

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

T.S. HOLDINGS, LLC,)) Case No. 08-3-0001
))
Petitioner,)) <i>(TS Holdings)</i>
))
v.))
))
PIERCE COUNTY,)) FINAL DECISION AND ORDER
))
Respondent.))
))

SYNOPSIS

In December of 2007, Pierce County adopted a subarea plan – the Alderton-McMillan Community Plan – which covers over 11,000 acres of the fertile Puyallup River valley around the City of Orting. About 42 percent of the area was designated agricultural resource lands. T.S. Holdings challenged the Community Plan alleging their property, an abandoned dairy farm, was erroneously designated as agricultural resource land.

The County’s GMA Comprehensive Plan incorporates the GMA’s definitions and criteria for designating, conserving and protecting agricultural lands of long-term commercial significance and provides for removal of erroneous designations. The community planning process is one of the ways to seek de-designation. But to de-designate agricultural lands, a proposal must be evaluated against the same criteria used to make the designation.

*Petitioner alleged the property did not meet the County’s soil type and productivity criteria and therefore a designation error had occurred. Petitioner provided information to support removal of the designation, and the County sought independent review of the proposal and solicited testimony on the issue. The Board reviewed the law governing agricultural lands, the County’s criteria and procedures, and the Record for each step of the community planning process. The Board found that the Alderton-McMillan Community Planning Board, Planning Commission and County Council were properly informed of the criteria and procedures for de-designating agricultural resource lands and were aware of Petitioner’s proposal, as well as contradictory evidence in the Record. The County concluded no designation error had occurred. The Board concluded the County’s decision to retain the agricultural resource lands designation for the property was **not clearly erroneous**.*

I. PROCEDURAL HISTORY¹

In December of 2007, Pierce County adopted a Community Plan for the Alderton-McMillan sub-area of the County – Ordinance No. 2007-41s2. Notice of adoption of the Community Plan was published on January 16, 2008.

On March 14, 2008, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from T.S. Holdings, LLC (**Petitioner** or **TS Holdings**). The matter was assigned Case No. 08-3-0001. Petitioner challenges Pierce County's (**Respondent** or **County**) adoption of the Alderton-McMillan Community Plan (**Community Plan** or **AMCP**) pertaining to Agricultural Resource Land designations. The basis for the challenge is noncompliance with the agricultural resource land conservation provisions and several goals of the Growth Management Act (**GMA** or **Act**).

The Board conducted a prehearing conference on April 21, 2008 and issued a prehearing order. The County's Index to the Record listed 842 items.² No motions were filed during the period scheduled for motions.

All briefing was timely filed. The Board received the following briefing in this matter:

- "T.S. Holdings LLC's Opening Brief" with 23 attached exhibits. (**TS Holdings PHB**).
- "Respondent Pierce County's Prehearing Brief" with 38 attached exhibits. Five attachments [A-E] were also included with a request that the Board take official notice of these attachments and include them in the Record. (**County Response**).
- "T.S. Holdings LLC's Reply Brief" (**TS Holdings Reply**). Six attachments [1-6] were included with a request that the Board include these attachments in the Record as supplemental exhibits.

On July 28, 2008, the Board held the Hearing on the Merits (**HOM**) at the Board's offices in the Chief Sealth hearing room, 800 5th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present for the Board. Julie Ainsworth-Taylor, Board attorney, also attended. Petitioner T.S. Holdings was represented by Margaret Y. Archer. Respondent Pierce County was represented by M. Peter Philley. Court reporting services were provided by Shelly M. Hoyt of Byers & Anderson, Inc. A transcript of the proceeding was ordered by the Board. The hearing convened at 10:00 a.m. and adjourned at approximately 11:45 a.m.

¹ The complete Procedural History for this matter is found in Appendix A.

² In addition to the Index received at the PHC, the County submitted two additional supplemental indexes adding a total of nine items.

On August 11, 2008, the Board received the transcript of the July 28th hearing on the merits (**HOM Transcript**).

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS

Legislative enactments adopted by Pierce County pursuant to the Act are presumed valid upon adoption. RCW 36.70A.320(1). Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions are in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. "The burden is on the petitioner to demonstrate that [the challenged action] is not in compliance with the requirements of [the GMA]." RCW 36.70A.320(2). The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1).

The Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance.

Lewis County v. Western Washington Growth Management Hearings Board (Lewis County), 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

In *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007), the Supreme Court summarized the Board's standard of review:

The Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations. The Board "shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). An action is "clearly erroneous" if the Board is "left with the firm and definite conviction that a mistake has been committed." "Comprehensive plans and development regulations [under the GMA] are presumed valid upon adoption." RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give deference to a [jurisdiction], the [jurisdiction's] actions must be consistent with the goals and requirements of the GMA.

161 Wn.2d at 423-24 (internal case citations omitted).

As to the degree of deference to be granted under the clearly erroneous standard, the *Swinomish* Court stated:

The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a “critical review” and is a “more intense standard of review” than the arbitrary and capricious standard.

Id. at 435, fn. 8 (internal citations omitted).

Pierce County argues the Board must defer to the County's decision. County Response, at 29-33. However, as noted by the *Swinomish* Court, the amount of deference owed to the County is not unlimited and the Board is required to give the County's action a critical review to determine whether the County has complied with the goals and requirements of the Act. The Board's analysis takes place within this framework.

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to only those issues presented in a timely petition for review. RCW 36.70A.290(1).

III. BOARD JURISDICTION, PRELIMINARY MATTERS, and ABANDONED ISSUES

A. BOARD JURISDICTION

The Board finds T.S. Holdings' PFR was timely filed, pursuant to RCW 36.70A.290(2); T.S. Holdings has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which adopts Pierce County's Alderton-McMillan Community Plan, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

Oral Rulings at the HOM:

The County moved the Board to take official notice and supplement the record with four additional exhibits.³ Petitioner did not object to Attachment A, B, or C, but likewise urged the Board to admit their proposed exhibits. However, Petitioner objected to Attachment D. At the HOM, after entertaining argument, the Board ruled as follows:

- Attachment A – Map depicting the Nauer Farm properties with 1994 land use designations. **Board takes Official Notice**, per WAC 242-02-660(4) – **HOM Ex. 1**

³ County Response, at 28-29. A fifth attachment, Attachment E, is merely an excerpt from the County's GMA Comprehensive Plan that sets forth the relevant LU-Ag Objectives 16, 17 and 18, all of which are already in the record.

- Attachment B – Report entitled *The Suitability, Viability, Needs and Economic Future of Pierce County Agriculture* – Phase I Report, American Farmland Trust, August 2004. **Board takes Official Notice**, per WAC 242-02-670(2) & (3) – **HOM Ex. 2**
- Attachment C – Excerpts from U.S. Department of Agriculture Natural Resource Conservation Service Field Office Technical Guide for Pierce County. **Board takes Official Notice**, per WAC 242-02-670(2) & (3)
 - Table B2 Land Capability and Yields per Acres of Crops and Pasture – **HOM Ex 3a**
 - Table Y – Prime Farmland – **HOM Ex. 3b**
 - Important Farmlands Mapping Unit Evaluations – **HOM Ex. 3c**
 - WA NASIS Guide 2 – Criteria for Placing Washington Soils into Capability Classes – **HOM Ex. 3d**
- Attachment D – Official property records taken from the Pierce County Assessor and Auditor’s websites. **Board takes Official Notice**, per WAC 242-02-670 (2) & (3) – **HOM Ex. 4.**

TS Holdings moved the Board to supplement the record with six additional exhibits. The six items are from the Record in the matter of *Orton Farms, et al., v. Pierce County*, CPSGMHB Consolidated Case No. 04-3-0007c. At the HOM, the Board entertained argument as to the Petitioner’s motion. The County objected to all six items as being irrelevant to the present matter. Petitioner argued these items are incorporated into, or support letters in evidence in the present proceeding, and should be admitted. The Board ruled as follows:

- Attachment 1 – The Buttes 2003 application for area-wide map amendment [M-1-, The Buttes/Nauer Farm] – **Admitted – HOM Ex. 5**
- Attachment 2 – 6/18/03 draft staff report Re: M-10 – **Admitted – HOM Ex. 6**
- Attachment 3 – 10/21/03 letter from GeoResources to Tom Sturgeon Re: Nauer Farm soils – **Admitted – HOM Ex. 7**
- Attachment 4 – 10/28/03 letter from Wayne Carlson to Planning Commission Re: M-10 – **Admitted – HOM Ex. 8**
- Attachment 5 – 10/29/03 Planning and Environment Committee meeting minutes (excerpts) – **Admitted – HOM Ex. 9**
- Attachment 6 - 10/29/03 Planning and Environment Committee meeting minutes (excerpts) – **Admitted – HOM Ex. 10**

Finally, the County offered a demonstrative exhibit showing the zoning from the Alderton-McMillan Community Plan for the vicinity, including a blown-up insert of the site in question. Petitioner did not object to the demonstrative exhibit. The Board identifies this item as **HOM Ex. 11.**

The items noted *supra*, as HOM Exhibits (**HOM Ex.**), may be of assistance to the Board in rendering its final decision and are therefore included as part of the record in this

matter. The relevancy of any exhibit to the present proceeding will be determined by the Board and exhibits will be accorded the weight, if any, that they merit.

The parties in this matter identified exhibits based upon when the Exhibit was introduced into the County in its process. Therefore, Exhibits identified as “CPB” were initially introduced before the Community Planning Board; Exhibits identified as “PC” were presented to the Planning Commission; Exhibits with the “PCC” label were placed before the Pierce County Council. The Board adheres to this terminology for identifying Exhibits in this decision.

C. ABANDONED ISSUES

The Board’s Rules of Practice and Procedure provide:

A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue.* Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied).

Additionally, the Board’s April 21, 2008 prehearing order in this matter states: “**Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits.**” PHO, at 6 (emphasis in original). *See City of Bremerton, et al., v. Kitsap County*, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5; *and Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7.

Also, the Board has stated, “Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned.” *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3. Further, the Board has held, “An issue is briefed when legal argument is provided; it is not sufficient for a petitioner to make conclusory statements, without explaining how, as the law applies to the facts before the Board, a local government has failed to comply with the Act.” *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order, (Jan. 8, 1997), at 7.

The single Legal Issue presented in this case includes reference to several of the GMA’s provisions, as follows:

Did Pierce County (County) fail to be guided by goals 5, 6, 8 and 11 [RCW 36.70A.020(5), (6), (8) and (11)] and fail to comply with the requirements of RCW 36.70A.030(2) and (10), .050, .120 and .170 when it adopted the Alderton-McMillan Subarea Plan (Ordinance No. 2007-41s2), because in adopting this Subarea Plan the County did not follow the Agricultural Resource Land (ARL) criteria or process for designating or de-designating ARL lands set forth in the Countywide GMA Plan (PCC 19A.30.070 generally, and PCC 19A.30.070(C) and (D) specifically)?

PHO, at 7; GMA statutory cites in bold – emphasis supplied.

The County moves to dismiss Petitioner’s claim on all counts asserting, “Petitioner did not indicate how the County violated most of the statutes listed in the Statement of the Legal Issues. Therefore, they have abandoned their claim.” County Response, at 33.

