

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 DRY CREEK COALITION,

4 Petitioner,

5
6 v.

7 CLALLAM COUNTY,

8
9 Respondent,

10 And

11
12 OLYMPIC MEADOWS LAND TRUST AND
13 NORTH PACIFIC LAND AND TIMBER,

14 Intervenor.

Case No. 08-2-0033

FINAL DECISION AND ORDER

15
16
17 **I. PROCEDURAL HISTORY**

18 Clallam County (the "County") adopted Ordinance 835 and Resolution No. 88, 2008 on
19 October 21, 2008.

20
21 On December 15, 2008, a Petition for Review (PFR) was filed by Dry Creek Coalition
22 ("DCC"). Amendments to the PFR were filed on January 14, 2009.

23
24 On January 20, 2009, Olympic Meadows Land Trust and North Pacific Land and Timber
25 were granted Intervention.

26
27 On March 9, 2009, in response to separate motions brought by the County,¹ Intervenor,²
28 and DCC,³ the Board denied the County Motion to dismiss Issues 1 and 7, but limited Issue
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31 _____
32 ¹ County Motion for Summary Judgment or, in the Alternative, to Dismiss. Clallam County's motion sought dismissal of all eight issues.

² Intervenor's Motion for Summary Judgment. Intervenor's motion sought dismissal of Issues 1, 2, and 7 as they related to the Deer Park LAMIRD.

1 1 to the County's treatment of allowed uses. Intervenor's motion to limit Issues 1 and 7 as
2 they apply to the southeast boundary of the Deer Park LAMIRD as well as to limits on
3 conditionally-allowed uses on the property referred to as NP-1 in the Deer Park LAMIRD
4 was granted. The Board granted the motion to dismiss Issue 2. The order noted that Issue
5 3 had been withdrawn by DCC. The motion to dismiss Issue 4 was granted. The motion to
6 dismiss issues 5, 6 and 8 was denied.
7

8 A Hearing on the Merits was held on April 28, 2009 in Sequim, Washington. DCC was
9 represented by Gerald Steel. The County was represented by Doug Jensen. Intervenor
10 were represented by Sandy Mackie. Board Members Nina Carter, William Roehl and
11 James McNamara were present with Mr. McNamara presiding.
12

13 **II. PRELIMINARY MATTERS**

14
15 In its opening brief, DCC brought a motion to supplement the record with the "2006 Clallam
16 County LAMIRDS Report with its May 2007 Supplement" and the "2008 GMA Compliance
17 Supplement".⁴ Although the County initially objected,⁵ it withdrew its objection at the HOM
18 and the Record will be supplemented with those two documents, to be designated IR 1000
19 and IR 1001, respectively.
20

21 DCC explicitly abandoned Issue 8 in its opening brief.⁶ Therefore, this issue will not be
22 addressed by the Board.
23

24 The County moved in its response brief to strike portions of DCC's opening brief.⁷ The
25 County argues that statements within the brief that describe facts as "to the best of my
26 knowledge", in reference to IR 1000 and 1001, should be barred as unsworn and irrelevant
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28
29

30 ³ DCC Motion for Change in Prehearing Order.

31 ⁴ DCC Opening Brief at 4.

32 ⁵ County Response, at 11-12.

⁶ DCC Opening Brief, at 20.

⁷ County Response, at 11-12.

1 testimony.⁸ DCC, in reply, argues that the purpose of the “best of my knowledge” phrase
2 was to give the County and Intervenors the opportunity to identify other sources of the
3 referenced information.⁹ The Board interpreted the comments from DCCs’ attorney
4 regarding “to the best of my knowledge” as argument, not an offer of evidence. In that light
5 such argument need not be stricken.
6

7 Contained in DCC’s reply brief was a request for clarification of Board policy regarding
8 submittal of exhibits.¹⁰ This matter was addressed at the HOM. In short, in submitting
9 evidence to the Board, the parties are expected to adhere to the requirements set forth in
10 the Prehearing Order, unless modified in response to a motion, which requires all exhibits to
11 be attached to a party’s brief.
12

13 **III. BURDEN OF PROOF**

14 For purposes of board review of the comprehensive plans and development regulations
15 adopted by local government, the GMA establishes three major precepts: a presumption of
16 validity; a “clearly erroneous” standard of review; and a requirement of deference to the
17 decisions of local government.
18

19 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
20 amendments to them are presumed valid upon adoption:
21

22 Except as provided in subsection (5) of this section, comprehensive plans and
23 development regulations, and amendments thereto, adopted under this chapter
24 are presumed valid upon adoption.
25

26 The statute further provides that the standard of review shall be whether the challenged
27 enactments are clearly erroneous:¹¹
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29

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31 ⁸ Id.

