

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

|                             |   |                                 |
|-----------------------------|---|---------------------------------|
| CORINNE R. HENSLEY and JODY | ) |                                 |
| L. McVITTIE,                | ) | <b>Consolidated</b>             |
|                             | ) | <b>Case No. 01-3-0004c</b>      |
|                             | ) |                                 |
| Petitioners,                | ) | <i>(Hensley IV)</i>             |
|                             | ) |                                 |
| v.                          | ) |                                 |
|                             | ) |                                 |
| SNOHOMISH COUNTY,           | ) | <b>FINAL DECISION and ORDER</b> |
|                             | ) |                                 |
| Respondent,                 | ) |                                 |
|                             | ) |                                 |
| and                         | ) |                                 |
|                             | ) |                                 |
| ROGER OLSEN,                | ) |                                 |
|                             | ) |                                 |
| Intervenor.                 | ) |                                 |
|                             | ) |                                 |

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**I. Procedural Background**

**A. General**

On February 14, 2001, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Corinne R. Hensley (**Petitioner** or **Hensley**). The matter was assigned Case No. 01-3-0003. Board Member Edward G. McGuire served as the Presiding Officer (**PO**) in this matter. Petitioner challenged Snohomish County’s (**County**) adoption of Ordinance Nos. 00-094 and 00-091, as they relate to revising and expanding the Maltby urban growth area (**UGA**) and the Clearview Rural Commercial designation. [*i.e.* a limited area of more intensive rural development (**LAMIRD**).] The basis for the challenge is noncompliance with the Growth Management Act (**GMA or Act**). The PFR included a “Motion for Expedited Review” (**Motion to Expedite**).

On February 16, 2001, the Board received a PFR from Jody L. McVittie (**Petitioner** or **McVittie**). The matter was assigned Case No. 01-3-0004. Petitioner also challenged the County’s adoption of Ordinance No. 00-091, as it relates to revising the Transportation Element.

The basis for the challenge is noncompliance with the GMA.

On February 26, 2001, the Board issued an “Order of Consolidation and Notice of Hearing” in the above captioned consolidated case. The Order set the date for the prehearing conference (**PHC**) and established a tentative schedule for the case.

On February 27, 2001, the Board received “Notice of Appearance” indicating Courtney E. Flora and Barbara J. Dykes are attorneys of record for Snohomish County.

On March 19, 2001, the Board received Petitioner McVittie’s “Amended Petition for Review” (**Amended PFR**).

On March 19, 2001, the Board held the PHC. At the PHC the PO **denied** Petitioner Hensley’s Motion for Expedited Review, based upon the Board’s lack of authority; the PO also noted that Petitioner McVittie’s amended PFR was timely filed and the issues included would be the basis of discussion at the PHC. Petitioners were asked to provide specific citations to the CPPs and Plan policies being challenged.

On March 21, 2001, the Board received “Board request for CPP and GPP clarification of issues Clearview No. 6 and Maltby No. 6” from Petitioner Hensley, and a letter from Petitioner McVittie providing the requested citations.

On March 22, 2001, the Board received a letter from the County indicating no objections to the clarifications and restatements provided by Petitioners Hensley and McVittie.

On March 23, 2001, the Board issued a “Prehearing Order” setting the schedule and Legal Issues for this case.

On May 1, 2001, the Board received “Motion to Intervene by Roger Olsen” and “Declaration of Roger Olsen.” The Board did not receive a response to the Motion to Intervene from any of the Petitioners. On May 7, 2001, the Board issued an “Order on Intervention,” **granting** Intervenor status to Roger Olsen.

On May 30, 2001, the Board received “Notice of Association of Counsel” indicating that Brent D. Lloyd has become associated with Snohomish County’s attorneys of record in this matter.

On June 7, 2001, pursuant to a “Stipulation Re: Revised Hearing and Briefing Schedule” signed by Petitioners and Respondent, <sup>[1]</sup> the Board issued an “Order Granting Revision of Hearing and Briefing Schedule.” The Order adjusted the briefing schedule and changed the hearing on the merits (**HOM**) to June 28, 2001.

## **B. Motions to Supplement And amend index**

On March 19, 2001, the Board received “Snohomish County’s Index to the Record Re: County’s Adoption of Ordinance Nos. 00-91 and 00-94” (**Index**). 321 items were included in the Index.

On March 28, 2001 the Board received the requested **core documents** from Snohomish County. The core documents included: 1) January 2001, Snohomish County GMA Comprehensive Plan (**GPP**), including the future land use map (**FLUM**) [Exhibit (**Ex**). 320]; 2a) December 2000, Transportation Element of the GPP [attachment C-1 to Ex. 75]; 2b) Summer 1995, Transportation Element of the GPP [Ex. 233]; 3) February 2000, Snohomish County County-wide Planning Policies (**CPPs**) [Ex. 319]; 4) Ordinance No. 00-091 [Ex. 75]; and 5) Ordinance No. 00-094 [Ex. 77].

On April 5, 2001, the Board received “Hensley Motion to Supplement the Record.” Attached to the motion were two proposed exhibits. On this same date, the Board also received a letter from Petitioner McVittie, indicating the County had agreed to include two items in the Index.

On April 18, 2001, the Board received “Response to Petitioners Motions to Supplement the Record” and “Snohomish County’s Revised Index to the Record Re: County’s Adoption of Ordinance Nos. 00-091 and 00-094” (**Revised Index**). The Revised Index included the two items offered by Petitioner Hensley.

On April 23, 2001, the Board issued its “Order on Motions to Supplement the Record.” The Order summarized the items comprising the record in this case.

At the HOM, the PO ruled on several motions, filed with briefing, regarding the record. These rulings, as well as rulings on post hearing motions, are reflected in Section III, *infra*.

## **C. Dispositive Motions**

On April 5, 2001, the Board received “Motion to Enter a Finding of Invalidity” from Petitioner McVittie. The McVittie Motion had two attachments.

On April 18, 2001 the Board received Snohomish County’s “County Response to Motion to Enter a Finding of Invalidity.” The County Response had 17 items from the Index attached. The County agreed with Petitioner that the County had failed to comply with the notice and public participation requirements of the Act for its adoption of amendments to the Transportation Element. The County asked that the Transportation Element amendments be remanded to allow for proper notice and public participation, but asked that invalidity not be imposed.

On April 23, 2001, the Board received “Reply to County’s Response to Motion to Enter a Finding of Invalidity.”

The Board did not hold a hearing on the dispositive motion.

On April 30, 2001, the Board issued its “Order on Dispositive Motion [Motion to Invalidate].” The Order **denied** the Motion to Invalidate, but entered a **finding of noncompliance** with the provisions of RCW 36.70A.020(11), .035, .070(preamble) and .140 and **remanded** the Transportation Element amendments to the County with directions to take corrective action. The Order also established a **compliance hearing date and compliance-briefing schedule**. Having prevailed on two of the four Legal Issues posed in the McVittie portion of this matter, Petitioner’s continued participation in this matter is limited to McVittie Legal Issues 2 and 3 as they relate to the Clearview Amendments.

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

On May 23, 2001, the Board received “Hensley Prehearing Brief” (**Hensley PHB**), with an Exhibit List, noting 19 exhibits. The Board also received “Petitioner’s Prehearing Brief and Motion to Recognize County Code” (**McVittie PHB**), with 9 attached exhibits.

On June 18, 2001, the Board received “Respondent Snohomish County’s Prehearing Brief” (**Co. PHB**), with 23 attached exhibits (seven lettered, 15 numbered from the Index and one core document). The Board also received “Intervenor’s Response Brief” (**Olsen PHB**), with 11 attached exhibits.

On June 19, 2001, the Board received several communications via FAX. Petitioner McVittie indicated that although Intervenor Olsen’s prehearing brief was due by 4:00 p.m. June 18, 2001, it had not been received as of 8:50 a.m. on June 19, 2001; McVittie requested Intervenor’s status be rescinded. Intervenor Olsen responded that Intervenor’s prehearing brief had been delivered via Fed Ex to Petitioner McVittie at 8:54 a.m. June 19, 2001. Petitioner McVittie acknowledged receipt of Intervenor’s prehearing brief.

On June 20, 2001, the Board received a letter from Intervenor attaching a copy of an exhibit inadvertently omitted from Olsen’s PHB.

On June 21, 2001, the Board received “Respondent Snohomish County’s Prehearing Brief – Corrected Version.” Also included was a corrected version with marked changes. Typographical errors (pagination, dates, citations, spelling, grammar, etc.) were corrected. References in this order will be to Snohomish County’s corrected brief, which will continue to be cited to as “Co. PHB.”

On June 25, 2001, the Board received “Petitioner Hensley Reply Brief” (**Hensley Reply**) and McVittie’s “Petitioner’s Reply Brief” (**McVittie Reply**)<sup>[2]</sup>. Petitioner McVittie also filed a “Motion to Not Allow Material into the Record,” referring to exhibits attached to the County PHB (**Motion to Strike**). Petitioner McVittie also filed a “Motion to Supplement the Record” (**Motion – Supp.**), asking that the record be supplemented with a staff memo recommending changes to an exhibit to a pending ordinance.<sup>[3]</sup> Finally, the Board received “Respondent Snohomish County’s Objection to Petitioner McVittie’s Motion to Supplement the Record” (**Co. Objection – Supp.**).

On June 28, 2001, the Board held a hearing on the merits in Suite 1022 of the Financial Center, 1215 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Lois H. North and Joseph W. Tovar were present for the Board. Petitioners Hensley and McVittie represented themselves *pro se*. Barbara J. Dykes and Brent D. Lloyd appeared for Respondent Snohomish County. Scott Missall represented Intervenor Olsen. Courtney Flora (Snohomish County) and Maureen Mitchell (Olsen) were also present. Numerous property owners and County officials also attended the hearing. Court reporting services were provided by Karen Aligo of Yamaguchi, Obien & Mangio, Seattle. The hearing convened at 12:00 p.m. and adjourned at approximately --- 3:45 p.m. A transcript of the hearing was ordered (**Transcript**).

### **E. Post Hearing Materials**

On June 29, 2001, pursuant to discussion at the HOM, the Board received the following requested information from Snohomish County: 1) Date of aerial photograph [1991] attached to Exhibit 103; and 2) Distances from Clearview LAMIRD to surrounding UGAs [Four distances were provided, three are one mile or less, the last is less than two miles].<sup>[4]</sup> The letter and map indicating distances are assigned an Index No. in Section III, *infra*.

