



Inc. (**Petitioners** or **Abbey Road**). The matter was assigned Case No. 05-3-0048. Edward G. McGuire was the presiding officer (**PO**) in this matter. Petitioners challenged Bonney Lake's (**Respondent** or **Bonney Lake**) adoption of Ordinance No. 1160, amending Bonney Lake's development regulations – zoning. The basis for the challenge was noncompliance with the Growth Management Act (**GMA** or **Act**).

During January 2006, the Board conducted the prehearing conference and issued the prehearing order setting forth the final schedule and Legal Issues to be decided in this matter. There were no motions to supplement the record or dispositive motions made in this case, although there were several exhibits attached to briefing that were addressed at the hearing on the merits (**HOM**).

During March and early April 2006, the Board received the following filings:

- 1) "Petitioners' Prehearing Brief" with 11 exhibits attached and 8 items for the Board to take official notice of. (**Abbey Road PHB**);
- 2) "City of Bonney Lake's Prehearing Brief" with 19 un-tabbed exhibits. (**Bonney Lake Response**); and
- 3) "Petitioners' Reply Brief" with three attached exhibits. (**Abbey Road Reply**).

On April 13, 2006, the Board held the HOM at the Board's offices in Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Bruce C. Laing and Margaret A. Pageler were present for the Board. Petitioners were represented by Gregory F. Amann. Respondent Bonney Lake was represented by Katheleen Haggard. Court reporting services were provided by Eva Jankowitz of Byers and Anderson. Julie Taylor (Board law clerk), Justin Titus (Board extern) and Steve Ladd (City of Bonney Lake) also attended. The hearing convened at 10:00 a.m. and adjourned at approximately 11:15 a.m. A transcript of the HOM was ordered.

On April 28, 2006, the Board received the transcript (**HOM Transcript**).

## **II. BOARD JURISDICTION, PRESUMPTION OF VALIDITY, BURDEN OF PROOF and STANDARD OF REVIEW**

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 were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. 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).

Petitioners challenge Bonney Lake's adoption of amendments to their development regulations (zoning), as adopted by Ordinance No. 1160. Pursuant to RCW 36.70A.320(1), Bonney Lake's Ordinance No. 1160 is presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the action taken by Bonney Lake is not in compliance with the goals and requirements of the GMA. RCW 36.70A.320(2).

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

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to Bonney Lake in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The State Supreme Court’s most recent delineation of this required deference states: “We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county’s planning action is in fact a ‘clearly erroneous’ application of the GMA.” *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

The *Quadrant* decision is in accord with prior rulings that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). As the Court of Appeals explained, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent’ with the requirements and goals of the GMA.” *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3<sup>rd</sup> 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240.

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

### **III. TIMELINESS, STANDING AND SUBJECT MATTER JURISDICTION, PREFATORY NOTE and PRELIMINARY MATTERS**

## **A. TIMELINESS, STANDING AND SUBJECT MATTER JURISDICTION**

The Board finds that the Abbey Road's PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioners have standing<sup>2</sup> to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction<sup>3</sup> over the challenged ordinance, which amends the City's implementing development regulations, pursuant to RCW 36.70A.280(1)(a).

## **B. PREFATORY NOTE**

### **The Action Challenged:**

Ordinance No. 1160 is entitled:

AN ORDINANCE OF THE CITY OF BONNEY LAKE,  
WASHINGTON REZONING VARIOUS STEEP SLOPES TO BE  
CONSISTENT WITH THE COMPREHENSIVE PLAN

Ordinance No. 1160, at 1. The Ordinance rezones approximately 235 acres from R-1 [Single Family Residential – 4-5 dwelling units per acres (du/ac)] and C-2 [Commercial, including Apartments – up to 20 du/ac] to RC-5 [Single Family Residential 1 du/5 acres]. Approximately 193 acres are rezoned from R-1 to RC-5 and approximately 42 acres are rezoned from C-2 to RC-5. There are 8 distinct Areas involved in this Rezone: Areas 12, 13, 14, 15, 18, 19, 19A and 19B. Each of these areas is located along the western edge of the plateau with the slope trending downward to the valley on the west. SR 410 generally runs north and south and bisects the slope. The Area identification numbers ascend from the north to the south.

### **Order the Board Addresses the Legal Issues:**

The Board first addresses Legal Issue 4 [Notice and Public Participation]; next, Legal Issue 3 [Best Available Science]; then Legal Issue 1 [Urban Densities]; and finally, Legal Issue 2 [Consistency between the Plan and Zoning].