32 ⁹ DCC Reply at 4.

¹⁰ Id., at 1-3.

¹¹ RCW 36.70A.320(3).

1 The board shall find compliance unless it determines that the action by the state
2 agency, county, or city is clearly erroneous in view of the entire record before
3 the board and in light of the goals and requirements of this chapter.

4 In order to find the County's action clearly erroneous, the Board must be "left with the firm
5 and definite conviction that a mistake has been made."¹²

6
7 Within the framework of state goals and requirements, the boards must grant deference to
8 local governments in how they plan for growth.¹³

9 In recognition of the broad range of discretion that may be exercised by counties
10 and cities in how they plan for growth, consistent with the requirements and goals
11 of this chapter, the legislature intends for the boards to grant deference to the
12 counties and cities in how they plan for growth, consistent with the requirements
13 and goals of this chapter. Local comprehensive plans and development
14 regulations require counties and cities to balance priorities and options for action
15 in full consideration of local circumstances. The legislature finds that while this
16 chapter requires local planning to take place within a framework of state goals and
17 requirements, the ultimate burden and responsibility for planning, harmonizing the
18 planning goals of this chapter, and implementing a county's or city's future rests
19 with that community.

20 In sum, the burden is on Petitioners to overcome the presumption of validity and
21 demonstrate that any action taken by the County is clearly erroneous in light of the goals
22 and requirements of Ch. 36.70A RCW (the Growth Management Act).¹⁴ Where not clearly
23 erroneous, and thus within the framework of state goals and requirements, the planning
24 choices of local government must be granted deference.

25 **IV. ISSUES PRESENTED**

26 The issues that remain before the Board in this appeal are as follows:¹⁵
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28

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30 ¹² *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

31 ¹³ RCW 36.70A.3201 (in relevant part).

32 ¹⁴ RCW 36.70A.320(2).

¹⁵ DCC initially set forth eight issues for review. As noted within this FDO, the Board's March 2009 Order on Motions dismissed Issues 2 and 4, noted the voluntary withdrawal of Issue 3, and established limitations as to Issues 1 and 7. As noted above, Issue 8 was specifically abandoned in DCC's Opening Brief.

1 1. Whether for each LAMIRD adopted by Ordinance No. 835 (“Ordinance”) and for each
2 designation and zone within those LAMIRDs, the Comprehensive Plan and implementing
3 development regulations identifying for purposes of new development and redevelopment,
4 the allowed and conditionally allowed building size, scale, use and intensity in compliance
5 with RCW 36.70A.020(1) and RCW 36.70A.020(2), RCW 36.70A.040, RCW 36.70A.070
(preamble), RCW 36.70A.070(1), RCW 36.70A.070(5), and RCW 36.70A.130?

6 5. Whether the comprehensive plan and zoning as amended in the RLC, RNC, and Rural
7 Centers fails to comply with RCW 36.70A.020(1) and (2), RCW 36.70A.040, RCW
8 36.70A.070(preamble), RCW 36.70A.070(1), RCW 36.70A.070(5), and RCW 36.70A.130?

9 6. Whether the Comprehensive Plan fails to comply with RCW 36.70A.020(1) and (2), RCW
10 36.70A.040, RCW 36.70A.070(preamble), RCW 36.70A.070(1), RCW 36.70A.070(5), and
11 RCW 36.70A.130 when it states that uses in LAMIRDs “should” instead of “shall” remain
12 similar to the use, scale, size, or intensity of uses existing as of July 1, 1990 (such as at
13 Rec. 2859, 2862, 2879, 2886-88)?

