

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

DAN AND RANDY JENSEN,)	CPSGMHB Case No. 04-3-0010
)	
Petitioners,)	<i>(Jensen)</i>
)	
v.)	
)	
CITY OF BONNEY LAKE,)	ORDER RESCINDING
)	INVALIDITY and FINDING
Respondent.)	COMPLIANCE [Re: Ordinance
)	Nos. 1110 and 1099]

I. BACKGROUND

On September 20, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its Final Decision and Order (**FDO**) in the above captioned case. The FDO provided in relevant part:

Based upon review of the GMA, 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. The City’s inclusion of the five repealed UGA expansions and urban designations for those areas on the FLUM was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.110.

2. The City of Bonney Lake’s adoption of the Phase 1 Plan Update, specifically the Very Low-Density and Low-Density Residential FLUM designations and corresponding text in the Land Use Element, was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.130, .070(preamble), .210 and was **not guided by** Goals 1 and 2 – RCW 36.70A.020(1) and (2).

3. Further, the adoption of the Very Low-Density and Low-Density Residential FLUM designations and corresponding text in the Land Use Element, substantially interfere with the fulfillment of Goals 1 and 2 – RCW 36.70A.020(1) and (2); therefore, the Board enters a **Determination of Invalidity** with respect to these FLUM designations and corresponding text in the Land Use Element.

4. The Board **remands** Ordinance 1011, the Phase 1 Plan Update, specifically the Very Low-Density and Low-Density Residential FLUM designations and corresponding text in the Land Use Element and the five repealed UGAs and their corresponding urban designations on the FLUM, to the City of Bonney Lake with direction to take legislative action to: a) delete the five erroneous UGAs; and b) take appropriate legislative action to amend, modify or otherwise revise the Very Low-Density and Low-Density Residential FLUM land use designations and text in the Land Use Element to provide for appropriate urban densities as required by the goals and requirements of the Act, as well as the CPPs and Plan.

5. The Board recognizes that the City intended to complete its Comprehensive Plan and development regulation revisions in two phases to be completed by December 1, 2004, as required by RCW 36.70A.130(4). The Board also acknowledges that the City's Phase II Plan Update (the Capital Facilities and Transportation Elements) must be consistent with the remanded Land Use Element and FLUM. Additionally, the City's development regulations must be revised to be consistent with and implement the Plan. Therefore, pursuant to RCW 36.70A.300(3)(b), the Board has determined that, but for the correction to the FLUM regarding the UGAs, the City's task is of unusual scope and the compliance schedule will be extended beyond the statutorily required 180-days. The compliance schedule for the remand period is as follows:
 - By no later than **November 10, 2004**, the City shall revise its FLUM to delete the five UGAs and the related urban designations. The City shall transmit copies of the revised FLUM and enacting Ordinance to the Board by no later than **November 17, 2004**. Upon receipt of the City's corrected FLUM and adopting Ordinance, the Board will issue a finding of partial compliance. Full compliance and the rescission of invalidity will be contingent upon the City achieving compliance by completing its remaining work according to the following schedule. [For the remaining portion of Bonney Lake's remand, an additional extraordinary (beyond 180 days) compliance schedule and compliance hearing date were established.]

FDO, at 27-29.

On November 17, 2004, the Board received a certified copy of Bonney Lake Ordinance No. 1075, adopted in response to the Board's FDO. Ordinance No. 1075 deleted the erroneous Urban Growth Area designations.

On November 19, 2004, the Board issued an "Order Finding Partial Compliance" related to correcting the FLUM to delete the erroneous UGA designations.

On March 17, 2005, the Board received Bonney Lake's "Statement of Actions Taken to Comply and Motion for Expedited Compliance Review" (SATC). The SATC indicated that the City had adopted two Ordinances (Ordinance Nos. 1110 and 1099) to revise its Very Low and Low Residential Density designations on its FLUM, and revise the text in its Plan and zoning code. Included with the SATC was the required Remand Index. The City asked for expedited compliance review related to these issues in order to pursue state funding for a public works project.

On March 21, 2005, the Board issued an "Order Granting Expedited Compliance Review." The Board's Order established a new compliance hearing date and dates for responding to the SATC; the Order also requested copies of the FLUM as amended by Ordinance No. 1110.