## **C. PRELIMINARY MATTERS**

### **Oral Rulings at the HOM Regarding the Record:**

Attached to Petitioners' opening brief were eight tabbed items (1-8). Each is an excerpt from the Bonney Lake Plan, Municipal Code (**BLMC**) or Pierce County's 2002 Buildable Lands Report. Petitioners ask the Board to take official notice of these items. The City did not object, and indicated that the attachments appeared to be excerpts from

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<sup>2</sup> See Preliminary Matters, *infra*. The Board addresses the standing question.

<sup>3</sup> See Preliminary Matters, *infra*. The Board addresses subject matter jurisdiction.

the most current versions of the City's documents. Therefore, pursuant to WAC 242-02-660, the **Board takes official notice** of the following items: 1) 2002 Pierce County Buildable Lands Report, Section III Residential and Commercial Capacity Analysis – Bonney Lake, at 27; 2) Chapter 14.140 BLMC [Amendment Process]; 3) Chapter 16.20 BLMC [General]; 4) Chapter 18.14 BLMC [R-1 District]; 5) Chapter 18.16 BLMC [R-2 District]; 6) Chapter 18.18 BLMC [R-3 District]; 7) Chapter 18.20 BLMC [RC-5 District]; and 8) Chapter 18.26 BLMC [C-2 District].

Bonney Lake also attached several exhibits to its response brief which Petitioners objected to. After hearing argument at the HOM, the Board made the following oral rulings on the challenged items:

- Attachment 2 – “Steep Slopes and RC-5 Zoning” – this illustrative exhibit overlays the parcel map with the steep slopes map from the County’s Plan. **Admitted as HOM Ex. 1.**
- Attachment 3a through 3d – “Photographs from SR 410 of portions of some of the affected parcels.” **Denied.**
- Attachment 5 – “6/20/05 Staff Report to the Planning Commission regarding a proposed project in Area 12.” The City included this item in its last-minute filing of an “Amended Index”. **Admitted as HOM Ex. 2.**

#### Board Rulings on Standing and Subject Matter Jurisdiction:

In Bonney Lake’s Response brief, for the first time, the City challenged Petitioners’ standing to challenge all the parcels noted in the PFR; and questioned the Board’s subject matter jurisdiction to review Ordinance No. 1160. Bonney Lake Response, at 9-14. Petitioners countered in their reply brief. Abbey Road Reply, at 1-5. At the HOM, the Board heard argument on the two issues and took the matters under advisement to be resolved in this Final Decision and Order (FDO). The Board now addresses these two motions.

#### Petitioners’ Standing

The City contends that while Petitioners have standing to challenge the City’s rezone of Areas 18 and 19 [rezoned from C-2 to RC-5], they may not challenge the rezones for Areas 12, 13, 14, 15 19a and 19b [rezoned from R-1 to RC-5]. Bonney Lake Response, at 12-14; HOM Transcript, at 13-14.

Petitioners counter that their participation before the City was reasonably related to the issues presented to the Board and although numerous areas were involved, the City’s action was *one area-wide rezone* affecting all the parcels included. Abbey Road Reply, at 2-4; HOM Transcript, at 14-15.

RCW 36.70A.280(4) states, “To establish participation standing under subsection (2)(b) of this section, a person must show that his or her participation before the county or city

was reasonably related to the person's issue as presented to the Board." The underlying rationale for the City's rezone of this area was to resolve inconsistencies between the Plan and zoning<sup>4</sup> and to provide additional protections for steep slopes. *See* Ordinance No. 1160. The City does not dispute that "all Petitioners participated in the process," but suggests that opposing the area-wide rezone is not enough to establish standing. The Board disagrees. These Petitioners voiced concerns about steep slopes and the change in urban densities regarding the entire area-wide rezone. *Abbey Road Reply*, at 3; *citing* to the record. Petitioners' participation before the City was reasonably related to the issues presented to the Board. The City's motion to limit Petitioners standing is **denied**.

#### Subject Matter Jurisdiction of the Board

The City asserts that there is no dispute that the challenged rezone achieves consistency with the Comprehensive Plan. Therefore, the City contends, the Petitioners' appeal effectively attempts to challenge Comprehensive Plan designations that were previously adopted and found compliant by the Board. *Bonney Lake Response*, at 9; *HOM Transcript*, at 16-18. Petitioners contend that zoning designations must comply with the Act, as well as be consistent with, and implement the Plan, regardless of an underlying Plan designation. *Abbey Road Reply*, at 2-3; *HOM Transcript*, 18.

