, published prior to the Planning Commission’s hearings scheduled from May 7 through July 22, 2003 [Ex. II.A.9.e];
- 2) **September 17, 2003**, published prior to the Pierce County Farm Advisory Commission’s review of the PC’s recommendation on September 22, 2003 [Ex. II.A.9.1, published in The Dispatch only.]; and
- 3) **October 15 and 29, 2003**, published prior to the County Council’s November 18, 2003 review and hearing where the amendments were adopted [Ex. IV.C.27].

Additionally, the County provided *mailed notice* to approximately 2500 businesses and individuals¹⁴ on **October 8, 2003**, prior to the County Council’s Planning and Environment Committee (**P&EC**) review and hearings on October 22 and 29, 2003 [Ex. V.A.2 and Ex. V.B.88]. This mailed notice also preceded the published notice of the County Council’s scheduled hearing. Each of these notices is discussed *infra*.

The April 16, 2003 Published Notice

The April 16, 2003 published notice for the PC meetings provides in relevant part:

Amendments to the comprehensive Plan can include: Text Amendments (changes in policies or text), Area-wide Map Amendments (changes in the Land Use Map resulting in changing zoning), Urban Growth Area/Urban Service Area Amendments (changes in designated Urban Growth Areas/Urban Service Areas); and Capital Facilities Plan Amendments (changes to the six-year financing plan for capital facilities).

The Planning Commission will begin public hearings on 2003 proposed Text, Area-wide Map, and UGA/USA Amendments to the Plan on April 30, 2003. An integrated staff report/supplemental environmental impact statement which evaluated the proposed amendments will be available at County public libraries by April 30.

...

The Planning Commission anticipates hearing testimony on specific changes as follows [all meetings are at 7:00 p.m. unless otherwise noted]:

...

May 7

T-8 Agriculture

...

Ex. II.A.9.e, (emphasis supplied). The reference to “T-8 Agriculture” is the only reference in the notice regarding possible changes to the County’s Agricultural policies.

¹⁴ The County did not provide, nor did the Board ask for, copies of the mailing lists of those who were mailed this notice.

This notice does not suggest whether new policies are being considered or existing policies are being deleted or revised as they relate to existing designated agricultural lands, nor does it mention the initial scope of the T-8 amendment related to Right-to-Farm policies. Further, there is no reference in the notice to changing designation criteria or to M-12 as an Area-wide Map amendment. The general nature or magnitude of the proposed amendments is not described. This notice merely indicates there are some proposed amendments to the Plan's Agriculture provisions; it was **not reasonably calculated to provide notice** to the public, including property owners, of the proposed amendments to the comprehensive plan.

The September 17, 2003 Published Notice

The September 17, 2003 published notice for the FAC meeting merely provides notice of the time and location of the *regular meeting* of the FAC. This notice was published after the PC had recommended revisions to the designation criteria. *See Chronology, supra.* In this notice there is no indication that the FAC may review the PC recommendations or the proposed 2003 Plan Amendments or make further comment or recommendation on them. There is no indication that the PC recommendation modified the criteria for designating agricultural lands, nor is M-12 mentioned. *See Ex. II.A.9.1.* The general nature or magnitude of the proposed amendments is not described. This notice was **not reasonably calculated to provide notice** to the public, including property owners, of the proposed amendments to the comprehensive plan.

The October 8, 2003 Mailed Notice

The October 8, 2003 mailed notice indicates that the P&EC was scheduled to meet on October 22, 2003 at 1:30 pm, and again on October 29, 2003 at 9:00 am and 1:30 pm. At these times, the P&EC is to take testimony and consider Ordinance No. 2003-103. Notice of the County Council's Final Hearing on the Ordinance is given as November 18, 2003 at 3:00.

The notice includes reference to the date and time that the various Amendments will be heard. There is also a description of each Amendment and the PC recommendation. The mailed notice indicates that on October 22, 2003 at 1:30, the P&EC will take testimony and consider 18 different Amendments. Among the listed Amendments is Text Amendment "T-8 Agricultural Policies." T-8 is described as "Add policies to support and preserve agriculture." The notice also indicates that the PC recommends "Approval." This notice does not indicate that the PC recommended changes to the criteria for designation of agricultural resource lands, or that the FAC recommended creating an agricultural designation in the valley between Orting and Sumner. *See Chronology, supra.* While the notice indicates dates and times for Map Amendments M-1 through M-11, there is no reference or notice of P&EC consideration of Map Amendment M-12. *See Ex. V.B.88 at 2.* The general nature or magnitude of the proposed amendments is not described. This notice was **not reasonably calculated to provide notice** to the public, including property owners, of the proposed amendments to the comprehensive plan.

The October 15 and 29, 2003 Published Notice

Finally, the October 15 and 29, 2003 published notice simply states the Title of Ordinance No. 2003-103¹⁵ and indicates that copies [of the Ordinance] are available at the County offices. Changes to Agricultural polices are not mentioned in the notice. This notice makes no reference to P&EC recommendations (based upon the PC and FAC recommendations) to change the criteria for designating agricultural resource lands and to designate agricultural resource lands in the Cascade Corridor – Puyallup River Valley between Orting and Sumner [*i.e.*, the Rural Farm designation]. Nor does it reference the M-12 Map amendment. *See* Ex. I.V.C.27. The general nature or magnitude of the proposed amendments is not described. This notice was **not reasonably calculated to provide notice** to the public, including property owners, of the proposed amendments to the comprehensive plan.

What the County Council finally adopted on November 18, 2003 in Ordinance No. 2003-103s included: 1) Amendment T-8, changes in policy language, including significant changes to the criteria for designating agricultural resource lands that could ultimately increase the amount of designated agricultural lands; and 2) Amendment M-12, a map amendment, that actually designated 5000 acres of land in the Cascade Corridor – Puyallup River Valley as “Rural Farm” – an agricultural resource land designation. The M-12 map apparently first appeared at the November 18, 2003 Council hearing. The Board finds that none of the County notices reflected the proposed change to designation criteria or the new Rural Farm designation. Although the County argued these proposals were “on the table” as early as the May 7, 2003 PC hearing, there was no notice indicating that the original menu of what would be “served at the table” had changed.

The “T-8 Amendment” that came out of the back end of the process bore little resemblance to the “T-8 Amendment” that was initiated in November of 2002; and the “M-12 Amendment” appears to have evolved in the closing minutes of the County’s 2003 amendment process. The Board notes that there is not even a Finding of Fact in the Ordinance related to the Amendment M-12. *See* Ordinance No. 2003-103s, Exhibit D (Findings of Fact).

Although the County’s intention to preserve additional agricultural resource land within the County is meritorious, especially in the context of GMA, and its Plan amendment process was long and extensive, the County’s efforts to provide notice to the public fell

¹⁵ The Title of Ordinance No. 2003-103s states,

AN ORDINANCE OF THE PIERCE COUNTY COUNCIL ADOPTING THE 2003 AMENDMENTS TO THE PIERCE COUNTY COMPREHENSIVE PLAN; AMENDING TITLE 19, TITLE 19A, AND TITLE 19D OF THE PIERCE COUNTY CODE, PIERCE COUNTY COMPREHENSIVE PLAN; SETTING FORTH AN EFFECTIVE DATE; AND ADOPTING FINDINGS OF FACT.

Ordinance No. 2003-103s, at 1.

far short of the notice and public participation requirements of RCW 36.70A.035, .130 and .140. Simply put, the County's notices on this topic never informed the public of the direction the agricultural lands amendments were heading.

Conclusions – Notice and Public Participation

The Board concludes that the County's adoption of the 2003 Plan Amendments T-8¹⁶ and M-12, as found in Ordinance No. 2003-103s, **do not comply** with the notice and public participation requirements of RCW 36.70A.035, .130 and .140. The Board will **remand** these amendments [T-8 and M-12] to the County with direction to provide effective notice of these, or other, proposed changes to the agricultural resource lands provisions of the Plan, should it wish to pursue them.

Legal Issues No. 1, 2 and 3 **[Agricultural Resource Land Designation]**

As noted in the Prefatory note *supra*, the Board will consider Legal Issues 1, 2 and 3 together, since they all challenge the process and criteria used by the County in designating agricultural resource lands. The Board's PHO set forth Legal Issue Nos. 1, 2 and 3 as follows:

1. *Did the County violate the agricultural resource lands provisions of the Growth Management Act [RCW 36.70A.020(8), .030(2), (10), .050 and .170] (the **GMA agricultural provisions**) when it adopted Amendment T-8 and any associated map amendments [includes Amendment M-12], because the amendments designated lands agricultural resource lands and Rural Farm lands properties that cannot be managed economically and practically for long-term commercial production of agricultural products and that are characterized by urban growth? [Based upon, and intended to reflect, Orton Farms PFR, paragraph 17, at 6.]*
2. *Did the County violate the GMA agricultural provisions when it adopted the Amendments, because the County failed to consider whether the parcels subject to the revised agricultural resource land designation and Rural Farm designation could be economically and practically managed for the long-term production of agricultural products? [Based upon, and intended to reflect, Orton Farms PFR, paragraph 18, at 6.]*

¹⁶ The Board acknowledges that the "T-8 Amendment" changed numerous objectives and policies within the Agricultural section of the County's Land Use Element, and it appears to the Board that the amendments to LU-Ag Objective 15 and new LU-Ag Objective 16A directly affect the criteria and designation of agricultural lands at issue in this case. However, the arguments offered by Petitioner and the County generally addressed "T-8" and "M-12." Therefore, the Board cannot discern, without guessing, whether other changes included within "T-8" fall short of the notice and public participation requirements of the Act. Consequently, the Board has to conclude that the entire scope of "T-8," as well as "M-12," fail to comply with the GMA, and the entire amendment will be remanded.