In reply Petitioner argues:

Just because TS Holdings chose not to organize its brief by addressing one GMA provision at a time, as the County seems to prefer, does not mean that TS Holdings did not address the relevant GMA provisions in its briefing. The effect and impact of the GMA provisions does not necessarily come from each provision individually, but the manner in which they interrelate to develop a planning concept and scheme. Frankly, TS Holdings believes that arguments are more effectively advanced when complimentary and intertwined GMA provisions are addressed collectively rather than myopically and in isolation.

TS Holdings Reply, at 2.

Review of the TS Holdings PHB reveals that reference to the GMA’s Goals addressing economic development [RCW 36.70A.020(5)] and private property rights [RCW 36.70A.020(6)] only occur where Petitioner restates the Legal Issue in this matter in their PHB, at 23 and 27. Further, the terms economic development and private property rights are only mentioned in a conclusory statement. PHB, at 29-30.⁴ Further, argument on compliance with these GMA provisions has not been “intertwined collectively” nor have they been addressed “in isolation.” **Therefore, the Board deems the challenge to the**

⁴ TS Holdings PHB, at 29-30 states:

It is contrary to the mandates of the GMA, however, for the County to designate lands for agricultural production of long-term commercial significance without consideration of the land’s commercial viability. [Citations omitted.] The County did little, if anything, to further the GMA goal to conserve productive agricultural lands and its actions ran directly counter to the GMA goals to encourage economic development and protect against the taking of property rights without just compensation. [Citations omitted.]

County's compliance with these Goals [RCW 36.70A.020(5) and (6)] to be abandoned.

In the Board's experience, most parties individually address the Legal Issues to be decided. Doing so allows the parties to argue, and the Board to decide, the merits of each issue discretely. On occasion, the Board will group related Legal Issues topically in its Order. In this matter, the Board acknowledges a clear interconnected relationship between the various GMA natural resource industry and agricultural land provisions – RCW 36.70A.020(8), .030(2) and (10), .050, .170, and RCW 36.70A.120. Since Petitioner's brief has "intertwined" argument pertaining to the GMA's agricultural land and industry goals and requirements, the Board will proceed with its analysis of whether the County complied with these related GMA provisions.

As to compliance with the public participation Goal [RCW 36.70A.020(11)], the Board notes Petitioner's only refer to that provision in the quote of the Legal Issue in the PHB, at 23. However, both Petitioner's and Respondent's briefing devote substantial pages to the public process the County undertook in adopting the Alderton-McMillan Community Plan. Consequently, **the Board concludes that the challenge to the public participation Goal [RCW 36.70A.020(11)] has not been abandoned.**

IV. LEGAL ISSUE AND DISCUSSION

A. LEGAL ISSUE

The Board's PHO set forth TS Holdings Legal Issue as:

- 1. Did Pierce County (**County**) fail to be guided by goals 5, 6, 8 and 11 [RCW 36.70A.020(~~5~~), (~~6~~),⁵ (8) and (11)] and fail to comply with the requirements of RCW 36.70A.030(2) and (10), .050, .120 and .170 when it adopted the Alderton-McMillan Subarea Plan (Ordinance No. 2007-41s2), because in adopting this Subarea Plan the County did not follow the Agricultural Resource Land (**ARL**) criteria or process for designating or de-designating ARL lands set forth in the Countywide GMA Plan (PCC 19A.30.070 generally, and PCC 19A.30.070(C) and (D) specifically)?*

Applicable Law

Petitioner alleges the County failed to be guided by the following Goals of the GMA:

- Natural resource industries – Maintain and enhance natural resource-based industries, including productive timber, agriculture and fisheries industries.

⁵ The Board has deemed the challenges to compliance with RCW 36.70A.020(5) and (6) **abandoned**. Therefore they are not repeated here.

Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses. RCW 36.70A.020(8).

- Citizen participation and coordination – Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts. RCW 36.70A.020(11).

Petitioner further alleges the County did not adhere to the following GMA definitions:

- ‘Agricultural land’ means land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW 84.33.140, finfish and upland hatcheries, or livestock, and that has long term commercial significance for agricultural production. RCW 36.70A.030(2)
- ‘Long-term commercial significance’ includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration of the land’s proximity to population areas, and the possibilities of more intensive use of the land. RCW 36.70A.030(10).

Petitioner also asserts the County did not comply with certain agricultural land designation requirements of the GMA:

- The Department of Community Trade and Economic Development (**CTED**) is required to, and has, developed and adopted minimum guidelines for the designation of agricultural lands [WAC 365-190-050, as required by RCW 36.70A.050]. These minimum guidelines “shall be considered” by the County in designating agricultural lands. RCW 36.70A.170.

Petitioner claims the County did not perform its activities – adopting the Alderton-McMillan Community Plan, as it relates to the de-designation of the Nauer Farm – in conformity with its comprehensive plan as required by RCW 36.70A.120.

Lastly, and in relation to compliance with .120, Petitioner cites to specific provisions of the Pierce County Code (**PCC**) pertaining to agricultural resource lands – *PCC* 19A.30.070(C) and (D).

PCC 19A.30.070(C) – LU-Ag Objective 17 states, “Use the community planning and joint planning agreement processes to make refinements to agricultural resource lands designations.” This objective goes on to list how community plans and joint planning agreements may be used to recommend refinements to ARLs.

PCC 19A.30.070(D) – LU- Ag Objective 18 states, “The criteria and process for removing properties from the Agricultural Resource Lands Designation.” This objective then lists various processes for agricultural resource land removal and refers back to the criteria for designation of agricultural resource lands – PCC 19A.30.070(B) – LU-Ag Objective 16.

PCC 19A.30.070(B) – LU-Ag Objective 16 states, “Designate agricultural resource lands based on the Growth Management Act definition and the Minimum Guidelines of WAC 365-190-050.”

Board Discussion

The Challenged Action: Background and Context for the Present Challenge:

The Alderton-McMillan Community Plan subarea lies within the Puyallup River Valley near the City of Orting in central Pierce County. The area straddles the Puyallup River and is about 30 miles northwest of Mount Rainier. The valley is broad and flat, crisply defined by steep slopes rising to plateaus on the east and west. Recent development in the area has occurred more frequently on the plateaus rather than on the valley floor which faces development constraints due to flooding, high water tables, and volcanic hazards.⁶

The valley floor is made up of rich alluvial soils deposited by the river over time. In the mid-1800’s, subsistence farming was prevalent where oats, rye, barley, potatoes, peas, fruit trees and vegetables were planted. Later in the 19th century, hops became a lucrative crop until replaced in the early 1900’s when bulbs, flowers, dairy, berry, vegetables and fruit orchards became more common, lucrative agricultural pursuits in the valley. There are approximately 4,700 acres of farmland, 42% of the land area, in the Community Plan area.⁷ Although the agricultural products have changed over time, the area remains an important source of agricultural production for the County.

The Nauer Farm, subject of this present challenge, lies in the fertile valley floor and is over 100 acres in size. The farm was once a dairy, but has been essentially defunct for over a decade, except for some hay production. It is located over a mile south of the City of Orting Urban Growth Area along Oroville Road. The Nauer Farm is also about one-half mile east of the southernmost extension of the Orting UGA along the Puyallup

⁶ Ex. PCC-96, Ordinance No. 2007-41s2, Alderton-McMillan Community Plan (AMCP), A component of the Pierce County Comprehensive Plan, Introduction, at 1. The Board notes that the property falls within: a potential seismic hazard area, volcanic hazard area [within an Estimated Lahar Travel Time of 30 minutes from Mt. Rainier], a potential flood hazard area with delineated wetlands on the site, and salmonids appear to be present in the stream on the property. See AMCP, Natural Environment Element, maps following page 74.

⁷ *Id.*

River.⁸ The property is abutted by Oroville Road on the west and it is confined by steep slopes rising to the plateau on the east. The northern edge of the property is a road rising to the top of the plateau where a residential subdivision is present. To the south lie additional flat agricultural lands.⁹

The Nauer Farm was originally designated with an Agricultural Overlay in the County's 1995 Comprehensive Plan.¹⁰ However, in 2004, when the County altered its criteria and process for designating agricultural resource lands (**ARLs**) – the property was designated as ARL. This designation was retained when the County adopted the Alderton-McMillan Community Plan in 2007. The Community Plan and zoning designations abutting and around the Nauer Farm are as follows: the land to the north, west and south is primarily designated ARL – with a few small parcels designated as Rural Farm or Rural-10; immediately east of the property the land is Rural-10; further east, on the top of the plateau where a residential subdivision is located, the area is zoned Rural-20.¹¹

T.S. Holdings, the present owner of the Nauer Farm, challenges Pierce County's decision to retain the agricultural resource land designation for 100+ acres of land. The Nauer Farm involved in the present appeal has been part of two prior cases decided by this Board.¹²

In *Orton Farms, et al., v. Pierce County (Orton Farms)*, CPSGMHB Consolidated Case No. 04-3-0007c, Final Decision and Order, (Aug. 2, 2004), the Board concluded the County's de-designation of the Nauer Farm from ARL to R-10 did not comply with the agricultural land conservation mandates of the Act because the Record showed the rationale for the de-designation was landowner intent and current use rather than application of the required criteria for determining the long-term commercial significance of the land.¹³

In response to the *Orton Farms* decision, the County revised its criteria for designating ARLs to specifically include factors addressing proximity to population areas and the possibility of more intensive use, as well as soil composition, growing capacity, and productivity. The County applied the revised criteria and again designated agricultural resource lands throughout the County. Applying these criteria, the Nauer Farm was designated as ARL, which included the Nauer Farm. The owners of the site filed a second appeal with the Board, alleging the criteria were applied too broadly and erroneously applied to the property.

⁸ HOM Ex. 11; AMCP, Land Use Designations and zoning maps following page 40. The Nauer Farm appears to be over a mile south from the Orting UGA following the major roads in the area – Orville Road E and SR 162. To the west, the Orting UGA is over one half mile away cross-country and via farm access roads.

⁹ *Id.*, see also aerial photographs in Ex. PC-67.

¹⁰ HOM Ex. 1.

¹¹ HOM Ex. 11; AMCP, Land Use Designations and zoning maps following page 40.

¹² The Nauer Farm property was previously owned by "The Buttes LLC" which was a party in the two prior cases.

¹³ *Orton Farms*, FDO, at 36-40.

In *Bonney Lake, et al., v. Pierce County (Bonney Lake)*, CPSGMHB Consolidated Case No. 05-3-0016c, Order Finding Compliance [CPSGMHB Consolidated Case No. 04-3-0007c – *Orton Farms*] and Final Decision and Order [CPSGMHB Consolidated Case No. 05-3-0016c], (Aug. 5, 2005), the Board concluded the County’s agricultural resource lands designation criteria and ARL designations (including for the Nauer Farm) complied with the agricultural land requirements and goal of the Act.¹⁴ The Board noted the County had adopted a process and criteria for the removal of ARLs designations to correct any possible mapping errors. The County included Plan Policies to allow for the de-designation of ARLs through community planning or joint planning agreements with Pierce County cities.¹⁵ The Board also noted the Nauer Farm was included in the Alderton-McMillan Community Planning area, which had begun the community planning process.¹⁶

In light of the *Bonney Lake* decision, the owner of the property eventually pursued de-designation of the Nauer Farm through the community planning process for the Alderton-McMillan Community Plan, asserting that a designation error had previously occurred. The product of the community planning process was the County’s enactment of Ordinance No. 2007-41s2 adopting the Alderton-McMillan Community Plan, including land use and zoning designations. In the Community Plan, the County retained the ARL designation for Nauer Farm.¹⁷ This appeal followed.