14 7. Whether the addition of the terms “where uses of such type, scale, size, or intensity
15 [already] existed” and “similar to the use, scale, size, or intensity as the uses that existed” in
16 the Comprehensive Plan (Rec. 2855-56, 2859, 2874-76, 2878-80, 2886-88) and RLC, RNC
17 and Rural Center zones comply with RCW 36.70A.020(1) and (2), RCW 36.70A.040, RCW
18 36.70A.070(preamble), RCW 36.70A.070(1), RCW 36.70A.070(5), and RCW 36.70A.130
19 without any further clarification as to what the parameters for use, scale, size, and intensity
20 are in each individual RLC, RNC, and Rural Center zoning district and what criteria must be
21 met to qualify as “similar” potentially including maximum and/or minimum, individual and
22 combined, parameters for buildings, outside storage, parking, and open space: including
23 floor area, stories, height, lot coverage, setbacks, screening, operating hours, noise limits,
24 lighting limits, color limits, pollution and odor limits, sign limits, etc., plus limits on maximum
25 and minimum lot size and number of businesses allowed on a lot, all to give clear direction
26 to administrators and to the public as to what is required to meet these code requirements in
27 each individual RLC, RNC, and Rural Center zoning district?

26 V. DISCUSSION

27 DCC challenges Clallam County’s adoption of Ordinance No. 835 and Resolution No. 88,
28 2008 which were adopted by the County on October 26, 2008. Ordinance No. 835
29 amended several sections of the County Code, Comprehensive Plan, and the Official
30 Comprehensive Land Use Map and Zoning Map, including Clallam County Code (CCC)
31 31.02, 31.03, 31.04, 33.15, and 33.19. These amendments relate to both urban and rural
32

1 lands within the County and arise from this Board's holding in a separate matter.¹⁶
2 Resolution No. 88, 2008 adopted specific findings to support Ordinance No. 835. DCC's
3 remaining issues primarily challenge the County's action in regards to Limited Areas of More
4 Intensive Rural Development (LAMIRDs), both designation and development standards.

5
6 As neither DCC nor the County addressed the issues in the order presented above, and in
7 many cases combined issues, the Board will address the issues in the order presented in
8 DCC's opening brief.
9

10 A. Lake Sutherland LAMIRD

11 DCC argues that the RNC LAMIRD list in the 2008 LAMIRD Supplement is in violation of the
12 internal consistency requirement of RCW 36.70A.070 (preamble) because it fails to list the
13 Lake Sutherland LAMIRD.¹⁷
14

15
16 Petitioner appears to misunderstand the purpose of the challenged section of the 2008
17 LAMIRD Supplement, suggesting that it purports to be a listing of all County RNC
18 LAMIRDs. In fact, CCC 31.02.263(3) provides, in relevant part, that the "Clallam County
19 LAMIRDs are described in detail, together with detailed maps, in the "2006 Clallam County
20 LAMIRD Report,' as supplemented (LAMIRD Report), and as subject to the revisions of the
21 '2008 GMA Compliance Supplement,' all of which are hereby incorporated by reference."¹⁸
22 The 2006 LAMIRD report, does in fact, list the Lake Sutherland LAMIRD. See, pages A-7,
23 A-8 and A-9 of the 2006 LAMIRD report, attached to DCC's Opening Brief. Turning to the
24 2008 Supplement, page 24 of that report (B-12 of DCC's attached exhibit) lists a number of
25 LAMIRDs but does not state that it lists all County RNC LAMIRDs. Instead, it appears to be
26 a discussion of the County's compliance strategy in response to an earlier Board ruling.
27 Even if the list of LAMIRDs on page 24 of the 2008 Supplement ought to have included the
28 Lake Sutherland LAMIRD as one the County felt needed to be addressed on compliance,
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32 ¹⁶ *Dry Creek Coalition, et al v. Clallam County*, Case No. 07-2-0018c.

¹⁷ IR 1001, at B-12.

¹⁸ IR 2856.

1 the failure to list it in the context of the County's *compliance strategy* is not a violation of
2 RCW 36.70A.070. The 2006 LAMIRDs report makes it abundantly clear that Lake
3 Sutherland is a LAMIRD.¹⁹ There is no internal inconsistency.
4

5 **Conclusion:** The absence of a listing of the Lake Sutherland LAMIRD from the listing of
6 LAMIRDs in the 2008 LAMIRD Supplement is not a violation of RCW 36.70A.070.
7

8 B. Policy 2 and the requirement that a LAMIRD be "consistent with the character of the
9 surrounding area."

10
11 Policy 2 is found at CCC 31.02.263(4)(c). It provides:

12 Infill, development, and redevelopment within LAMIRDs may include commercial,
13 industrial, and urban residential uses where uses of such type, scale, size, or
14 intensity already existed prior to or as of July 1, 1990 but shall not extend beyond
15 the LAMIRD's boundaries.²⁰