Also on June 29, 2001, pursuant to discussion at the HOM, the Board received Snohomish County’s “Post-hearing Motion to Supplement the Record” (**Co. Motion-Post**). The motion asked the Board to supplement the record with two pending ordinances of Snohomish County.

On July 2, 2001, also pursuant to discussion at the HOM, the Board received the supplemental information it requested on the status of uses along SR 9 in the Clearview LAMIRD created by Ordinance 00-091. The uses described are generally between 172<sup>nd</sup> Street and 164<sup>th</sup> Street. This letter and map containing this information is assigned an Index No. in Section III, *infra*.

The Board did not receive a reply from Petitioners on the Co. Motion – Supp., within the time allotted by the Board.

## **II. presumption of validity, burden of proof and standard of review**

Petitioners challenge Snohomish County's adoption of amendments to its Comprehensive Plan, Future Land Use Map (**FLUM**) and zoning designation, as adopted by Ordinance Nos. 00-091 and 00-094. Pursuant to RCW 36.70A.320(1), Snohomish County's Ordinance Nos. 00-091 and 00-094 are presumed valid upon adoption.

The burden is on Petitioners, Hensley and McVittie, to demonstrate that the actions taken by Snohomish County are not in compliance with the 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 Snohomish County 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 the County'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).

### **iii. board jurisdiction, PRELIMINARY MATTERS and Prefatory note**

#### **A. Board Jurisdiction**

The Board finds that both Petitioners' PFRs were timely filed, pursuant to RCW 36.70A.290(2); Petitioners Hensley and McVittie have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and pursuant to RCW 36.70A.280(1)(a), the Board has subject matter jurisdiction over the challenged ordinances, which amend the County's Comprehensive Plan, FLUM and zoning regulations.

#### **B. PRELIMINARY MATTERS**

##### **Motion to Rescind Intervenor Status (Motion to Strike Olsen's PHB):**

In the June 19, 2001 correspondence noted in Section I.D, *supra*, Petitioner McVittie asks the Board to "rescind" Intervenor status for Roger Olsen based upon an untimely delivery of Olsen's PHB to Petitioner. The Board notes that Intervenor was not a party to the Stipulation to adjust the briefing schedule or HOM, but did receive a copy of the Board's "Order Granting Revision of Hearing and Briefing Schedule." Further the Board notes that it has made several adjustments in the time and location to accommodate the parties. Consequently, in light of the "shifting sands" of the latter stages of this proceeding, the Board finds no harm in Petitioner's receipt of Olsen's PHB within approximately 16 hours of the deadline. Petitioner's Motion to Rescind Intervenor status or strike Olsen's PHB is **denied**.

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Motions to take Official Notice:

-  
Petitioner Hensley asks the Board to take official notice of Title 18 (zoning matrix – Ex. 208 and 1995 and 1996 versions) of the Snohomish County Code (SCC) and the Western Washington Growth Management Hearings Board’s Final Decision and Order in WWGMHB Case No. 00-2-0031c, *Panesko v. Lewis County*. Hensley PHB, at 9 and 23, footnotes 18, 35, 59 and 60.

Petitioner McVittie requests that the Board take official notice of the Snohomish County Code. McVittie PHB, at the caption. The County agreed that the Board may take notice of these items. Pursuant to WAC 242-02-660, the **Board takes notice** of these items.

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Motions to Strike and Supplement:

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In Petitioner McVittie’s June 25 filing, she requests that the Board not allow material in the record. McVittie challenges Attachments C, D and E (*sic* G) to the County PHB as not being part of the record. Motion to Strike, at 1. It is undisputed that these items are not part of the record. However, at the HOM the County requested that the Board take official notice of these items or allow the record to be supplemented. Attachment C is an excerpt [p. 120] from Rural by Design: Maintaining Small Town Character, by Randall Arendt. Attachment D is a Note [Comment] appearing in the Harvard Environmental Law Review, Vol. 22, 559-606, entitled The Land Use Study Commission and the 1997 Amendments to Washington State’s Growth Management Act, by Jared Black. Attachment G is a copy of King County Ordinance No.14094, amending King County’s zoning moratorium for new permits for schools and churches. County PHB, Attachments C, D and G.

Both the County and Petitioner McVittie were afforded the opportunity at the HOM to explain the need for, and contest, these materials. Pursuant to WAC 242-02-660, the **Board takes notice** of Attachments D<sup>[5]</sup> and G. Regarding Attachment C (Rural by Design excerpt) the **Board takes notice** pursuant to WAC 242-02-670(3) – Technical or scientific facts within the Board’s specialized knowledge. In past cases the Board has made reference to this and other works by Randal Arendt that address the rural landscape. Petitioner’s Motion to Strike is **denied**, Respondent’s Motion to Supplement is **granted**.

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Petitioner McVittie also moved the Board to Supplement the record in one of the June 25, 2001 filings. Petitioner asks the Board to include in the record a June 18, 2001 memo from County staff to the County Council, regarding amendments to the transportation element that include road improvements in and through part of the Clearview LAMIRD. Motion – Supp., at 1. The County objected to inclusion of this memo. Co. Objection – Supp, at 1-3. However, the since the motion was made, the County Council enacted the Ordinance in question (Ordinance No. 01-040). Both parties urged the Board to take notice of the Ordinance, which contains the

amendments addressed in the staff memo. The **Board takes notice** of Ordinance No. 01-040; the motion to include the staff memo is **denied**.

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Post-hearing Information Requested:

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The date of aerial photograph attached to Exhibit 103 is 1991. The County's 6/29 letter transmitting this information is assigned an additional Index number.

The County's 6/29 letter indicates the distances from the Clearview LAMIRD to surrounding UGAs as: 1) LAMIRD at 184<sup>th</sup> to Maltby UGA – 1 mile; 2) LAMIRD at 180<sup>th</sup> west to UGA – 1.9 miles; 3) LAMIRD at 164<sup>th</sup> west to UGA - .85 mile; and 4) LAMIRD north along SR 9 to UGA - .89 mile. The County's 6/29 letter and map indicating distances are assigned one Index number. Intervenor Olsen's 7/10 letter and map indicates that the County's measurements are "as the crow flies", and suggests the driving distances are approximately 2.1 miles for distances 1 and 2, *supra*. Intervenor's letter is assigned one Index number.

The status of uses along SR 9 (generally between 172<sup>nd</sup> Street and 164<sup>th</sup> Street) within the Clearview LAMIRD created by Ordinance No. 00-091 are described in the County's 6/29 letter with accompanying reference map. The 6/29 letter and map describing the status of uses are assigned one Index number.

Post-hearing Motion to Supplement:

Also on June 29, 2001, pursuant to discussion at the HOM, the Board received Snohomish County's "Post-hearing Motion to Supplement the Record" (**Co. Motion-Post**). The motion asked the Board to supplement the record with two pending ordinances of Snohomish County. The Board did not receive a reply from Petitioners on the Co. Motion – Post, within the time allotted by the Board.

The first of the County's two proposed ordinances relates to Clearview Rural Commercial Development Standards; the second adopts an area-wide rezone within the Clearview Rural Commercial Area. These ordinances have been prepared by the County's Department of Planning and Development Services and recommended for adoption by the County's Planning Commission. Co. Motion – Post, at 1. The Board notes that, at the time of their submittal to the Board, neither of these proposals has been reviewed, considered or adopted by the County. The Board recognizes that these proposals are "works in progress" that may or may not be adopted in their present form and consequently would be of limited utility to the Board in rendering its decision. Nonetheless, they indicate the County's intent and verify that the County has not implemented the Clearview LAMIRD; consequently, the **Board takes notice** of these two proposals for this limited purpose.

## Summary Table:

The Board finds that the items discussed above, and summarized in the following table, are determined to be potentially necessary or of substantial assistance to the Board in reaching its decision in this matter. However, the Board notes that these exhibits, based on their relevancy, have been accorded the weight they deserve in reaching the Board's decision.

| <b>Proposed Exhibit: Documents</b>  | <b>Revised Index No.</b>  |
|---|---|
| 1. Title 18 SCC – zoning matrix, including 1995 and 1996 versions             | <b>Board take notice</b> - Index No. 1 - HOM  |
| 2. WWGMHB FDO in <i>Panesko v. Lewis Co.</i>                                  | <b>Board take notice</b> - Index No. 2 - HOM  |
| 3. SCC – generally (of relevant Titles and chapters provided by the parties)  | <b>Board take notice</b> - Index No. 3 - HOM  |
| 4. Rural by Design – Attachment C   | <b>Board take notice</b> - Index No. 4 – HOM  |
| 5. Harvard Environmental Law Review – Attachment D.                           | <b>Board take notice</b> - Index No. 5 – HOM  |
| 6. King County Ordinance No. 14094 – Attachment G.                            | <b>Board take notice</b> - Index No. 6 – HOM  |
| 7. Snohomish County Ordinance No. 01-040.                                     | <b>Board take notice</b> - Index No. 7 – HOM, inclusion of the staff memo is <b>denied</b>                      |
| 8. 6/29 County letter indicating date for Ex. 103 aerial photograph (1991)    | <b>Admitted</b> - Index No. 8 – HOM   |
| 9. 7/2 County letter and map indicating distances from LAMIRD to UGAs         | <b>Admitted</b> - Index No. 9 – HOM   |
| 10. 6/29 County letter indicating the status of uses along SR 9 within LAMIRD | <b>Admitted</b> - Index No. 10 – HOM  |
| 11. 7/10 Intervenor letter indicating distances from LAMIRD to UGAs.          | <b>Admitted</b> - Index No. 11 – HOM  |
| 12. Two pending Ordinances relating to implementing the Clearview LAMIRD      | <b>Board takes notice</b> - Index No. 12a – HOM (development standards); Index No. 12b – HOM (area-wide rezone) |

### **c. Prefatory Note**

The Board will first address the challenges to the County's designation of the Clearview area as a LAMIRD, then the challenges to the County's Maltby UGA designation. Finally the Board addresses the requests for Invalidity. Petitioner McVittie's challenge is limited to the Clearview

LAMIRD designation. Within the Board’s discussion of the Clearview LAMIRD, the Board addresses the Legal Issues in the following order: 2, 4, 6, 3, 5 and 1. The Legal Issues for the Maltby challenge are discussed in the following order: 1, 2, 3, 4, 5 and 6.