GMA Context for Agricultural Resource Lands Discussion:

Population growth increases the pressure to convert agricultural lands to other uses, thereby undermining the land base that supplies our source of food. Other pressures are also at work to undermine the long-term viability of commercial agriculture, such as the loss of local markets, global competition, and the absence of a new generation of farmers.¹⁸ The GMA creates a framework for addressing these pressures, especially the fragmentation and conversion of the agricultural land base and maintenance of the agricultural industry.

The GMA recognizes the importance of agricultural lands and the industries that rely upon them by requiring cities and counties to *designate, conserve* and *protect* agricultural lands and *maintain* and *enhance* the agricultural industry that they support. In one of its earliest GMA decisions, our Supreme Court held:

The GMA sought to control and regulate growth, and specifically emphasized the protection of natural resource lands, including agricultural

¹⁴ *Bonney Lake*, OFC/FDO, at 20-21.

¹⁵ *Id.* at 21.

¹⁶ *Id.* at 21, fn. 11.

¹⁷ *See*: AMCP, Land Use Designations and zoning maps following page 40; and HOM Ex. 11.

¹⁸ Ex. CPB-482, *Conserving Pierce County Farmlands – Development Rights Purchasing Program - Report and Analysis for Growth Management/Agricultural Land Conservation*, Cascade Land Conservancy, December 2006, at 12.

land. The legislature hoped to preserve agricultural land near our urban centers so that freshly grown food would be readily available to urban residents and the next generation could see food production and be disabused of the notion that food grows on supermarket shelves.¹⁹

Accommodating growth while conserving agricultural lands is a difficult challenge for Washington's local governments, yet the GMA demands it. The Western Washington Growth Management Hearings Board best summarized the state of the law in a recent decision where it stated:

The Board recognizes that the counties and cities of Washington face a multitude of difficult and demanding challenges when determining how their communities may grow. But these challenges must be addressed within the mandates of the GMA so as to serve the "public's interest in the conservation and wise use of our lands."²⁰ Washington's limited, irreplaceable agricultural lands are at the forefront of this mandate, with cities' and counties' discretionary planning choices confined so as to prevent the further demise of the State's ability to provide food for its citizens.

The GMA, through RCW 36.70A.020(8), .060, and .170, direct counties and cities to protect agricultural lands by:

1. *Designating* agricultural lands of long-term commercial significance;
2. Assuring the *conservation* of agricultural land;
3. Assuring that the use of adjacent lands *does not interfere* with their continued use for agricultural purposes;
4. Conserving agricultural land in order to *maintain* and *enhance* the agricultural industry; and
5. *Discouraging* incompatible uses.²¹

The question of the meaning of agricultural lands, under the GMA, was recently clarified by the Supreme Court in the *Lewis County* decision.²² In that case, the proper definition of agricultural land was set forth with the Court holding:

We hold that agricultural land is land:

¹⁹ *Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn. 2d 38, 58; 959 P.2d 1091, (1998).

²⁰ RCW 36.70A.010

²¹ *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn. 2d 543, 588; 14 P. 3d 133 (2000).

²² *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn. 2d 488; 139 P.3d 1096 (2006).

- a. not already characterized by urban growth
- b. that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, and
- c. that has long term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses.²³

This definition emphasizes the three required elements of agricultural lands – that it is *not already characterized by urban growth*, that it is *primarily devoted to* agricultural production, and has *long-term commercial significance* for agricultural production.

The meaning of *primarily devoted to* has been addressed by the Supreme Court, with the phrase denoting that the land “is in an area where the land is actually used or capable of being used for agricultural production.”²⁴ The focus is on the general characteristics of the property itself and whether it can be used for any type of the types of agriculture enumerated in RCW 36.70A.030(2). The Board notes that soils play a significant role in determining whether land is capable for agricultural use. However, it is not the exclusive method since some types of agriculture are not soils’ dependent. The question is simply – *Is this site or could this site be used for the grazing of cattle? For the cultivation of corn? For the raising of chickens?* The Board further notes that “capable” does not equate to the economics of the property²⁵ - that is, for the next element which addresses the viability of the site for long-term commercial value.

²³ *Lewis County*, 157 Wn. 2d 488, at 502.

²⁴ *Redmond*, 136 Wn. 2d 38, at 53 (emphasis added) holding:

[I]f current use were a criterion, GMA comprehensive plans would not be plans at all, but mere inventories of current land use. The GMA goal of maintaining and enhancing natural resource lands would have no force; it would be subordinate to each individual landowner’s current use of the land ... [I]f landowner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably, in the case of agricultural land, it would always be financially more lucrative to develop such land for uses more intense than agriculture ... [I]f the designation of such land as agriculture depends on the intent of the landowner as to how he or she wishes to use it, the GMA is powerless to prevent the loss of natural resource land.

See also Lewis County, 157, Wn. 2d 488, at 500.

²⁵ *See Redmond*, 136 Wn. 2d 38, at 53 (Neither current use nor a landowner’s intent is conclusive in regard to primarily devoted to.)

The GMA's definition of *long-term commercial significance* seeks to address the economic viability of the property. This requires an assessment of five different factors, three generally related to the capability of its soils and two based on development-related impacts from the surrounding area.²⁶ When considering growing capacity, productivity, and soil composition, the focus is on the land itself and jurisdictions must use the USDA soil classification system which incorporates these three considerations.²⁷ If the property contains a soils type the USDA has determined suitable for agricultural production, then it qualifies for *potential* treatment as land with long-term commercial significance, *subject* to the considerations of development-related impacts. Although the presence of agricultural soils weighs heavily on the designation of agricultural land, soils alone do not mandate designation; the GMA requires an analysis of more than just soils to identify and designate agricultural lands.

When evaluating the proximity of the property to population areas as well as its vulnerability to more intensive uses – counties and cities may consider the development-related factors enumerated in WAC 365-190-050(1).²⁸ These factors consider not only the availability of public facilities and services but the intensity of neighboring land uses, some of which may be incompatible with agricultural uses. The GMA does not assign or dictate the weight of each factor and, therefore, a jurisdiction has discretion regarding how to apply them.²⁹ In contrast to the analysis of capacity, productivity, and soils, the focus of these factors is on the development prospects of the site and, as the Supreme Court found in *Lewis County*, may potentially pertain to factors not specifically enumerated in RCW 36.70A.030(10), including the economic needs of the agricultural industry for the county as a whole, so long as these considerations are within the mandates of the GMA and pertain to the characteristics of the agriculture land to be evaluated.³⁰

John Karpinski, Clark County Natural Resources Council and Futurewise v. Clark County, WWGMHB Case No. 07-2-0027, Final Decision and Order Amended for Clerical and Grammatical Errors, (June 3, 2008), at 33-36; *see also Orton Farms, et al.*,

²⁶ RCW 36.70A.030(10)(b) lists these factors as growing capacity, productivity, soil composition, proximity to population areas, and the possibility of more intense uses of the land.

²⁷ WAC 365-190-050(1).

²⁸ *Lewis County*, 157 Wn. 2d 488, at 502; *see also Redmond*, 136 Wn. 2d 38, at 55.

²⁹ *Id.* at 502-503.

³⁰ *Id.* (Finding that it was not clearly erroneous for the County to weigh the farm industry's anticipated land needs above all else, noting that if the industry cannot use the land then the possibility of more intensive use of the land is heightened); *Id.* at 505 (Holding that the farmer's non-farm economic needs are not a logical or permissible consideration because it does not relate to a characteristic of farmland to be evaluated in determining long-term commercial significance).

v. Pierce County, CPSGMHB Case No. 04-3-0007c, Final Decision and Order, (Aug. 2, 2004), at 24-28.

In the *Orton Farms* case, this Board stated, “USDA, SCS, and NRCS soils’ information establishes and defines the “potential universe” of lands that could be designated as agricultural resource lands.”³¹ As noted in the *Clark County* case, *supra*, some types of agriculture are not necessarily soils-dependent – *e.g.* dairy, poultry, upland finfish hatcheries, or livestock production. RCW 36.70A.030(2). **This Board now acknowledges and concurs with the Western Board’s recent conclusion, that the “potential universe” of agricultural resource lands may be larger than that simply defined by soils.**

While the present status of the law for the *designation* of agricultural resource lands has been clarified, as described *supra*, the present case poses a question on the *de-designation* of such lands. In essence, did the County fail to comply with the GMA when it retained an ARL designation for the Nauer Farm?

Although the GMA does not specify a process or criteria for the “de-designation” of agricultural resource lands, such a process is needed to respond to changed circumstances or designation errors. Once lands are designated agricultural resource lands, they are not necessarily destined to be agricultural lands forever. However, this is not license for local governments to de-designate lands where it may be locally popular or politically convenient. De-designation of agricultural resource lands is a significant matter with potentially long-term consequences. Given the GMA’s mandate to conserve and protect agricultural resource lands and the methodical analysis required for designation of agricultural resource lands, the process of de-designation necessarily requires a showing that the criteria for designation are no longer, or never were, met and the previous designation was in error or is no longer applicable. This is the analysis the Board has consistently used to review de-designation challenges.³² Pierce County acknowledges this de-designation process.³³

In the *Orton Farms/Bonney Lake* cases, the Board ultimately found the County’s criteria and process for *designating* agricultural resource lands complied with the Act and the Board acknowledged the County had adopted Plan Policies on the processes and criteria for making refinements to, and removing, the existing ARLs designations – “Removal of properties from the ARL designation must be evaluated against the same criteria as designation.”³⁴ Thus, the law governing designation is germane to the de-designation

³¹ *Orton Farms*, FDO, at 25.

³² *Grubb v. City of Redmond*, CPSGMHB Case No. 00-3-0004, Final Decision and Order, (Aug. 11, 2000) (Overruled in *Redmond v. CPSGMHB*, 116 Wn. App 48, Div. I, (2003); *Forster Woods Homeowners Association, et. a. v. King County*, CPSGMHB Case No. 01-3-0008c, Final Decision and Order, (Nov. 6, 2001); and *Pilchuck Audubon Society, et al., v. Snohomish County*, CPSGMHB Consolidated Case No. 06-3-0015c, Final Decision and Order, (Sep. 15, 2006).

³³ Objective 18.1.

³⁴ *Id.*

procedures adopted by Pierce County. The Board now turns to the County's process and criteria for designating agricultural resource lands and refining or removing those designations.

Pierce County's Process and Criteria for Designating, Revising and Removing ARLs Designations:

Three of the County's Plan Objectives deal with the processes and criteria for *designating, refining and removing* ARLs designations – LU-Ag Objectives 16, 17, and 18, (*PCC 19A.30.070(B), (C), and (D)*), respectively – hereafter referred to as Objectives 16, 17 and 18). These Objectives provide as follows: [The Board comments on each of these Objectives as to its relevance to the present matter.]