16 DCC argues that this policy does not comply with RCW 37.70A.070(5)(d)(i)(C) because it
17 does not require the development and redevelopment in Type I LAMIRDs, including RNC,
18 RLC and CEN designations, to be "consistent with the character of the existing area" in
19 terms of "building size, scale, use, or intensity".²¹ As a result, DCC argues, the County
20 seeks to allow development and/or redevelopment in Type I LAMIRDs which meets only
21 one of the terms in the phrase "building size, scale, use, or intensity" without consideration
22 of whether the development would actually be consistent with the character of the
23 surrounding area. DCC argues consistency with just one parameter would not make the
24 development consistent with the 1990 character if there was not also consistency with the
25 other relevant parameters. DCC urges the word "or" be interpreted as an alternative term
26 so that building size, scale, use, *and* intensity are considered to have the same meaning so
27 that all are to be considered for new development or redevelopment within a Type I
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32 ¹⁹ IR 1000; Exhibit A at A-7 to A-9.

²⁰ IR 2856.

²¹ DCC Opening Brief at 8.

1 LAMRID.²² DCC also argues that the County is noncompliant for its failure to explicitly
2 require comparison to “building size” .²³

3
4 This Board has addressed an issue of interpretation of RCW 36.70A.070(5)(d)(i)(C) in the
5 Order on Reconsideration in Case No. 07-2-0018c. There the Board noted that “building
6 size is but one characteristic to consider in assessing the character of the existing area,
7 consideration must also be given to use, scale, or intensity.”²⁴ The statute’s use of the term
8 “or” rather than “and” appears to indicate a Legislative determination that the factors of
9 building size, scale, use or intensity are ones that may be considered in determining the
10 character of the existing area, but that development is not required to meet every one of
11 those parameters. If the Legislature had intended to use the word “and” in the statute, they
12 clearly could have done so.

13
14
15 Further, DCC would have the Board interpret the County policy in a light that grants no
16 deference to Clallam County. Rather than find that the policy language *might be interpreted*
17 *in a manner that violates the GMA*, the Board is required to grant deference to the County²⁵
18 and presume its decisions to be valid upon adoption.²⁶ These presumptions will be upheld
19 unless it is shown that the provisions are clearly erroneous.²⁷ The Board finds that Policy 2
20 is compliant with the GMA. The County adequately ensures consistency with the 1990
21 existing areas. CCC 31.02.263 incorporates language from an earlier Board decision to the
22 effect that “Fundamental to the establishment of a LAMIRD is the requirement that it be
23 based upon ‘existing areas and uses’ as established . . . by the built environment. . . . The
24 County must FIRST identify the built environment as of July 1, 1990 so that it may be
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30 _____
31 ²² Id. 10.

32 ²³ Id. at 11.

²⁴ Order on Reconsideration, WWGMHB No. 07-2-0018c (06/09/08) at 11.

²⁵ RCW 36.70A.3201.

²⁶ RCW 36.70A.320(1).

²⁷ RCW 36.70A.320(3).

1 minimized and contained as required by the GMA.²⁸ That same section continues in
2 subsection (2)(c):

3 “To implement the revised policies relating to LAMIRDs, the zoning standards for
4 the following comprehensive plan and zoning map designations were adjusted
5 for the purpose of clarifying that any future development must be similar to “uses
6 of such type, scale, size or intensity as already existed prior to or as of July 1,
7 1990,” consistent with the criteria for Type I LAMIRD designations under RCW
8 36.70A.070(5)(d)(i): Rural Neighborhood Commercial (RNC), Rural Limited
Commercial (RLC), and Rural Center (CEN).”²⁹

9 This language indicates an intent to adhere, in application, to the requirements of the GMA.
10 The Board does not find Policy 2 clearly erroneous. Nor does the Board find it clearly
11 erroneous for the County to use the word “or” rather than “and” in the phrase “scale, size, or
12 intensity” when the Legislature also chose to use the term “or”.
13

14 With regard to the County’s decision to not include “building size” in this phrase, it is
15 apparent that the term “uses” in the phrase “uses of such type, scale, size, or intensity”
16 includes the parameter of building size.
17

18
19 **Conclusion:** DCC has not met its burden of proof to demonstrate CCCP Policy 2 fails to
20 comply with the requirements of RCW 36.70A.070(5)(d)(i)(C).
21

22 C. Zoning for RNC, RLC and CEN and the requirement to be “consistent with the
23 character of the surrounding area” in terms of building size, scale, use and intensity.