Ordinance No. 1160 amends Bonney Lake's zoning map, an implementing development regulation for its GMA Comprehensive Plan. The Board clearly has jurisdiction to review appeals challenging development regulations, and amendments thereto, which allegedly do not comply with the goals and requirements of the Act. *See* RCW 36.70A.280 and .290. The City's motion to dismiss for lack of subject matter jurisdiction is **denied**.

### **IV. LEGAL ISSUES AND DISCUSSION**

#### **A. LEGAL ISSUE NO. 4 [Notice and Public Participation]**

The Board's PHO set forth Legal Issue No. 4:

4. *Did the adoption of the Ordinance No. 1160 (the **Zoning Amendment**) fail to comply with the notice and public participation requirements and goal of RCW 36.70A.020(11), .035(1), .140 and the Bonney Lake Municipal Code (BLMC) Ch. 14.140 BLMC, when only one public hearing was held on the proposed rezone, notice of the public hearing was not published in the official newspaper, and the Planning Commission did not adopt written findings and conclusions?*

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<sup>4</sup> Resolution of the inconsistencies between the City's Plan and zoning was addressed in a recent Bonney Lake case – *Jensen v. City of Bonney Lake (Jensen)*, CPSGMHB Case No. 04-3-0010, Final Decision and Order, (Sep. 20, 2004), at 7-10.

### Applicable Law

Goal 11 seeks to “encourage the involvement of citizens in the planning process.” RCW 36.70A.020(11). This is accomplished through the jurisdiction’s notice and public participation program for its GMA planning. A public hearing is an essential component of the public planning process.

The GMA’s notice provisions require jurisdictions to have “notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals . . . of proposed amendments to comprehensive plans and development regulations.” RCW 36.70A.035(1). Examples of reasonable notice provisions include: posting of the property, publishing notice in a newspaper, notifying those with known interest in the proposal being considered, published notice in special interest publications or agency newsletters, or sending notice to agency mailing lists. *Id.* Each jurisdiction’s public participation program must provide for early and continuous public participation in the development and amendment of comprehensive plans and development regulations implementing the plans. RCW 36.70A.140.

### Discussion

#### Position of the Parties:

Part of Petitioners’ challenge to the City rezone involves an allegation that the City’s notice and public participation process was flawed in relation to a June 1, 2005 public hearing before the Planning Commission. Abbey Road PHB, at 22. Petitioners acknowledge that the effected property owners and adjacent property owners received mailed notice of the pendency of Ordinance No. 1160. However, they contend that such notice is not enough, and that published notice should have been required. Petitioners suggest that Bonney Lake’s Municipal Code [14.140.040(A)(4) BLMC] requires publication of notice for between 15 and 30 days before a public hearing. This, Petitioners allege, the City did not do for the June 1, 2005 Planning Commission public hearing. *Id.* Petitioners also contend that the Planning Commission neglected to adopt written findings when it passed its recommendation on to the City Council, which also violates local code provisions [14.140.100 BLMC]. *Id.* at 23.

In response, the City acknowledges that due to clerical error, notice of the June 1, 2005 Planning Commission public hearing was not published. Bonney Lake Response, at 30. However, the City counters that as early as February 2005 it anticipated widespread citizen interest in its efforts to bring its development regulations into consistency with its Plan, and began planning accordingly. *Id.* at 6-7. The City states,

On March 16, 2005, after posting notice of the meeting in the Tacoma News Tribune, Puyallup Herald, Bonney Lake Courier-Herald, and at City

Hall, the library, the post office, and on the Internet, and after mailing individual notice to all registered property owners, the Planning Commission held a public information meeting. [Ex. 7 and 8.] The City then mailed notice of the June 1 public hearing to all property owners within 600 feet of the [rezone] sites. [Ex. 9.] The June 1, 2005 public hearing before the Planning Commission attracted numerous attendees, eleven of whom spoke. [Ex. 10.] The rezone was again discussed at length before the City Council. The Council sponsored a special meeting on September 1, 2005 so members of the Council and public could tour the proposed rezone areas. [Ex. 11.] The Council then discussed the matter, and elicited public comment, at regularly scheduled meetings on August 23, September 6, and September 13, 2005. [Exs. 12-14.]