LU-Ag Objective 16. Designate Agricultural Resource Lands (ARL) based on the Growth Management Act definition and the Minimum Guidelines of WAC 365-190-050. (**Bold** emphasis supplied.)

1. **Agricultural Resource Lands are lands meeting the definition in RCW 36.70A.030(2):** "... land primarily devoted to the commercial production of horticulture, viticulture, floriculture, 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
2. The focus for **preservation of agricultural lands must be on lands not already characterized by urban growth**, characterized by more intensive rural development, designated Reserve-5 for future urban growth of a city or town or dedicated to Forest Lands.
 - a. Only rural lands shall be considered for agricultural resource lands designation.
 - b. Properties already characterized by urban growth, characterized by more intensive rural development, designated Reserve-5 for future urban growth of a city or town, shall be excluded and are defined as follows
 - 1) Lands designated Rural Activity Center, Rural Neighborhood Center;
 - 2) Lands rezoned to Rural Activity Center, Rural Neighborhood Center, Limited Area of More Intensive Rural Development (LAMIRD), or Reserve-5 in the adoption of a community plan or an associated Comprehensive Plan Amendment

- 3) Lands that are part of a preliminary plat approved prior to February 1, 2005, or a final plat recorded prior to February 1, 2005, including any associated open space or other non-buildable tracts identified on the face of the plat; and
- 4) Lands with mobile home parks.

c. Designated Forest Lands shall be excluded.

3. **Designation of Agricultural lands of “long-term commercial significance”** requires consideration of 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 intensive uses of the land (**RCW 36.70A.030(10)**). **WAC 365-190-050 prescribes the minimum guidelines** for identifying agricultural lands of long-term commercial significance and said minimum guidelines shall be considered in designating land as Agricultural Resource Land, including the following:

a. **Soils.** The key criterion for defining agricultural resource lands is the presence of the County’s most productive agricultural soil types and their associated production yield: soils identified as “Prime Farmland” in the NRCS [National Resource Conservation Service] Field Office Technical Guide for Pierce County, Section 2., distributed February 24, 2003, which have a grass/legume production yield of 3.5 tons per acre or greater, as identified by the U.S. Department of Agriculture, Natural Resource Conservation Service soil classification system.

- 1) **Minimum parcel size.** The threshold size used as a basis for the designation of agricultural resource lands is 5 acres or larger in size because soils data is most reliable at this size. Options for including parcels below the 5-acre threshold are provided in community planning processes. [See Objective 17] or the Comprehensive Plan Amendment process.
- 2) **Portion affected.** The identified soils types and yield must be found on 50 percent or more of the parcel area, PROVIDED that for properties abutting the Carbon, Puyallup, or White Rivers, the threshold shall be 25 percent or more of the parcel area. The designation would affect the whole parcel, not just the portion containing the soils types and yield. Options for including parcels not meeting this criteria are provided in community planning processes. [See Objective 17] or the Comprehensive Plan Amendment process.

b. **Intensity of Nearby Uses.** To address the intensity of nearby uses, parcels that are adjacent to lots of record of one acre or less on more than 50 percent of the perimeter of the parcel shall not be designated agricultural resource lands.

c. **Pressure to Urbanize.** Community planning and joint planning efforts may be used to define and establish an appropriate buffer of Reserve-5 around the urban growth area of a city or a town. In determining whether a Reserve-5 buffer should be established, the following criteria shall be considered:

1) **Proximity to Urban Growth Area.** A buffer of a reasonable width of Reserve-5 designation adjacent to the city/town urban growth boundary, following property lines, may be proposed in a community plan or joint planning agreement. Such a proposal must be accompanied by findings that support the designation and width of the buffer consistent with the [GMA, CPPs and Comprehensive Plan]. Once established, the buffer shall not be expanded except through the Compliance review required by RCW 36.70A.130. Designation shall be accompanied by implementing regulations which address setbacks and other zoning techniques used to protect adjacent agricultural activities.

2) **Economic Viability and Environmental Impacts of Farming.** In the community plan/joint planning evaluation of a potential buffer of Reserve-5 adjacent to a city or town pursuant to 1) above, economic viability and environmental impacts of farming may be considered as additional factors for inclusion of specific parcels in the Reserve-5 buffer. However, economic viability or environmental impacts of farming shall not be the only determining factors for re-designation.

3) **Other Criteria.** In establishing a Reserve-5 buffer, and notwithstanding any other provisions of PCC 19A.30.070(B), a community planning board or parties to a joint planning effort shall consider all of the criteria prescribed in WAC 365-190-050 and shall document such consideration in its recommendations to the County Council.

d. **Landowner Intent.** While landowner intent cannot be used as a rationale for de-designation, it can be used as a criterion for inclusion when reflected by the tax status of the land (inclusion in the County's Current Use Assessment program as agriculture).

In this single Objective, the County incorporates: the required definitions from the GMA [RCW 36.70A.030(2) and (10)]; a commitment to designate ARLs [RCW 36.70A.170], which was accomplished in 2004; CTED's minimum guidelines that must be considered in designating agricultural resource lands [RCW 36.70A.050 and WAC 365-190-050]; and the components for designation as set forth in *Lewis County*. Additionally, the County has clearly *refined* and *defined* soils' factors to consider in the designation process such as productivity yields, parcel size, and portion of parcel affected. Intensity of nearby uses is also defined in terms of lot sizes on the perimeter of potential parcels. Lastly, proximity to population or the pressure to urbanize is identified in terms of proximity to UGAs and the economic viability and environmental impacts of farming. Landowner intent is also recognized as a factor.

The County's next Objective explains how the ARLs designations may be refined.

LU-Ag Objective 17. Use the community planning and joint planning agreement process to make refinements to agricultural resource lands designations as follows: (**Bold** emphasis supplied.)

1. Joint planning agreements and community plans may recommend re-designation of agricultural resource lands to Reserve-5 for a buffer around a city or town Urban Growth Area, using the criteria specified in 19A.30.070.B.3.c.1), 2), and 3). [Long-term commercial significance factors pertaining to the pressure to urbanize.]
2. Community plans may recommend that parcels not meeting the criteria of 19A.30.070.B be designated as agricultural resource lands:
 - a. When contiguous ownership involves parcels that meet the criteria of 19A.30.070.B., except that some parcels are below the threshold size of 5 acres,
 - b. When the soil type and yield are present, but the size of the parcel is below the threshold of 5 acres, or
 - c. When the soil type and yield is not present, but the property is being used for commercial agriculture and the landowner requests inclusion.
3. **Community plans and joint planning agreements may recommend de-designation of agricultural resource lands to correct errors in designation.**
4. Community plans can make refinements to the implementing regulations consistent with the provisions of 19A.30.070.E.

It is undisputed that Petitioner did not seek a Reserve-5 designation for the Nauer Farm. This is self-evident since the Nauer Farm is not adjacent to the nearest UGA – the City of

Orting.³⁵ Therefore, the only relevant provision in this Objective, as it relates to the present challenge, is the notion that the community plan may recommend de-designation of agricultural resource lands **to correct errors in designation**.

The County's next Objective explains how agricultural resource lands designations may be removed – in this matter to correct an alleged designation error.

LU-Ag Objective 18. Provide the criteria and process for removing properties from the ARL designation.³⁶ (**Bold** emphasis supplied.)

- 1. Removal of properties from the agricultural resource lands designation must be evaluated against the same criteria as designation (see 19A.30.070.B, above).**
- 2. Removal of properties from agricultural resource lands designation shall be limited to the following processes:**
 - a. The approval of a Map Amendment to correct technical errors under the timelines and procedures established for regular Comprehensive Plan Amendments.
 - b. The adoption of a community plan that includes re-designation of parcels consistent with 19A.30.070.C.**
 - c. The approval of a Map Amendment to establish a Reserve-5 buffer for a city or town, following a recommendation of an approved joint planning agreement consistent with the provisions of 19A.30.070.C.1 and 3.
 - d. De-designation of agricultural resource lands for the purpose of expanding a Reserve-5 buffer for a city or town created pursuant to 19A.30.070 C shall only be considered during the Compliance review required by RCW 36.70A.130.

³⁵ See HOM Transcript, at 59 and 72; Ex. CPB-603; and footnote 8, *supra*.

³⁶ The Board notes that a finding [#4] pertaining to this provision accompanied the adoption of this Objective in Ordinance No. 2004-87S, which stated:

De-designation Additional Finding. The Council has provided for the possibility of a de-designation process for agricultural resource lands of long-term commercial significance to accomplish a number of specific policy goals, including:

- Like other jurisdictions, the County was unable to conduct site-specific analysis as part of its designation process because of time and resource constraints. Through the de-designation process, a more detailed analysis of the locational factors and intrinsic attributes of the land can be conducted as part of a community planning or joint planning process where the geographic area is smaller and the planning process is not limited to a specific timeframe.

See PC-3, Handout #2, at 8-9 (Exhibit K to Ordinance No. 2004-87S, at 8-9) and Ex. PC-4, Attachment B, at 2.

3. Agricultural resource lands cannot be amended directly into the UGA.

This Objective notes that for the County to remove ARL designations, the evaluation must employ the same *criteria* as was used for designation – *i.e.* Objective 16. **Thus, it must be shown that the designation criteria were applied in error or they are no longer applicable.** The relevant *process* for considering removal is the community planning process – here, the Alderton-McMillan Community Planning process. The Board now turns to the Petitioner’s arguments in the context of the County’s process.

Given that Pierce County’s designation of agricultural resource lands was found compliant by the Board in the *Orton Farms/Bonney Lake* decisions, Petitioner’s challenge to the County’s compliance with RCW 36.70A.020(8), .030(2) and (10), .050 and .170 is only relevant in the context of the challenge to RCW 36.70A.120. **Did the County perform its activities – adopting the Alderton-McMillan Community Plan, as it relates to the requested de-designation of the Nauer Farm – in conformity with its comprehensive plan, as required by RCW 36.70A.120.**

Position of the Parties:

TS Holdings claims the Community Plan, as related to the Nauer Farm, is noncompliant because:

- Petitioner’s request for de-designation was not adequately considered by the County, especially by the Alderton-McMillan Community Planning Board, since a site-specific evaluation was not conducted;³⁷
- The County’s evaluation of the request was limited to consideration of the presence of prime soils, as directed by staff;³⁸ and
- Petitioner provided information to the County showing that the Nauer Farm does not meet the agricultural resource lands designation criteria because the property is not economically viable for farming due to: inadequate drainage, lack of water rights for irrigation, the presence of steep slopes, a stream, a wetland, non-prime soils, and adjacent residential development.³⁹

In response, the County contends:

- The County’s decision to retain the agricultural resource land designation for the Nauer Farm is supported by the Record and complies with the agricultural

³⁷ TS Holdings PHB, at 24-26.

³⁸ *Id.* at 27-32.