**iv. legal issues**

**A. CLEARVIEW LAMIRD ISSUES**

**Legal Issue 2**

The Board’s PHO set forth Hensley Legal Issue No. 2, [\[6\]](#) as follows:

- *Did the County fail to comply with the limited areas of more intensive rural development (LAMIRD) requirements of RCW 36.70A.070(5), when it adopted the Clearview amendments?*

**Applicable Law**

The pertinent portions of RCW 36.70A.070(5), regarding LAMIRD creation, provide as follows:

(d) *Limited areas* of more intensive development [LAMIRDs]. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:

(i) Rural *development consisting of the infill, development, or redevelopment of existing* commercial, industrial, residential, or mixed-use *areas*, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments. A commercial, industrial, residential, shoreline, or mixed-use area shall be subject to the requirements of (d)(iv) . . . .

(ii) The intensification of development on *lots* containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development. . . .

...

(iv) A county shall adopt *measures to minimize and contain the existing areas* or uses of more intensive development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing

a new pattern of low-density sprawl. *Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominantly by the built environment*, but that may also include undeveloped lands if limited as provided in this subsection. *The county shall establish the logical outer boundary of an area of more intensive rural development.* In establishing the logical outer boundary the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the preventions of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl.

(v) For purposes of (d) of this subsection, *an existing area* or existing use is one that was in existence: (A) On July 1, 1990, in a county that was initially required to plan under the provisions of this chapter. . . .

(Emphasis supplied.) The Board concurs with, and adopts by reference, the Western Washington Growth Management Hearings Board’s “.070(5) Framework Analysis” as found in *Panesco v. Lewis County (Panesco)*, WWGMHB Case No. 00-2-0031c, Final Decision and Order (Mar. 5, 2001), at 20-28.

## Discussion

The threshold question on this issue pertains to the County’s delineation of the Clearview LAMIRD. The Clearview LAMIRD lies within a rural area of unincorporated south Snohomish County. Within a few miles to the north, west and south lies the County’s previously designated UGAs. On the FLUM, the Clearview area appears to fall within the open jaws of these UGAs. SR 9 bisects this rural area resembling a stick holding the UGA jaws apart. The Clearview LAMIRD is a node on the middle of this stick [SR 9]. Finding of Fact (FOF) 1, and FLUM.

An initial step in creating a LAMIRD is the clear identification of the area’s logical outer boundary (LOB). The LOB requirements of (d)(iv) apply only to LAMIRDs designated pursuant to (d)(i), <sup>[7]</sup> for “development consisting of the *infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas.*” The area(s) to be contained by the LOB are the “existing areas” as defined in (d)(v). These existing areas are those areas containing manmade structures in place (built) by July 1, 1990. *See: Panesco*, at 26. The built environment, as of 1990, in the Clearview area is shown in Ex 83, Map A-1; and Ex. 84, Map A-1. The existing land use inventory [1998] is shown in Ex. 84, Map A-2. The delineation of the Clearview Rural Commercial Area, the LOB for the Clearview LAMIRD, is depicted in Ex. 75, Ordinance No. 00-091, Exhibit B.

Hensley argues that the existing area should only include the commercial uses, the built environment, that existed on July 1, 1990, not those that were permitted or vested between 1990 and 2000 or the other undeveloped lands the County considers infill. She refers to County maps indicating two nodes of existing commercial uses, generally centered along SR-9 at 164<sup>th</sup> Street and 180<sup>th</sup> Street. She cites to the alternatives discussed in the County's Supplemental Environmental Impact Statement (**SEIS**) and the Planning Commission and staff recommendations, which indicate connecting these nodes would not comply with the requirements of the GMA, to support her contention that the LOB includes too much area. Additionally she argues that the County has not adopted any measures to minimize or contain the existing areas. Hensley PHB, at 21-33; *citing* Exs. 75, 83 and 84; *See also* FOF 2-13.

In response, the County contends that, “[M]ost of the development contained in the Clearview LAMIRD consists of rural infill of existing areas of commercial development”; and “Most of the commercial development that will occur by virtue of the LAMIRD designation constitutes infill of the areas between already existing commercial developments.” Co. PHB, at 23 and 24, (emphasis supplied). The County also argues that the LAMIRD designation is supported by what is “actually on the ground” and that “land use policy cannot effect positive change unless it is based on an accurate factual foundation. In keeping with this principle, the determination of what constitutes legitimate infill must be made based upon a review of the location of undeveloped land and its relation to commercially developed properties.” In this context, the County contends that the LAMIRD designation is consistent with the concept of infill. Co. PHB, at 26-27. The County argues it has provided measures to contain the existing development by citing to new GPP Plan Policies for the Clearview LAMIRD. Co. PHB, at 28-29. Additionally, the County cites to findings and conclusions in Ex. 75 [Ordinance No. 00-091] to support the LOB for the Clearview LAMIRD. Co. PHB, at 30-35.

Intervenor Olsen argues that only 1/3 of a mile separates the two existing nodes and this intervening land is already characterized by commercial and other non-rural uses. Intervenor also lists the uses on the intervening properties. Olsen PHB, at 7-12.

In reply, Hensley argues that reference to maps and air photos contained in Exs. 83, 103 and 155 support her position that the Clearview LAMIRD does not comply with the requirements of RCW 36.70A.070(5)(d). Hensley Reply, at 1-4.

**Petitioner Hensley has carried her burden of proof and demonstrated that the County has not complied with the LAMIRD requirements of RCW 36.70A.070(5).** The Act requires the LOB to minimize and contain the existing areas of commercial development. The record [particularly Exs. 83 and 84] supports Petitioner's contention that the LOB goes beyond the existing area creating a commercial strip – the “infill” goes beyond the existing development, it is not limited. The County's own findings and conclusions regarding the LAMIRD designation

(See: J<sup>[8]</sup> and K<sup>[9]</sup> in Ordinance No. 00-091, at 6-8) do not support the delineation of the Clearview LAMIRD as a commercial strip. These findings address two existing commercial nodes at intersections along SR-9, but not the designated *infill* area between them. However, the County does attempt to justify a change to the FLUM for this strip commercial infill area, but this justification does not comply with the requirements of .070(5) for including the area in a LAMIRD.

In essence, the County concludes that including 27 acres of infill between the two existing commercial nodes is not as bad as the original proposal to include 103 acres of infill between them.<sup>[10]</sup> A smaller version of a noncompliant designation creating a commercial strip does not change the nature of the noncompliant action. The LAMIRD designation is not limited to the existing area. Finally, although the County points to new plan policies<sup>[11]</sup> that are intended to minimize and contain the LAMIRD, the County admits that it has not implemented them.<sup>[12]</sup> The County's designation of the Clearview LAMIRD **does not comply** with the requirements of RCW 36.70A.070(5).

Having found that the County's action of delineating and designating the Clearview LAMIRD does not comply with the requirements of RCW 36.70A.070(5), it follows that the Plan Policies<sup>[13]</sup> that support the Clearview LAMIRD designation, including the description of uses and restrictions that would have been applicable therein, do not comply with the requirements of the Act. Consequently, the Clearview Area Plan Policies [LU 6.I.1 through LU 6.I.8 and following text] **do not comply** with the requirements of RCW 36.70A.070(5).

## **Conclusion**

The Board finds that the County's delineation, and adoption, of the Clearview LAMIRD, as designated in Ordinance No. 00-091, was **clearly erroneous** and **does not comply** with the LAMIRD requirements of RCW 36.70A.070(5). Further, the Board finds that the adoption of the Clearview Area Plan Policies [LU 6.I.1 through LU 6.I.8 and following text], as contained in Ordinance No. 00-091, was **clearly erroneous** and **do not comply** with the LAMIRD requirements of RCW 36.70A.070(5).

## **Legal Issue 4**

The Board's PHO set forth Hensley Legal Issue No. 4,<sup>[14]</sup> as follows:

- *Did the County fail to comply with the urban growth area (UGA) requirements of*

## ***RCW 36.70A.110(1) and (3), when it adopted the Clearview amendments?***

### **Applicable Law and Discussion**

RCW 36.70A.110 sets forth the requirements for County designation of UGAs. The Clearview amendments, as set forth in Ordinance No. 00-091, reflect no intent to establish or otherwise designate the Clearview area as a UGA; instead, the Ordinance evidences the County's intention to establish the area as a LAMIRD, pursuant to RCW 36.70A.070(5)(d). *See*: Ex. 75, Ordinance No. 00-091; especially Section 1.B, Exhibits A, at 19, Exhibit B (Clearview LAMIRD map); and Co. PHB, at 51.

The UGA designation requirements of RCW 36.70A.110 are not applicable to the County's intended action – designation of the Clearview area as a LAMIRD. Consequently, the Board need not address this issue. As discussed in Legal Issue 2, *supra*, the Board has already determined that the County failed to comply with the LAMIRD designation requirements of RCW 36.70A.070(5). Petitioner's challenge to the County's compliance with RCW 36.70A.110 is misplaced and **dismissed**.

### **Conclusion**

Petitioner Hensley's challenge to the County's compliance with RCW 36.70A.110, regarding the County's adoption of Ordinance No. 00-091 – pertaining to the Clearview LAMIRD, is misplaced and **dismissed**.

### **Legal Issue 6**

The Board's PHO set forth Hensley Legal Issue No. 6<sup>[15]</sup> and McVittie Legal Issue 4,<sup>[16]</sup> as follows:

- ***Did the County fail to comply with the County-wide Planning Policy consistency requirements of RCW 36.70A.210 (CPPs: UG-3, OD-1, 5 and 11, RU-1, 3 and 5, TR-4, 5 and 8), and the internal consistency requirements of RCW 36.70A.070(preamble) (Plan Policies: PE-1.B & B.1, LU-1.B.2, LU-2.B.3 & B.4, LU-3.A.6, LU-6, LU-6.A & 6.A.1, LU-6.B & B.5, LU-6.E.3 & E.4, LU-6.F, & F.1-8, LU-6.I, & I.1-8, LU-10.A.1, TR-1, TR-1.A & A.3, TR-1.B.2 & B.3, TR-1.C.4 & C.5, TR-4, TR-4.B, TR-4.D.1 & D.4 & D.9, TR-4.E.2 & E.4 & E.5, TR-5.A.2 & A.4, TR-7[including all Objective A and B and associated policies], TR-8.B, TR-8.C [and associated policies], TR-9.A.2, TR-9.B.1, TR-10, CF-1.A & A.1, CF-2, CF-10.B, UT-2.B.2, NE-1.B.1, NE-1.C.2, NE-3.C2, NE-4A[and associated policies] and NE-4.D[and associated policies], when it adopted the Clearview amendments?***

- *Did the County fail to comply with the County-wide Planning Policy consistency requirements of RCW 36.70A.210 (CPPs: TR-7 and TR-8), the internal consistency requirements of RCW 36.70A.070(preamble) (Plan Policies: CF-1, text in the transportation section of the Plan, TR-5, TR-8, TR-9, capital facility plan and transportation element), when it adopted the transportation amendments and Clearview amendments?*

### **Abandoned Issues**

Legal Issues, or portions of Legal Issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits. March 23, 2001 PHO, at 6-7.