Bonney Lake Response, at 8.

The City contends that these efforts satisfy and surpass the GMA's notice and public participation requirements. *Id.* at 29-31. The City does concede that the Planning Commission did not enter written findings, but notwithstanding this technical error, it did devote ample time to consideration of the rezone. *Id.* at 31.

In reply, Petitioners note the City admits it did not publish notice of the June 1, 2005 Planning Commission public hearing and that the Planning Commission did not enter written findings. Therefore, to Petitioners, the City failed to comply with the notice and public participation requirements of the Act. Abbey Road Reply, at 11-12.

#### Board Discussion:

First, the Board notes that RCW 36.70A.035 offers a nonexclusive list of methods to provide reasonable notice including mailed notice to interested or potentially affected individuals. Publication is not the only acceptable means of providing reasonable notice. Here, it is undisputed that interested and affected property owners received mailed notice of the June 1, 2004 Planning Commission public hearing.

Second, it is undisputed that the City hosted informational meetings, held special meetings and workshops to discuss the rezone proposals. These actions support the City's contention that it made extensive efforts to solicit public input and encourage public participation on the rezone Ordinance.

Third, at the HOM, the City's attorney noted that the City Council's Regular Meeting Agendas are posted and each Agenda lists items being considered by the Council. Counsel also clarified that public comment was solicited and received on the rezone proposal at each of the Council's regular meetings on August 23, 2005, September 6, 2005, and September 23, 2005. HOM Transcript, at 35-40; *citing* Exs. 12-14.

The Board acknowledges that the City stumbled in adhering to its own procedures for timing of publication and written findings from the Planning Commission, but these errors, which the City should not repeat, are not fatal in terms of compliance with the GMA. The Board finds and concludes that the notice and public participation opportunities provided by the City on this rezone, Ordinance No. 1160, were **guided by** Goal 11 [RCW 36.70A.020(11)] and **comply** with the provisions of RCW 36.70A.035 and .140.

### **Conclusion**

The Board finds and concludes that the notice and public participation opportunities provided by the City on this rezone, Ordinance No. 1160, were **guided by** Goal 11 [RCW 36.70A.020(11)] and **comply** with the provisions of RCW 36.70A.035 and .140.

### **B. LEGAL ISSUE NO. 3 [Best Available Science]**

The Board's PHO set forth Legal Issue No. 3:

3. *Does the Zoning Amendment, a purported purpose of which is to supplement the critical areas code in managing areas that are steep and prone to geologic instability, fail to comply with RCW 36.70A.172(1) by failing to include the best available science or any science in the ordinance or the record?*

### **Applicable Law**

RCW 36.70A.172(1) provides:

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation and protection measures necessary to preserve or enhance anadromous fisheries.

### **Discussion**

#### **Position of the Parties:**

Abbey Road argues that zoning is a development regulation under the terms of the Act and that if such development regulations are to protect the function and value of critical areas, they must be based on the best available science (**BAS**). Petitioners assert that the record for the adoption of Ordinance No. 1160 is devoid of any evidence of BAS. Therefore, Abbey Road concludes, the City failed to comply with .172(1). Abbey Road PHB, at 20-21.

Bonney Lake counters that its critical areas regulations are based on BAS and that the Comprehensive Plan designations for the area are likewise based on BAS. Therefore, the City asserts, it need not conduct new BAS review for its implementing zoning regulations, but may “reuse or recycle” the BAS used for the critical areas code and the Plan’s land use designations. Bonney Lake Response, at 22-24.

In reply, Abbey Road clarifies that it does “not contend that the critical areas code is not based on best available science or that the City must conduct new scientific studies. Petitioners’ contention is that Ordinance No. 1160 must comply with RCW 36.70A.172(1) because it goes above and beyond the critical areas code to protect critical areas.” Abbey Road Reply, at 11. Petitioners continue to assert that evidence of BAS must be included in the record, and it is lacking in this instance. *Id.*

Board Discussion:

It is undisputed by the parties that: 1) steep slopes are geologically hazardous (critical) areas under the GMA; 2) the City’s critical areas code designates areas having slopes steeper than 15% as landslide hazard areas;<sup>5</sup> and 3) BAS was included in the record, substantively considered, and used in developing the City’s critical areas code and critical areas designations. Additionally, the City’s critical areas code indicates a preference for leaving critical areas in their natural state, in order to avoid the negative effects of developing them; and states as one of its purposes, “[To] protect the public from injury and loss due to slope failures, erosion, seismic events, volcanic eruptions, or flooding.” Bonney Lake Response, at 21; *citing* Bonney Lake Municipal Code (**BLMC**) 16.20.020(C) and .130(B).