³⁹ *Id.* at 33.

land conservation goals and requirements of the GMA and is consistent with the de-designation process and criteria in the County's Plan.⁴⁰

In reply, Petitioner counters:

- The County did not give adequate consideration to the request for de-designation since the County's evaluation and findings were limited to soils, not the components of long-term significance and the economic viability of the Nauer Farm.⁴¹

Petitioner's Request for De-designation and the County Process – Community Planning Board:

The Alderton-McMillan Community Planning Board (**Community Board**) was created in 2004 to work with the County in the development of the Alderton-McMillan Community Plan (**Community Plan**).⁴² Between April of 2004 and February of 2007, the Community Board held 67 public meetings and hearings to develop and discuss the Community Plan.⁴³ The Community Board was composed of 13 members from the community planning area, one of whom happened to be actively pursuing de-designation of his property.⁴⁴ During its process, the Community Board was advised that agricultural resource lands could be de-designated to correct designation errors and the criteria for de-designation were noted, including the “pressure to urbanize” criteria of Objective 16.B.3, as well as “key criteria” pertaining to soil type and associated production yield.⁴⁵ The Community Board operated by consensus and voted only when a consensus could not be reached.⁴⁶

About a month before the Community Board finished its work on the Community Plan, Tom Sturgeon⁴⁷ submitted a request asking that the Nauer Farm be de-designated from ARL.⁴⁸ The written request asserted: the Nauer farm was a defunct dairy; the land had been used for grazing of the milk cows – not crop production; the property only produced a yield of forage grass at 1.85 tons per acre rather than the 3.5 tons per acre the County uses for identifying prime farmland; surrounding lands are used for other non-farm uses; needed drainage renovations would be costly; and the property should be de-designated from agricultural resource lands since it does not meet the County's criteria for designation.⁴⁹

⁴⁰ *Id.* at 33-48.

⁴¹ *Id.* at 7-19.

⁴² County Response, at 5; Ex. PCC-96.

⁴³ *Id.*

⁴⁴ *Id.* at 8; TS Holdings PHB, at 14; *see also*, CPB-454 and 623,

⁴⁵ Ex. CPB-675.

⁴⁶ *See* Ex. PCC-96, Ordinance No. 2007-41s2, at 2, second WHEREAS.

⁴⁷ Mr. Sturgeon is one of the present owners of the Nauer Farm property. HOM Ex. 4.

⁴⁸ Ex. CPB. 603.

⁴⁹ *Id.*

The focus of Petitioner’s request for de-designation was that the land allegedly did not meet the criteria for soil type and productivity, arguably as they relate to economic viability – both criteria the County uses in defining long-term commercial significance. *See* Objective 16.3(a) and 3(c)(2).

On the same day the de-designation request was received, the County contacted both the National Resource Conservation Service (NRCS) and Washington State University asking for review and comment on the Nauer Farm request, noting the owner’s claim that the soil conditions on the site merit a change in the resource designation, particularly related to the grass/legume standard of 3.5 tons per acre established for identifying prime farmland soils.⁵⁰

On March 1, 2007, the Community Board held an open house and offered its draft recommendation on the Community Plan – the recommendation retained the ARL designation for the Nauer Farm. Around the same time, staff requested a second independent review of the Nauer Farm request. Allen S. Zulauf, a retired NRCS soil scientist who developed the Pierce County Soils Survey used by NRCS, was enlisted.⁵¹

On March 8, 2007, planning staff met with Mr. Sturgeon and his attorney, William Lynn, to discuss the de-designation process and request.⁵²

On March 9, 2007, the County received Mr. Zulauf’s report and conclusion on the Nauer Farms request.⁵³ The Zulauf report concluded the Nauer Farm contained Orting Soils which are rated as Agricultural Capability Class II soils, meeting the definition of prime farmland according to NRCS, and Zulauf states the request contained “questionable analysis to draw a conclusion as to profitability over the long-term.”⁵⁴ On the same day,

⁵⁰ Ex. CPB-606 and Ex. CPB-607.

⁵¹ Ex. PC-4, Attachment C, at 2.

⁵² Ex. PC-4, Attachment C, at 2; County Response, at 10.

⁵³ County Response, at 10.

⁵⁴ Ex. CPB-620A, and Ex. PC-4, Attachment C, at 2. The Zulauf report stated:

General Evaluation

The Soil Survey of Pierce County Area, Washington indicates that the Lauer [*sic* Nauer] Farm contains Prime Agricultural Land as defined in the Federal Register. Under good management the Orting Soils used for farming purposes are highly productive. Crops that can be grown are row crops, pasture or green chop for silage. Daffodil bulbs, strawberries, sweet corn and cucumbers are common crops. Farm practices that maintain soil tilth and fertility are necessary. Drainage can be provided by tile or open ditch. Weed control and supplemental irrigation help to maximize yields.

General response to the Nauer Farm paper

This paper utilizes a hay crop and questionable hay yields with no supplemental irrigation to develop the economic profile for the soils. It is a questionable analysis from which to draw a conclusion as to profitability over the long-term. The soil survey report for

the Community Board's recommendation for the Community Plan was passed on to the County Planning Commission (**Planning Commission**) for further review.⁵⁵

Petitioner claims additional information was submitted from GeoResources LLC, a firm with expertise in soils, which supported the initial request.⁵⁶ However, this information was not presented to the County until April 3, 2007,⁵⁷ after the Community Board had made its recommendation and forwarded the Community Plan to the Planning Commission. Thus, this information will be discussed by the Board in relation to the Planning Commission's review.

Further, Petitioner's argument in briefing focuses on the productivity of the soils – the forage grass yield - and the inability to make any money farming the property from two hay cuttings per year.⁵⁸ Petitioner argues the Community Board did not conduct a focused evaluation for the property and did nothing, not even vote on the issue given the information presented.⁵⁹ The County counters that the Community is an advisory body which merely makes recommendations, and it is the Council that ultimately makes the final decision.⁶⁰

The Community Board process is only the first step in the community planning process prior to review by the Planning Commission, with the final step being the County Council. The Board also understands that the Community Board and Planning Commission are advisory bodies that make recommendations to the County Council, the ultimate decision-maker in land-use matters. However, as to the Community Board process, this Board finds and concludes as follows:

- 1) The Community Board was made up of residents from, and familiar with, the Alderton-McMillan Community Planning area.
- 2) Petitioner's request was based upon an alleged designation error – related to soil productivity.
- 3) Even though Petitioner's request came at the 11th hour, the Community Board had knowledge of the Nauer Farm request for de-designation.
- 4) The Community Board had been advised of the agricultural resource lands designation criteria as set forth in Objective 16, and had been advised of their ability to recommend de-designation for designation errors (Objectives 17 and 18).

example, cites yields of 5 tons per acre of grass-legume hay under a good level of management. Some of the items listed are really one-time items rather than annual tasks.

⁵⁵ County Response, at 10.

⁵⁶ TS Holdings PHB, at 13.

⁵⁷ *Id.* and Ex. PC-47.

⁵⁸ *Id.* at 13-14.

⁵⁹ *Id.*

⁶⁰ County Response, at 38.

- 5) The staff sought independent review of Petitioner’s proposal by NRCS, WSU and Mr. Zulauf. [The Zulauf report was received by the County on the same day the Community Board made its recommendation on the Community Plan to the Planning Commission. The record is not clear whether the contents of the Zulauf report were made available to the Community Board before they made their recommendation. However, the exhibit is identified as CPB Ex. 620A, suggesting it was before the Community Board.]
- 6) While the Community Board knew of the de-designation request and the applicable designation criteria and process, it nonetheless did not recommend de-designation of the Nauer Farm.
- 7) Since the Community Board operated by consensus, it appears there was general agreement that the Nauer Farm should retain the ARL designation.⁶¹
- 8) Having chosen not to recommend removal of the agricultural resource lands designation for the Nauer Farm, no further review or evaluation by the Community Board was necessary, per Objective 18.
- 9) In light of Findings 1 through 8, *supra*, **the Board concludes that the County’s actions during the Community Board process were not clearly erroneous.**

Petitioner’s Request for De-designation and the County Process – Planning Commission:

The Planning Commission held five public hearings on the proposed Community Plan during April and May of 2007.⁶² The Draft Supplemental Environmental Impact Statement (**DSEIS**) on the Community Plan was issued on April 2, 2007.⁶³ On April 4, 2007, the first staff report was issued on the proposed Community Plan.⁶⁴ Like the Community Board, the Planning Commission was advised by staff that agricultural resource lands could be de-designated to correct designation errors and the criteria and process for de-designation were explained.⁶⁵

The April 2, 2007 DSEIS contains a discussion of the “Major Areas of Controversy.” Within this section the “De-designation of ARLs” is listed, noting that during the community planning process, several applications were received requesting de-designation based upon soils.⁶⁶ The DSEIS goes on to explain the County’s designation criteria from Objective 16, noting that any de-designation recommendation must address

⁶¹ The Board has to assume that the Community Board either was not persuaded that the request, on its face, showed an error in designation, or that the Community Board was apprised of the Zulauf report and thereby convinced that no designation error had occurred. In either case, by consensus, the Community Board recommended that the Community Plan retain the ARL designation for the Nauer Farm.

⁶² Ex. PCC-96, Ordinance No. 2007-41s2, at 3.

⁶³ Ex CPB-677.

⁶⁴ Ex. PC-3.

⁶⁵ Ex. PC-4.

⁶⁶ CPB-677, at 16.

all the criteria of Objective 16 and the intent of the de-designation process is to correct designation errors [mapping errors] made by the County.⁶⁷ No specific de-designation proposals were mentioned in the DSEIS.⁶⁸

On April 3, 2007, Mr. Lynn, Petitioner's attorney, submitted a letter to the Planning Commission regarding the de-designation request for the Nauer Farm, reiterating the request for de-designation.⁶⁹ The letter claimed the Community Board did not conduct an analysis of the request or address the information presented; the Planning Commission was urged to undertake such a review.⁷⁰ Attached to the letter were: 1) a cost estimate for installing/replacing 40,000' of drain pipe [\$1,165,230]; 2) a report from GeoResources LLC discussing crop production and related costs; 3) the Soil and Plan Laboratory report [originally submitted by Mr. Sturgeon to the Community Board]; and 4) a spread sheet on income/expenses for the Nauer Farm in 2005-2006.⁷¹

On April 4, 2007, the first County staff report on the entire Community Plan was issued.⁷² In describing the Land Use Element, the staff report summarized the focus of the Community Plan, which was to preserve farmland, improve the viability of farmers and maintain the rural character into the future. Specific mechanisms are described to achieve these goals.⁷³

⁶⁷ *Id.* 16-18.

⁶⁸ *Id.*

⁶⁹ Ex. PC-47.

⁷⁰ *Id.* at 3.

⁷¹ *Id.*

⁷² Ex. PC-3.

⁷³ *Id.* at 3. The staff report stated:

[T]he proposed land use changes within the [AMCP] strive to preserve farmland, improve the financial viability of farmers, and maintain the rural character of the community into the future. In order to achieve these goals, some innovative land use planning strategies are introduced such as a Transfer of Development Rights Program. Strategies to achieve the vision are outlined below and were largely guided by the Pierce County Comprehensive Plan policies on Agriculture, Title 19A.30.070; and on the recommendations from the Agricultural Strategies Study by American Farmland Trust, Barney and Worth, and Globalwise.