On March 24, the Board received copies of the City's current FLUM as adopted by Ordinance No. 1110.

On April 4, 2005, the Board received "Petitioners Response Brief" (**Jensen Response to SATC**). The Jensen Response to SATC was timely filed.

On April 13, 2005, the Board received "City's Reply to Petitioners Response to SATC" (**City Reply**), with numerous attached exhibits.

On April 18, 2005, beginning at 10:00 a.m. the Board conducted the Compliance Hearing in the above captioned matter. Board member Edward G. McGuire presided. Board member Bruce C. Laing was also present. Matthew L. Sweeney represented Petitioners. Lance M. Andree represented Respondent City of Bonney Lake. Court reporting services were provided by Eva Jankovits from Byers and Anderson, Inc. Steven Ladd (City of Bonney Lake) also attended. A transcript of the Compliance Hearing was ordered.

On April 21, 2005, the Board received the transcript of the compliance hearing (**CH Transcript**).

II. BACKGROUND and DISCUSSION

The Actions Taken:

The Board's FDO broke the compliance schedule for the City of Bonney Lake into two phases. The City's adoption of Ordinance 1075, and the Board's November 19, 2004 Order addressed the first issue in the FDO. The present expedited compliance hearing addresses the City's Very Low and Low Density Residential Density designations as adopted in Ordinance No. 1011.

In response to the Board's remand of Ordinance No. 1011, the City adopted two Ordinances – Ordinance Nos. 1110 and 1099.

The title of Ordinance No. 1110 amends the City’s Plan, and states:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BONNEY LAKE AMENDING THE COMPREHENSIVE PLAN TO COMPLY WITH THE CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD ORDER

Ordinance No. 1110, at 1. The Ordinance further provides:

WHEREAS, the Central Puget Sound Growth Management Hearings Board, in its September 20, 2004 order regarding Case No. 04-3-0010 invalidated the City’s Very Low-Density Residential and Low-Density Residential designations, corresponding to the R-1(A) and R-1 zoning districts, due to failure to provide for appropriate urban densities; and

WHEREAS, upon deliberation, the City’s strategy for complying with the order is to redesignate Very Low-Density Residential areas as Low-Density Residential (renamed Single Family Residential) and increase the density target of the Single Family Residential designation.

...

Section 1. The Comprehensive Plan Land Use Element’s Future Land Use Map, Figure Number 3-4, is hereby amended such that all lands shown as “Very Low Density Residential” or “Low Density Residential” is changed to “Single Family Residential.”

Section 2. Figure 3-5 of the Comprehensive Plan Land Use Element is hereby amended as follows. Strikethroughs means deletions, underlines mean new text.

Figure 3-5 Future Land Uses¹

Designations	Intent and density at build-out	Implementing zone	Acres so designated on Figure 3-4 [FLUM]	% of Area of City
Very Low Density Residential	Large lot neighborhoods with extensive tree coverage, up to two units per acre	R-1(A) Very low density residential	250	5%

¹ Only the relevant, and amended, provisions of Figure 3-5 are reflected here.

Low Density Residential	Single Family neighborhoods, up to four units per acre	R-1, Low density residential	2,336	47%
<u>Single Family Residential</u>	<u>Single family neighborhoods. Undeveloped lands will be platted at 4-5 units per net acre (critical areas, streets, storm-water ponds, etc. netted out).</u>	<u>R-1</u>	<u>2,586</u>	<u>52%</u>

Id. at 2.

The title of Ordinance No. 1099 states:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BONNEY LAKE, WASHINGTON, AMENDING TITLES 14 AND 18 OF THE BONNEY LAKE MUNICIPAL CODE AND ORDINANCE NOS. 740, 746M 747M 788, 851, 891, 908, 952, 988, 1002, AND 1025, DELETING THE R-1(A) ZONE, AMENDING THE ALLOWABLE DENSITY IN THE R-1 ZONE, DELETING THE P.U.D. PROCESS, ALTERING THE PROCESS WHEREBY PRELIMINARY PLATS ARE DECIDED, AND DELETING LAND USE AND DIMENSIONAL TABLES.

Ordinance No. 1099, at 1.

Among other things, this Ordinance, at Sections 9, indicates the general intent of the Single Family Residential designation as, “This district is intended to protect single-family residential neighborhoods from incompatible land uses and *create new compatible housing at a density of 4-5 units per net acres.*” *Id.* at 6, (emphasis supplied).