3. *Did the County violate the GMA agricultural provisions when it adopted the Amendments, because the County failed to consider the affected parcels proximity to population areas, the possibility of more intense uses of the land as indicated by a property's relationship to urban growth areas, predominant parcel size, land values under alternative uses, landowner intent, current land use, intensity of nearby land uses, and land use-settlement patterns and their compatibility with agricultural practices? [Based upon, and intended to reflect, Orton Farms PFR, paragraph 19, at 6.]*

Applicable Law

The goals of the GMA, which are to guide the development of comprehensive plans and development regulations, are found at RCW 36.70A.020. In this portion of the case, noncompliance with Goal (8) is alleged. This GMA goal provides:

(8) Natural resource industries. *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.*

(Emphasis supplied).

RCW 36.70A.050 provides in relevant part:

(1) *Subject to the definitions provided in RCW 36.70A.030, the department [CTED] shall adopt guidelines, . . . to guide the classification of: (a) Agricultural lands . . .*

. . .

(3) *The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington State. The intent of these guidelines is to assist counties and cities in designating the classification of agricultural lands . . . under RCW 36.70A.170.*

(Emphasis supplied.)

RCW 36.70A.170 provides in relevant part:

(1) . . . [E]ach county . . . shall designate where appropriate: (a) Agricultural lands that are not already characterized by urban growth and that have long term commercial significance for the commercial production of food or other agricultural products. . .

(2) *In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.*

(Emphasis supplied.)

The definitions for the GMA are contained in section RCW 36.70A.030. The relevant definitions at issue in this matter are .030(2) and (10):

(2) “Agricultural land” means *land 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.*

...

(10) “Long-term commercial significance” includes the *growing 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 use of the land.*

(Emphasis supplied.)

The relevant minimum guidelines for the designation of agricultural lands, developed by CTED pursuant to RCW 36.70A.050, is found at WAC 365-190-050, which provides:

(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 Agriculture Soil Conservation Service as defined by Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soils 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 patterns 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 to markets.

- (2) *In defining categories of agricultural lands of long-term commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils mapped by the Soil Conservation Service. If a county or city chooses not to use these categories, the rationale for that decision must be included in the next annual report to [CTED].*

(Emphasis supplied.)

Discussion

Having found that amendments T-8 and M-12 failed to comply with the notice and public participation requirements of the GMA, the Board could end its inquiry without ever addressing Legal Issues 1, 2 and 3. However, Petitioner wages a significant challenge to the methods and procedures, or lack thereof, which the County employs for designating agricultural resource lands of long-term significance. Therefore, assuming *arguendo* that the notice provisions provided by the County adhered to the GMA requirements, the Board will address Legal Issues 1, 2 and 3.

The Action:

Amendment T-8 amended numerous provisions of the Agricultural section in the Land Use Element of the County's Plan. Those amended sections that appear to relate to the criteria for designating agricultural land include LU-Ag Objectives 15 and 16A. *See* Ordinance No. 2003-103s, Section 2, Exhibit A, at 92-95. [The entirety of T-8 is found in Exhibit A, at 92-100, including the "Prime Agricultural Lands within Pierce County" map.] There are other sections or subsections not quoted *infra* that may also be affected. However, these two Objectives appear to capture the focus of the challenge in Legal Issue 1, 2 and 3. Relevant parts of each Objective are quoted with new language underlined and deleted language in ~~strikeout~~.

Pierce County Code (PCC) 19A.30.070 and LU-Ag Objective 15, as amended, provides in relevant part:

Define agricultural lands and the purpose behind agricultural land conservation.

1. At a minimum, agricultural land in Pierce County will be defined as land meeting the following criteria: the definition in RCW 36.70A.030(2): "land primarily devoted to the commercial production of horticulture, 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” (and including poultry raising, horse farms and ranches).

- a. Agricultural lands are lands that are not already characterized by urban growth and have long-term significance for the commercial production of food or other agricultural products.
- b. The criteria for classifying and designating agricultural lands are as follows:
 1. ~~Lands in parcels which are ten acres or larger in size shall be identified according to the USDA, NRCS soil classification system;~~ and
 2. Lands which are prime or unique soils as identified in:
 - ~~(a) United States Department of Agriculture (USDA), Soil Conservation Service, February, 1979, Soil Survey of Pierce County, Washington;~~
 - ~~(b) USDA Soil Conservation Service, June, 1981, Important Farmlands of Pierce County, Washington;~~ and
 3. Lands which are primarily devoted to the commercial production of horticulture, 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.;
 4. ~~Lands which are not adjacent to lots of record of one acre or less on more than 50 percent of the perimeter of the parcel.~~

LU-Ag Objective 16A, a new objective, provides in relevant part:

Establish a Rural Farm land use designation which would apply to all parcels of 2.5 acres or more in size with class 1, 2s, 2w and 3w soils located within the Alderton-McMillin Community Plan area and the Riverside part of the Mid-County Community Plan area (see Prime Agricultural Lands Map¹⁷), provided that those lands currently zoned

¹⁷ The Board notes that the map entitled Prime Agricultural Lands within Pierce County is part of Amendment T-8. Additionally, a note on this map indicates that “The capability classes that define prime farmland in Pierce County are 2s, 2w and 3w.” Class 1 soil, referenced in the text of LU-Ag Objective 16A, is not included on the Prime Agricultural Lands map. Ordinance No. 2003-103s, Attachment A, Amendment T-8 between pages 93 and 94.

Rural Neighborhood Center or rezoned to Rural Neighborhood Center through adoption of a community plan shall not be included in the Rural Farm land use designation. Expansion of the Rural Farm designation to other rural lands with these soil characteristics may be accomplished after further study, additional public participation and Council action.

Amendment M-12 adopts a “Proposed Rural Farm Designation – Amendment M-12” that includes a large portion of the Cascade Corridor - Puyallup River Valley between the Cities of Orting and Sumner. *See* Ordinance No. 2003-103s, Section 3, Exhibit “B” – Amendment #M-12.

Position of the Parties:

Orton Farms notes that the Board’s review is on the record before the County, and that record must support the County’s action. Here, Petitioner contends that the County cites to nothing in the record to support its designation of agricultural resource lands – *i.e.*, Rural Farm lands. *Citing Whidbey Environmental Action Network v. Island County*, 118 Wn. App. 567, 76 P. 3d 1215 (2003); and *Hensley v. Snohomish County* (**Hensley VI**), CPSGMHB Case No. 03-3-0009c, Final Decision and Order, (Sep. 22, 2003). Orton Farms PHB, at 11-12. Additionally, Petitioner argues that the County failed to address or consider the mandatory GMA requirements, including RCW 36.70A.020(8), .030(2) and (10), .050, .170, and CTED’s minimum guidelines [WAC 365-190-050(1)], when it adopted the Ordinance. *Id.*, at 12-13.

Petitioners do not dispute that their lands are lands that *are* “devoted to” agricultural use since they are in an area where the land is actually used or capable of being used for agricultural production.” (*Citing, City of Redmond v CPSGMHB*, 136 Wn 2d 38, 54, 959 P.2d 1091 (1998) (**Redmond**). *Id.*, at 12. However, Orton Farms cites this Board’s *Hensley VI* case, where the Board stated, “even lands that are ‘devoted to agriculture’ may not have long-term commercial significance and thereby not be appropriate for designation under the GMA.” *Id.* Based upon this framework, Petitioner then asserts,

The record – or more precisely, the lack thereof – shows that when developing amendments to PCC [Pierce County Code] § 19A.30.070 set forth in Section T-8 of Ordinance No. 2003-103s, Pierce County utterly failed to consider these requirements. In deleting the minimum parcel size requirements and the surrounding land use provisions, the County actually removed required elements that were previously included in the Comprehensive Plan.

...

In creating the new Rural Farm land use designation, the County ignored any concept of commercial viability and looked only to soils and a very small parcel size (2 ½ acres) to designate agricultural land. . . .[T]he County failed to consider proximity of such lands to population areas, the possibility of more intense uses of the land as indicated by a property’s

relationship to urban growth areas, predominant parcel size, land values under alternative uses, landowner intent, current land use, intensity of nearby land uses, and land-use-settlement patterns and their compatibility with agricultural practices, all as required by the Act.

Id., at 14; (emphasis in original). Petitioners also argue the County’s designation relies solely on soil characteristics and does not consider commercial viability. *Id.*, at 7-8.

The County responds by suggesting that the *Redmond* decision “clearly and explicitly elevated the GMA’s agricultural lands policy to the preservation level,” and that “the County could no longer rely on landowner intent [in designating agricultural lands]; it had to proactively begin to preserve precious agricultural lands.” County Response, at 38-39. The County then goes on to contend that the record supports the County’s extra efforts to preserve agricultural lands by adopting this Ordinance, noting the Prime Agricultural Lands map and correspondence from 1000 Friends of Washington to support its action. *Id.*, at 39-41. The County also suggests that Orton Farms abandoned Legal Issue 2 and argues, in relation to Legal Issue 3, that Chapter 365-190 – the CTED minimum guidelines – are advisory only and not binding; but nonetheless, the County considered them as evidenced by the 1000 Friends letters and the July 16, 2003 Staff Report and Draft Supplemental EIS, which evaluates similar factors. *Id.*, at 42-45.

Intervenor 1000 Friends also asserts that the County considered the GMA’s criteria for the designation of agricultural lands of long-term significance. It references supplemental exhibits admitted by the Board and its submittals to the PC and Council. 1000 Friends also reiterates in its brief, 1000 Friends’ interpretation of how WAC 365-190-050(1) supports the County’s action of designating additional agricultural lands of long-term commercial significance. 1000 Friends Response, at 1-18.

CTED also supports the County’s action. In its brief CTED asserts: 1) The purpose of the GMA’s Agricultural Lands provisions is to ensure that sufficient suitable land is available for agriculture; 2) Long-term commercial significance is not equivalent to commercial viability; 3) The GMA does not require the County to assess commercial viability as a criterion for designating agricultural lands; and 4) The factors in WAC 365-190-050 should not be used as an exclusionary tool to prevent agricultural lands designation. CTED Response, at 1-12.