- Maintain rural character – R10, R20, ARL, introduce RF [rural farm]
- Preserve farmland –
 - Allow retail sales of farm and related products on property
 - Agricultural tourism
 - Purchase and Transfer of Development Rights
 - Preserve soils that support agricultural activities by creating a new Rural Farm designation and zone
 - ARL/Rural Farm densities – 2 units per 10 acres, maximum 1 acre lots remaining tract to agriculture conservation easement
- 2 Rural Neighborhood Centers . . .
- Rural Industrial Center

The staff report also included a section that identified “Areas of Controversy” noting, “more difficult issues are likely to emerge during the [Planning Commission’s] public hearing process.”⁷⁴ One of the difficult issues listed was, “Properties requesting to be removed from the ARL designation based on soils.”⁷⁵ No specific proposals were identified.

On April 18, 2007, a staff memo was submitted to the chair of the Planning Commission describing the criteria and process for designating, modifying, and removing an agricultural resource land designation.⁷⁶ The memo was essentially the same as the one prepared for the Community Board.⁷⁷ Attached to the staff memo were: 1) a synopsis of the relevant Plan Policies, 2) the relevant Findings of Fact from Ordinance No. 2004-87s, which designated ARLs county-wide, 3) a table noting de-designation proposal correspondence involving the Nauer Farm and others, 4) a copy of the Zulauf Report,⁷⁸ and 5) a Pierce County Comprehensive Plan Agricultural Policy Chronology from 2004-2007.⁷⁹

At this point in the Planning Commission’s process, it is certain from the Record that the Planning Commission was informed of the Nauer Farm request for de-designation and of the Zulauf report rebutting the soils classification and productivity aspects of the request. The Planning Commission proceeded through its public hearing process.

During the hearing process, the Planning Commission received numerous letters and testimony regarding de-designation,⁸⁰ several comments of which dealt with the Nauer Farm proposal.

Futurewise provided aerial photos of the property and walked through the County’s criteria for designation as related to the Nauer Farm.⁸¹ Futurewise stated,

[Petitioners] argue that the land does not produce this much hay [3.5 tons/acre], but that is not the criterion. The criterion is whether it can. And with the right farming techniques this soil can produce a yield of 3.5 tons or more of grasses or legumes each year.⁸²

⁷⁴ *Id.*, at 6

⁷⁵ *Id.*

⁷⁶ Ex. PC-4.

⁷⁷ *Id.* see also CPB-675.

⁷⁸ Ex. CPB-620A, and Ex. PC-4, Attachment C, at 2.*Id.*, at 3.

⁷⁹ *Id.*

⁸⁰ Ex. PC-36 (requesting de-designation to Reserve-5 for 18 acres); Ex. PC-46 (requesting joint planning for an area south of Sumner – Orton Farms); and Ex. PC-48 (requesting de-designation of Orton Farms and joint planning with the City of Sumner.)

⁸¹ Ex. PC-67, at 2-5; County Response, at 18-20; see also Ex. PC-72.

⁸² Ex. PC-67, at 3.

Futurewise also prepared a table illustrating each of the County’s designation criteria (including the WAC indicators of WAC 365-190-050) indicating whether or not they still applied to the Nauer property. In light of this evaluation, Futurewise concluded the County’s ARL designation of the Nauer Farm was appropriate since it still met the criteria identifying long-term commercial significance – *i.e.* no designation error had been made by the County.⁸³

The chair of the Farming, Assistance, Revitalization and Marketing Board (**FARM**), also sent a letter indicating FARM did “not support any action that will lead to the conversion of agricultural land to other uses and would like to see currently-designated agricultural resource lands remain intact.”⁸⁴ The Tatoosh Group of the Sierra Club also opposed de-designation of any agricultural resource lands.⁸⁵

Petitioner’s attorney [Mr. Lynn] also submitted a letter to the Planning Commission responding to the Zulauf report and commenting on staff guidance provided to the Community Board and the Planning Commission.⁸⁶ Regarding the Zulauf analysis, the letter argues that a site-specific analysis was not conducted, but rather Mr. Zulauf relied upon generalizations and did not respond to information provided on behalf of the Nauer request, specifically related to the costs and investments necessary to make the land productive.⁸⁷ The letter reiterated concerns raised in the prior submittal noting: some non-prime soils on site, presence of wetlands and a stream, a well-head protection area, existing buildings on site, surrounding zoning of Rural, and a 350-lot development to the east of the site.⁸⁸ The letter also provided attachments, including those contained in the original request and the GeoResources LLC report.⁸⁹ Lastly, the letter suggested staff guidance on the de-designation process was incorrect when the Community Board was told, “the CPB may recommend de-designation of the studied parcels based on an analysis of the various pressures to urbanize, but they must also show that prime farmland soils are not present within the study area.”⁹⁰ The Board notes Mr. Lynn’s letter correctly indicated that soil type is only one of the indicators for agricultural resource land designation – it is not determinative.⁹¹ The letter concluded by arguing the Nauer Farm had no long-term commercial significance and asserted that to retain the ARL designation would “inappropriately doom [the Nauer Farm] to economic failure...”⁹²

⁸³ *Id.*

⁸⁴ Ex. PC-72.

⁸⁵ County Response, at 21. [The referenced exhibit – Ex. CP-70 – was not provided to the Board.]

⁸⁶ Ex. PC-27.

⁸⁷ *Id.* at 2-3.

⁸⁸ *Id.* at 3-4.

⁸⁹ *Id.* see attachments to Ex. PC-27.

⁹⁰ *Id.* at 4, referring to Ex. PC-4, at 3.

⁹¹ *Id.*

⁹² *Id.* at 5.

At its last public hearing, on May 2, 2007, the Planning Commission voted to recommend approval of the Community Plan. The Planning Commission chose not to recommend the de-designation of the Nauer Farm; hence it retained the ARL designation.⁹³

Petitioner acknowledges that staff explained the de-designation process to the Planning Commission, but argues the instruction was incorrect since it suggested the presence of prime soils in the area precluded de-designation.⁹⁴ Petitioner notes that other proponents of specific de-designation proposals also asked the Planning Commission to conduct site-specific analysis of the proposals.⁹⁵ Petitioner also reiterates the criticisms of the Zulauf report offered by Mr. Lynn in his letter to the Planning Commission.⁹⁶

The County responds that Petitioner did not demonstrate that the County had made a mistake in designating the Nauer Farm as agricultural resource lands.⁹⁷ The County asserts that the Zulauf report refutes Petitioner's assertions on soil type and productivity and supports the conclusion that the property contains prime farmland soils, and should remain designated agricultural resource lands.⁹⁸ The County notes testimony opposing the de-designation of any agricultural resource lands in the Alderton-McMillan Community Plan area, and specifically points to the Futurewise analysis of the designation factors which concluded the land should not be de-designated.⁹⁹

As to the staff instruction to the Community Board and Planning Commission, the County acknowledges the sentence in question "could have been worded differently."¹⁰⁰ However, the County emphasizes soil type and productivity are key criteria for an ARLs designation, and concurs that other indicators must also be considered. The County notes that the same staff memo details the non-soils factors – intensity of nearby uses, and proximity to UGAs – as well.¹⁰¹ Further, the County points out that Mr. Lynn's letter clarified that soils was not a determinative factor in designating agricultural resource lands. The County assures the Planning Commission, as well as the County Council, were aware of all the criteria and the correct process.¹⁰²

In reply, Petitioner contends the County failed to give adequate consideration to the long-term commercial significance prong of the agricultural resource lands designation test and the decision-makers were inaccurately advised.¹⁰³

⁹³ County Response, at 21.

⁹⁴ TS Holdings PHB, at 16.

⁹⁵ *Id.* at 17-18.

⁹⁶ *Id.* at 18-22.

⁹⁷ County Response, at 43.

⁹⁸ *Id.* at 43-45.

⁹⁹ *Id.* at 44.

¹⁰⁰ *Id.* at 46.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ TS Holdings Reply, at 12-16..

As to the Planning Commission process, the Board finds and concludes as follows:

1. The Planning Commission knew of the Nauer Farm request for de-designation and the alleged designation error was related to soils and soil productivity.
2. Other requests for de-designation were also presented to the Planning Commission.
3. The Planning Commission had been briefed on the criteria as found in Objective 16, and had been advised of their ability to recommend de-designation for designation errors.
4. The staff briefing memo outlined *all* criteria to be considered in de-designation and the Lynn letter clarified any ambiguity in considering the criteria.
5. The Zulauf report rebutting the soils classification and questioning the soil productivity aspects of the Nauer Farm request was before the Planning Commission.
6. Mr. Lynn's letter, which responded to the Zulauf report and its conclusions, provided additional information to the Planning Commission about the site and urged the Planning Commission to conduct further review and de-designate the property.
7. Other information and testimony, urging agricultural resource lands not be de-designated, was before the Planning Commission – the FARM and Tatoosh testimony.
8. Futurewise provided specific testimony pertaining to the Nauer Farm providing its evaluation of the designation factors and concluded the County's ARL designation of the Nauer Farm was appropriate since it still met the criteria identifying long-term commercial significance – *i.e.* no designation error had been made by the County.
9. The Planning Commission knew of the de-designation request, the criteria and process for de-designation, and it had information before it urging both retention, and removal, of the ARL designation for the Nauer Farm.
10. Based upon the information provided to the Planning Commission, it was not persuaded that an error had been made in designation based upon soils or soil productivity, as argued by Nauer Farms.
11. On a 6-0 vote, the Planning Commission forwarded its recommendation on the Community Plan to the County Council – the recommendation retained the ARL designation for the Nauer Farm.
12. Having concluded that no designation error occurred and deciding not to recommend removal of the agricultural resource land designation for the Nauer Farm, no further evaluation by the Planning Commission was necessary, per Objective 18.
13. In light of Findings 1 through 12, *supra*, **the Board concludes that the County's actions during the Planning Commission process were not clearly erroneous.**

Petitioner's Request for De-designation and the County Process – County Council:

From June 2007 through November of 2007, the County Council's Community Development Committee [composed of five members of the County Council] held hearings on the Community Plan.¹⁰⁴ Ms. Archer, also Petitioner's attorney, appeared at a hearing and resubmitted Mr. Lynn's letter of April 25, 2007.¹⁰⁵ The FARM Board appeared, indicating, "[It] does not support the de-designation of Orton Farms or the Nauer Farm."¹⁰⁶ The Record demonstrates the Council's Committee was aware of the de-designation criteria and process, and in fact, prepared an amendment recommending the de-designation of *another property* for a designation error, providing a written analysis of the County's designation criteria, including each of the WAC factors.¹⁰⁷ Although the same information provided to the Community Board and Planning Commission was before the Council's Committee, the Nauer Farm was not considered for de-designation from agricultural resource lands. At a subsequent public hearing of the Council's Committee, the members recanted on their proposed de-designation amendment for another property and forwarded their recommendation to the full County Council.¹⁰⁸ The Committee recommendation retained the ARL designation for the Nauer Farm.

The full County Council held a public hearing on the Alderton-McMillan Community Plan on December 11, 2007 and, on that evening, enacted Ordinance No. 2007-41s2, which adopted the Alderton-McMillan Community Plan and retained the ARL designation for the Nauer Farm.¹⁰⁹ The County Council entered the following findings pertaining to de-designation:

28. The County Council finds that property owners were provided the opportunity to submit information that would support the de-designation of agricultural resource lands.
29. The County Council finds that Planning and Land Services forwarded submitted ARL de-designation reports to an independent soils scientist for review and confirmation of the reports' conclusions.
30. The County Council finds that the soil scientist concluded that the submitted reports failed to prove that the properties do not have the prime agricultural soil or may produce the yield, using best

¹⁰⁴ County Response, at 21-26.