Positions of the Parties:

The City’s SATC summarizes the City’s action and position as, “The City has eliminated the Very Low Density land use and zoning designations. In addition, the City has revised the R-1 designation and zone to require a net density of 4-5 dwelling units per acre for new development. The City respectfully requests that the Board make a finding of compliance based on these appropriate and timely legislative actions.” SATC, at 2.

In response to the City's SATC, Petitioners contend that the City has failed to do more than the minimum in response to the Board's FDO. Petitioner offers the following arguments in urging the Board not to rescind invalidity but to continue noncompliance:

- GMA mandates that the City analyze its development patterns and take corrective action to ensure appropriate development.
- The Board expressed concerns regarding the City's lack of compliance with the GMA required Plan Update.
- The City has ignored and will continue to ignore its legal obligation to provide for compact urban development.
- The City disregards its legal obligation to provide for affordable housing.
- The City has so little area designated for multi-family that there is minimal variety in housing types or densities.
- The City is legally obligated to make provision for population allocated to the City by Pierce County.
- The City has not analyzed its ability to accommodate population.
- The Board must insist that the City perform the needed analysis and set forth provisions in the comprehensive plan to ensure population accommodation.

Jensen Response to SATC, at 1-12.

The City counters, "Petitioner now asks the Board to 'move the target' and find the City noncompliant for allegedly failing to do a number of things that the City was not ordered to do. The City has gone above and beyond what was required to comply with the Board's Order, including amending its zoning ordinance to implement the changes in the Plan." City Reply, at 2.

The City contends that its adoption of Ordinance Nos. 1110 and 1099 provide for appropriate urban densities and comply with direction given by the Board in the FDO. City Reply, at 1-2. The City also asserts that Petitioner is arguing matters beyond the scope of the Board's remand. *Id.* at 2-14.

Board Discussion:

The Board's FDO provided:

4. *The Board **remands** Ordinance 1011, the Phase 1 Plan Update, specifically the Very Low-Density and Low-Density Residential FLUM designations and corresponding text in the Land Use Element and the five repealed UGAs and their corresponding urban designations on the FLUM, to the City of Bonney Lake with direction to take legislative action to: a) delete the five erroneous UGAs; and b) take appropriate legislative action to amend, modify or otherwise revise the Very Low-Density and Low-Density Residential FLUM land*

use designations and text in the Land Use Element to provide for appropriate urban densities as required by the goals and requirements of the Act, as well as the CPPs and Plan.

FDO, at 27; (emphasis supplied). The Board concurs with the City. The only matter challenged before the Board, and the matter decided by the Board, was Ordinance No. 1011's compliance with the Act. The remand was limited to bringing the challenged provisions of Ordinance No. 1011 into compliance with the GMA. Adoption of Ordinance Nos. 1110 and 1099 address the direction stated in the FDO, Section VI. 4(b).

Although there were various ways² the City could have revised the land use designations on its FLUM and in its Plan text to achieve compliance with the Board's Order, the City exercised its discretion and chose to redefine the two noncompliant designations as one, rather large, "Single Family Residential" designation that requires 4-5 dwelling units per net acre throughout the designated areas – clearly an undisputed appropriate urban density.

Additionally, the City amended its zoning regulations to implement this change in Plan designation.³ It appears that Petitioners' preference for the City to achieve compliance would have been an alternative approach involving not only increasing density in the single family areas but also designating more land into multi-family designations. However, this is not the option the City adopted.

Petitioner also raised concerns regarding anticipated efforts by the City to again attempt to expand its County-designated UGA – a matter which is not before the Board in this proceeding. Consequently, the Board concludes that the City's adoption of Ordinance Nos. 1110 and 1099 cures the noncompliance found by the Board in invalidating the City's adoption of Ordinance No. 1011 – the ordinance originally challenged. Therefore, the Board will rescind the determination of invalidity and enter a finding of compliance related to Ordinance No. 1110 and 1099.

