

1 received the City's Index (**Index**). The Index consisted of 2 attachments – Exhibit A is the
2 Index for Resolution No. 927 and Exhibit B is the Index for Resolution No. 926. On May 23,
3 2006, the Board issued its Prehearing Order (PHO) which set forth the Legal Issues and the final
4 schedule for the matter.
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6 On June 5, 2006, the Board received the City's Motion to Dismiss (**City's Dismissal**). The
7 City's motion alleges that the Board does not have subject matter jurisdiction in this case.
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9 On June 5, 2006, the Board received Petitioners' Motion for Summary Judgment (**Petitioners'**
10 **Summary Judgment**).
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12 On June 19, 2006, the Board received Petitioners' Response to the City's Motion to Dismiss
13 (**Petitioners' Response – Dismissal**).
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15 On June 23, 2006, the Board received the City's Response to Petitioners' Motion for Summary
16 Judgment. (**City's Response – Summary Judgment**).
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18 On June 23, 2006, the Board received the City's Reply to Petitioners' Response to the City's
19 Motion to Dismiss (**City's Reply – Dismissal**).
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21 The Board did not hold a hearing on the dispositive motions.
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23 **II. DISCUSSION AND ANALYSIS**

24 *City's Motion for Dismissal*

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26 On September 14, 2005, Petitioner Roland Jankelson submitted an application to amend the
27 Comprehensive Plan (Proposed Amendment #05-14) and an application to amend the text of the
28 Zoning Code (Proposed Amendment #05-15). *PFR, Attachments A and B*. Proposed
29 Amendment #05-14 sought to amend the Comprehensive Plan's Land Use Element for the R-4
30 Conservation Zone (R-4-C) to allow for an increase to the maximum allowable slope limits for
31 alteration from 15% gradient to a 25% gradient. *PFR, Attachment A*. Proposed Amendment
32 #05-15 sought to amend Fircrest Municipal Code (FMC) Section 22.34.005 Development
33 Standards for the R-4-C district to allow for an increase in the maximum impervious surface
34 coverage limits from 15% to 35% and to allow for an increase to the maximum allowable slope
35 limits from 15% gradient to 25%. *PFR, Attachment B*. On March 28, 2006, the City Council
36 passed Resolution 926, denying Proposed Amendment #05-14, and Resolution 927, denying
37 Proposed Amendment #05-15. *City's Motion to Dismiss* at 1-2. As noted above, Petitioners
38 filed a PFR with the Board challenging the City Council's denial of Proposed Amendments #05-
39 14 and #05-15 on April 13, 2006.
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47 the current slope and imperviousness standards do not prevent development, effectively taking the property
48 subject to such Ordinance without just compensation?

- 49 6. Did the City violated RCW 36.70A.020(6) by rejecting the proposed amendments to the R-4-C Ordinance
50 and Fircrest Comprehensive Plan LU-22 when such amendments were supported by the only scientific
evidence produced in this proceeding, or the original proceeding enacting such Ordinance?

1 1. Timeliness

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3 In its motion, the City asserts, citing RCW 36.70A.290(2)², that the Board lacks jurisdiction in
4 this matter because the PFR was not timely filed. *City's Motion to Dismiss* at 4. The City
5 contends that the Petitioners' challenge relates to Ordinance 1246 (FMC 22.34), adopted in 2000,
6 and Ordinance 1196 (Comprehensive Plan Element LU-22), adopted in 1998.³ *City's Motion to*
7 *Dismiss* at 4; *Declaration of Rosenblatt, Attachment H – Ordinance 1246*. The City argues that
8 RCW 36.70A.290(2) requires that a petition challenging a City's actions must be filed within 60
9 days of publication of the challenged action and the Petitioners filed their PFR on May 18, 2006,
10 well beyond the 60 day time limitation set by the statute. *City's Motion to Dismiss* at 4.