¹⁰⁵ *Id.*; see Ex. PC-27.

¹⁰⁶ Ex. PCC-83.

¹⁰⁷ County Response, at 22, see also Ex. PCC-73. The Council Committee also considered a revision to the criteria for designating ARLs – Ex. PCC-74 [The amendment would have allowed de-designation of ARLs based on proximity to urban areas and intensity of nearby uses without regard to soils; this amendment was also removed from the Committee recommendation.]

¹⁰⁸ *Id.* at 26.

¹⁰⁹ *Id.* at 27.

management practices, as stipulated in the ALR designation criteria.

31. The County Council finds that proposals to de-designate ARLs lands must utilize the same criteria that established the ARL through the 2004 Pierce County Comprehensive Plan 10-year update.¹¹⁰

Based upon review of the County Council Committee and full County Council process, the Board finds and concludes as follows:

1. The County Council members knew of the Nauer Farm request for de-designation based upon an alleged designation error.
2. The alleged designation error pertained to soil productivity.
3. The Council knew the criteria and process for designation and knew that removal of an agricultural resource land designation must be evaluated against the same criteria as for designation.
4. The Council Committee, in fact, proposed de-designation of another property and prepared an evaluation against the Objective 16 criteria.
5. The Record before the Council included the initial Nauer Farm request, the materials presented by Mr. Lynn, the Zulauf report, letters and testimony by Futurewise, FARM, and the Sierra Club – arguing for and against de-designation of the Nauer Farm.
6. Neither the Council Committee nor the full Council was persuaded that a designation error had occurred in relation to the Nauer Farm and de-designation was not included in the final version of the Alderton-McMillan Community Plan that was placed before the full Council.
7. Since removal of the designation was not recommended, no further evaluation was necessary, per Objective 18.
8. On December 11, 2007, the County Council adopted the Community Plan – the Nauer Farm retained the agricultural resource land designation;
9. Based upon Findings 1 through 8, *supra*, **the Board concludes that the County's action during the Council Committee and full Council process were not clearly erroneous.**

The County's public participation process spanned over three years. Citizens were encouraged to participate and the opportunity to participate was provided early and continuously. It appears to the Board from the Record presented that the County Council, as well as the Community Board and Planning Commission, were well aware of the Nauer Farm de-designation proposal alleging that a designation error had occurred and they were aware of the information both supporting and opposing its de-designation. Further, the County Council was aware of the requirements to assess any recommended de-designation proposal against the same criteria as was used for designation. The

¹¹⁰ County Response, at 27-28; *see also* Ex. PCC-96, Ordinance No. 2007-42s2, Findings of Fact, Exhibit D, at 3.

Council, as well as the Community Planning Board and Planning Commission, was plainly not persuaded the Nauer Farm was erroneously designated ARL. Therefore no further analysis was required by the County. The information presented to the County during its community planning process simply did not support, in the County's collective mind, a de-designation of the Nauer Farm from agricultural resource land.

The information provided by Petitioner, in the request for de-designation and in Mr. Lynn's letter, focuses on: inadequate drainage and the cost of repair, lack of water rights for irrigation, the presence of steep slopes, a stream, a wetland, some non-prime soils on site, and the 350-lot subdivision on the plateau.¹¹¹ The Board notes that slope and soil moisture content are factors considered by NRCS in classifying soils; and that the Orting soils are denoted as Prime Farmland (Class II-w) in Pierce County.¹¹² The Board also notes the presence of critical areas may pose constraints on any type of use or development of the property. Changing the designation from ARL to another designation does not eliminate these constraints.

In reviewing Pierce County's Record in light of the Supreme Court's test in *Lewis County* for the designation of agricultural resource lands, as well as the County's own criteria, the Board's critical review yields the following conclusions:

The Nauer Farm is not characterized by urban growth, nor adjacent to areas characterized by urban growth. The City of Orting's UGA is more than one-half mile away with intervening agricultural lands. The property is surrounded on the north, west and south by agricultural land that is designated as such.¹¹³ To the east of the Nauer Farm, on the slopes and plateau, the land is designated for rural uses. These facts would likely appear to be self-evident, especially to the residents of the area that made up the Community Board, as well as the members of the Planning Commission and County Council.¹¹⁴

The Nauer Farm is primarily devoted to agriculture. It was a former dairy operation and at present is essentially defunct, although hay has been harvested in recent years. The land is used or capable of being used for agricultural production. The predominant soils found on the property are Orting Soils Class II-w. Prime farmland based upon the Natural Resource Conservation Service soil classification system – the basis for the County's classification system.

The Nauer Farm has long-term commercial significance. The County's criteria for defining long-term commercial significance indicates that soils is a *key criterion* for defining agricultural resource lands¹¹⁵ since it requires an assessment of soil composition,

¹¹¹ Ex. CPB-603; Ex. PC-47.

¹¹² See HOM Ex. 3b; and Ex. PC-67, attachment from the Soil Survey for Pierce County.

¹¹³ On the west side of Orville Road there are a few small parcels designated as Rural Farm or Rural-10; see HOM Ex. 11; AMCP maps following page 40.

¹¹⁴ *Id.*

¹¹⁵ Objective 16.3.(a).

growing capacity and productivity – three of the five components in determining long-term commercial significance. As noted *supra*, the predominant soils on the Nauer Farm are Orting Soils [Orting fine Sandy Loam and Orting Loam] and the County sets parameters for production yield for grass/legume at 3.5 tons per acre or greater. This was the focus of Petitioner’s alleged error in designation. Petitioner provided information indicating the property only yielded 1.8 tons per acre and therefore was erroneously designated. However, the Zulauf report suggested better management practices would produce higher yields, and other information in the Record suggests the capability of the soil to produce such yields is the critical factor, not what the present landowner produced. From the Record, it appears to the Board that there was sufficient evidence for the County’s reviewing bodies to weigh the proponent’s claims and conclude that the land was capable of meeting the County’s production yield factor with a revision to management practices on the land. The County concluded no designation error occurred.

The County also includes a “parcel size” criterion and “portion affected” criterion within its soils’ component of long-term commercial significance.¹¹⁶ The minimum parcel size of 5 acres is exceeded by the Nauer Farm property.¹¹⁷ In the Puyallup River Valley, the County requires at least 25 percent of the area to contain prime farmland soils. The Record reveals over 80 percent of the Nauer Farm property is prime farmland – Orting Soils Class II-w.¹¹⁸ The Nauer Farm fits within these parameters of the County.

Long-term commercial significance is also to be determined in view of the possibility of more intensive use which the County characterizes as intensity of nearby uses.¹¹⁹ The County has defined this factor in terms of adjacent lots of one acre or less on 50 percent of the property’s boundary.¹²⁰ There is evidence in the Record indicating that less than 20 percent of the lots abutting the Nauer Farm are one acre or less.¹²¹ The 350-lot subdivision Petitioner points to does not abut the Nauer Farm, as it lies on the top of the plateau which is a distinct topographical and visual separation. Further, the subdivision on the plateau is designated and zoned as Rural-20.¹²² The fact that the Nauer Farm does not meet this criterion was apparently self-evident to the Community Board, Planning Commission and County Council.

The final component of the Act’s definition of long-term commercial significance deals with proximity to population areas, which in essence addresses the pressure to urbanize. Here, the County has refined this definition to address proximity to urban growth

¹¹⁶ Objective 16.3.(a)(1) and (2).

¹¹⁷ There are at least three tax parcels included in what the Board understands to be the Nauer Farm properties. The largest parcel is about 71 acres, another is approximately 35 acres and a third is around 2 acres. See Ex. PC-67 and HOM Ex. 4.

¹¹⁸ Ex. PC-67.

¹¹⁹ Objective 16.3.(b).

¹²⁰ See Objective 16.3.b

¹²¹ Ex. PC-67; HOM Ex. 4.

¹²² See HOM Demonstrative Ex. 11, and AMCP, maps following page 40.

areas.¹²³ As noted *supra*, the nearest UGA is that of the City of Orting and the UGA is at least a one-half mile distance from the Nauer Farm. The property's location in relation to UGAs was apparently also self-evident to the County and its reviewing bodies.

In assessing long-term commercial significance, the County also includes factors related to economic viability and environmental impacts of farming.¹²⁴ Perhaps the most telling analysis of the economic viability of local farms is the County's efforts at evaluating the future of agriculture in Pierce County, as evidenced by the Phase I¹²⁵ and Phase II¹²⁶ reports prepared for the County. These reports paint a picture of the changing face of agriculture in the County, one trending toward smaller scale agriculture and capitalizing on the Puget Sound market. The Community Plan incorporates many of the recommendations of these reports into the Economic Element of the Community Plan, including implementing actions.¹²⁷

This industry view is a critical component of achieving compliance with the GMA, especially in light of Goal 8 – RCW 36.70A.020(8) – which directs jurisdictions to *maintain* and *enhance* the agricultural industry, *conserve* productive agricultural lands and *discourage* incompatible uses. This Board acknowledged an industry-wide perspective in its *Orton Farms* decision, “The GMA’s agricultural 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.”¹²⁸ Additionally, this Board concurs with the Western Washington Growth Management Hearings Board’s conclusion in a recent case where it stated:

[Petitioner’s] argument that his property has never produced a profitable crop does not demonstrate that the County was clearly erroneous in designating it ARL. Although the *Lewis County* Court did note that the GMA was not intended to trap anyone in economic failure, [Citation omitted.] when it comes to agricultural lands, it is the economic concerns of the agricultural industry, not an individual farmer’s economic needs’ that are to be considered. [Citation omitted.] Whether a competent commercial farmer would go broke trying to farm the land is not the test

¹²³ Objective 16.3.(c)(1).

¹²⁴ Objective 16.3.(c)(2). None of the parties pointed to any evidence addressing the environmental impacts of farming criteria. However, the Board notes that RCW 36.70A.060(1)(b) requires notice on all plats and permits issued within 500’ of designated resource lands.

¹²⁵ HOM Ex. 2, *The Suitability, Viability, Needs, and Economic Future of Pierce County Agriculture*, American Farmland Trust, August 2004.

¹²⁶ Ex. CPB-280, *Preserving Farmland and Farmers – Pierce County Agriculture Strategic Plan – Summary Report*, Barney & Worth Inc. and Globalwise Inc, January 2006.

¹²⁷ Ex. PCC-96, AMCP, Economic Element, at 75-94

¹²⁸ *Orton Farms v. Pierce County*, CPSGMHB Consolidated Case No. 04-3-0007c, Final Decision and Order, (Aug. 2, 2004), at 27.

the Legislature or the Courts requires the County to apply when designating agricultural lands of long-term commercial significance.¹²⁹

Here the County, especially in the context of the Alderton-McMillan Community Plan has focused on the importance of keeping agriculture prosperous in the Puyallup Valley. The agricultural community, residents of the valley and the County have worked together to develop the Community Plan striving to:

Preserve farmland, improve the financial viability of farmers, and maintain the rural character of the community into the future. In order to achieve these goals, some innovative land-use planning strategies are introduced. Funding for farmland preservation and programs to provide agricultural viability is a very limited resource and time is of the essence. Land prices have risen dramatically pricing new farmers out of the market and allowing retiring farmers to sell their property for large residential lots at top dollar. The community plan recognizes the importance of Purchase of Development Rights (PDR) program but acknowledges that only a few purchases could be made with the potential funding sources. Transferring development rights is another tool to preserve farmland. The community plan proposed to transfer development rights of farms in the valley to targeted areas beyond the community plan boundaries.