The City’s Comprehensive Plan includes a “Steep Slopes Map” which indicates that the area in question is made up of unconsolidated glacial materials and is susceptible to landslides. HOM Ex. 1. This map shows the designated steep slopes along the western edge of the City, above the Puyallup River Valley. Much of the area in question is noted as containing slopes of 40%-100%, a significant portion indicates slopes of 20%-40%, and wetlands are shown at the base of most of these steep slope areas. Any developable land is apparently at the base of the landslide areas or adjacent to wetlands. *Id.*

While Petitioners seem to focus on an alleged lack of BAS “in the record” for the challenged rezoning action, Petitioners do not indicate what might be missing. In its review of the record, the Board was directed to the City’s critical areas regulations, the City’s “Steep Slopes Map” which identifies and designates geologically hazardous areas, and the City’s Comprehensive Plan Future Land Use Map (**FLUM**). It is not disputed that BAS was used to develop these documents.

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<sup>5</sup> See Bonney Lake Response, at 21; citing BLMC 16.28.010(B)(4).

Further, if Petitioners believed that the City’s identification, designation and protection of geologically hazardous areas along the western edge of the City was clearly erroneous, Petitioners could have challenged the City’s adoption of its critical areas regulations, the City’s identification and designation of geologically hazardous areas, or the Comprehensive Plan’s land use designations for the area. Petitioner did none of the above, and it is untimely to challenge any of those actions at this time. To now challenge the zoning designations that implement the unchallenged Plan designations, which are admittedly based upon BAS, is without merit. Both parties have demonstrated that BAS, as reflected in adopted documents, was part of the record in this rezoning action. Additionally, the City has demonstrated that BAS, in the form of its critical areas regulations, steep slope designations and Plan designations, provided the basis for the rezone. Therefore, the Board finds and concludes that the City of Bonney Lake’s adoption of Ordinance No. 1160 was **not clearly erroneous** and **complies** with RCW 36.70A.172(1).

### **Conclusion**

The Board finds and concludes that the City of Bonney Lake’s adoption of Ordinance No. 1160 was **not clearly erroneous** and **complies** with RCW 36.70A.172(1).

### **C. LEGAL ISSUE NO. 1**

The Board’s PHO set forth Legal Issue No. 1:

- 1. Did the City of Bonney Lake fail to be guided by the goals of RCW 36.70A.020(1), (2), (4) and (6) and comply with the requirements of RCW 36.70A.110(2) and .115 when it adopted the Zoning Amendment, changing the zoning of approximately 235 acres at the west entrance to the City from C-2 or R-1 to RC-5, which limits residential densities to one dwelling unit per five acres?*

### **Applicable Law**

RCW 36.70A.110(2) requires the City to “include areas and densities sufficient to permit the urban growth . . . Each urban growth area [i.e. cities] shall permit urban densities and shall include greenbelt and open space areas.” RCW 36.70A.115, a recent amendment to the Act (2003), requires that a jurisdiction’s Plan and development regulations “provide sufficient capacity of land suitable for development. . .” These requirements of the Act further and support Goals 1 (encourage urban growth), 2 (reduce sprawl), and 4 (encourage the availability of affordable housing). RCW 36.70A.020(1), (2) and (4). Goal 6, protecting private property rights, is an underpinning of the entire growth management regime.

## Discussion

Abbey Road devotes the majority of its briefing towards this issue, and cites extensively to prior decisions of this Board regarding the urban density question. *See* Abbey Road PHB, at 3-18. What Petitioner does not recognize is that most of the cases cited involve challenges to Plan designations and a few involve concurrent Plan and zoning designations. However, none are like this case which exclusively challenges a rezone done to implement the Plan. However, Petitioner does acknowledge, “The clear impetus for the Ordinance was to bring the zoning for the properties in compliance with their comprehensive plan designations.” *Id.* at 11, *citing* various staff reports and minutes of Planning Commission and City Council meetings.

The City response notes its suspicion that this appeal is a collateral attack, or “backdoor challenge” to its Plan designations which were not challenged by these Petitioners, and cannot now be challenged by them. Bonney Lake Response, at 9-13. Generally, the Board agrees. As the Board noted *supra*, the Board has jurisdiction to review challenges to zoning amendments. Here, the matter before the Board is the Zoning Amendment, not the City’s Plan designation. The City also emphasizes that this action was taken to achieve consistency between the Plan and the implementing zoning regulations – as required by RCW 36.70A.040 and .130. *Id.* at 3 and 10.