Petitioner Hensley provides no briefing or inconsistency argument regarding the Clearview Area Plan Policies and CPP TR-4, 5 and 8. Hensley PHB, at 42-50. Further, Petitioner Hensley provides no briefing or internal inconsistency argument regarding Clearview Area Plan Policies and Plan Policies: LU-1.B.2, LU-2.B.3 & B.4, LU-3.A.6, LU-6.A.1, LU-6.B & B.5, LU-6.I, & I.1-8, LU-10.A.1, TR-1, TR-1.A & A.3, TR-1.B.2 & B.3, TR-1.C.4 & C.5, TR-4, TR-4.B, TR-4.D.1 & D.4 & D.9, TR-4.E.2 & E.4 & E.5, TR-5.A.2 & A.4, TR-7 [including all Objective A and B and associated policies], TR-8.B, TR-8.C [and associated policies], TR-9.A.2, TR-9.B.1, TR-10, CF-1.A & A.1, CF-2, CF-10.B, UT-2.B.2, NE-1.B.1, NE-1.C.2, NE-3.C2, NE-4A[and associated policies] and NE-4.D[and associated policies]. Hensley PHB, at 50-54. Issues, or portions of issues not briefed are deemed **abandoned**. WAC 242-02-570.

Petitioner McVittie provides no briefing or inconsistency argument regarding the Clearview Area Plan Policies and CPP TR-7. McVittie PHB, at 14-16. Additionally, Petitioner McVittie provided no briefing or internal inconsistency argument regarding the Clearview Area Plan Policies and Plan Policy TR-8. McVittie PHB, at 16-21. Issues, or portions of issues not briefed are deemed **abandoned**. WAC 242-02-570.

### **Applicable Law and Discussion**

The relevant consistency provision of RCW 36.70A.210(1), provides:

For the purposes of this section, a “county-wide planning policy” is a written policy statement or statements used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required by RCW 36.70A.100.

In some of its earliest cases, the Board interpreted this section to clarify that all comprehensive plans within a county must be consistent with county-wide planning policies (**CPPs**) to ensure the required interjurisdictional consistency. *See: Snoqualmie v. King County*, CPSGMHB Case No. 92-3-004c, Final Decision and Order, (Mar. 1, 1993), at 17; *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008c, Final Decision and Order, (Oct. 23, 1995), at 34; *Association to Protect Anderson Creek v. City of Bremerton*, CPSGMHB Case No. 95-3-0053, Final Decision and Order, (Dec. 26, 1995), at 22. Generally, this consistency requires that the policies from the two documents - a CPP and Plan policy - are compatible; a policy in one document may not thwart the other.

The relevant internal consistency provision of RCW 36.70A.070(preamble), provides:

The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

This internal consistency requirement means that the policies within a plan – one document - are compatible; one Plan policy may not thwart another.

Hensley argues the newly adopted Plan policies for the Clearview area are inconsistent with CPPs UG-3, OD-1, 5 and 11, RU-1, 3 and 5, TR-4, 5 and 8. Hensley PHB, at 42-50. Petitioner McVittie limits her challenge to the County's compliance with CPP TR-8 (b) and (e). McVittie PHB, at 14-16.

Petitioner Hensley challenges the internal consistency of the Clearview Plan Policies with existing Plan Policies PE 1.B & B.1, LU 6, 6.A, 6.A.1, LU 6.E.3 & E.4 and LU 6.F.1-8. Hensley PHB, at 50-54. Petitioner McVittie questions whether the County has *acted consistently* with Plan Policies CF-1, TR-5, TR-8 and TR-9. McVittie PHB, at 16-21. McVittie's arguments are misplaced. The challenge presented in this Legal Issue relates to consistency of Policies and documents, not to whether the County has adopted development regulations that implement its plan [RCW 36.70A.040] nor to whether the County is performing its planning activities and making capital budget decisions in conformity with its plan [RCW 36.70A.120].

As discussed in Legal Issue 2, *supra*, the Board found that the County's delineation and designation of the Clearview LAMIRD did not comply with the requirements of RCW 36.70A.070(5). Also, the Board found that the Clearview Area Plan Policies [LU 6.I.1 through LU 6.I.8 and following text] did not comply with the requirements of RCW 36.70A.070(5). Consequently, the Board need not, and will not, review Plan Policies that support a noncompliant designation for consistency with the County's CPPs or review them for internal consistency with other plan policies.

## Conclusion

As noted *supra*, major portions of this issue have been abandoned. Further, having found that the County's delineation and designation of the Clearview LAMIRD and related Plan Policies did not comply with the requirements of RCW 36.70A.070(5), the Board need not, and will not, review the noncompliant Plan Policies for consistency with the County's CPPs or review them for internal consistency with other plan policies.

## Legal Issues 3 [and 2]

The Board's PHO set forth Hensley Legal Issue No. 3<sup>[17]</sup> and McVittie Legal Issue 2,<sup>[18]</sup> as follows:

- *Did the County fail to comply with the transportation element requirements of RCW 36.70A.070(6), when it adopted the Clearview amendments?*
- *Did the County fail to comply with the level of service (LOS) requirements for state-owned facilities of RCW 36.70A.070(6)(a)(iii)(C) and be guided by goal RCW 36.70A.020(12), when it adopted the transportation amendments and Clearview amendments?*

## Abandoned Issues

Petitioner McVittie provides no briefing or argument regarding how the Clearview LAMIRD fails to comply with the County's Transportation Element.<sup>[19]</sup> Instead her arguments focus on Goal 12.<sup>[20]</sup> McVittie PHB, at 1-22. Issues, or portions of issues not briefed are deemed **abandoned**. WAC 242-02-570.

## Applicable Law and Discussion

The GMA's provisions for the Plan's Transportation Element include numerous requirements, including: the adoption of Level of Service standards for all locally owned arterials to serve as a gauge to judge system performance; actions to bring into compliance local arterials that are below the established LOS; and adoption and enforcement of a concurrency ordinance which prohibits development approval if development would cause the LOS to decline below the LOS established in the Transportation Element. *See*: RCW 36.70A.070(6)(a)(iii)(B) and (D) and RCW 36.70A.070(6)(b), respectively.

Hensley’s arguments challenging compliance with the requirements for the County’s Transportation Element can be simply stated as: three County arterials<sup>[21]</sup> in the Clearview LAMIRD have established LOS standards of “C”<sup>[22]</sup>; the County’s own DSEIS<sup>[23]</sup>, and recent Concurrency report<sup>[24]</sup> indicate that the designation of the Clearview LAMIRD would cause these roads to operate at a LOS below the adopted LOS C; consequently the County can not designate the area as a LAMIRD. Hensley PHB, at 34-37.

The County counters that Petitioner Hensley has failed to support her claim, that it is not a foregone conclusion that traffic will worsen as the result of the Council’s designation of the Clearview LAMIRD, and the Council included in the Ordinance the finding that the “[LAMIRD] amendments are consistent with the transportation element of the GMACP and will minimize the need for future traffic improvements. The compact nature of more intense rural development will facilitate more efficient transit service.” Co. PHB, at 48-51.

The Board is not persuaded by the County’s responses, that Petitioner Hensley has not simply and clearly met her burden of proof on this issue. However, the Board does not, and need not, hold here that she has. The Board need not address compliance with RCW 36.70A.070(6) for the following reasons: 1) the Board has already concluded that the Clearview LAMIRD, and reciprocal Plan policies, do not comply with the Act; 2) the Board notes that it has already **remanded** the County’s attempted adoption of the Transportation Plan amendments for inadequate notice<sup>[25]</sup>; and 3) review for compliance with the 1995 Transportation Element, as opposed to the recently adopted [and remanded] amendments to the Transportation Element is an inefficient use of the Board’s resources.<sup>[26]</sup>

### **Conclusion**

As noted *supra*, portions of this issue have been abandoned. Further, having found that the County’s delineation and designation of the Clearview LAMIRD and related Plan Policies did not comply with the requirements of RCW 36.70A.070(5), the Board need not, and will not, review them for compliance with RCW 36.70A.070(6).

### **Legal Issue 5**

The Board’s PHO set forth Hensley Legal Issue No. 5,<sup>[27]</sup> as follows:

- *Did the County fail to comply with the requirements of RCW 36.70A.120, which requires planning activities and capital budget decisions to be made*

*consistently with the comprehensive plan, when it adopted the Clearview amendments?*

## **Applicable Law and Discussion**

RCW 36.70A.120 provides:

[Snohomish County] shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

Hensley argues, “Very simply put, the planning activities of the County and the capital budget decisions pertaining to transportation do not conform as required by law. The County’s road improvements and financing are non-existent in the capital budget and the planning activities of the County call for increased development without funding road improvements.” Hensley PHB, at 41. The County counters that Petitioner has abandoned this issue and contends that “noncompliance with RCW 36.70A.120 cannot be established without a much more detailed analysis than Petitioner has provided.” County PHB, at 52-53. The Board agrees with the County, Petitioner must provide more detailed argument to carry the burden of proof. Petitioner Hensley has failed to carry the burden of proof on this issue.

## **Conclusion**

Petitioner Hensley has **failed to meet the burden of proof** on this issue. Petitioner’s challenge to the County’s compliance with RCW 36.70A.120 is **dismissed**.

## **Legal Issue 1**

The Board’s PHO set forth Hensley Legal Issue No. 1, <sup>[28]</sup> as follows:

- *Did Snohomish County (the County) fail to be guided by goals RCW 36.70A.020 (1), (2), (3), (5), (10) and (12), <sup>[29]</sup> when it adopted the Clearview Rural Commercial area in Ordinance No. 00-91 (Clearview amendments)? <sup>[30]</sup>*

## **Abandoned Issues**

Petitioner Hensley failed to brief the challenge to compliance with goal 5. Issues, or portions of issues not briefed are deemed **abandoned**. WAC 242-02-570.