In reply Orton Farms contends that the *Redmond* Court only dealt with the “devoted to” agricultural purposes prong of the statutory agricultural land designation test, and did not decide or interpret the second prong requiring “long-term commercial significance.” Nor did the Court alter GMA agricultural lands policy to require preservation of all lands where any agricultural production might be possible. Orton Farms Reply, at 22. However, Petitioner notes that the *Redmond* Court listed all the CTED minimum guidelines [WAC 365-190-050(1)] as criteria and factors that provide “ready guidance in determining if land has ‘long-term significance’ for agricultural production.” In summarizing the *Redmond* Court decision, Petitioner indicates that the Court emphasized

that preserving agricultural lands of long-term commercial significance involves many factors beyond mere capability of soils. *Id.*, at 23.

Board Discussion:

It is undisputed that the GMA imposes a **duty** upon Pierce County to identify, designate and protect agricultural resource lands of long-term commercial significance. *See* RCW 36.70A.170, .050, .060, .020(8) and .030(2) and (10). The GMA defines terms, and mandates criteria and factors that must be considered in discharging this duty. WAC 365-190-050(1) also provides direction for meeting this duty. To fulfill this obligation, the County must solicit public participation and develop a record that demonstrates that the County has conducted the required analysis (*i.e.*, application of the statutory criteria) in reaching its decision.

In the mid-1990's, the County adopted its GMA Plan and implementing regulations that included designations of agricultural resource lands of long-term commercial significance. These designations were not challenged. However, as evidenced by the challenged Ordinance, now the County has chosen to reevaluate and alter the agricultural resource lands designation criteria, and the resulting designations, found in its Plan. The Board finds nothing in the Act that suggests that a jurisdiction may not reevaluate its criteria for identifying and designating resource lands, or resource land designations, so long as the mandates of the Act continue to be followed. In fact the GMA requires "continuing review and evaluation" of Plans and implementing regulations. RCW 36.70A.130(1)(a).

So what are the purposes and parameters for designating agricultural resource lands?

The Supreme Court has stated,

The agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) direct counties and cities (1) to designate agricultural lands of long-term commercial significance; (2) to assure the conservation of agricultural land; (3) to assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes; (4) to conserve agricultural land in order to maintain and enhance the agricultural industry; and (5) to discourage incompatible uses.

King County v. CPSGMHB, 142 Wn.2d 543, 558, 14 P.3d 133 (2000).

In interpreting the Act, specifically the definitions of RCW 36.70A.030(2) and (10), the Board has articulated a two-part test for identifying and designating agricultural resource lands. The first requirement is that the land be "devoted to" agricultural usage; the second is that the land must have "long-term commercial significance" for agriculture. *See Richard R. Grubb v. City of Redmond (Grubb)*, CPSGMHB Case No. 00-3-0004, Final Decision and Order, (Aug. 10, 2000), at 11; and *Corinne R. Hensley et al., v.*

Snohomish County (Hensley VI), CPSGMHB Case No. 03-3-0009c, Final Decision and Order, (Sep. 22, 2003), at 36.

Regarding the test's first prong, the *Redmond* Court clarified that land is devoted to agricultural use "[I]f it is in an area where the land is *actually used or capable of being used* for agricultural production." *Redmond*, at 53, (emphasis supplied). This component of the test [*i.e.*, "devoted to"] is derived from USDA, SCS and NRCS soil surveys, land capability and soil classifications maps. It is important to acknowledge that these maps are large scale and particularly useful in identifying soils on a county-wide or area-wide basis, but the delineation of soil types noted on these maps may vary from site-specific soil assessments for a given parcel. However, they meet the GMA requirement and are appropriate for use by a jurisdiction in meeting its designation obligations pursuant to the Act. Thus, soils data plays a significant role in the identification and designation of agricultural resource lands.

Petitioners do not dispute that the soils-based criteria are appropriate, or that the newly designated Rural Farm lands, at least lands owned by them within the new designation, are *devoted to* agriculture as that term has been interpreted by the *Redmond* Court. Amendment T-8 and Amendment M-12 explicitly adopt and reference these soil surveys, land capability and classification systems as a basis for identifying prime agricultural lands in Pierce County. *See* Ordinance, Amendment T-8, Objective 15(1)(b)(1 and 2) and Prime Agricultural Lands Map; and Amendment M-12 map note. However, as noted *supra*, Petitioners assert that the Act requires an analysis of more than soils to identify and designate agricultural resource lands, and that the County ignored the second prong of the designation test. The Board agrees. The long-term commercial significance (LTCS) prong of the test is equally significant in the designation process.

CTED argues, *supra*, that while soil is not the sole determinant for identifying agricultural resource lands, it is the primary factor in the designation process. CTED notes that the definition of LTCS¹⁸ (the second prong of the test) includes reference to soils, *i.e.* the intrinsic attributes of the land, in three of the five factors to be considered – growing capacity, productivity and soil composition of the land. CTED Response, at 6-8. The Board agrees that soils weigh heavily in the designation of agricultural resource lands. USDA, SCS and NRCS soils information establishes and defines the "potential universe" of lands that could be designated as agricultural resource lands.

However, the Act's definition of LTCS requires two other factors to be considered: 1) the land's proximity to population areas and 2) the possibility of more intense use of the land. These two factors are principally locational factors requiring that the intrinsic attributes of the land be evaluated in the context of the land's location and surroundings.

¹⁸ RCW 36.70A.030(10) provides, "Long-term commercial significance" includes the growing 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 use of the land.

Application of these two factors will likely cull the size of the potential agricultural resource land universe derived solely from soil information, and yield fewer acres as appropriate for designation as agricultural resources lands of long-term commercial significance. It is these latter two factors for determining LTCS that provide the basis for the present dispute. Note that these are not optional factors to consider, by definition they are required components for determining LTCS; they must be evaluated and considered.

Petitioner and Intervenors address CTED's minimum guidelines – WAC 365-190-050(1)(a through j) – as providing additional indicators to aid jurisdictions in evaluating the “proximity to population areas” and the “possibility of more intensive use” components of the LTCS prong of the test. The CTED indicators are: the availability of public facilities; tax status; the availability of public services; relationship or proximity to urban growth areas; predominant parcel size; land use settlement patterns and their compatibility with agricultural practices; intensity of nearby land uses; history of land development permits issued nearby; land values under alternative uses; and proximity to markets. *See* WAC 365-190-050(a through j). These indicators have been acknowledged and recognized both by the Court and this Board as being valid and valuable indicators in complying with the GMA's requirements for determining LTCS. *See Redmond, Grubb and Hensley VI*. CTED's indicators are also indirectly referenced in RCW 36.70A.050.

As mentioned *supra*, Orton Farms contends that these CTED indicators are *mandatory* factors that the County must, but did not, evaluate in adopting Amendments T-8 and M-12. The County, however, correctly points out that this Board has stated that the minimum guidelines are advisory and not mandatory. In one of its earliest cases, the Board stated, “The minimum guidelines (Chapter 365-190 WAC) remain advisory – the legislature has not given [CTED] the authority to adopt mandatory regulations.” *See Twin Falls Inc., et al., v. Snohomish County (Twin Falls)*, CPSGPHB Case No. 93-3-0003, Order on Dispositive Motions, (Jun. 11, 1993), at 7. The Board notes that over the ensuing decade, the legislature still has not seen fit to authorize CTED to adopt the “minimum guidelines” as mandatory regulations. Consequently, the County is not compelled to rely upon or apply the CTED indicators noted in WAC 365-190-050(1)(a through j) in its designation process.¹⁹

However, in lieu of using these very useful CTED indicators of LTCS, the County is still required to evaluate LTCS in relation to “proximity to population areas” and the “possibility of more intensive use.” Addressing these factors is a mandatory requirement of the Act. If the County does not use WAC 365-190-050(1) for evaluating LTCS, it must explicitly identify those indicators it does use to satisfy the statutory analysis requirements.

¹⁹ The Board notes with interest that in each instance where agricultural lands designations or de-designations have been challenged before the Board, the challenged jurisdiction has either explicitly adopted by reference WAC 365-190-050(1) into its Plan, or explicitly applied WAC 365-190-050(1) in its analysis and findings supporting the decision.

There are other factors in evaluating agricultural resource land designations. Land-owner intent and current use are two that are not mentioned in the GMA definitions or CTED guidelines. Yet these indicators have been determined to be factors that may be included in evaluating whether lands are “devoted to” agricultural use. But, as the *Redmond* Court has stated, these indicators cannot be the sole or determinative factor.

While the land use on a particular parcel and the owner’s intended use for the land may be considered along with other factors in the determination of whether a parcel is in an area primarily devoted to commercial agricultural production, neither current use nor landowner intent of a particular parcel is conclusive for purposes of this element of the statutory definition.

Redmond, at 53. Nonetheless, current use and land owner intent may be indicators that can be part of the designation analysis, but they are not conclusive.²⁰

Orton Farms suggests “commercial viability,” which it defines as “managed economically and practically for long-term commercial production of food,” as the controlling factor in determining LTCS. Orton Farms PHB, at 7. CTED argues that commercial viability is not equivalent to LTCS, noting that “like any other economic use of land, the financial rewards of agriculture may ebb and flow over time. The GMA does not require that the county predict – much less guarantee – that any particular parcel of agricultural land will be economically viable over a period of time.” CTED Response, at 5-6. CTED contends that “The GMA’s agricultural lands provisions do not purport to ensure the success of any particular agricultural endeavor on any particular agricultural land. Their purpose is to ensure that sufficient suitable land is available for agriculture to continue.” *Id.* In reply, Petitioner asserts that the GMA does not preclude consideration of “commercial viability” as a factor in determining LTCS. The Board agrees with both CTED and Petitioner.