The City of Bonney Lake’s Comprehensive Plan FLUM (updated in December 2004), shows the western edge of the City, along the steep slopes leading to the Puyallup River Valley as “Conservation/Open Space.” Plan FLUM, at 3-10, Figure 3-4. The Plan goes on to explain that this designation: 1) affects 729 acres (about 15% of the City); 2) the intent of the designation is to identify “open space, natural resource production lands, and environmentally sensitive areas;” and 3) the implementing zones for this designation is “RC-5, residential/conservation and other zones.” Plan, at 3-12, Figure 3-5. The Plan also explains that,

[The Conservation/Open Space designation] includes parks, important wildlife habitat, lands with severe environmental limitations, agriculture land, and forest lands such as the Washington State University (WSU) Conservation Research Center. *This designation includes steep slope areas along the western city limits and the Fennel Creek corridor, which performs important biological functions and connects a series of beautiful open spaces running through the heart of Bonney Lake. Some open spaces buffer otherwise incompatible land uses. . . .*

Goal 3-11 Conserve important open space.

Plan, at 3-15, (emphasis supplied).

Given this Plan designation, explanation, and goal, it becomes incumbent upon the City to adopt development regulations that are consistent with, and implement, the Plan. This

is what the City has done by adopting the RC-5 zoning designation. This action finishes the GMA's logical progression undertaken by the City. First, steep slopes (*i.e.* geologically hazardous areas – critical areas) were identified and designated. Second, critical areas regulations (based upon BAS) were adopted to protect critical areas. Third, the City adopted its Plan to reflect the significance of the steep slopes along the western slope of the City, not just Petitioners' parcels. These lands were designated in the Plan as "Conservation/Open Space." Finally, the City has adopted development regulations that are consistent with, and implement, the Plan – the RC-5 is consistent with, and implements, the City's *Conservation/Open Space* FLUM designation in the Plan.

The present situation is distinguishable from the situation presented in *MBA/Brink v. Pierce County*, CPSGMHB Case No. 02-3-0010, Final Decision and Order, (Feb. 4, 2003), where the Board found a residential density zoning designation noncompliant with the Act even though it implemented a prior Plan designation. In *MBA/Brink* the noncompliant zoning allowed between 2-4 du/acre to implement a prior non-challenged plan designation permitting between 2-6 du/acre. The Board noted that neither the prior Plan designation, nor even the challenged zoning designation, would necessarily be noncompliant with the Act, if there had been some environmental rationale offered for the action. There was none. *See MBA/Brink*, at 19-21. Here, the City of Bonney Lake has clearly based its land use decisions regarding the western slopes of the City on environmental factors – an extensive area making up much of the City boundary laced with steep slopes and landslide hazards. The extent of this area is also distinguishable from the isolated and sporadic wetlands in *MBA/Brink* that could adequately be protected by the County's existing critical areas regulations.

Further, these Plan designations indicate that these limited areas are not areas where dense housing development should be encouraged – affordable or otherwise. The FLUM indicates significant other areas designated for residential development. The Board has previously stated that Goal 4 "does not require each and every land use designation of a jurisdiction to provide for affordable housing." *LMI/Chevron v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, Final Decision and Order, (Jan. 8, 1999), at 29.

Likewise, Goal 6 is not thwarted since the rezoning action includes the western slopes of the City and is not targeted to a few individual parcel owners. There is also significant rationale for the choice of the City to adopt the rezone, it was a reasoned decision. Additionally, the Board notes that the RC-5 zoning designation permits various uses of the property including residential development.

Based upon the foregoing discussion, the Board finds and concludes that the City's adoption of Ordinance No. 1160, rezoning 235 acres as RC-5 was **not clearly erroneous** and **complies** with the requirements of RCW 36.70A.110(2), .115 and **was guided by**, and complies with, the direction indicated in Goals 1, 2, 4 and 6 [RCW 36.70A.020(1), (2), (4) and (6)].

## Conclusion

The Board finds and concludes that the City's adoption of Ordinance No. 1160, rezoning 235 acres as RC-5 was **not clearly erroneous** and **complies** with the requirements of RCW 36.70A.110(2), .115 and was **guided by**, and complies with, the direction indicated in Goals 1, 2, 4 and 6 [RCW 36.70A.020(1), (2), (4) and (6)].