## **Applicable Law**

RCW 36.70A.020 articulates the GMA's goals. These goals are to be used for guiding the development of comprehensive plans and development regulations. The relevant GMA goals involved in this Legal Issue are, as follows:

- (1) Urban growth. Encourage urban development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
- (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

...

- (5) Economic Development. **Abandoned**

...

- (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

...

- (12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

The Board has explained:

[T]o show substantive noncompliance with a planning goal, a petitioner must identify that portion of the challenged enactment that is not consistent with, or thwarts, the planning goal, and explain why the identified portion does not comply with that goal.

*Rabie v. City of Burien*, Consolidated CPSGMHB Case No. 98-3-0005c, Final Decision and Order, (Oct. 19, 1998), at 5

## Discussion

### Goals 1 and 2:

Petitioner Hensley argues that the County's delineation and designation of the Clearview LAMIRD was not guided by RCW 36.70A.020(1) and (2), because it created a commercial strip

beyond the UGA, thus thwarting goals (1) and (2). Hensley PHB, at 8-14. The County responds that, “It is axiomatic that allowing ‘more intensive rural development’ has the potential to detract from the development in UGAs.” Also, the County argues it must balance the goals of the GMA and that “The fact that the Clearview LAMIRD complies with RCW 36.70A.070(5)(d) indicates that the balance of goals struck by [Ordinance No. 00-091] is well within the legislative intent of ESB 6490.” Co. PHB, at 39 and 41. Intervenor contends the ordinance complies with goal 2. Olsen PHB, at 20.

Goals 1 and 2 provide guidance for the development of numerous elements of a county’s comprehensive plan, including the rural element. The GMA enables jurisdictions to weigh and balance the goals of the Act in developing their plans and implementing regulations. However, the Board has found that the County’s adoption of the Clearview LAMIRD and Clearview Plan Policies do not comply with the *requirements* of RCW 36.70A.070(5); failure to comply with a GMA requirement supports the allegation that the action has not been guided by the supporting goal(s) of the Act. Here, since the County has not complied with the requirements of RCW 36.70A.070(5), the Board concludes that the County’s adoption of the Clearview LAMIRD and Clearview Plan Policies was **not guided** by RCW 36.70A.020(1) and (2). Notwithstanding the discretion afforded to local jurisdictions, the balance struck here was not consistent with the intent of the State Legislature.

### Goal 3:

Hensley asserts, “the transportation needs for this LAMIRD are out of sync with [Washington State Department of Transportation (**WSDOT**)] regional priorities. [WSDOT] clearly has indicated that its priorities are state highways of statewide significance. SR 9 will need significant capacity improvements now in order to mitigate the impacts of this LAMIRD and current development.” Petitioner then quotes from comment letters from WSDOT, in the record, indicating that some segments of improvements to SR 9 could more realistically be completed by 2010, not 2006. Hensley PHB, at 14-16. The DSEIS also indicates that under any alternative, traffic volume and congestion will increase with development. Ex. 155, DSEIS, at III-88. The County responds that the LAMIRD will facilitate more efficient transit services, and “Petitioner simply failed to identify how any portion of the challenged enactment thwarts goal 3, and she has therefore failed to carry her burden of proof.” Co. PHB, at 46-47. Intervenor also contends that the ordinance complies with goal 3. Olsen PHB, at 20.

The Board has already found the Clearview LAMIRD to be noncompliant with RCW 36.70A.070 (5). Nonetheless, the Board disagrees with the County’s contention that Petitioner has not met her burden. Petitioner has cited evidence in the record supporting her allegation that the *Clearview LAMID designation* is not compatible with regional transportation priorities. Consequently, the Board finds that the County’s designation of the Clearview LAMIRD was **not**

**guided** by goal 3.

Goal 10:

Petitioner Hensley argues that the designation of the Clearview LAMIRD allows more development and therefore, more impervious surface.” Petitioner then cites to comment letters from the Washington State Department of Fish and Wildlife (**WDFW**), in the record, indicating their concerns regarding the effect of increased impervious cover on water quality. Hensley PHB, at 117-20. *See: Ex. 155, DSEIS, at III-19.* Again the County responds, “Petitioner fails to identify any specific provision of the challenged enactment and explain how that provision is noncompliant with goal 10.” Co. PHB, at 47-48. Although Petitioner has cited to some evidence supporting her allegation that the LAMIRD designation is not compatible with protecting the environment, specifically, water quality, the Board finds that Petitioner has **not carried the burden of proof** on this issue. Hensley’s challenge to the County’s compliance with goal 10 is **dismissed**.

Goal 12:

Petitioner Hensley does not specifically brief goal 12, but relies on argument provided by Petitioner McVittie regarding this challenge. Hensley PHB, at 20.

Review of Petitioner McVittie’s briefs and arguments regarding goal 12 compliance, and the County’s response to those arguments, lead the Board to conclude that the principle thrust of McVittie’s challenge goes to whether the County’s transportation element complies with RCW 36.70A.070(6) *and* goal 12 as it relates to that GMA requirement. The Clearview LAMIRD appears to be used to illustrate noncompliance with .070(6). *See: McVittie PHB, at 4-14; Co. PHB, at 70-86; and McVittie Reply, at 1-20.* As the Board has noted previously, the County’s amended TE, adopted in Ordinance No. 00-091, was remanded – compliance is pending and McVittie has brought a new PFR challenging that action. Additionally, the Board has already found the Clearview LAMIRD to be noncompliant with RCW 36.70A.070(5). Consequently, the Board **dismisses** McVittie’s challenge to whether the *Clearview LAMIRD* was guided by goal 12.

[\[31\]](#)

## **Conclusion**

The County’s adoption of the Clearview LAMIRD and Clearview Plan Policies was **not guided** by RCW 36.70A.020(1) and (2). Further, the County’s designation of the Clearview LAMIRD was **not guided** by RCW 36.70A.020(3). Petitioners’ challenges regarding whether the Clearview LAMIRD was guided by goals 10 and 12 are **dismissed**.

## **Summary of Conclusions Re: Clearview LAMIRD**

The Board finds and concludes that the County's delineation, and adoption of the Clearview LAMIRD and the Clearview Area Plan Policies [LU 6.I.1 through LU 6.I.8 and following text] as contained in Ordinance No. 00-091, was **clearly erroneous** and do **not comply** with the LAMIRD requirements of RCW 36.70A.070(5). The Board has **dismissed** Petitioner Hensley's Legal Issues 4 [compliance with RCW 36.70A.110] and Legal Issue 5 [compliance with RCW 36.70A.120]. The Board has determined that it **need not address** Petitioner Hensley's Legal Issue 6 and Petitioner McVittie's Legal Issue 3 [compliance with RCW 36.70A.210 and .070 (preamble)], nor Hensley's Legal Issue 3 and McVittie's Legal Issue 2 [compliance with RCW 36.70A.070(6)]. The Board finds and concludes that the County's designation of the Clearview LAMIRD was not guided by RCW 36.70A.020(1), (2) and (3) [Goals 1, 2 and 3]. Finally, Petitioners' challenge to compliance with RCW 36.70A.020(10) and (12) [Goals 10 and 12] is **dismissed**.

## **B. mALTBY UGA ISSUES**

### **Abandoned Issues**

Legal Issues, or portions of Legal Issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits. March 23, 2001 PHO, at 6-7.

Petitioner states, "Legal issues 1-5 will be briefed where appropriate in legal issue 6. If a reference or inference to these issues is not suggested, then please consider the [Legal Issue] abandoned. This is being done to simplify the issues and eliminate redundancy." Hensley PHB, at 57. The County asserts that Petitioner has in fact abandoned Legal Issues 1-5 in their entirety. Co. PHB, at 100. Generally, the Board agrees, but notes that the essence of Petitioner's challenge under Legal Issue 6 is that the County's action of adopting the Maltby UGA did not comply with its CPPs and Plan Policies, thus Legal Issue 5 has not been abandoned, it will be discussed along with Legal Issue 6. Pursuant to WAC 242-02-570 issues, or portions of issues not briefed are deemed **abandoned**. Therefore, Petitioner Hensley has **abandoned** Maltby UGA Legal Issues 1-4.

### **Legal Issues 5 and 6**

The Board's PHO set forth Legal Issue Nos. 5 and 6, as follows:

5. *Did the County fail to comply with the requirements of RCW 36.70A.120, which requires planning activities and capital budget decisions to be made consistently with the comprehensive plan, when it adopted the Maltby amendments?*
  
6. *Did the County fail to comply with the County-wide Planning Policy consistency requirements of RCW 36.70A.210 (CPPs: UG-1, 8, and 14, OD-1, 5, 9, 10 and 11, TR-4, 5 and 8), the internal consistency requirements of RCW 36.70A.070 (preamble) (Plan Policies: PE-2.C1, LU-1.A, LU-1.A.2 & A.9 & A.10, LU-1.B & B.2, LU-1.C.3, Objective LU-1.D [and policies], LU-2.B.1 & B.2, LU-2.C.2, LU-10.A.1, TR-1.A & A.3, TR-1.B.2 & B.3, TR-1.C.2 & C.4 & C.5, TR-4, TR-4.D.1 & D.2 & D.4 & D.6, TR-4.E.2 & E.4 & E.5, TR-5.A.4, TR-7 [including all Objective A and B and associated policies], TR-8.B, TR-8.C[and associated policies], TR-9.A.2, CF-1.A and A.1, CF-2, CF-10.B, UT-2.B.2, NE-1.B.1, NE-1.C.2, NE-3.C.2, NE-4.A [and associated policies], and NE-4.D [and associated policies]), and the requirements of RCW 36.70A.215, when it adopted the Maltby amendments? [3/21/01 submittal; Hensley PFR, at 3 – Maltby #6]*

### **Abandoned Issues**

Petitioner Hensley's briefing and argument is limited to challenging the Maltby UGA designation's compliance with RCW 36.70A.120, .210, .215 and consistency with CPP UG-14 and Plan Policy LU-1.A.9. Hensley PHB, at 56-66. The County agrees. Co. PHB, at 100. Hensley, Snohomish County and the Board are all in accord.