CTED’s general premise is one of the basic tenets of land use planning, and one of the purposes of designating future land uses in a GMA plan – *i.e.* to ensure that sufficient suitable land is available for all types of uses, including agriculture. But once designated, no land use designation comes with a guarantee. However, as Petitioners claim, the

²⁰ The Court explained:

[I]f land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture . . . All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the “agricultural land” designation.

Redmond, at 53.

GMA does not prohibit “commercial viability” from being considered as a factor,²¹ but again, it is not conclusive in determining LTCS. Given this construct and understanding of the process and criteria (both mandatory and optional) for identifying and designating agricultural lands of long-term commercial significance, does the County’s action comply? The Board answers with a firm – **No**. While the County’s action meets the “devoted to” (soils) prong of the test; the County fails the second prong (LTCS) of the two part designation test.

As outlined, *supra*, LTCS is defined in the Act as requiring an assessment of five different factors. Three generally relate to soils and two are locational factors: “proximity to population areas” and the “possibility of more intensive use.” Petitioner has made a *prima facie* case in demonstrating that the County did not evaluate or consider LTCS. The County could not counter these allegations. The Board finds that there is no evidence that the County can point to in the record that demonstrates it considered the appropriate criteria when it altered its criteria and designated certain agricultural resource lands.

What does the Board look to in its review of the County’s action? It looks for an articulated basis for the County’s decision. So what did the County do, and what can the County actually point to in its decision-making process that demonstrates it has carried out its designation duty as imposed by the Act? To answer these questions the Board turns to the relevant documents prepared by the County, where the required evaluation and analysis should be referenced or found. These documents include: 1) the relevant provisions of the Ordinance; 2) the “Findings of Fact (**FoF**) documenting the actions taken by the Planning Commission and Council,” as adopted in Ordinance No. 2003-103s, Section 5, and Exhibit “D;” 3) the July 16, 2003 Staff Report & Draft Environmental Impact Statement (**7/16/03 Report**) (Ex. I.N.1); 4) the November 3, 2003 FSEIS (**11/3/03 FSEIS**) (Ex. III.B.4); and 5) evidence in the record.

The Ordinance Language - Amendment T-8:

At a minimum, Amendment T-8 amplified and clarified the soils information the County uses for designation of agricultural lands; retained the “phrase” that such lands be of LTCS (undefined and unspecified); eliminated a 10-acre minimum parcel size; and eliminated a requirement that a parcel not have adjacent one-acre lots on 50% of the parcel’s perimeter. The two eliminated provisions are locational factors that logically fall within the Act’s definition of LTCS or CTED’s non-binding minimum guidelines. *See* Amendment T-8, Objective 15. Amendment T-8 also established new criteria for a new Rural Farm land use designation to be applied to all parcels 2.5 acres or more with prime soils located in the Cascade Corridor – Puyallup River Valley. *See* Amendment T-8,

²¹ 1000 Friends argues that proximity to, or presence of critical areas as defined in the GMA, may affect commercial viability by limiting the possibility of more intensive use of the land. The lands at issue here are in a floodplain, a seismic zone and lehar chute. The Board agrees that these are also reasonable factors to consider in evaluating agricultural lands of LTCS.

Objective 16A. It is interesting to note that the minimum lot size requirements were eliminated in Objective 15 which sets forth *the County criteria* for designating agricultural resource lands, yet the new Objective 16A includes a minimum lot requirement, but only for a portion of the County. Query: Are Objective 15 and 16A internally inconsistent? Can the County reconcile them?

The language of Amendment T-8, amending Objective 15, and the County's criteria for designating agricultural resource lands is now almost exclusively "soils" based. All three criteria listed relate to soils [*See* LU-Ag Objective 15(1)(b)(1, 2 and 3), *supra*]; although Objective 15(1)(b)(3) includes the "phrase" LTCS. *Id.* Likewise, LU-Ag Objective 16A relies heavily on specific soils criteria, but LTCS is not even mentioned here. However, Objective 16A includes a minimum lot size criterion. The amended criteria in Objective 15 and the new criteria in Objective 16A virtually ignore LTCS and the second prong of the test for identifying and designating agricultural resource lands of long-term commercial significance. Query: The soil types referenced in the Objective 16A and those listed on M-12 differ. Are these provisions internally consistent?

On its face, the Ordinance language does **not comply** with the requirements of the GMA. Perhaps the Ordinance Findings provide an explanation and more clarification?

The Ordinance's Findings of Fact (FoF):

The Ordinance's FoF supporting the adoption of Amendment T-8 states;

The County Council finds that proposed Text Amendment T-8 to add policies to the Land Use Element to address issues raised by the Farm Advisory Commission relating to agriculture and to encourage and support agriculture in the County should be approved because:

- It supports the viability of agriculture in Pierce County, consistent with policy direction in the Comprehensive Plan;
- It has the effect of diverting the rate of development away from resource lands;
- It increases the marketability of agriculture by allowing additional agricultural activities that could provide more visibility to resource industries and programs for conserving agricultural lands;
- It distinguishes agricultural, forest, and mineral resource policies from one another;
- The additional changes made by the Planning Commission will support the County in its efforts to gain support from cities and towns in Pierce County to preserve agricultural lands; and
- The amendments provide for protection of all rural parcels of 2.5 acres or more in size, located in the Alderton-McMillan Community Plan area and the Riverside portion of the Mid-County Community Plan area and which have class 1, 2s, 2w and 3w soils.

This is intended as a starting point for county-wide protection of prime agricultural lands. Expansion of the Rural Farm designation to other rural lands with these soil characteristics may be accomplished after further study, additional public participation, and Council action through the Comprehensive Plan compliance update in 2004, required by RCW 36.70A.130;

- As part of the effort to expand the Rural Farm land use designation county-wide, new Comprehensive Plan policies will be developed to address location and redesignation criteria so that guidance will be provided for Plan Amendment requests to convert from the Rural Farm designation to another designation;
- The community plan process should be the vehicle used to provide the specificity in the Development Regulations for more intensive agricultural-related uses, such as cold storage, processing, retail sales, etc., which are needed to help keep agriculture viable in Pierce County. It is also the process that should be used to establish the parameters for housing of temporary farm workers. The community plan process allows these regulations and standards to be crafted to fit the individual community's needs;
- The creation of a new Rural Farm land use designation and zone classification recognizes and more effectively accomplishes the goals and policy direction of the Planning Commission and its recommendation;
- A minimum threshold of 2.5 acres for the designation of Rural Farm land will ensure that lands only be included that have the capacity for long-term economic viability for agriculture.

Ex. V.B.88, Ordinance No. 2003-103s, Ex. D, at 4-5.

These FoF do not address how the amendments and deletions to the designation criteria in LU-Ag Objective 15(1)(b)(1 through 4) still adhere to the GMA requirements for identifying agricultural resource lands of long-term commercial significance. Nor are Objective 15 and 16A reconciled in these FoF. One of the findings mentions soils in relation to establishing a Rural Farm designation adopted as Objective 16A, but it does not address the criteria for determining whether agricultural lands are of LTCS. None of the findings address or mention a County analysis of the required criteria or whether the County includes or evaluates, or has evaluated, the “proximity to population areas” and the “possibility of more intensive use” in designating agricultural resource lands – the locational factors in determining LTCS. These FoF do not demonstrate compliance with the Act.

The 7/16/03 Staff Report:

The 7/16/03 Staff Report describes T-8 as adding “policies to the Land Use Element to address issues raised by the Farm Advisory Commission relating to agriculture, to encourage and support agriculture in the County. It also amends existing policy language so as to distinguish agricultural policies from policies tied to forestry and mining areas.” I.N.1., at 131. The proposed text of Amendment T-8 set forth in this Report, does not amend Objective 15(1)(b)(1 through 4) and does not include an Objective 16A. *Id.*, at 131-133.

This Report’s included “Impact Analysis” is based upon nine factors: Effect on rate of growth, development, and conversion of land as envisioned in the Plan; Effect on the County’s capacity to provide adequate public facilities; Effect on the rate of population and employment growth; Whether Plan objectives are being met as specified or remain valid and desirable; Effect on general land values or housing costs; Whether capital improvements or expenditures are being made or completed as expected; Consistency with GMA, the Plan and County-wide Planning Policies; Effect on critical areas and natural resource lands; and Effect on other considerations. *Id.*, at 139-140. These nine criteria are for evaluating amendments to the comprehensive plan and hardly correspond to WAC 365-190-050(1) as asserted by the County. *See* County Response, at 42-45. Nothing in the report addresses the criteria for determining whether agricultural lands are of LTCS; nor does it refer to a County analysis of whether the County includes or evaluates, or has evaluated, the “proximity to population areas” and the “possibility of more intensive use” in designating agricultural resource lands – the locational factors in determining LTCS. *Id.*

The 11/3/03 FSEIS:

For the first time, the 11/3/03 FSEIS recommends the adopted changes to the agricultural land designation criteria contained in T-8’s amendment to Objective 15(1)(b)(1 and 4), but even the FSEIS does not mention Objective 16A. Ex. III.B.4., at 7. The “Staff Analysis” in its entirety states,

The changes proposed by the Planning Commission would provide for additional land suitable for agriculture to be placed in the Agriculture designation and would limit conversion of agricultural land to other uses. It would also amend the criteria for identifying agricultural lands; specify that off-site density bonuses may be applied to maintain large minimum lot sizes; prohibit development on prime agricultural soils within the Cascade Corridor – Puyallup Valley area; allow limited commercial uses that are incidental to the primary agricultural use; and would not allow agricultural land in the UGA. These changes are intended to result in increased preservation of agricultural land. The proposed amendment could result in increased commercial development associated with agricultural uses in the rural area.

Id. While the FSEIS mentions that the agricultural land designation criteria would be amended, the FSEIS does not address the County’s criteria for determining whether agricultural lands are of LTCS; nor does it refer to a County analysis or address whether the County includes or evaluates, or has evaluated “proximity to population areas” and the “possibility of more intensive use” in designating agricultural resource lands – the locational factors in determining LTCS.