### **D. LEGAL ISSUE NO. 2**

The Board's PHO set forth Legal Issue No. 2:

2. *Does the Zoning Amendment fail to comply with the following City of Bonney Lake Comprehensive Plan Goals (G) and Policies (P): G 3-1, G 3-4, P 3-4(a),(b), G 3-6, P 3-6(a), G 3-7, P 3-7(b), G 3-15, P 3-15(a) and G 4-1, in violation of RCW 36.70A.040 and .130 which requires the City's development regulations to be consistent with and implement the City's comprehensive Plan?*

### Applicable Law

RCW 36.70A.040(4) requires GMA planning jurisdictions to "adopt . . . development regulations that are consistent with and implement the comprehensive plan." RCW 36.70A.130(1)(d) requires that "Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan."

### Discussion

The Board notes that the City of Bonney Lake has been working on resolving inconsistencies between its Plan and zoning for quite some time and that the Board's prior *Jensen* decision addressed the question of inconsistency between the Plan and zoning. See footnote 4, *supra*, for the full citation to the *Jensen* case.

Here, Petitioners present a question of the Plan and zoning being inconsistent. On this issue Petitioners assert that the RC-5 zoning designation is inconsistent, not with the Plan's FLUM designation, but with certain Goals and Policies<sup>6</sup> stated in the Plan. Abbey

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<sup>6</sup> See Abbey Road PHB, at 18-20:

Goal 3-1: Accommodate the 20-year target for household and employment within an urban growth area of appropriate size and density, where public facilities and services exist or can be provided efficiently.

Goal 3-4: Use land efficiently

Policy 3-4a: Encourage infill and development that minimizes consumption of land.

Policy 3-4b: Create some areas of higher residential density in order to accommodate the population projection without excessive outward sprawl.

Goal 3-6: Provide compatible residential development that meets community needs.

Road PHB, at 18-20. Petitioners cite the various Goals and Policies and merely suggest that since the RC-5 zoning designation does not allow more residential density, it cannot be consistent with the cited Goal or Policy. *Id.* The Board notes that these Goals and Policies apply to the entire Plan, not simply Petitioners' parcels and that, without more, conclusory statements do not carry the burden of proof.

Further, Petitioners ignore the FLUM designation and fail to note the Plan's Goals and Policies that are tied to the Conservation/Open Space designation from the FLUM. *Id.*

There is no argument offered, nor could there be a persuasive argument offered, indicating that the RC-5 zoning designation does not implement the Conservation/Open Space FLUM designation. The Board finds and concludes that the RC-5 zoning designation is **consistent with and implements** the Conservation/Open Space FLUM designation.

There is no argument offered indicating that the RC-5 zoning, which implements the Conservation/Open Space FLUM designation, is inconsistent with the Goals and Policies governing the Conservation and Open Space FLUM designation. The Board finds and concludes that the RC-5 zoning designation is **consistent with and implements** the Conservation/Open Space Goals and Policies of the Plan.

Further, Petitioners have **failed to carry their burden of proof** in demonstrating that the RC-5 zoning designation is not consistent with the City's GMA Comprehensive Plan, for those Goals and Policies cited by Petitioners.

### Conclusion

The Board finds and concludes that:

- The RC-5 zoning designation is **consistent with and implements** the Conservation/Open Space FLUM designation.
- The RC-5 zoning designation is **consistent with and implements** the Conservation/Open Space Goals and Policies of the Plan; and

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Goal 3-6a: Encourage compact residential development. Encourage clustering to provide open space, reduce impermeable surfaces, preserve environmental features, and reduce the per-unit cost of utilities.

Goal 3-7: Provide affordable housing.

Policy 3-7b: Locate multiple family housing in close proximity to shopping, employment, entertainment facilities, open space, recreation facilities, and public transportation.

Goal 3-15: Protect property rights

Goal 4-1: Provide adequate land and zoning of appropriate residential density to accommodate the 20-year population projection.

- Petitioners have **failed to carry their burden of proof** in demonstrating that the RC-5 zoning designation is not consistent with the City's GMA Comprehensive Plan, for those Goals and Policies cited by Petitioners

### **E. INVALIDITY**

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. Nevertheless, Petitioner has framed the request for invalidity as a Legal Issue:

5. *Should the Board find noncompliance with the GMA for any of the Legal Issues 1-4 supra, does such noncompliance substantially interfere with the goals of the Act meriting the imposition of a determination of invalidity by the Board?*

PHO, at 7.