Pursuant to WAC 242-02-570 issues, or portions of issues not briefed are deemed abandoned. Therefore, Petitioner Hensley has **abandoned** the following portions of Maltby UGA Legal Issues 6: CPPs: UG-1, 8, OD-1, 5, 9, 10 and 11, TR-4, 5 and 8), the internal consistency requirements of RCW 36.70A.070(preamble) (Plan Policies: PE-2.C1, LU-1.A, LU-1.A.2 & A.10, LU-1.B & B.2, LU-1.C.3, Objective LU-1.D [and policies], LU-2.B.1 & B.2, LU-2.C.2, LU-10.A.1, TR-1.A & A.3, TR-1.B.2 & B.3, TR-1.C.2 & C.4 & C.5, TR-4, TR-4.D.1 & D.2 & D.4 & D.6, TR-4.E.2 & E.4 & E.5, TR-5.A.4, TR-7 [including all Objective A and B and associated policies], TR-8.B, TR-8.C[and associated policies], TR-9.A.2, CF-1.A and A.1, CF-2, CF-10.B, UT-2.B.2, NE-1.B.1, NE-1.C.2, NE-3.C.2, NE-4.A [and associated policies], and NE-4.D [and associated policies]).

### **Applicable Law and Discussion**

Petitioner Hensley's challenge to the designation of the Maltby UGA expansion is basically as follows. Pursuant to RCW 36.70A.215, the County adopted CPP UG -14 to govern UGA expansions; to maintain consistency with this UGA expansion CPP, the County adopted Plan policy LU 1.A.9. The CPP and Plan policy include review and analysis requirements for the expansion of UGAs for residential, commercial and industrial lands. The FLUM designation and rezone accompanying the Maltby UGA designation was for commercial lands. In making this UGA expansion and designations, the County did not comply with its requirements for UGA expansion as provided for in UG-14 and LU 1.A.9. The use of the area, or existence of a concomitant agreement, is meaningless in terms of compliance with these policies. The County has not followed its own policies. Hensley PHB, at 58-66, Hensley Reply, at 39-43.

The County does not dispute that it expanded the Maltby UGA, amended the FLUM and rezoned the area commercial, but essentially argues that the existence of a concomitant agreement limiting the use of the area in dispute, limits the use of the property for use as a church. Since the land cannot be used for commercial purposes, the requirements of UG-14 and LU 1.A.9 are not applicable. Further, the County argues that the Board must accord deference to the County in interpreting its own CPPs. Co. PHB, at 106-117.

The relevant provisions of CPP UG-14, is subsection (d), which provides:

*Expansion of the Boundary of an Individual UGA: Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it complies with the Growth Management Act, and one of the following four conditions are met:*

1. The expansion is the result of the five-year buildable lands review and evaluation required by RCW 36.70A.215.
2. The expansion is the result of the review of UGAs at least every ten years to accommodate the succeeding twenty years of projected growth, as required by RCW 36.70A.130(3).
3. All of the following conditions are met for expansion of the boundary of an individual UGA to include additional residential land [Three conditions are specified relating to population growth, land capacity analysis and reasonable measures to accommodate growth without expanding the UGA.]
4. Both of the following conditions are met for expansion of the boundary of an individual UGA to include additional commercial and industrial land:
  - a). The county and the city or cities within that UGA document that commercial or industrial land consumption within the UGA (city plus

unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the Procedures Report required by UG-14(a), may also be considered as a basis for expansion of a boundary of an individual UGA to include additional commercial or industrial land; and

b). The county and the city or cities within the UGA consider reasonable measures adopted as an appendix to the Countywide Planning Policies pursuant to UG-14(b) that could be taken to increase commercial or industrial land capacity inside the UGA without expanding the boundaries of the UGA.

Ex. 319, Countywide Planning Policies for Snohomish County, as amended by Ordinance No. 99-121, at 4-5, (emphasis supplied). The only section of this CPP that is disputed in this case is UG-14(d).<sup>[32]</sup> There is no ambiguity in UG-14(d) related to whether it applies to the expansion of a UGA that includes commercial land. The plain language of the CPP [and Plan Policy] governs. Simply put, *expansion of a UGA to include commercial land shall not be permitted unless certain conditions are met*. No interpretation is needed, by the Board or the County, to divine its application. The same clarity resonates in Plan Policy LU 1.A.9, which includes UG-14(d) in its entirety.<sup>[33]</sup> Therefore, the question for the Board is what significance, if any, does the concomitant agreement have in relation to UG-14(d) and LU 1.A.9. Does it work to exempt or exclude this action from the provisions of UG-14 or LU 1.A.9?

The County explains that under the County's land use inventory system a church is a quasi-public/institutional use. However, neither the County's FLUM nor zoning code includes a "quasi-public/institutional" use category. Therefore, use of an existing FLUM and zoning category – commercial – is appropriate. However, the County contends, the designation on the FLUM and rezoning to "commercial" does not necessarily mean the land can be used for commercial purposes. To ensure that the property is not designated and zoned for commercial, then used for [commercial] purposes other than a church, the owner of the property signed and recorded a concomitant agreement.<sup>[34]</sup> Ex. 163. Therefore, the County reasons, since the concomitant agreement limits the use of the property for that of a church, and church related facilities, the

property cannot be used for commercial purposes and UG-14(d) and LU 1.A.9 does not apply. Co. PHB, at 106-109.

In reply, Petitioner Hensley reiterates that the issue is not about individualized use of the property, but about the County's refusal to follow its own policies. Hensley Reply, at 39.

Although the Board understands the County's logic, it does not find the County in compliance with the GMA for the following reasons. First, the Board acknowledges concomitant agreements have a long history in this state and have been upheld by our Courts in the pre-GMA *zoning* context; [\[35\]](#) however, concomitant agreements do not readily transfer to the GMA context. GMA planning contains numerous requirements not found in pre-GMA planning. These requirements include, for example: ongoing and extensive public participation, designated and documented UGAs, state articulated goals provide guidance to plans and implementing regulations, required (not optional) comprehensive planning, plans must contain certain elements, plan elements must be consistent, and development regulations must be implemented consistently with the plans – through regulations (*i.e.* zoning) and capital investments. UGA expansion and amendment to a plan [FLUM] designation involves broader issues of public concern and interest than the use of an individual parcel of property. Concomitant “zoning” agreements for a parcel of property cannot be the controlling factor in issues of UGA expansion or comprehensive plan [FLUM] designation.

Second, the Board notes that churches are permitted in virtually all of the County's zoning designations as either outright or conditional uses. Ex. 1-HOM, Zoning Code Use Matrix, 18.32.040 SCC. Consequently, the ultimate use of the property could not have been the impetus for the expansion of the UGA, change in FLUM designation or rezoning.

Third, and related, the County acknowledges, “Prior to the action, this property was located on the edge of the urban growth boundary. It could have been permitted outside the urban growth boundary, but would not have had sewers available. The scale of the use is such that it is more appropriate in the urban area.” Co. PHB, at 113; *see also*, Ex. 164.

Fourth, there is no language in UG-14 or LU 1.A.9 that indicates that “commercial land” means anything other than what is designated on the FLUM or Zoning maps. The concomitant agreement does not alter this fact. Therefore, the inescapable conclusion is that expanding the Maltby UGA to include the 13 acres as “urban commercial” is commercial land falling within the purview of UG-14(d) and LU 1.A.9. FOF 14-16.

The Board does not disagree with the County that this church use is more appropriate in the urban area, but the issue here is whether the UGA was expanded consistently with the County's own policies. The availability and adequacy of capital facilities, such as sewers, is a significant factor

in the designation and/or expansion of UGAs and cannot be glossed over lightly. *See*: RCW 36.70A.215(2)(a) and .110(3) and (4). Since the availability of sewers was a determining factor in the expansion, not the ultimate use of the property, the Board finds that the rationale provided by the County for concluding that CPP UG-14(d) and LU 1.A.9, did not apply to the Maltby amendments was in error.

For the reasons stated above, the Board finds UG-14(d) and LU 1.A.9 are applicable to the County's expansion of the Maltby UGA and "urban commercial" designation on the FLUM and rezoning, as accomplished by the adoption of Ordinance Nos. 00-091 and 00-094. The County's adoption of the Maltby amendments in Ordinance Nos. 00-091 and 00-094 was **clearly erroneous** and **does not comply** with the consistency requirements of RCW 36.70A.210, 070 (preamble) and .120.

Finally, the Board recognizes, as the County explains, it has not fully completed all aspects of its "buildable lands" process as required by RCW 36.70A.215. The County is correct, that full compliance with RCW 36.70A.215 is not required to be completed until September 1, 2002. However, portions of the County's "buildable lands" process have been completed, adopted and are effective, including the guiding principle of UG-14 – "Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it complies with the [GMA] and one of the following four conditions are met." If the conditions have not yet been fully defined, by necessity, the prohibition on UGA expansion is operative until such time as they are established and applied.

### **Conclusions**

The Board finds that the rationale provided by the County for determining that CPP UG-14(d) and LU 1.A.9, did not apply to the Maltby amendments and their subsequent adoption was **clearly erroneous**. UG-14(d) and LU 1.A.9 **are applicable** to the County's expansion of the Maltby UGA, "urban commercial" designation on the FLUM and rezoning, as set forth in Ordinance Nos. 00-091 and 00-094. The County's adoption of the Maltby amendments in Ordinance Nos. 00-091 and 00-094 **does not comply** with the consistency requirements of RCW 36.70A.210, 070(preamble) and .120. The Ordinances will be **remanded** and the County directed to take legislative action to comply with the requirements of the GMA.

### **C. INVALIDITY REQUEST**

Both Petitioners assert that the County's actions substantially interfere with the goals of the Act and urge the Board to enter a determination of invalidity. Hensley PHB, at 55 and 66; McVittie PHB, at 21.

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 county. 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 county or city or to related construction permits for that project.

The Board has found that the County's adoption of the Clearview LAMIRD and Clearview Plan Policies, in Ordinance No. 00-091, did not comply with the requirements of RCW 36.70A.070(5) and was not guided by the goals stated in RCW 36.70A.020(1), (2) and (3). Further, the Board has found that the County's adoption of the Maltby UGA, in Ordinance No. 00-094, did not comply with the requirements of RCW 36.70A.120 or .210. This Order will **remand** these Ordinances for remedial action by the County. Consequently, pursuant to RCW 36.70A.302, the Board now considers whether to enter a determination of invalidity on either or both of the actions embodied in these Ordinances.