Evidence from the Record:

In briefing, the County alludes to letters and testimony in the record,²² provided by the public, specifically by Intervenor 1000 Friends, regarding WAC 365-190-050(1). County Response, at 37-45. The County contends that it “considered” these letters and documents, especially 1000 Friends’ analysis of WAC 365-190-050(1), in making its determination of LTCS and adopting Amendment T-8. But there are no findings or references at all to make this linkage. The Board notes that 1000 Friends was an advocate for certain provisions of T-8 and as such would prepare an analysis of WAC 365-190-050(1) that supported its position. Opponents to the changes might reach different conclusions using these same criteria. That is why it is imperative that the legislative body, the entity charged with the duty to identify, designate and protect agricultural resource lands of long-term commercial significance, have explicit criteria which are applied in a County analysis, to support its own conclusions regarding these important decisions.

The required support (evaluation and analysis of the statutory criteria) for the County conclusions could be expressed in an adopting Ordinance as: 1) explicit County findings of fact; 2) reference to, and adoption of, conclusions or recommendations found in County documents such as staff reports, environmental documents, advisory committee reports, *etc.*; or 3) reference to, and adoption of, documents or testimony provided by the public.²³ To withstand a challenge, as presented here, [that there is no evidence to

²² The Board notes that the supplemental exhibits and rebuttal exhibits [regarding tax status of various parcels] admitted by the Board were irrelevant in this inquiry since there is no indication that this information was ever before or considered by the County in adopting the challenged amendments.

²³ The Board recently stated,

[T]he relative weight or credibility that the County assigned to the opinions expressed by individuals during the . . . hearing, sheds little light on the question of whether agricultural lands . . . have long-term commercial significance. While the Board would agree that soils information alone is not determinative, neither is reliance on anecdotal, parcel-focused expression of opinion nor is land owner intent. Instead, to cull the universe of lands that are “devoted to” agriculture to the subset that also has “long-term commercial significance” demands an objective, area-wide inquiry that examines locational factors as well as the adequacy of infrastructure to support the agricultural industry. The County errs in its assumption that “long-term commercial significance” is determined simply by weighing anecdotal, parcel-specific witness testimony.

support the County's action] the County must be able to reference or cite to its analysis in the record to support a claim that it has discharged its duty in accordance with the requirements of the GMA. See *Whidbey Environmental Action Network v. Island County*, No. 50736-2-I, 2004 WL 1240505, at *12 (Wash. Ct. App. June 7, 2004).

The Board concludes that the County failed to discharge its duty to identify and designate agricultural resource lands under the GMA by failing to include or apply statutorily mandated criteria in its process. The adoption of Amendment T-8 was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.170, .050, as defined in .030(2) and (10). Further, the Board concludes that the adoption of Amendment T-8 was **not guided by**, and **does not comply** with, Goal 8 – RCW 36.70A.020(8).

Amendment M-12:

As described *supra*, (The Action), M-12 adopts a Rural Farm designation for a large portion of the Cascade Corridor - Puyallup River Valley. There are no findings of fact supporting the County's action in adopting Amendment M-12, nor does the 7/16 Staff Report or FSEIS provide any reference or documentation of what factors the County evaluated or considered and relied upon in adopting Amendment M-12 – the Rural Farm designation. While there may be testimony or letters in the record that speak to the desire or need for additional agricultural resource land in the County, the Board is directed to nothing in the record that indicates the County applied the statutory criteria and based its decision on the conclusions derived from their application.

The Board concludes the County failed to discharge its duty to identify and designate agricultural resource lands under the GMA by failing to apply statutorily mandated criteria. The adoption of Amendment M-12 was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.170, .050, as defined in .030(2) and (10). Further, the Board concludes that the adoption of Amendment M-12 was **not guided by**, and **does not comply** with, Goal 8 – RCW 36.70A.020(8).

Conclusions – Agricultural Lands Resource Land Designation

The County **failed to discharge its duty** to identify and designate agricultural resource lands under the GMA by failing to include and apply statutorily mandated criteria. The adoption of Amendments T-8 and M-12 were **clearly erroneous** and **do not comply** with the requirements of RCW 36.70A.170, .050, as defined in .030(2) and (10). Further, the Board concludes that the adoption of Amendments T-8 and M-12 were **not guided by**, and **do not comply** with, Goal 8 – RCW 36.70A.020(8). The Board will **remand** these amendments [T-8 and M-12] to the County with direction to take appropriate legislative

1000 Friends of Washington, et al., v. Snohomish County [Dwayne Lane – Intervenor] (Island Crossing), Order Finding Continuing Noncompliance and Continuing Invalidity and Recommendation for Gubernatorial Sanctions, (Jun. 24, 2004), at 17.

action to discharge its duty and comply with the goals and requirements of the Act, as interpreted in this Order.

B. 1000 FRIENDS LEGAL ISSUES

Legal Issue 6

[Redesignation of Agricultural Resource Lands to Rural R-10]

The Board's PHO set forth Legal Issue No. 6 as follows:

6. *Does the adoption of Ordinance No. 2003-103s redesignating 171.69²⁴ (sic 291) acres from Agriculture to Rural 10 fail to comply with GMA goals RCW 36.70A.020(2) and (8), and GMA requirements and provisions RCW 36.70A.040, .050, .060²⁵ and .170, when this redesignation lacks justification in the record and fails to enhance, protect or conserve agricultural lands of long-term commercial significance? [Based upon, and intended to reflect, 1000 Friends PFR, Legal Issue 2, at 3.]*

Applicable Law

As noted *supra*, the goals of the GMA are to guide the development of comprehensive plans and are found at RCW 36.70A.020. In this portion of the case, noncompliance with Goals (2) and (8) are alleged. These GMA goals provide:

(2) Reduce Sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling low-density development.

...

(8) Natural resource industries. 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.

RCW 36.70A.040 provides in relevant part:

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: . . .(b) *the county . . .shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated*

²⁴ It is undisputed that the acreage involved here is 291 acres, not 171.69 acres.

²⁵ The Board notes that the Legal Issue references RCW 36.70A.060, which requires the adoption of development regulations to conserve agricultural lands, however, Ordinance No. 2003-103s amended the County's Plan, it did not alter or amend the County's development regulations. Therefore, this GMA provision is not directly germane to the issue posed.

agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060.

(Emphasis supplied.)

References to the relevant portions of RCW 36.70A.050 and .170 are noted *supra* and will not be repeated here.

Discussion

The Action:

The Plan amendment in question here is Amendment M-10, described by the County as “Technical Map Amendments.” 1000 Friends challenges three of these “technical” map amendments that change the Plan designations for approximately 291 acres from Agriculture to Rural 10. The Dunning parcel is located in the Roy area and is 153 acres in size. The Rozgowski parcel is located in the Eatonville area and is 20 acres in size. The parcel owned by “The Buttes” is in the Orting area and is 118 acres in size. See Ordinance No. 2003-103s, Section 3, Exhibit B, at 8, 9 and 11; see also 1000 Friends PHB, at 5.

Position of the Parties:

1000 Friends argues that the de-designation of these lands from agricultural resource lands to rural designations is based upon an error of law, as established in the *Redmond* decision. In essence, Petitioner contends that the basis of the County’s action was that the land owners no longer intended to farm these lands, which is contrary to the holding of the *Redmond* Court. 1000 Friends PHB, at 9-10. 1000 Friends also argues that these parcels continue to meet the statutory criteria for agricultural resource lands of long-term commercial significance and points to correspondence it provided to the County evaluating the designations in relation to the statutory criteria. *Id.*, at 10-18.

The County responds that de-designation of agricultural land, in certain circumstances, may be appropriate, and is not prohibited by the Act. In its response, the County does not distinguish the three parcels. Here, the County contends, the land owners clearly no longer intend to farm these lands and other factors such as steep slopes and drainage problems persuaded the County that changing the designations was proper. County Response, at 61-63.

The Buttes²⁶ argues that the Act’s provisions regarding the presumption of validity and deference to local government are not diminished because agricultural designations are involved. Consequently, Intervenor urges the Board to defer to the County’s decision.

²⁶ The Buttes response brief only addresses “The Buttes” property; there is no discussion of, or reference to the Dunning or Rozgowski parcels.

The Buttes Response, at 5-9. The Buttes then discusses the CTED indicators (WAC 365-190-050(1)) for designating agricultural resource lands of long-term commercial significance as applied to The Buttes property and concludes that the change to Rural-10 was appropriate. The rationale for Intervenor's conclusion includes that the land: is not entirely prime agricultural soils; has not been farmed for many years; has constraints to farming such as steep slopes, drainage and the lack of water rights. Consequently, Intervenor asserts, the land is no longer of long-term commercial significance. The Buttes cites to numerous documents and testimony it provided to the County to support the change in designation. *Id.*, at 9-19.

In reply, Petitioner contends that the record indicates that The Buttes property does contain prime soils, as defined by the County, and that disrepair of drainage tiles or lack of water rights does not alter this conclusion. 1000 Friends Reply, at 4-8. 1000 Friends asserts that land owner intent is the basis for the County's decision, which is contrary to law. *Id.*, at 9-11.

Board Discussion:

This is the flip side of the arguments addressed *supra* regarding the County's designation of agricultural resource lands. Here, instead of "designating agricultural resource lands of long-term commercial significance" the County has removed, or de-designated, the agricultural designation from such lands and established them as rural lands.

This Board has stated, "Once lands are designated as agricultural lands they are not necessarily destined to be agricultural lands forever. This is not a license for local governments to "de-designate" agricultural lands where it may simply be locally popular or politically convenient. De-designation of agricultural lands is a serious matter with potentially very long-term consequences." *Grubb*, at 11.²⁷ Also, this Board is bound by the decisions of the *Redmond* Court, discussed *supra*, re: land owner intent and current use.