While this Order of the Board addresses the narrow issue presented for compliance – revision of the Very Low and Low Density Residential Plan designations and related Plan text – the City should be mindful that the Board's FDO extended the City's compliance schedule beyond the 180-day limit to facilitate the City's completing *all* its Plan and regulation review Update. In other words, allowing the City to complete *its Phase II Plan Update (Capital Facilities and Transportation Elements) and to resolve identified inconsistencies between its Plan designations and zoning designations*. Nonetheless, the

² For example, if appropriate, the City could have perhaps maintained some of the acreage in lower density residential designations in order to protect critical areas that are large in scope, with a high rank order value and are complex in structure and function. [*per Litowitz*] Additionally, Board member Pageler's Concurring Opinion mentioned revising the mix and amount of acreage in the single family and multi-family designations.

³ The Board notes that the City's implementing – zoning regulations were not part of the original appeal.

City chose to proceed otherwise. The City sought, and received, expedited compliance review regarding the noncompliant portion of its Phase 1 Plan Update action.

The FDO, Section VI. 5 provided:

5. The Board recognizes that the City intended to complete its Comprehensive Plan and development regulation revisions in two phases to be completed by December 1, 2004, as required by RCW 36.70A.130(4). *The Board also acknowledges that the City's Phase II Plan Update (the Capital Facilities and Transportation Elements) must be consistent with the remanded Land Use Element and FLUM. Additionally, the City's development regulations must be revised to be consistent with and implement the Plan.* Therefore, pursuant to RCW 36.70A.300(3)(b), the Board has determined that, but for the correction to the FLUM regarding the UGAs, the City's task is of unusual scope and the compliance schedule will be extended beyond the statutorily required 180-days. . . .[enunciating compliance schedule dates].

FDO, at 28; (emphasis provided).

Ordinance No. 1110, *supra*, did not amend the City's Plan to update either the Capital Facilities or the Transportation Element. Ordinance No. 1099, *supra*, did not amend the zoning code or map to reconcile the inconsistencies and implement the Plan. Additionally, at the April 18, 2005 Compliance Hearing, in response to questions from the Board, the City conceded that it had not yet completed its Phase II Plan Update, at least as it relates to the Capital Facilities element, and that the City had not yet resolved inconsistencies between the Plan designations and zoning designations.⁴ However, the City noted that these actions and revisions are expected to be accomplished in late summer or early fall. *See* CH Transcript, at 31 – 37.

The Board recognizes that neither the Phase II Plan Update, nor the resolution of inconsistencies between the Plan designations and zoning designations are part of the present proceeding. However, the City should be advised that until it completes its required 2004 review and evaluation, *i.e.* the Plan Update, it could be subject to a failure to act challenge. As always, upon completion of its review, any legislative action taken affecting its GMA Plan and/or implementing regulations could be subject to challenge before this Board.

In short, this Order of the Board, while addressing compliance on the challenged action, is not to be construed as a Board finding of compliance for the City's entire Plan and

⁴ The Board notes that the GMA requires the City's development regulations to implement its Plan. RCW 36.70A.040 and .130. Therefore, unless the City again revises its Plan and FLUM, the City's zoning must implement the Plan designations.

04310 Jensen FOC (April 26, 2005)

**04-3-0010 Order Rescinding Invalidity and
Finding Partial Compliance [Re: Ordinance Nos.
1110 and 1099]**

implementing development regulations. The Board explicitly raises this concern, in light of the City’s admission that it has not completed its Plan Update, nor has it resolved the identified inconsistencies⁵ where its regulations do not implement its Plan.

III. Findings and Conclusions

The Board finds and concludes:

1. Ordinance No. 1110 deletes the City’s FLUM and Plan text designations for “Very Low Density Residential” and “Low Density Residential” and replaces those designations with one “Single-Family Residential” designation. Ordinance No. 1110, Sections 1 and 2, at 1-2.
2. The “Single-Family Residential” designation applies to 2,586 acres (52% of the area of the City) within the City of Bonney Lake. *Id.*
3. The FLUM designation of “Single-Family Residential” is implemented by the City’s R-1 zoning designation. *Id.*
4. Ordinance No. 1099 provides that the R-1 zoning district “[I]s intended to protect single-family residential neighborhoods from incompatible uses *and create compatible housing at a density of 4-5 units per net acre.* Ordinance No. 1099, Section 9, at 6, (emphasis supplied).
5. Ordinance Nos. 1110 and 1099 allow for new development on all lands⁶ within the Single-Family FLUM designation and the implementing R-1 zoning designation at a density of 4-5 dwelling units per net acre. Findings 1-4, *supra.*