#### Clearview LAMIRD:

The Board has found the designation of the Clearview LAMIRD and Clearview Plan Policies **noncompliant** with RCW 36.70A.070(5) and not guided by Goals 1, 2 and 3 [RCW 36.70A.020 (1), (2) and (3)]. However, the County has **not** adopted development regulations to implement this designation or these policies. Therefore, absent such implementing regulations, no vesting to the designation can occur, making a finding of invalidity unnecessary. Consequently, **the Board declines to enter a determination of invalidity** for the Clearview LAMIRD designation and Clearview Plan Policies.

## Maltby UGA:

The Board has found the designation of the Maltby UGA, FLUM designation and rezoning to be **noncompliant** with RCW 36.70A.120, .070(preamble) and .210. In adopting the Maltby amendments, the County adopted changes to its regulations to implement these noncompliant designations. The County has attempted to expand and designate a UGA without complying with its own CPP and Plan Policy which would require compliance with RCW 36.70A.020(1). The County did not determine that adequate public facilities and services existed or could be provided in an efficient manner to the expanded Maltby UGA, therefore, the County's action substantially interfered with fulfillment of Goal 1. The Board enters a **determination of invalidity** for Ordinance Nos. 00-094 and 00-091, related to the Maltby UGA, FLUM designation and rezoning.

## **V. ORDER**

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

Snohomish County's adoption of Ordinance No. 00-091, as it applied to the Clearview LAMIRD designation and Clearview Plan Policies, was **clearly erroneous** and **does not comply** with the LAMIRD requirements of RCW 36.70A.070(5) and was not guided by the goals of RCW 36.70A.020(1), (2) and (3), as set forth and interpreted in this Final Decision and Order (**FDO**).

Additionally, Snohomish County's adoption of Ordinance Nos. 00-091 and 00-094, as it applied to the expansion of the Maltby UGA, FLUM designation and rezoning, was **clearly erroneous** and **does not comply** with the consistency requirements of RCW 36.70A.210, .070(preamble) and .120, as set forth and interpreted in this FDO. Further, the Board enters a **determination of invalidity** on the adoption of these Ordinances, as they pertain to the Maltby UGA, FLUM designation and rezoning, since the County's action substantially interferes with the fulfillment of goal 1 (RCW 36.70A.020(1)).

The Board therefore, **remands** Ordinance Nos. 00-091 and 00-094 to the County with the following directions:

1. By no later than **November 14, 2001**, the County shall take appropriate legislative action to repeal, amend or otherwise modify the Clearview LAMIRD

and Plan Policies, as adopted in Ordinance No. 00-091, to comply with the requirements of RCW 36.70A.070(5), and be guided by the GMA goals of RCW 36.70A.020(1), (2) and (3).

2. Also, by no later than **November 14, 2001**, the County shall take appropriate legislative action to repeal, amend or otherwise modify the Maltby UGA, FLUM designation and rezoning, as adopted in Ordinance Nos. 00-091 and 00-094, to comply with the consistency requirements of RCW 36.70A.210, .070(preamble) and .120.

3. By no later than **November 21, 2001**, the County shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with the GMA, as set forth in this FDO. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on Petitioners Hensley and McVittie, and Intervenor Olsen.

Pursuant to RCW 36.70A.330(1), upon receipt of the County's SATC the Board will schedule a Compliance Hearing and establish dates for Comments on the SATC for Petitioners and Replies by the County and Intervenor.

If the County takes legislative compliance actions prior to the November 14, 2001 deadline set forth in section 1 or 2 of this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 15<sup>th</sup> day of August 2001.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member

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Lois H. North,

Board Member

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Joseph W. Tovar, AICP

Board Member (*See also*: Concurring Opinion)

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.

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**Board Member Tovar's Concurring Opinion**

I concur with my colleagues' rationale and the outcome regarding the expansion of the Maltby UGA. I write separately here to clarify why the County's reliance on a concomitant agreement in this specific instance was misplaced, particularly in view of the other alternatives apparently available to achieve the County's policy objectives. I also would like to voice a more general concern about reliance on concomitant agreements in the context of county legislative actions pursuant to the GMA, such as UGA expansions or rural land use designations.

Notwithstanding the fact that the Future Land Use Map designates the land in question as “urban commercial” (Finding of Fact 15) the County’s legislative body here relies on a private agreement to effectively designate it “church use only.” At the hearing on the merits, I asked about the process for revoking or extinguishing the concomitant, and queried whether such revocation would require notice, a hearing or provision for an appeal. The County pointed to none. Instead, it agreed with Hensley’s assertion that the concomitant is something that the County could revoke at “any point in time,” but seemed to suggest that it could achieve a similar result by simply amending its plan. Transcript at 100-101. This response reveals a fatal flaw in the County’s approach. Unlike the revocation of a concomitant agreement, the revocation of the County’s land use plan, whether on a wholesale or a partial basis, would be subject to the goals and requirements of the GMA, including notice pursuant to RCW 36.70A.035, public participation pursuant to RCW 36.70A.130/.140, and provisions for appeal pursuant to RCW 36.70A.280.

Stepping back and examining the County’s policy objective (i.e., to expand the UGA for a very narrow range of permitted uses) it is clear that there are several GMA-compliant alternatives available to the County to achieve this end. For example, at the hearing on the merits, I asked the County if anything prohibited it from simply amending its future land use map and comprehensive plan to create a category (e.g., “public/institutional) to correspond to the designations in the land use inventory. The response was “no.” Transcript, at 106. This would seem to be one, albeit not the only, way in which the County could respond.

Finally, I would sound two cautions to local governments concerning the use of “concomitant agreements” in the land use arena. First, the scope and nature of legislative actions under the GMA (e.g., adoption/amendment of comprehensive plans or development regulations) are fundamentally different from the scope and nature of development permits. Instruments such as concomitant agreements may still have utility as applied to permits, however, as illustrated here, are problematic at best when applied to legislative GMA actions. Second, I would caution against reliance on applicability of the “conditional rezoning doctrine” to GMA legislative actions. All of the court cases cited by the County describing this doctrine were pre-GMA (i.e., pre-1990) cases. There is no post-1990 case law that attempts to apply or reconcile the “conditional rezoning doctrine” with the legislative component of the land use decision-making regime under the GMA.

## **APPENDIX A**

### **Findings of Fact**

1. The Clearview area lies in unincorporated south Snohomish County. The area extends from just north of SE 164<sup>th</sup> Street on the northern boundary to south of 184<sup>th</sup> Street SE on

the southern boundary. State Route 9 (**SR-9**) bisects the area. Co. PHB, at 7

2. The 1987 Cathcart – Maltby – Clearview Area Comprehensive Plan (**'87 CMC Plan**) recognized two existing commercial nodes in this area along SR 9. The northern node was generally centered on the intersection of SR 9 and 164<sup>th</sup> Street; the southern node is generally centered on the intersection of SR 9 and 180<sup>th</sup> Street. Along SR-9, the distance between the southern boundary of the southern commercial node and the northern boundary of the northern commercial node is approximately 1.7 miles; approximately .6 miles of rural land separates the two commercial nodes. Ex. 323, '87 CMC Plan; Ex. 83, maps.

3. Within the Clearview Area, the County identifies approximately 50-acres of existing commercial land or uses. 35.5-acres of commercial area or uses are identified as being in existence in 1990. An additional 14.3-acres are identified as “permitted” or “vested” between 1990 and 2000. Ex. 84, Maps A-1 and A-2 (from SEIS).

4. The existing zoning provides for approximately 85 acres of commercial use. The existing zoning for the southern node (approximately 68-acres) is predominantly community business [CB]. The existing zoning for the northern node (approximately 17-acres) is neighborhood business [NB]. None of the area is designated as rural business [RB]. Ex. 155, DSEIS, at II-8 and Appendix C – map (figure 2).

5. As part of its RCW 36.70A.130 and .470 annual plan review process, the County's Department of Planning and Development Services (**PDS**), and consultants, prepared a series of alternatives to be evaluated for the entire 193-acre Clearview Area – two nodes and land in-between. These alternatives formed the basis of the analysis in the County's Supplemental Environmental Impact Statement (**SEIS**), which, in turn, is intended to support the County's decisions regarding the designation of the Clearview LAMIRD. Co. PHB, at 9-11, Ex. 155.

6. The SEIS evaluated three alternatives for the Clearview LAMIRD. Ex. 155, SEIS.

7. Alternative 1, the “No Action” alternative, would designate 90-acres in the Clearview LAMIRD as rural commercial. Generally, this alternative would add 5 acres to the northern commercial node, but otherwise maintain the two-node configuration (north node = 22-acres, south node = 68-acres). Ex. 155, at II-8 and Alternative 1 Map.

8. Alternative 2, would designate 112-acres in the Clearview LAMIRD as rural commercial. Generally, under this alternative the northern node is the same as Alternative 1 (22-acres), but 22 acres are added to the southern commercial node east of SR-9 (90-acres). This alternative maintains the two-node configuration. Ex. 155, at II-9-10 and

## Alternative 2 Map.

9. Alternative 3 would designate 193-acres in the Clearview LAMIRD as rural commercial. Basically, this alternative includes the northern commercial node, the southern commercial node, and connects them with all the lands between them on both the east and west side of SR-9. Ex. 155, at II-15-16 and Alternative 3 Map.

10. The Snohomish County Planning Commission recommended that the Clearview LAMIRD include approximately 99-acres of rural commercially designated land. This recommendation, referred to as Alternative 1-A, added 9-acres to the northern boundary of the southern node, approximately half to the east and half to the west of SR-9. Alternative 1-A maintained the two-node configuration. Ex. 81, Proposed Amendment Map.

11. The Snohomish County Council, in adopting the Clearview LAMIRD in Ordinance No. 00-091, included 127-acres as rural commercial. The Council's action included Alternative 1-A and added approximately 28-acres to connect the northern and southern commercial nodes. Approximately  $\frac{3}{4}$  of the acreage added by the Council lies west of SR-9. Ex. 75, Ordinance No. 00-091, Sections 1, 4, 5 and Exhibits A (text) and B (Clearview LAMIRD map).

12. Ordinance No. 00-091 adopted Map and Text amendments to the County's GMA Comprehensive Plan. Ex. 75.

13. The County has not adopted development regulations or zoning to implement the Clearview LAMIRD. Ex. 75, and 12a and 12b – HOM.

14. Ordinance No. 00-094 expands the Maltby UGA to include the 13 acres within the challenged area. Ex. 77, Ordinance No. 00-094, Section 3, Exs. A and B.