The Board continues to believe that de-designation of previously designated resource lands is possible under the Act. Given the importance of soils data and mapping, and the large scale of such maps, it seems reasonable that as Plans are reviewed and evaluated in terms of more current or refined information, a jurisdiction may realize that mistakes²⁸ have been made or circumstances have changed²⁹ that warrant a revision to prior resource land designations. However, since agricultural resource lands were identified and

²⁷ Although the Board was reversed on other grounds, the Court did not disrupt this conclusion of the Board.

²⁸ For example, the County could inaccurately delineate soils information when transferring information from large scale maps to smaller scale maps containing property lines or ownership that are used for regulating.

²⁹ For example, "pipeline" development has occurred. Projects that were vested, but not constructed, may have been overlooked during the initial designation analysis and may alter the determination of long-term commercial significance.

designated pursuant to the GMA's criteria and requirements it follows that the de-designation of such lands demands additional evaluation and analysis to ascertain whether the GMA criteria and requirements are, or are not, still applicable to the lands being considered for change. A rational process evaluating objective criteria is essential for designating or de-designating agricultural resource lands.

As discussed in Legal Issues 1, 2 and 3, *supra*, to discharge its duty in designating agricultural resource lands, the County must conduct an evaluation and analysis that applies the mandated GMA requirements (*i.e.*, the criteria) for designation to the lands under consideration. This evaluation must be part of the record, and drawn upon, to support the designation decisions. It logically follows that if the County is required to conduct an analysis based upon GMA mandated criteria to designate agricultural resource lands of long-term commercial significance; it cannot simply adopt an Ordinance that undoes, undermines or contradicts the analysis performed to support the original designation decisions. Again, there must be some link from the County's conclusions to this analysis.³⁰

In relation to the three parcels challenged here, what is the County's articulated basis for the decision to alter the agricultural designations and change them to rural? Again, the Board looks to the relevant documents prepared by the County³¹: 1) the "Findings of Fact documenting the actions taken by the Planning Commission and Council," as adopted in Ordinance No. 2003-103s, Section 5, and Exhibit "D;" 2) the 7/16/03 Report, noted *supra*, (Ex. I.N.1); 3) the 11/3/03 FSEIS, noted *supra*, (Ex. III.B.4); and 4) Evidence in the record.

Ordinance FoF:

The relevant findings of fact supporting the M-10 Amendment provide:

The County Council finds that the proposed Map Amendment M-10 for Dunning, Rozgowski . . . should be approved because:

- . . .
- The proposed technical amendments recognize different land use designations for *lands that are no longer intended to be used for commercial agriculture.*
- The Buttes property *is not suitable for agriculture because of severe drainage problems and steep slopes; the property has not been used for agriculture for 14 years; and it does not have the potential to be commercially productive agricultural land in the long-term.* In addition, under the Rural-10 classification,

³⁰ The Board notes that LU Ag Objective 20 is entitled "Address the conversion of agricultural land." While there is reference to CTED's agricultural lands classifications (soils) there is no reference to WAC 242-02-050(1).

³¹ The Ordinance itself just contains the maps included in Amendment M-10, there is not text.

clustering of new residential lots is possible, providing better protection of the critical areas on-site.

Ex. V.B.88., Ordinance No. 2003-103s, Ex. D, at 9, (emphasis supplied).

The 7/16/03 Staff Report:

The 7/16/03 Staff Report states,

This proposal is a technical amendment to reclassify and rezone properties defined as technical map amendments: corrections of cartographic and clerical errors, addressing annexations and incorporations, and requests for agricultural conversions where the property on (*sic* no) longer meets the definition of agriculture pursuant to PCC 19A.30.070A and is being reclassified to the surrounding rural designation. This includes proposed agricultural conversions by Dunning, Rozgowski, and The Buttes, plus others to be identified. [The owner and acreage for each parcel then described.]

[In discussing the Impact Analysis, the report to apply the nine Plan amendment criteria – not to be confused with LTCS criteria - and under the heading “Whether the Plan objectives are being met as specified or remain valid and desirable” the report states:]

Proposed changes to address annexations and incorporations are consistent with Plan objectives.

The Comprehensive Plan identifies criteria for classifying and identifying agricultural lands (PCC 19A.30.070 A.1.b).³² One criterion identifies agricultural lands as “lands which are primarily devoted to the commercial production of [agricultural products], and which have long-term commercial significance for agricultural production.” *Because the proposals to change the land use designation from Agriculture to Rural 10 apply to lands which the property owner no longer intends to use for commercial agriculture, the non-agricultural use of the land would no longer be consistent with the criteria for identifying agricultural lands.* Also the Plan identifies agriculture as a preferable use in rural areas, including the proposed Rural 10 designation. Open space provisions for increasing residential densities in the Rural 10 specifically allow agriculture in open space areas.

...

Staff Recommendation

³² The Board notes that this Pierce County Code reference is to Objective 15 – the criteria, discussed *supra*.

. . . The amendment would also recognize a different land use designation for *lands that are no longer intended to be used for commercial agriculture*.

Ex. I.N.1., at 285 – 287, (emphasis supplied).

The 11/3/03 FSEIS:

The 11/3/03 FSEIS states,

Area-Wide Map Amendment M-10, Technical Amendments

. . .

The Commission recommends that the proposed agricultural conversion for the Buttes not be approved.

Staff Analysis: The proposed change to the Baxter property recognizes the suitability for a different land use designation for *land that is no longer intended to be used for commercial agriculture*. *The Buttes proposal is located on prime agricultural soil, and maintaining the property in the Agriculture designation is consistent with the Commission's recommendation in Text Amendment T-8 to prohibit, within the Cascade Corridor, development on such soils except for agriculture related buildings or structures.* No significant environmental impacts are anticipated to result from the proposed change.

Ex. III.B.4., at 12, (emphasis supplied).

Petitioners have presented a *prima facie* case; one that the County has not refuted. The *only* basis for de-designating the Dunning and Rozgowski properties articulated by the County in the findings of fact of the Ordinance, the 7/16/03 Staff Report or the 11/3/03 FSEIS is: that the land owners no longer intend to continue using the land for agricultural production. This Board is bound by the determination of the *Redmond* Court that land owner intent or current use is not conclusive in satisfying the statutory definition of agricultural lands of long-term commercial significance. Consequently, the Board concludes that County's decision to change the designation on the Dunning and Rozgowski properties from Agriculture to Rural 10 was **clearly erroneous** and **does not comply** with the agricultural resource land designation requirements of RCW 36.70A.040, .050, .060 and .170, and the de-designation was **not guided by** Goal 8 (RCW 36.70A.020(8)).

In relation to The Buttes, the Board notes that both Petitioner and Intervenor applied the CTED indicators for LTCS in testimony to the County, and in briefing, and drew different conclusions as to whether the property was of long-term commercial significance. Again, this stresses the importance of the County's conducting its own

analysis and drawing its own conclusions, be they different or the same as those presented.

Regarding The Buttes, again, Petitioners have made a *prima facie* case to which the County has not convincingly responded. The Board finds: 1) the 7/16/03 Staff Report only indicates land owner intent as the reason for the change; 2) the 11/3/03 FSEIS concludes that the property is “on prime agricultural soil” and the PC recommended the proposal not be approved; and 3) the Ordinance findings refer to: the lack of land owner intent to farm; current use not being agriculture; drainage and slope constraints are noted, but there is no indication of whether the property continues to adhere to the County’s criteria for prime agricultural land; there is also a conclusory statement that the land does not have the *potential to be commercially productive agricultural land in the long-term*. There is no reference to the criteria the County used, or analysis conducted in reaching the de-designation conclusion.

As with the Dunning and Rozgowski properties, the Board concludes that the County’s decision to change the designation on The Buttes properties from Agriculture to Rural 10 was **clearly erroneous** and **does not comply** with the agricultural resource land designation requirements of RCW 36.70A.040, .050, .060 and .170, and the de-designation was **not guided by** Goal 8 (RCW 36.70A.020(8)).

The Board wants to be clear that the Board’s decision here is not based on whether any of the affected parcels would ultimately meet appropriate criteria had they been applied and analyzed within the required statutory framework.

Conclusion

The Board concludes that the County’s decision to change the designation on the Dunning, Rozgowski and The Buttes properties from Agriculture to Rural 10 was **clearly erroneous** and **does not comply** with the agricultural resource land designation requirements of RCW 36.70A.040, .050, .060 and .170, and the de-designation was **not guided by** Goal 8 (RCW 36.70A.020(8)). The Board will **remand** Amendment M-10 related to these properties with direction to the County to take legislative action to comply with the GMA requirement.

Legal Issue 7

[Densities in the Rural Area – R-10]

The Board’s PHO set forth Legal Issue No. 7 as follows:

- 7. Does the adoption of Ordinance No. 2003-103s redesignating 171.69 (sic 291) acres from Agriculture to Rural 10 fail to comply with GMA goals RCW 36.70A.020(1) and (2), and GMA requirements RCW 36.70A.070(5) and .110, when this redesignation will allow urban densities of one dwelling unit per four*

acres within the rural area if the development is clustered? [Based upon, and intended to reflect, 1000 Friends PFR, Legal Issue 3, at 3.]

Discussion

Position of the parties:

1000 Friends notes that urban growth, largely defined by density, is prohibited outside urban growth areas; and that appropriate rural densities are typically a mix of one dwelling unit per five acres or one dwelling unit per 10 acres. Petitioner continues that in determining whether rural densities comply with the Act, rural density bonuses and clustering provisions must also be considered. (*Citing* several prior Board cases.) 1000 Friends PHB, at 19. Petitioner concludes that the 291 acres redesignated Rural-10 are now subject to the density bonuses and clustering provisions permitted in the Plan and implementing development regulations, which in turn would permit densities of one unit per four acres if the clustering and density bonus provisions were used. The resulting densities, Petitioner argues, are urban densities in the rural area that are prohibited by the GMA. *Id.*, at 20-22.