The community plan strives to allow more options for farmers to market products locally by allowing certain retail use on the farm site and developing and promoting agricultural tourism. Opportunities are provided to sell produce, nursery items, plants, eggs, wine, arts and crafts, dairy products, and limited accessory retail directly from the farm. This allows the market to come directly to the farm which increases profits and reduces the costs to the farmer.¹³⁰

Viewed from the Community Plan's context, the economic viability of the agricultural community and industry is a key factor in the County's Community Plan and supports the conclusion that its decision regarding the Nauer Farm is **not clearly erroneous**.

The County also acknowledges landowner intent as a factor to be weighed in determining long-term commercial significance.¹³¹ Here, the Record indicates the property has been: abandoned as a dairy, water rights have been sold, the land has not been farmed, but for some hay production, the property is in need of maintenance, particularly its drainage system, and the present landowner wants the land to be de-designated. Each of these actions is a reflection of individual choices – landowner intent. The County was aware of

¹²⁹ *PanESCO, et al., v. Lewis County, et al*, WWGMHB Consolidated Case No. 99-2-0031, Compliance Order, (Jul. 7, 2008), at 57.

¹³⁰ Ex. PCC-96, AMCP, at 21.

¹³¹ Objective 16.3.(c)(3)..

these concerns, but in light of its efforts to preserve farmland in the valley, maintain and enhance the agricultural industry and discourage incompatible uses, the County weighed these factors more heavily than the desires of the individual landowner.

The Courts, the Boards and the County all recognize landowner intent is a factor to be weighed, but it is not determinative. As the Supreme Court has stated,

[I]f landowner 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 ... [I]f the designation of such land as agricultural depends on the intent of the landowner as to how he or she wishes to use it, the GMA is powerless to prevent the loss of natural resource land.¹³²

The County's decision to retain the ARL designation for the Nauer Farm in light of the economic viability and landowner intent criteria was within the County's discretion and was **not clearly erroneous**.

The Board reaches the same conclusion that no designation error occurred when reviewing the record against CTED's minimum guidelines – the factors of WAC 365-190-050.¹³³

- *Availability of public facilities* – The property is bounded on the west by Oroville Road and the north by The Buttes Drive East. While septic systems are prevalent in the area, no sewer service is provided and water service is available from groundwater wells through a local water purveyor.¹³⁴
- *Tax status* – The property's two major parcels, totaling approximately 100 acres, are in the County's agricultural current use assessment program.¹³⁵
- *The availability of public services* – Services are typical to those found in agricultural and rural areas.¹³⁶
- *Proximity to UGAs* – The property is over one-half mile from the Orting UGA, *see supra*.
- *Predominant parcel size* – The major parcel sizes comprising the Nauer Farm are 70-acres and 30-acres in size.¹³⁷
- *Land use settlement patterns and their compatibility with agricultural practices* – The surrounding area is agricultural and rural uses which are compatible with agriculture.¹³⁸

¹³² *Redmond v. CPSGMHB*, 136 Wn.2d 38, at 53 (1998)

¹³³ Objective 18.1

¹³⁴ HOM Ex. 5; and Ex. PC-67.

¹³⁵ HOM Ex. 4; and Ex. PC-67..

¹³⁶ *Id.*

¹³⁷ HOM Ex. 4; HOM Ex. 5; and Ex. PC-67.

¹³⁸ *See* "Not characterized by urban growth" criterion, *supra*; HOM Demonstrative Ex. 11; and Ex. PC-67.

- *Intensity of nearby uses* – The property is largely surrounded by agricultural zoning with some rural zoning on the east.¹³⁹
- *History of land development permits issued nearby* – Diamondhead at the Buttes was recorded in 2005 and the larger Buttes Division preceded it – these are the lots on the plateau to the east of the Nauer Farm.¹⁴⁰
- *Land values under alternative uses* – There is no information indicated in the Record to evaluate (no alternative uses proposed in the request).
- *Proximity to markets* – The property has access to South Puget Sound cities and the I-5 corridor.¹⁴¹

Based upon this Board’s review of the entire record and the County’s ARLs Policies – the criteria and process for designation, revision and removal of ARLs – **the Board finds and concludes that the County’s conclusion that no designation error was made was not clearly erroneous and its decision not to de-designate the Nauer Farm from agricultural resource land – ARL – was not clearly erroneous.**

Further, the Board finds and concludes that the County’s adoption of the Alderton-McMillan Community Plan, as it relates to the Nauer Farm property, has incorporated the definitions of RCW 36.70A.030(2) and (10), adhered to the minimum guidelines prepared by CTED – RCW 36.70A.050 and WAC 365-109-050, appropriately designated ARLs as required by RCW 36.70A.170 and been guided by Goals 8 and 11. More importantly, in the present proceeding, the County performed its activities – adopting the Alderton-McMillan Community Plan, as it relates to the de-designation of the Nauer Farm – in conformity with its comprehensive plan, as required by RCW 36.70A.120. **Therefore, the Board concludes that the County’s adoption of Ordinance No. 2007-41s2 complies with the requirements of RCW 36.70A.030(2) and (10), .050 [and WAC 365-190-050], .170 and .120 and was guided by Goals 8 and 11 – RCW 36.70A.020(8) and (11).**

Conclusion

Based upon the discussion, analysis and findings presented *supra*, the Board concludes that the County’s adoption of Ordinance No. 2007-41s2 **complies** with the requirements of RCW 36.70A.030(2) and (10), .050 [and WAC 365-190-050], .170 and .120 and **was guided by** Goals 8 and 11 – RCW 36.70A.020(8) and (11).

V. ORDER

Based upon review of the Petition for Review, the GMA, case law from the Courts and the Boards, the relevant WACs, core documents, the briefs and exhibits submitted by the

¹³⁹ *Id.* and “Intensity of nearby uses” *supra*.

¹⁴⁰ Ex. PC-67.

¹⁴¹ *Id.* and Ex. PCC-96, AMCP.

parties, having considered the oral arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- The County’s Motion to Dismiss Petitioner’s challenge to compliance with RCW 36.70A.020(5) and (6) – Goals 5 and 6 – as abandoned is **granted** .
- The County’s Motion to Dismiss Petitioner’s challenge to compliance with RCW 36.70A.020(8) and (11), .030(2) and (10), .150, and .170 as abandoned is **denied**.
- The County’s adoption of Ordinance No. 2007-41s2, adopting the Alderton-McMillan Community Plan, as it relates to the Nauer Farm, was **not clearly erroneous** and **complies** with Goals 8 and 11 [RCW 36.70A.020(8) and (11)], and the **complies** with GMA’s agricultural resource lands requirements as contained in RCW 36.70A.030(2) and (10), RCW 36.70A.050, RCW 36.70A.170 and RCW 36.70A.120.

So ORDERED this 2nd day of September, 2008.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David Earling
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 242-02-832.¹⁴²

¹⁴² Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the

Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

APPENDIX A

Procedural Background

A. General

On March 14, 2008, the Central Puget Sound Growth Management Hearings Board received a Petition for Review from T.S. Holdings, LLC. The matter was assigned Case No. 08-3-0001. Board Member McGuire is serving as the presiding officer in this matter. Petitioner challenges Pierce County's adoption of the Alderton-McMillan Subarea Plan pertaining to Agricultural Resource Land designations. The basis for the challenge is noncompliance with the Growth Management Act.

On March 20, 2008, the Board issued a "Notice of Hearing"¹⁴³ in the above-captioned case. The Order set a date for a prehearing conference and established a tentative schedule for the case.

On April 8, 2008, the presiding officer issued a Memorandum Proposing a Restatement of the Legal Issues for discussion at the prehearing conference.

On April 21, 2008, the PHC was conducted at the Board's offices in Seattle. Board member Edward G. McGuire, Presiding Officer in this matter, conducted the conference. Board member Margaret A. Pageler was also present. Margaret Y. Archer represented Petitioner T.S. Holdings and M. Peter Philley represented Respondent Pierce County. The "Prehearing Order," framing the legal issues and setting the final schedule, was issued the same day.

On June 23, 2008, the Board received a joint request from the parties asking an adjustment be made to the briefing schedule. The request was granted, via e-mail, and an "Order Amending Schedule" was issued on June 25, 2008.

B. Motions to Supplement the Record and Amend the Index

On April 21, 2008, at the PHC, the Board received "Pierce County Alderton-McMillan Community Plan Index." The Index referenced 833 items.

On May 22, 2008, the Board received "Supplemental Alderton-McMillan Community Plan Index." Four additional items were included.

On June 23, 2008, the Board received an "Amended Alderton-McMillan Community Plan Index" from the County. Five additional items were included.

The requested Core Document¹⁴⁴ was received on July 7, 2008.

¹⁴³ The Board issued a subsequent Order modifying the time, but not the date of the PHC.

There were no motions to supplement the record in this matter filed during the motions period. However, the County moved for the Board to supplement the record – take official notice - of four documents in its response brief. Likewise, Petitioners asked the Board to supplement the record with six items in the reply brief. These motions are addressed in the Board’s discussion of Preliminary Matters.

C. Dispositive Motions

There were no dispositive motions submitted in this matter.

D. Briefing and Hearing on the Merits

On June 25, 2008, the Board issued an “Order Amending Schedule” that granted an additional week to filing of the Petitioner’s and Respondent’s opening briefs.

On June 30, 2008, the Board received “T.S. Holdings LLC’s Opening Brief,” with 23 attached exhibits. Pursuant to Board request, Petitioner provided color copies of certain exhibits on July 1, 2008. Sixteen replacement color pages were provided to the Board.

On July 21, 2008,¹⁴⁵ the Board received “Respondent Pierce County’s Prehearing Brief,” with 38 attached exhibits and five attachments [A-E].

On July 23, 2008, the Board received “T.S. Holdings LLC’s Reply Brief,” with six attachments [1-6].

On July 28, 2008, the Board held a Hearing on the Merits at the Board’s offices in the Chief Sealth Hearing Room, 800 5th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present for the Board. Board attorney Julie Ainsworth-Taylor was also present. Petitioner T.S. Holdings LLC was represented by Margaret Y. Archer. Respondent Pierce County was represented by M. Peter Philley. Court reporting services were provided by Shelly M. Hoyt of Byers & Anderson Inc. The Board ordered a transcript of the hearing. The hearing convened at 10:00 a.m. and adjourned at approximately 11:45 a.m.

On August 11, 2008, the Board received the transcript of the hearing.

¹⁴⁴ The Alderton-McMillan Community Plan, two copies.

¹⁴⁵ This submittal was hand delivered and received by the Board on July 21, 2008. However, the Administrative Officer neglected to update the date stamp and it was stamped “Received” on July 18, 2008.