24 Similar to its challenge of the Clallam County Comprehensive Plan provisions addressed
25 *supra*, DCC asserts that the zoning code provisions for the RNC, RLC and CEN zones do
26 not implement a requirement that development and redevelopment in these zones be
27 consistent with the character of the existing area in terms of building size, scale, use or
28 intensity.³⁰
29
30

31
32 ²⁸ IR 2855.

²⁹ IR 2855-56.

³⁰ DCC Opening Brief at 11, et seq.

1 DCC's arguments with regard to the zoning provisions are similar in some respects to the
2 argument made regarding Policy 2 of the Comprehensive Plan. For example, DCC argues
3 that the zoning code provisions would allow new development to comply with only one of
4 the listed parameters (type, scale, size, or intensity) instead of with all relevant parameters
5 in order to be consistent with the 1990 existing character.³¹ For the same reasons outlined
6 above in the discussion of Policy 2, DCC has not demonstrated that the zoning code
7 provisions are clearly erroneous.
8
9

10 DCC also argues that the zoning regulations do not adequately implement the
11 comprehensive plan because there is no record referenced in the plan or zoning code that
12 describes the building size or other size, scale, or intensity characteristics of the 1990
13 development.³² According to DCC, this record is needed to provide a source of information
14 regarding these parameters so as to provide both the public and planning staff with
15 guidelines.³³
16
17

18 This very issue regarding the need for specific parameters for new development was
19 addressed in the Board's Order on DCC's Motion for Reconsideration of the Compliance
20 Order in Dry Creek et al. v. Clallam County, WWGMHB No. 07-2-0018c, (2/20/09) at 4.
21 This Board held:
22

23 Finally, DCC argues that the Board should require documentation in the Plan or
24 the Clallam County Code of the parameters of the Laird's LAMIRD as of July 1,
25 1990, so that future decision makers would have this available as a guideline. In
26 fact, several sections of the Clallam County Code provide that the use allowed in
27 a particular zone must be "similar to the use, scale, size or intensity as the uses
28 that existed in the area prior to or as of July 1, 1990." The Board agrees that
29 specification of those parameters would provide great assistance to the County in
30 determining the nature of future land uses to be allowed in its LAMIRDs.

31 However, no such requirement exists in the GMA, and it was not error for the
32 Board to fail to impose such a requirement. In any event, as a result of this

³¹ Id. at 12-13.

³² Id. at 13.

³³ Id..

1 appeal, an extensive record has been compiled regarding the state of the built
2 environment in the County's LAMIRDs as of July 1, 1990, which the County and
3 the public can rely upon for future land use decisions.

4 The same reasoning applies in this case as well – the County has not violated the GMA by
5 failing to adopt parameters that define the existing character of each LAMIRD where no
6 such requirement is contained in the GMA. The County has the policies and zoning
7 regulations in place to implement the requirements that new development and
8 redevelopment be consistent with the 1990 existing areas. DCC has failed to show that the
9 County's provisions are clearly erroneous.
10

11
12 **Conclusion:** DCC has failed to demonstrate that zoning for RNC, RLC and CEN does not
13 implement the requirement to be “consistent with the character of the surrounding area” in
14 terms of building size, scale, use or intensity
15

16 D. The relation between commercial development and the existing and projected rural
17 population.

18
19 DCC asserts that the County comprehensive plan and zoning code provisions of RNC, RLC
20 and CEN designations and zones fail to comply with RCW 36.70A.070(5)(d)(i)(B) because
21 they do not require commercial development to be principally designed to serve the existing
22 and projected rural populations. DCC argues that the County erroneously allows tourist
23 uses and facilities such as motels and gift shops in these areas, whereas such uses are
24 designed to serve the non-resident population.³⁴
25

26 RCW 36.70A.070(5)(d)(i)(B) provides:
27

28 (B) Any development or redevelopment other than an industrial area or an
29 industrial use within a mixed-use area or an industrial area under this subsection
30 (5)(d)(i) must be principally designed to serve the existing and projected rural
31 population.
32