The County and Intervenor contend that 1000 Friends' challenge is to provisions in the Plan and implementing development regulations that have not been altered by the 2003 Plan amendments in Ordinance No. 2003-103s; those existing provisions permit density bonuses and clustering. Since these provisions have been in place, and have not been affected by the Ordinance, both the County and Intervenor assert that Petitioners' challenge is untimely. County Response, at 63; The Buttes Response, at 19-22.

In reply, Petitioners claim that they are attacking the change from Agriculture to the Rural 10 designation, which was adopted in the challenged Ordinance; therefore, the challenge is timely. 1000 Friends then goes on to argue why allowing development at one dwelling unit per four acres does not comply with the Act. 1000 Friends Reply, at 12-21.

Board discussion:

The Board agrees with the County and Intervenor that 1000 Friends' challenge is untimely. The County has numerous land use designations and zoning standards that have been previously adopted. The present action moves 291 acres of land out of one Plan classification and places it in another. The Amendments in the Ordinance do not alter any existing provisions of the Plan or development regulations or standards associated with the Rural-10 designations. Those Plan and development regulations that apply to Rural-10 have not been amended in any way by Ordinance No. 2003-103s. These existing provisions continue to apply to all R-10 designations.

The whole focus of 1000 Friends' challenge is to the potential application of existing Plan policies and regulations specifically regarding clustering and density bonuses in the

R-10 designation. These provisions were not amended by the action of the County in amending its plan in 2003. At best 1000 Friends' challenge is a collateral attack on existing Plan policies and regulations. Had 1000 Friends wanted to challenge the clustering provisions of the R-10 classification, it should have done so when those provisions were enacted. Petitioner cannot challenge those provisions in the context of this present action.³³ Therefore, the Board concludes that Petitioners challenge to the density provisions for the Rural-10 Plan or zoning classification, which were not affected by the County's action, is **untimely** and is hereby **dismissed with prejudice**.

Conclusion

The Board concludes that Petitioners challenge to the density provisions for the Rural – 10 Plan or zoning classification, which were not affected by the County's action, is **untimely** and is hereby **dismissed with prejudice**.

C. INVALIDITY

RCW 36.70A.302 provides in relevant part:

- (1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
 - a. Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
 - b. Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter . . .

The Board has determined, *supra*, that Pierce County's adoption of Amendments T-8 and M-12 in Ordinance No. 2003-103s was **clearly erroneous** and **does not comply** with the notice and public participation requirements of RCW 36.70A.035, .130 and .140 or the agricultural resource land designation provisions of RCW 36.70A.050 and .170, as defined in .030(2) and (10), and were **not guided by** Goal 8 – RCW 36.70A.020(8). Additionally, the Board has determined, *supra*, that Pierce County's adoption of Amendment M-10, related to the three challenged parcels, was **clearly erroneous** and **does not comply** with the agricultural resource land designation and implementation provisions of RCW 36.70A.040, .050, .060, .170 and was not guided by Goal 8 – RCW 36.70A.020(8). The Board's Order, *infra*, **remands** Amendments T-8m M-12 and M-10 in Ordinance No. 2003-103s to the County with direction to take legislative action to

³³ The present action arises in the context of the County's annual review cycle. RCW 36.70A.130(2)(a). In the context of the required "updates" set forth in RCW 36.70A.130(1)(a) and (4)(a), a situation may arise where a previously uncontested GMA Plan or regulation provision may be subject to Board review, but this is not that case.

achieve compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

The question now before the Board is whether any of these noncompliant provisions of Ordinance No. 2003-103s substantially interfere with the fulfillment of the Goals of the Act. The Board notes that a determination of invalidity was not requested by the parties challenging Amendment T-8 or M-12; however, 1000 Friends³⁴ specifically requested invalidity if the Board found Amendment M-10 noncompliant.

The Board has stated that invalidity is a remedy available to the Board rather than a legal issue that must be posed or a remedy that must be requested in a PFR. “The Board has authority to consider invalidity *sua sponte* regardless of whether or not a party raises it during the proceeding. RCW 36.70A.302(1) and WAC 242-02-831(2).” *King County v. Snohomish County [Cities of Renton and Edmonds – Intervenors]*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 23, 2003), at 18.

Both Amendments T-8 and M-12 were adopted in violation of the Act’s notice and public participation requirements and contrary to Goal 11 – RCW 36.70A.020(11).³⁵ Public participation is one of the bedrock principals of the GMA. Based upon the findings and conclusions set forth in the Board’s discussion of Legal Issue 4 *supra*, the County’s failure to notify the public of the significant proposed changes to the County’s agricultural resource land designation criteria and the County’s Rural Farm designation substantially interfere with the fulfillment of Goal 11. The County did not encourage or provide for the effective involvement of its citizens in the planning process. Therefore the Board enters a determination of invalidity for Amendments T-8 and M-12.

Also, Amendment M-10 enables land previously designated as Agriculture, but changed to Rural-10, *albeit* in a manner that the Board has determined to be noncompliant with the Act, to utilize existing R-10 zoning provisions. Consequently, development proposals could vest due to these noncompliant provisions. Therefore, based upon the findings and conclusions set forth in the Board’s discussion of Legal Issue 6 *supra*, the Board concludes that the continuing validity of Amendment M-10 during the remand period would substantially interfere with the fulfillment of Goal 8 – RCW 36.70A.020(8). Amendment M-10’s “de-designation” of lands designated as agricultural resource lands does not maintain and enhance the agricultural industry, nor does it encourage the conservation of productive agricultural lands. Amendment M-10 substantially interferes with this Goal. Therefore, the Board enters a **determination of invalidity** for Amendment M-10, as set forth in Ordinance No. 2003-103s.

³⁴ See PHO, Legal Issue 8 and 1000 Friends PFR, Legal Issue 4, at 3.

³⁵ “Encourage the involvement of citizens in the planning process.”

V. ORDER

Based upon review of the GMA, the Board's Rules of Practice and Procedure, other relevant WACs, case law, prior Orders of this Board and the other Boards, the PFR, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having considered and deliberated on the matter, the Board ORDERS:

1. Pierce County's adoption of Amendments T-8 and M-12, in Ordinance No. 2003-103s, was **clearly erroneous** and **does not comply** with the notice and public participation requirements of RCW 36.70A.035, .130 and .140 or the agricultural resource land designation provisions of RCW 36.70A.050 and .170, as defined in .030(2) and (10), and was **not guided by** Goal 8 – RCW 36.70A.020(8).
2. Pierce County's adoption of Amendment M-10, in Ordinance No. 2003-103s, related to the three challenged parcels, was **clearly erroneous** and **does not comply** with the agricultural resource land designation and implementation provisions of RCW 36.70A.040, .050, .060, .170 and was **not guided by** Goal 8 – RCW 36.70A.020(8).
3. Further, the adoption of Amendments T-8 and M-12 substantially interfere with the fulfillment of Goal 11 – RCW 36.70A.020(11); and Amendment M-10 substantially interferes with the fulfillment of Goal 8 – RCW 36.70A.020(8); therefore, the Board enters a **Determination of Invalidity** with respect to Amendments T-8 and M-12 and to the noncompliant parcels in Amendment M-10 of Ordinance No. 2003-103s.
4. The Board **remands** text amendment T-8, in its entirety, map amendment M-12, in its entirety, and map amendment M-10, related to the three challenged parcels, to the County with direction to provide for effective notice and the opportunity for public participation and take appropriate legislative action to establish explicit criteria for the designation and/or de-designation of agricultural resource lands and conduct the appropriate analysis in undertaking such designations in order to comply with the goals and requirements of the Act.
 - By no later than **January 31, 2005**, the County shall take appropriate legislative action to bring its Plan into compliance with the goals and requirements of the GMA, as interpreted and set forth in this Final Decision and Order (**FDO**).
 - By no later than **February 7, 2005**, the County shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with the GMA, as interpreted and set forth in this FDO. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on Petitioners and Intervenors. By this same date, the County shall file a "**Remand Index**," listing the procedures (meetings, hearings *etc.*) occurring during the remand

period and materials (documents, reports, analysis, testimony *etc.*) considered during the remand period in taking the remand action.

- By no later than **February 14, 2005**,³⁶ the Petitioners and Intervenors may file with the Board an original and four copies of Comments on the County's SATC. Petitioners and Intervenors shall each simultaneously serve a copy of its Comments on the County's SATC on the County and each other.
- By no later than **February 17, 2005**, the County may file with the Board an original and four copies of the County's Reply to Comments. The City shall simultaneously serve a copy of such Reply on Petitioners and Intervenors.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Compliance Hearing** in this matter for **10:00 a.m. February 21, 2005** at the Board's offices.

If the parties so stipulate, the Board will consider conducting the compliance hearing telephonically. If the County takes legislative compliance actions prior to the January 31, 2005 deadline set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 2nd day of August 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

³⁶ September 20, 2004 is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2).

APPENDIX A

PROCEDURAL HISTORY

A. GENERAL

On November 18, 2003, Pierce County completed its 2003 annual plan amendment cycle and adopted Ordinance No. 2003-103s, amending Pierce County's GMA Comprehensive Plan. The Ordinance was signed by the Executive on December 1, 2003. The County's 2003 Plan amendments included amendments to the policies of the Plan (Text amendments = T), amendments to the future land use map (FLUM) (Map amendments = M), and amendments to the urban growth areas within the County (UGA amendments = U).

On January 16, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Orton Farms LLC, Riverside Estates Joint Venture and Knutson Farms (**Petitioners** or the **Farms**). The matter was assigned Case No. 04-3-0002, and is hereafter referred to as *Orton Farms, et al., v. Pierce County*. Board member Edward G. McGuire was the Presiding Officer (**PO**) for this matter. Petitioners challenged Pierce County's (**Respondent** or the **County**) adoption of Ordinance No. 2003-103, specifically Amendment T-8, amending the Pierce County Comprehensive Plan. The basis for the challenge is noncompliance with several provisions of the Growth Management Act (**GMA** or **Act**).