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13 In response, the Petitioners' reiterate their initial challenges against the City – that Petitioners
14 lacked adequate notice of the City's actions in regard to the original enactments, that the City's
15 Critical Areas Ordinance (CAO) is not based on best available science (BAS), that the City's
16 development regulations are internally inconsistent, and that the City's failure to adopt the
17 proposed amendments constitutes an arbitrary and discriminatory uncompensated taking of
18 private property. *Petitioners' Response – Dismiss* at 3-4.

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20 The Petitioners assert that the Board has jurisdiction even if RCW 36.70A.290(2)'s sixty day
21 time period has expired if effective and reasonable notice was not provided. *Id.* at 5. Petitioners'
22 argue that RCW 36.70A.035 requires "notice procedures that are reasonable calculated to
23 provide notice to property owners" and that the Board has previously stated that effective notice
24 must, at a minimum, provide the general nature and magnitude of the amendments. *Id.* at 8,
25 citing to *Orton Farms et. al. v. Pierce County et. al.*, CPSGMHB Case No. 04-3-0007c (FDO,
26 Aug. 2, 2004). According to Petitioners, the City's published notices for all ordinances were
27 inadequate because the notices were not detailed enough so as to alert a reader to the major
28 issues and the ways in which to participate in the process. *Petitioners' Response – Dismiss* at 13-
29 14. Specifically, Petitioners assert that the published notices did not state that existing policies
30 would be significantly altered and that changes to criteria and standards would affect the amount
31 and type of development permitted and, the notices did not reference specific proposed changes
32 or the location and proposed or future classification. *Id.* at 12-14.

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35 In addition, Petitioners assert that they were entitled to individual notice of the City's actions.
36 *Id.* at 14-15. Petitioners argue that the nature of the action by the City was not an area-wide,
37 seen as a legislative action, but was limited to just a few property owners, of which the
38 Petitioners' land constituted more than 50% of the land affected. *Id.* at 15-16.

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43 ² RCW 36.70A.290(2) provides: All petitions relating to whether or not an adopted comprehensive plan,
44 development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this
45 chapter or chapter 90.58 or 43.21C RCW *must be filed within sixty days after publication by the legislative bodies of*
46 *the county or city.* (Emphasis added)

47 ³ Notice of the adoption of Ordinance 1196 was published on May 26, 1998, in *The News Tribune*, a daily
48 newspaper published in Tacoma, Washington. *Id.*, *Attachment D – Ordinance 1196*. Notice of the passage of
49 amendments to the City's Comprehensive Plan was published in *The New Tribune*, on May 30, 1998.³ *Id.*,
50 *Attachment C – Affidavit of Publication*. Notice of the passage of Ordinance 1246 was published in *The News*
Tribune on April 15, 2000. *Id.*, *Attachment I - Affidavit of Publication*.

1 The Petitioners also argue that FMC 22.34 R-4-C zoning standards defining permissible
2 development on slopes conflicts with the City's CAO which controls development within critical
3 areas, including landslide hazard areas. *Id.* at 17-18. The Petitioners assert that the City has a
4 "non-discretionary GMA duty to assure all regulations are consistent as required [by the Act]"
5 and when the City denied the Petitioners proposed amendments in March 2006, the City
6 breached that duty. *Id.* at 19.
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9 In reply, the City reiterates its argument that the Board has no jurisdiction to hear appeals of
10 comprehensive plan amendments or development regulations more than 60 days after publication
11 of notice adoption by the City Council *City's Response – Dismiss* at 3. The City further argues
12 that it had no duty to adopt the Petitioners' proposed amendments solely because the Petitioners
13 assert that the City's regulations are inconsistent. *Id.*
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15 *Board's Analysis*