³⁴ Id. at 17.
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1 As the County correctly notes, this provision requires development in these areas to be
2 “principally” designed to serve the existing and projected rural population; there is no
3 requirement that it “exclusively” serve that population.³⁵ Pursuant to CCC 31.02.263, the
4 RNC, RLC and CEN LAMIRDs are permitted to include “tourist uses” consistent with the
5 1990 built environment. Further, an examination of the allowed uses in the RNC, RLC and
6 CEN zones reveals the predominantly allowed uses include agricultural activities, churches,
7 commercial greenhouses, commercial horse facilities, gas stations, grocery stores and a
8 host of other uses serving the existing and projected rural population. While such uses as
9 bed and breakfast inns and tourist shops are allowed in the RNC, RLC and CEN zones,
10 DCC has failed to demonstrate that the allowance of these uses is of such a nature that the
11 zones would no longer result in these zones principally serving the rural population.
12

13
14 **Conclusion:** DCC has failed to demonstrate that the uses allowed in the RNC, RLC and
15 CEN zones are of such a nature that these zones would not principally serve the rural
16 population in violation of RCW 36.70A.070(5)(d)(i)(B).
17

18 E. Comprehensive Plan Policy 4

19 Comprehensive Plan Policy 4 at CCC 31.02.263(4)(e) provides:
20

21 In order to maintain rural character, infill-development and redevelopment within
22 LAMIRDs should minimize impervious surfaces in order to maintain a more
23 “open” or “rural” atmosphere; should have increased setbacks, buffers, and
24 screening to separate land uses from adjacent rural residential zones; should
25 incorporate measures to reduce the impacts of noise, odor, and traffic; and
26 should require high-quality landscaping designed to protect rural character.³⁶

27 DCC alleges the County’s failure to implement this policy in the RNC, RLC and CEN zones
28 is a violation of RCW 36.70A.040(3) and -130(1)(d)’s requirement to adopt development
29 regulations that are consistent with and implement the comprehensive plan.
30

31
32 ³⁵ County Response at 17.

³⁶ IR 2856.

1 In response, the County argues that “Amended Policy 4 now articulates and links CP
2 policies with County DRs, ensuring both guidance and internal consistency”.³⁷ Such linkage
3 is not explicit in Policy 4 which does not reference any provision of the County development
4 regulations. Although such an explicit linkage is not specifically required by the GMA, the
5 County could not point to any development regulations that, in fact, implemented this policy.
6 For example, while the County cited provisions of its landscaping, planting, screening and
7 alternative design standards in its development regulations,³⁸ none of these provisions call
8 for “increased setbacks, buffers, and screening to separate land uses from adjacent rural
9 residential zones” as indicated by Policy 4. Instead, the referenced regulations apply to the
10 same extent, and impose no additional protections, in the rural areas as they do elsewhere
11 in the County. Consequently, the Board concludes that the County has failed to adopt
12 regulations to implement this comprehensive plan policy.
13
14

15 **Conclusion:** The County has failed to implement Policy 4 of its Comprehensive Plan in its
16 development regulations in violation of RCW 36.70A.040(3) and -130(1)(d)’s requirement to
17 adopt development regulations that are consistent with and implement the comprehensive
18 plan.
19

20
21 F. Building Heights in the RNC, RLC, and CEN zones

22 DCC notes that the County has created an exception in the RNC, RLC and CEN zones for
23 overheight structures when compliance with Federal and State pollution control
24 requirements is required. DCC argues that this is in violation of RCW
25 36.70A.070(5)(d)(i)(C)’s requirement that development or redevelopment in terms of
26 building size, scale, use or intensity be consistent with the character of the existing area.
27

28 In response, the County argues that DCC has failed to meet its burden that a consideration
29 of such an exception for an allowed use is *per se* inconsistent with the “building size, scale
30

31
32 ³⁷ County Response at 18.

³⁸ *Id.*

1 use or intensity” in RNC, RLC and CEN zones.³⁹ As the County correctly notes, the Board
2 has stated that “building size is but one characteristic to consider in assessing the character
3 of the existing area, consideration must also be given to use, scale or intensity.”⁴⁰ So too
4 with building height, it is but one factor to consider in determining if a development is
5 consistent with the 1990 existing area. The County’s provisions for maximum heights must
6 be read in harmony with other provisions, such as CCC 33.15.040 (9), .050(9), and .060 (8)
7 which require that allowed and conditional uses in the CEN, RNC and RLC zones,
8 respectively, “must be similar to the use, scale, size, or intensity as the uses that existed in
9 the area” on July1, 1990.⁴¹ So read, there is no violation of the GMA.
10