On January 22, 2004, the Board issued its Notice of Hearing (**NOH**) in the above captioned matter. The NOH set February 19, 2004 as the date for the prehearing conference.

On February 3, 2004, the Board received a PFR from 1000 Friends of Washington and Friends of Pierce County (**Petitioner** or **Friends**). The matter was assigned Case No. 04-3-0007, and is hereafter referred to as *Friends of Pierce County v. Pierce County*. Board member Edward G. McGuire was the Presiding Officer (**PO**) for this matter. Petitioner also challenged Pierce County's adoption of Ordinance No. 2003-103s, specifically amendments U-5, U-6, U-7, U-8, U-9 and M-10 amending the Pierce County UGAs and Comprehensive Plan. The basis for the challenge is noncompliance with various provisions of the Act.

Additionally, February 3 and 6, 2004, respectively, the Board has received "1000 Friends of Washington's Motion to Intervene and Consolidate" regarding their intervention in the *Orton Farms* proceeding and requesting the two PFRs be consolidated; and "CTED's Motion to Intervene" in CPSGMHB Case No. 04-3-0007.

On February 10, 2004, the Board issued a "Notice of Hearing and Order of Consolidation" which consolidated the Orton Farms and Friends of Pierce County PFRs

into this CPSGMHB Consolidated Case No. 04-3-0007c, captioned *Orton Farms v. Pierce County*.

On February 17, 2004, the Board received “City of Bonney Lake’s Motion to Intervene” and “CTED’s Amended Motion to Intervene.”

On February 18, 2004, the Board received “Stipulation and Order Regarding Intervention of Sumner School District No. 320.”

On February 19, 2004, the Board conducted the prehearing conference (**PHC**) at the Board’s Offices.

On February 20, 2004, the Board received “The Buttes Motion to Intervene.”

On February 23, 2004, the Board issued its “Prehearing Order and Order on Intervention” (PHO). The PHO set the Legal Issues for this matter and established the final schedule. It also granted intervention to: CTED (with Petitioner 1000 Friends), 1000 Friends, City of Bonney Lake, Sumner School District 320 and The Buttes (all with Respondent County).

On March 10, 2004, the Board issued an “Order Setting Location for Hearing on the Merits” (3/10/04 Order). The 3/10/04 Order established the location of the hearing on the merits in Sumner and set a schedule for oral argument; indicating that the *Orton Farms* portion of the matter be argued in the morning of June 17, 2004; and the *1000 Friends* portion of the matter be argued that afternoon.

On May 12, 2004, pursuant to motions and consent of Petitioner 1000 Friends and Respondent Pierce County, the Board issued an “Order Granting Settlement Extension, Establishing a New Schedule and Bifurcating Issue 5 from CPSGMHB Case No. 04-3-0007c” (**5/12/04 Order**). The 5/12/04 Order captioned the new case regarding the Bonney Lake UGA expansion as *1000 Friends III v. Pierce County*, and assigned it a new number – CPSGMHB Case No. 04-3-0015.

The remaining portions of 1000 Friends Issues from PFR and the PHO challenge the County’s redesignation of certain Agricultural Lands to Rural 10. These matters remain in this consolidated case.

Also on May 12, 2004, the Board issued a “Notice of Withdrawal of Board Member Tovar.”

B. MOTIONS TO SUPPLEMENT AND AMEND INDEX

On February 19, 2004, the Board received “Index of Public Records Located in the Pierce County Planning and Land Services Department Advanced Planning Division Vol. III 2003 Amendments to the Pierce County Comprehensive Plan” (**Index**). The Index is 77

pages long and lists five separate headings for documents related to the 2003 Plan amendments. Each item listed is individually identified.

On March 13, 2004 the Board received the following **core documents** from the County: 1) Pierce County's Comprehensive Plan; 2) Pierce County's Buildable Lands Report – September 2002, with maps for cities; and 3) Ordinance No. 2003-103s.

On March 18, 2004, the Board received “City of Bonney Lake’s Motion to Supplement the Record.” The proposed exhibit was Bonney Lake’s Ordinance No. 1011, passed January 27, 2004. Ordinance No. 1011 adopted the City’s “Phase 1 Comprehensive Plan Amendment.” Attached to the Ordinance are 4 exhibits: A) Bonney Lake Comprehensive Plan Update; B) 3/12/03 memo from Steve Ladd to the GMCC³⁷ regarding a 2022 Population Allocation Request; C) 8/13/03 memo from Steve Ladd to the GMCC and Chip Vincent regarding clarification of the population allocation and UGA amendment process; and D) 5/29/03 letter from Bob Leedy to Chip Vincent regarding City of Bonney Lake Urban Growth Area amendments.

On March 18, 2004, the Board also received “1000 Friends of Washington Motion to Supplement the Record and to Take Official Notice.” Attached to the motion was a “Declaration of Tim Trohimovich and Supplemental Exhibits from the Pierce County Assessor-Treasurer Website.” The proposed exhibits included a map apparently prepared by the City of Sumner entitled “Agricultural Resource Land Map” and information obtained from the Pierce County Assessor-Treasurer’s website providing detailed information for 66 different parcel numbers³⁸. The parcels fell within 8 different Assessor-Treasure Use Codes.³⁹

On April 1, 2004, the Board received “Petitioner Orton Farms, LLC, et al., Response to Motion to Supplement the Record and Take Official Notice.” Orton Farms opposes 1000 Friends Motion and does not address the Bonney Lake Motion.

Neither Pierce County nor any of the other parties to this proceeding filed responses to any of the motions.

On April 8, 2004, the Board received “1000 Friends of Washington Rebuttal on Motion to Supplement the Record and Take Official Notice.”

On April 22, 2004, the Board issued its “Order on Motions to Supplement the Record.” This Order **granted** Bonney Lake’s motion, and admitted 5 supplemental exhibits; it also **granted** 1000 Friends motion, and admitted or took official notice of 4 supplemental

³⁷ Growth Management Coordinating Council.

³⁸ 1000 Friends lists six parcels under “Orton Farms LLC;” 47 parcels under “Knutson Farms;” and 13 parcels under “Riverside Estates.”

³⁹ The use code designations include: single family dwelling, mobile home, other residential, miscellaneous manufacturing, agriculture (not current use), horticulture specialties, current use farm and agriculture (per chapter 84.34 RCW), and residential vacant land.

exhibits. Orton Farms was also **allowed to present rebuttal evidence** drawn from the Assessor Treasurer’s website parcel information. The Order summarized the documents (Index, Core Documents and Supplemental exhibits) comprising the record in this matter.

On May 17, 2004, the Board received a letter from Pierce County amending the County’s Index of the Record to include several items inadvertently omitted. The items were noted as Ex. Nos. II.A.9.j, k, l and m.

C. DISPOSITIVE MOTIONS

There were no dispositive motions filed in this matter.

D. BRIEFING AND HEARING ON THE MERITS

On May 13, 2004, the Board received “1000 Friends of Washington Opening Brief,” with 4 attached exhibits” (**1000 Friends PHB**).

On May 14, 2004 the Board received “Opening Brief of Petitioners Orton Farms LLC, Riverside Estates Joint Venture and Knutson Farms, Inc.,” with 13 attached exhibits. (**Orton Farms PHB**).

On June 3, 2004, the Board received “Respondent Pierce County’s Prehearing Brief,” with 33 attached exhibits.

On June 4, 2004, the Board received: 1) “1000 Friends of Washington Response Brief Orton Farm Issues – (as Intervenor),” with 7 attached exhibits; and 2) “The Buttes LLC’s Response to Brief of 1000 Friends,” with 13 attached exhibits.

On June 5, 2004, the Board received “CTED’s Response Brief,” no exhibits were attached.

On June 11, 2004, the Board received: 1) “Reply Brief of Petitioners Orton Farms LLC, Riverside Estates Joint Venture and Knutson Farms Inc.,” no exhibits were attached; and 2) 1000 Friends of Washington Reply Brief,” with 2 attached exhibits.

On June 14, 2004, the Board received a letter from 1000 Friends with two updated exhibits attached to prior submittals. The first was a *signed* copy of an Order on Dispositive Motions in *1000 Friends v. Chelan County*, EWGMHB Case No. 04-1-0002 [replacing Tab A in the Reply Brief], the second was a copy of a new *Whidbey Environmental Action Network v. Island County* (WEAN) slip opinion – 2004 WL 1240505 (Wash. App. Div. 1) [replacing Tab 7 in the Response Brief].

The Board did not receive any briefing from Intervenor City of Bonney Lake or Sumner School District No. 320. These Intervenor are now parties to the *1000 Friends IV* case involving the Bonney Lake UGA expansion issue that was segregated from this matter.

On June 17, 2004, the Board held a hearing on the merits at the Sumner City Hall Council Chambers, 1104 Maple Street, Sumner Washington. Board members Edward G. McGuire, Presiding Officer, and Bruce C. Laing were present for the Board. Petitioners 1000 Friends of Washington and Friends of Pierce County were represented by Tim Trohimovich, John T. Zilavy and Tim Allen. Petitioners Orton Farms LLC, Riverside Estates Joint Venture and Knutson Farms Inc., were represented by William T. Lynn. Respondent Pierce County was represented by M. Peter Philley. Intervenor CTED was represented by Alan D. Copsey. Intervenor 1000 Friends of Washington was represented by John T. Zilavy and Tim Trohimovich. Intervenor The Buttes LLC was represented by William T. Lynn. Court reporting services were provided by Terilynn Pritchard of Byers and Anderson Inc. Anna Graham [Pierce County] also attended. Approximately 15 persons observed the hearing. The hearing convened at 9:30 a.m. and adjourned at approximately 3:00 p.m.