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17 The GMA establishes an administrative review process designed to resolve allegations that a
18 local government failed to comply with the GMA's requirements. The GMA requires that any
19 person making such a challenge file a petition within 60 days of the date the local government
20 took the challenged action. RCW 36.70A.290(2) provides:
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22 All petitions relating to whether or not an adopted comprehensive plan,
23 development regulation, or permanent amendment thereto, is in compliance with
24 the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must
25 be filed *within sixty days after publication* by the legislative bodies of the county
26 or city. (Emphasis added)
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29 The Petitioners' Legal Issues No. 1, 2, 3, and 4 clearly alleges violations of the GMA based on
30 FMC 22.34 and Comprehensive Plan LU-22.⁴ As noted by the City, the amendments to FMC
31 22.34 were published on April 15, 2000, and the amendments to LU-22 were published on May
32 30, 1998. The GMA requires that a party appeal any adopted comprehensive plan, development
33 regulation, or permanent amendment made under it, within 60 days of publication of the
34 adoption of the comprehensive plan, development, or any amendments. RCW 36.70A.290(2).
35 Thus, Petitioners missed their opportunity to argue that the City did not comply with the GMA's
36 notice and public participation procedures or BAS requirements when adopting FMC 22.34 and
37 LU-22 because their challenge is untimely. The fact that notice may, or may not, have been
38 adequate does not stay this statutory deadline.⁵
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40 2. Duty to Amend

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42 Legal Issues No. 5 and 6 are based on the City's denial of the Petitioners proposed amendments
43 to FMC 22.34 and LU-22, alleging that the denial violates RCW 36.70A.020(6) and effectuates a
44 taking of private property without just compensation. *Restatement of Issues* at 2. The Petitioners
45 argue that FMC 22.34 and FMC 22.100, although defining slope in different ways, provide
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48 ⁴ See Legal Issues 1, 2, 3, and 4.

49 ⁵ See *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2005), a land use matter involving the Land Use Petition Act
50 (LUPA), RCW 36.70C, in which the Washington Supreme Court held that even illegal decisions, including those
absent proper statutorily or constitutionally required notice, must be challenged in a timely, appropriate manner.

1 varying standards for development on slopes, with FMC 22.34 allowing for development on
2 slopes of 15% or less and FMC 22.100 permitting development on slopes up to 40%.
3 *Petitioner's Response – Dismiss* at 17-18. The Petitioners assert that the City had a duty to
4 amend these provisions, and the related land use policies contained in LU-22, because of
5 inconsistencies between the regulations and the land use element. *Petitioners' Response –*
6 *Dismiss* at 17-18.
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9 *Board's Analysis*

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11 The Board has determined that “non-amendments” are generally not subject to the Board’s
12 review:

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14 While RCW 36.70A.130 authorizes a local government to amend comprehensive plans
15 annually, it does not require amendments. Moreover, it does not dictate that a specific
16 proposed amendment be adopted. *Cole v. Pierce County*, CPSGMHB Case No. 96-3-
17 0009c, Final Decision and Order (July 31, 1996), at 10.
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20 The Board has previous stated that a city has no duty to adopt a party’s proposed amendment,
21 absent an explicit GMA duty compelling such an amendment and, the Board has delineated
22 whether, and when, the GMA creates a duty for a city to amend.⁶ Without this explicit duty, a
23 city has the authority to reject any amendment it determines lacks merit.
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25 FMC 22.34.005 does not define slopes, but rather sets the maximum developable slope at 15%
26 slope within the footprint of a structure or, in the alternative, that the average slope for the
27 developed area of a site may not exceed 15%. *FMC 22.34.005*. FMC 22.100.020(b)(6), to
28 which the Petitioners cite in their Response Brief, provides just 1 of 6 examples of landslide
29 hazard areas. This section does not establish development standards but merely defines these
30 areas to include not only those areas with a slope of 40% or greater but also areas of historic
31 failures (i.e. unstable old slides, lahars, or quaternary slumps), areas of that have shown
32 movement during the Holocene epoch, slopes steeper than 15%, hillsides intersecting geologic
33 contacts with a relatively permeable sediment overlay, or slopes that are parallel or subparallel of
34 weakness in subsurface materials. *FMC 22.100.020(b)(1)-(6)*. In addition, FMC 22.100 sets
35 forth various requirements such as critical areas reports which include site plans, hazards
36 analysis, geotechnical engineering recommendations, erosion, sediment and drainage controls
37 and performance standards for landslide hazard areas which do not set forth specific developable
38 slope or impervious coverage percentages but rather provide such things as buffer requirements,
39 alterations criteria, design standards, vegetation retention, and prohibited development. *FMC*
40 *22.100.070(a)*; *FMC 22.100.090*.
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43 The Petitioners’ proposal appears to have been thoroughly reviewed by the City.
44 Environmental documents were issued, various City agencies were consulted on the proposals, a
45 public hearing was held on December 6, 2005 in which substantial testimony was presented and,
46 subsequent to the hearing and receipt of additional information and deliberation, the City’s
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49 ⁶ See *Orton Farms LLC et. al. v. Pierce County*, CPSGMHB Case No. 04-3-0007c (FDO Aug. 2, 2004); *Port of*
50 *Seattle v. City of Des Moines*, CPSGMHB Case No. 97-3-0014 (FDO Aug. 31, 1997); *Cole et. al. v. Pierce County*,
CPSGMHB Case No. 96-3-0009c (July 31, 1996).