11
12 **Conclusion:** Provisions of the County zoning code that allow for heights to exceed those
13 that existed as of July 1, 1990, when read in the context of other requirements that allowed
14 uses and conditional uses must be similar to the use, scale, size, or intensity of uses that
15 existed in the area on July1, 1990 do not violate RCW 36.70A.070(5)(d)(i)(C).
16

17 G. Use of the term “Should” in the County Comprehensive Plan

18 DCC argues the use of the following language in the County’s Comprehensive Plan is
19 contrary to RCW 36.70A.070(5)(d)(i)(C): “New commercial or industrial uses should be
20 similar to the use, scale, size, or intensity as the uses that existed . . . as of July 1, 1990.”⁴²
21 DCC argues the use of the word “should” violates the statutory requirement that new
22 development “shall” be consistent with the character of the existing area in terms of building
23 size, scale, use or intensity.⁴³
24

25
26 RCW 36.70A requires the adoption of comprehensive plans and development regulations
27 by jurisdictions subject to the provisions of the GMA. The GMA defines a “comprehensive
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29 ³⁹ Id.

30 ⁴⁰ Order on Motion for Reconsideration, *Dry Creek et al. v. Clallam County*, WWGMHB No. 07-2-0018c, at 11.

31 ⁴¹ County language referencing the applicable time frame as “prior to or as of July 1, 1990” has previously
32 been found to violate the GMA. Compliance Order, *Dry Creek et al. v. Clallam County*, WWGMHB No. 07-2-
0018c,(1/30/09).

⁴² IR 2879-2880.

⁴³ DCC Opening Brief at 19-20.

1 plan” as a “generalized coordinated land use policy statement of the governing body”.⁴⁴
2 “Development regulations” on the other hand are the “controls placed on the development of
3 land use activities by a county or city”.⁴⁵ Development regulations must be consistent with
4 and implement the plan, and it is the development regulations that ensure that the
5 requirements of the GMA are implemented. There is no inconsistency in the use of the term
6 “should” in a comprehensive plan where, as here, the development regulations implement
7 the policy statements contained in the plan. Therefore, the Board concludes that the
8 County’s use of the word “should” in its comprehensive plan was not clearly erroneous.
9

10
11 **Conclusion:** DCC has failed to demonstrate an inconsistency in the use of the term
12 “should” in the comprehensive plan where the development regulations implement the
13 policy statements contained in the plan. The County’s use of the word “should” in its
14 comprehensive plan was not clearly erroneous.
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16 VI. FINDINGS OF FACT

- 17 1. Clallam is a county located west of the crest of the Cascade Mountains that is
18 required to plan pursuant to RCW 36.76A.040.
- 19 2. On October 21, 2008 the County adopted Ordinance 835 and Resolution No. 88,
20 2008, amending Clallam County Code 31.02, Countywide Comprehensive Plan;
21 31.03, Sequim-Dungeness Regional Plan; 31.04, Port Angeles Regional Plan; 33.15,
22 Commercial Zones; 33.19, Sequim Urban Growth Area and the Official
23 Comprehensive Land Use and Zoning Map of Clallam County.
- 24 3. On December 15, 2008 Petitioner filed a timely appeal.
- 25 4. The Lake Sutherland LAMIRD, while not listed in the 2008 LAMIRD Supplement, is
26 listed in the County’s 2006 LAMIRD report.
- 27 5. CCC 31.02.263(3) provides, in relevant part, that the “Clallam County LAMIRDs are
28 described in detail, together with detailed maps, in the ‘2006 Clallam County LAMIRD
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⁴⁴ RCW 36.70A.030 (4).

⁴⁵ RCW 36.70A.030(7).

1 Report,' as supplemented (LAMIRD Report), and as subject to the revisions of the
2 '2008 GMA Compliance Supplement,' all of which are hereby incorporated by
3 reference."