⁵ The Board’s FDO, at 17-18 provides:

The Board recognizes that only the Plan was amended by Ordinance No. 1011; not the City’s zoning and development regulations. However, the Board notes that Exs. 68 and 71 identify 11 areas (footnote 18, omitted) where the Plan and FLUM designations permit higher densities or more intense uses than the existing [zoning] designations allow. The staff recommendation for these 11 areas does not resolve the inconsistency. In these instances the staff recommendation is to “Entertain a rezone if and when ripe for development.” Taking this avenue would not be compliant with the Act since the unchanged zoning designations *would not implement the Plan and FLUM designations*, as required by RCW 36.70A.040 and .130.

The City has the duty to maintain consistency between its Plan and regulations that implement its Plan; it may not ignore or delay this requirement and shift the duty to project proponents by “entertain[ing] rezones if and when ripe for development.” If the City did not amend its Plan to remove all the inconsistencies identified and documented in Ex. 68, it must do so now and amend its *development regulations* to allow the densities and uses authorized in the Plan and FLUM in order to be consistent with *and implement the Plan and FLUM designations*. RCW 36.70A.130 requires the City to complete its compliance review by December 1, 2004 or be subject to further challenges before this Board.

(Emphasis in original).

⁶ Undeveloped or vacant land, underdeveloped land or redeveloped land within the Single-Family FLUM and R-1 zoning designations are permitted to develop at 4-5 dwelling units per net acre.

6. The Single-Family Residential FLUM and Plan amendments in Ordinance No. 1110 and the R-1 [Single-Family] implementing zoning amendments in Ordinance No. 1099 [both allowing new development at a density of 4-5 dwelling units per net acre] provide for appropriate urban densities as required by the GMA. Findings 1-5, *supra*.

IV. FINDING OF COMPLIANCE and RECISSION OF INVALIDITY

Based upon review of September 20, 2004 Final Decision and Order, the City of Bonney Lake's SATC, Jensen Response to the SATC, the City Reply, the Board's review of Ordinance Nos. 1110 and 1099, the arguments and comments offered in the briefing and at the compliance hearing, the Board finds:

- By adopting Ordinance Nos. 1110 and 1099 [Eliminating the Very Low and Low Density Residential designations on the FLUM, in the Plan text and zoning, to create and designate a "Single Family Residential" FLUM and amending the R-1 zoning designation to require 4-5 dwelling units per net acre], the City of Bonney Lake has complied with the goals and requirements of the GMA as set forth in the aforementioned Board FDO and the GMA. The Board therefore enters a **Finding of Compliance** for the City of Bonney Lake Re: Ordinance Nos. 1110 and 1099.
- Further, having achieved compliance with the goals and requirements of the Act by adopting Ordinance Nos. 1110 and 1099, there is no longer a basis for invalidity; consequently the Board's **Determination of Invalidity**, as set forth in the Boards September 20, 2004 FDO is **rescinded**.

V. ORDER

Based upon review of the September 20, 2004 Final Decision and Order, the City of Bonney Lake's SATC, the Jensen Response to the SATC, the City Reply, the Board's review of Ordinance Nos. 1110 and 1099, the arguments and comments offered in the briefing and at the compliance hearing, and having deliberated on the matter, the Board **ORDERS**:

CPSGMHB Case No. 04-3-0010, *Jensen v. City of Bonney Lake*, is **closed**. The City of Bonney Lake's adoption of Ordinance Nos. 1110 and 1099 corrects the deficiencies found in Ordinance No. 1011 and **complies** with the goals and requirements of the GMA as set forth in the Board's September 20, 2004 FDO. The

Board therefore enters a **Finding of Compliance** for the City of Bonney Lake Re: Ordinance Nos. 1110 and 1099. Further, the Board **rescinds** the determination of invalidity.

So ORDERED this 26th day of April 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler⁷
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.

⁷ Board member Pageler did not attend the compliance hearing, but did review the written materials, the compliance hearing transcript and deliberate with the Board on this matter.

04310 Jensen FOC (April 26, 2005)

**04-3-0010 Order Rescinding Invalidity and
Finding Partial Compliance [Re: Ordinance Nos.
1110 and 1099]**