### **Applicable Law**

RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
  - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
  - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
  - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or City. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the City or city or to related construction permits for that project.

### Findings of Fact and Conclusions of Law

In the present proceeding, the Board has not found noncompliance with any of the challenged provisions of the GMA and is not remanding to the City of Bonney Lake. Consequently, there is no basis for the Board to entertain a request for a determination of invalidity. Therefore the Board **declines** to consider Petitioners' request that invalidity be imposed on Ordinance No. 1160.

### V. ORDER

Based upon review of the Petition for Review, the Board's Rules of Practice and Procedure, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, prior orders by this Board and the other Growth Boards, case law, and having deliberated on the matter the Board ORDERS:

- The City of Bonney Lake's adoption of Ordinance No. 1160 was **not clearly erroneous**. The City's action **complies** with RCW 36.70A.035, .140, .172, .110(2), .115, .040 and .130 and **was guided by** Goals 11, 1, 2, 4 and 6.
- The matter of *Abbey Road v. City of Bonney Lake*, CPSGMHB Case No. 05-3-0048 is **closed**.

So ORDERED this 15th day of May, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP  
Board Member

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Edward G. McGuire, AICP  
Board Member

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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.<sup>7</sup>

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<sup>7</sup> 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 November 23, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Abbey Road Group LLC, Virginia J. Leslie Trust, Karl J. and Virginia S. Thun, Thomas Pavolka and Reich Land Inc. (**Petitioners** or **Abbey Road**). The matter was assigned Case No. 05-3-0048. Edward G. McGuire is the presiding officer (**PO**) in this matter. Petitioners challenge Bonney Lake's (**Respondent** or **Bonney Lake**) adoption of Ordinance No. 1160, amending Bonney Lake's development regulations – zoning. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On November 23, 2005, the Board issued a “Notice of Hearing;” on January 5, 2006 the Board conducted the prehearing conference; and on the same day, the Board issued its “Prehearing Order” (**PHO**) setting the schedule and Legal Issues for this case.

#### **B. Motions to Supplement the Record and Amend the Index**

On December 28, 2005, the Board received “City of Bonney Lake’s Index” (**Index**). The Index listed 158 items grouped under three headings: City Clerk’s Files, Planning Files and Planning Department Staff Files.

There were no motions to supplement the record filed within the deadlines contained in the PHO. However, the Board addressed several exhibits attached to briefing at the hearing on the merits (**HOM**). *See* Section III. C – Preliminary Matters, *infra*.

On April 12, 2006, the day before the HOM, the Board received “City of Bonney Lake’s Amended Index” (**Amended Index**). The amended index included an item that the City attached to its response brief that was objected to by Petitioners in reply. The matter was addressed at the HOM. *See* Section III C – Preliminary Matters, *infra*.

#### **C. Dispositive Motions**

There were no dispositive motions filed within the deadline contained in the PHO. However, in the City’s Response brief, the City challenged Petitioners’ standing and whether the Board has subject matter jurisdiction to review the present challenge. These issues were addressed *supra*. *See* Section III C – Preliminary Matters.

#### **D. Briefing and Hearing on the Merits**

On March 9, 2006, the Board received “Petitioners’ Prehearing Brief” with 11 exhibits attached and 8 items for the Board to take official notice of. (**Abbey Road PHB**).

On March 30, 2006, the Board received “City of Bonney Lake’s Prehearing Brief” with 19 un-tabbed exhibits. (**Bonney Lake Response**).

On April 7, 2006, the Board received “Petitioners’ Reply Brief” with three attached exhibits. (**Abbey Road Reply**).

On April 13, 2006, the Board held a hearing on the merits (**HOM**) at the Board’s offices in Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Bruce C. Laing and Margaret A. Pageler were present for the Board. Petitioners were represented by Gregory F. Amann. Respondent Bonney Lake was represented by Katheleen Haggard. Court reporting services were provided by Eva Jankowitz of Byers and Anderson. Also attending were: Julie Taylor (Board law clerk), Justin Titus (Board extern) and Steve Ladd (City of Bonney Lake). The hearing convened at 10:00 a.m. and adjourned at approximately 11:15 a.m. A transcript of the HOM was ordered.

On April 28, 2006, the Board received the transcript (**HOM Transcript**).