- 4 6. Policy 2 is found at CCC 31.02.263(4)(c) and provides that infill, development, and
5 redevelopment within LAMIRDs may include commercial, industrial, and urban
6 residential uses where uses of such type, scale, size, or intensity already existed
7 prior to or as of July 1, 1990 but shall not extend beyond the LAMIRD's boundaries.
- 8 7. This Board has previously held that building size is but one characteristic to consider
9 in assessing the character of the existing area, consideration must also be given to
10 use, scale, or intensity.
- 11 8. This Board has previously addressed the issue regarding the need for specific
12 parameters for new development in the Board's Order on DCC's Motion for
13 Reconsideration of the Compliance Order in Dry Creek et al. v. Clallam County,
14 WWGMHB No. 07-2-0018c, (2/20/09) at 4.
- 15 9. The County has the policies and zoning regulations in place to implement the
16 requirements that new development and redevelopment be consistent with the 1990
17 existing areas.
- 18 10. Pursuant to CCC 31.02.263, the RNC, RLC and CEN LAMIRDs are permitted to
19 include "tourist uses" consistent with the 1990 built environment.
- 20 11. An examination of the allowed uses in the RNC, RLC and CEN zones reveals the
21 predominantly allowed uses include agricultural activities, churches, commercial
22 greenhouses, commercial horse facilities, gas stations, grocery stores and a host of
23 other uses serving the existing and projected rural population.
- 24 12. Comprehensive Plan Policy 4 does not reference any provision of the County
25 development regulations.
- 26 13. At hearing, the County could not point to any development regulations that
27 implemented this policy. While the County cited provisions of its landscaping,
28 planting, screening and alternative design standards in its development regulations,
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1 none of these provisions call for “increased setbacks, buffers, and screening to
2 separate land uses from adjacent rural residential zones” as indicated by Policy 4.
3 Instead, the referenced regulations apply to the same extent, and impose no
4 additional protections, in the rural areas as they do elsewhere in the County.

5 14. The RNC, RLC and CEN zones allow for overheight structures when compliance
6 with Federal and State pollution control requirements is required.

7 15. The County Comprehensive Plan contains provisions stating that new commercial or
8 industrial uses “should” be similar to the use, scale, size, or intensity as the uses that
9 existed . . . as of July 1, 1990.

10 16. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.

11 VII. CONCLUSIONS OF LAW

12 A. The Board has jurisdiction over the parties to this action.

13 B. The Board has jurisdiction over the subject matter of this action.

14 C. Petitioner Dry Creek Coalition has standing to raise the issues in this case.

15 D. The absence of a listing of the Lake Sutherland LAMIRD from the listing of LAMIRDs
16 in the 2008 LAMIRD Supplement is not a violation of RCW 36.70A.070.

17 E. DCC has not met its burden of proof to demonstrate CCCP Policy 2 fails to comply
18 with the requirements of RCW 36.70A.070(5)(d)(i)(C).

19 F. It is not clearly erroneous for the County to use the word “or” rather than “and” in the
20 phrase “scale, size, or intensity” when the Legislature also chose to use the term “or”
21 in RCW 37.70A.070(5)(d)(i)(C).

22 G. DCC has failed to demonstrate that zoning for RNC, RLC and CEN does not
23 implement the requirement to be “consistent with the character of the surrounding
24 area” in terms of building size, scale, use or intensity.

25 H. DCC has failed to demonstrate that the uses allowed in the RNC, RLC and CEN
26 zones are of such a nature that these zones would not principally serve the rural
27 population in violation of RCW 36.70A.070(5)(d)(i)(B).
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- I. The County has failed to implement Policy 4 of its Comprehensive Plan in its development regulations in violation of RCW 36.70A.040(3) and -130(1)(d)'s requirement to adopt development regulations that are consistent with and implement the comprehensive plan.
- J. Provisions of the County zoning code that allow for heights to exceed those that existed as of July 1, 1990, when read in the context of requirements that allowed uses and conditional uses must be similar to the use, scale, size, or intensity as the uses that existed in the area on July1, 1990 do not violate RCW 36.70A.070(5)(d)(i)(C).
- K. DCC has failed to demonstrate an inconsistency in the use of the term "should" in the comprehensive plan where the development regulations implement the policy statements contained in the plan. The County's use of the word "should" in its comprehensive plan was not clearly erroneous.
- L. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.

VIII. ORDER

Compliance Due	September 4, 2009
Compliance Report and Index to Compliance	September 11, 2009
Any Objections to a Finding of Compliance and Record Additions/Supplements Due	October 2, 2009
County's Response Due	October 23, 2009
Compliance Hearing (location to be determined)	November 2, 2009

Entered this 12th day of June 2009.

James McNamara, Board Member

Nina Carter, Board Member

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William P. Roehl, Board Member

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 mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-02-330. The filing of a petition 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, by fax 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.

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

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