1 Planning Commission found that there was no compelling reason to amend FMC 22.34 or LU-
2 22. *PFR, Attachment A and Attachment B*. The City Council conducted a public hearing on
3 February 28, 2006, accepting written and oral testimony, and, subsequent to the hearing,
4 deliberated and voted 5 to 1 to accept the Planning Commission's recommendation. *PFR,*
5 *Attachment A – Resolution 926 and Attachment B – Resolution 927*. It is obvious from these
6 actions that the City fully considered the Petitioners' proposed amendments and denied it. *Id.*
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9 The City does not have to amend its development regulations or comprehensive plan merely
10 because the Petitioners requested it to do so nor is this Board empowered to require the City to
11 adopt a specific amendment to its regulations or plan unless such an amendment is mandated in
12 order to bring the regulations or plan into compliance with the GMA. Petitioners apparently
13 disagree with the City's original development standards for the R-4-C zone, the landslide hazard
14 provisions within FMC 22.100, and LU-22, but did not challenge the City's actions enacting
15 those provisions in 1998 and 2000 and cannot now challenge these provisions collaterally by
16 challenging the City's decisions *not to adopt* the Petitioner's proposed amendments.
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18 **Based on the above, the Board finds that Petitioners' challenge, as stated in Legal Issues 1,**
19 **2, 3, and 4 is untimely and that the City was not required to adopt the Petitioners'**
20 **proposed amendments and that the City's denial of the proposed amendments, as stated in**
21 **Legal Issues 5 and 6, did not violate any GMA duty to amend the City's development**
22 **regulations and/or comprehensive plan.**
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26 *Petitioner's Motion for Summary Judgment*
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28 Having dismissed with prejudice Petitioners' challenge to Ordinances 926 and 927, the Board
29 need not and will not address Petitioners' Motion for Summary Judgment.
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35 **III. ORDER**
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37 Based upon review of the GMA, Board's Rules of Practice and Procedure, briefing and exhibits
38 submitted by the parties, case law and prior decisions of this Board, and having deliberated on
39 the matter, the Board enters the following ORDER:
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- 41 1. The City of Fircrest's Motion to Dismiss is **granted**.
- 42
- 43 2. The matter of *Orchard Reach et. al. v. City of Fircrest*, CPSGMHB Case No.
44 06-3-0019 is **dismissed with prejudice**.
- 45
- 46 3. All further proceedings in this matter are **cancelled** and the matter is **closed**.
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- 48 4. This Order of Dismissal should not be construed as a Board determination as
49 to whether the City of Fircrest substantively complies with the relevant goals
50 and requirements of the GMA.

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So ORDERED this 6th day of July, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce Laing, FAICP
Presiding Officer/Board Member

Margaret Pageler
Board Member

Edward McGuire, AICP
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.