15. Ordinance No. 00-094 redesignates the expanded Maltby UGA area from Rural Residential and Rural/Urban Transitional Area to "**Urban Commercial**". Ex. 77, Ord. No. 00-094, Section 4, Exs. A and B. The Board notes that Ex. B to this Ordinance indicates a "PCB [Planned Community Business] designation, per SCC 18.12.030.

16. Ordinance No. 00-091 amends the County's FLUM to change the 13 acres within the challenged Maltby area from Rural Residential and Rural/Urban Transitional Area to "**Urban Commercial**." Ex. 75, Ordinance No. 00-091, Section 2 and Ex. B-1.

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<sup>[1]</sup> Intervenor Olsen was not a signator of this stipulation.

[2] Petitioner McVittie filed her Reply brief with page number corrections corresponding to the County's corrected PHB. This document will continue to be referenced as "McVittie Reply."

[3] The Ordinance in question is intended to comply with the Board's remand of a portion of this case related to the defective notice for the original adoption of the County's Transportation Element - Exhibit C to Ordinance No. 01-040. See: Order on Dispositive Motion [Motion to Invalidate], April 30, 2001.

[4] On July 10, 2001, the Board received a letter from Intervenor Olsen, indicating that the mileage shown in the County's letter was "as the crow flies", not driving distances, nor driving distances to goods and services within the UGAs. This letter indicated the driving distance to two points, south and west of the Clearview LAMIRD, both were approximately 2.1 miles.

[5] The Board interprets WAC 242-02-660, which allows the Board to take official notice of journals and committee reports, to include and encompass notes, comments or law review articles on state legislation.

[6] Hensley PFR, at 2 – Clearview Issue #2.

[7] As the Western Board stated in *Panesko*, at 25: "LAMIRDs designated under (d)(ii) or (iii) are defined and bounded by 'lots' and thus LOB requirements become irrelevant." Although the County argues that it is not precluded from including "tourist-oriented development [apparently lots per (d)(ii)] such as art galleries, antique stores, and lodging facilities among the *uses* permitted" within the Clearview LAMIRD, it does not dispute, and in fact argues that the Clearview LAMIRD was designated pursuant to RCW 36.70A.070(5)(d)(i). Co. PHB, at 36; Ex. 75, at 3-12, Exhibit A, at 19-21 and Exhibit B; and Co. PHB, at 23-35.

[8] *The northern existing rural commercial designation area* is located at the intersection of State Route 9 and 164<sup>th</sup>. *The "limited area of more intensive development" will not extend beyond the existing area or use, which is delineated predominantly by the built environment.* Its designation as a "limited area of more intensive rural development is supported by the following findings:

1. This intersection is clearly identifiable as an existing commercial area. There are existing commercial developments on two corners of this intersection that existed prior to July 1, 1990; and permits are pending for a commercial use on the third corner. This area has historically been a commercial area, and is designated for Rural Commercial uses on the FLU map of the GPP.
2. The need to preserve the character of existing natural neighborhoods and communities. The Boundary for the Clearview Rural Commercial designation at this intersection will preserve [the] character of existing natural neighborhoods and communities. The south, west and east boundaries at this intersection are delineated based on the property lines of commercially developed or developing properties. Residential neighborhoods are not split or included within the designation.
3. Physical boundaries such as bodies of water, streets and highways, land forms. The boundaries include all corners created by the intersection of State Route 9 and 164<sup>th</sup> Street SE. Three corners are developed or developing with commercial uses. The fourth corner contains several small lots, which do not meet minimum residential lot size requirements and which will be significantly impacted by traffic generated by existing and proposed commercial development of the other three corners of the intersection. The south boundary of the southeast corner of the intersection is delineated by property lines and a stream and gully. The roadways and stream/gully are the only significant physical boundaries existing at this intersection.
4. The prevention of abnormally irregular boundaries. To prevent abnormally irregular boundaries,

the boundaries generally follow property lines and include all four corners of the intersection.

5. The ability to provide public facilities and public services in a manner that does not permit low-density sprawl. The properties included within the limited area of more intense rural development at this intersection are served by a public water system, but are not served by sewers. Development will continue to be served by on-site sewage disposal systems. No extension of the public water or sewer system is needed to serve future development. This area of more intense rural development will not encourage sprawl.

Ex. 75, at 6-7, (*italicized emphasis supplied*).

[9] *The southern existing rural commercial designation area is located east and west of SR 9 between the intersections of 184<sup>th</sup> and 180<sup>th</sup> to just north of 172<sup>nd</sup> Street SE. The “limited area of more intense rural development” will not extend beyond the boundary of the existing area or use, which is delineated predominately by the built environment. Its designation as a “limited area of more intensive rural development” is supported by the following findings:*

1. This area is clearly identifiable as an existing commercial area. The existing boundaries are based predominately on commercial uses existing prior to July 1, 1990. Areas that were developed with commercial uses between 1990 and 2000, consistent with existing zoning, are also included within the boundary since they are characterized by more intensive uses. There are some undeveloped and infill areas included consistent with the requirement to develop logical outer boundaries. The boundaries of the designation between these intersections [180<sup>th</sup>/184<sup>th</sup> and 172<sup>nd</sup>] were first established through the adoption of the Cathcart-Maltby-Clearview area (Motion No. 87-015) first adopted on March 4, 1987, and there have been commercial uses in the area since the 1960s.

2. The boundary for the Clearview Rural Commercial designation at this intersection will preserve the character of existing natural neighborhoods and communities. The west and east boundaries at this intersection are delineated based on the property lines of commercially developed or developing properties which abut SR 9, or infill between these properties. The north and south boundaries are based on roadways and the limits of existing commercial uses. Residential neighborhoods are not split or included within the designation.

3. Physical boundaries such as bodies of water, streets and highways, and land forms. The southern boundary is formed by 184<sup>th</sup> Street SE. Due to the scattering of commercial uses located between the intersections of 180<sup>th</sup> and 184<sup>th</sup> Streets SE with SRT 9, 184<sup>th</sup> Street SE is a more logical boundary than the property lines of these commercially developed properties. All four corners are of this intersection are included in the designation. Two corners are developed with commercial or non-residential uses, and the remaining two corners will be impacted by existing and future commercial uses. The east boundary generally follows property lines of commercially developed properties, the crest of the hill, and the boundary of a large nursery/greenhouse operation.

4. To prevent abnormally irregular boundaries. Boundaries generally follow the property lines of commercially developed properties, except where designations of the entire parcel would result in an irregular boundary, or significantly impact adjacent rural residential uses. Due to the scattering of commercial uses located between the intersections of 180<sup>th</sup> and 184<sup>th</sup> Streets SE with SR 9, 184<sup>th</sup> Street SE is used instead of the property lines of existing developed commercial uses.

5. The ability to provide public facilities and public services in a manner that does not permit low-density sprawl. The properties included within the limited area of more intensive rural development at this intersection are served by a public water system, but are not served by sanitary sewers. No extension of the public water or sewer system is needed to serve future development. Development

will continue to be served by on-site sewage disposal systems. This area of more intensive rural development will not encourage sprawl.

Ex. 75, at 7-8, (*italicized emphasis supplied*).

[\[10\]](#) County Finding of Fact and Conclusion, at P. 6. provides:

FLU Map change #6 is located at three quadrants of the intersection of 168<sup>th</sup> and SR 9, generally extending north of the intersection of 172<sup>nd</sup>/SR 9 and south of the existing designation at the intersection of 164<sup>th</sup>/SR 9. The proposal by Shockley/Brent Associates, Inc. originally proposing to amend the FLU Map to add approximately 103 acres to the Clearview Rural Commercial designation, was subsequently modified to approximately 27 acres at the intersection of 168<sup>th</sup> St. SE and SR 9. See Council Exhibits 42, 43, 50, 51, 52, 53 and 59; and Planning Commission Exhibits 10, 12, 16, 21, 29 and 31.

The original proposal was not consistent with the PDS proposed amendments to the GPP text and the FLU map. In addition, the original proposal would be inconsistent with the requirements of the GMA, which requires that limited areas of more intense rural development be based primarily on the built environment. The expansion would have doubled the size of the existing designation in the Clearview area, and would include primarily undeveloped areas or areas developed with residential uses.

The proposal by Shockley/Brent Associates redesignates approximately 27 acres from Rural Residential to Clearview Rural Commercial. This change is supported by the following findings:

- (i) FLU map change #6 significantly reduces the acreage, lot coverage, building size, and environmental impacts which would have resulted from the original proposal.
- (ii) The northerly portion of the acreage is adjacent to existing commercial uses on the southwest corner of the intersection of 164<sup>th</sup> and SR 9.
- (iii) The record demonstrates that expansion of this boundary is warranted as logical and limited infill in a rural area already characterized by more intense rural development. PDS' response to comment 10A in the Final SEIS regarding FLU map change #6 assumed the possibility of rezoning this acreage to Neighborhood Business zoning or Rural Community Business. Neighborhood Business zoning would result in more intense use of the environment than the restrictions imposed by the proposed Rural Community Business zone.
- (iv) The record before the Council including testimony presented at Council hearings supports a conclusion that the FLU map change #6 will not create significantly greater impacts to the site and adjacent area than Alternative 1A as recommended to be amended by the Planning Commission and Planning Department, and will create lesser impacts than Alternative 2, with respect to the implementing zoning.
- (v) *The additional acreage is located between two existing commercially developed areas.* The boundaries primarily follow the existing built environment and roadway corridor. Critical areas were deleted from the original docket proposal, and the acreage reduced from 103 to 27 acres. With the use of the proposed implementing zone and its restrictions on footprint and building size and additional landscaping regulations, the effective use of the 27 acres is significantly restricted from what the county's Neighborhood Business and Community Business zones would otherwise

allow, and the resulting development opportunity can be supported as limited and conditioned infill of an existing rural commercial area.

(vi) This addition does not result in a new or inappropriate development pattern within the rural area: *the areas to the north and south are already characterized by more intensive rural development and this addition lies in between already developed commercial uses* and does not expand the outer boundaries of the Clearview Rural Commercial area.

(vii) The additional area continues to limit commercial development for comparison shopping, yet serves the daily needs of rural area residents, as required by the County-wide Planning Policies.

Ex. 75, at 10-11 (*italicized* emphasis supplied).

[11] See: New Plan Policies - LU 6.I.6(a), LU 6.I.7 and LU 6.I.8. Ex. 75, Attachment A, at 20.

[12] See: Two *proposed* ordinances – Index Nos. 12a and 12b HOM.

[13] The Plan policies for the Clearview area, as adopted in Ordinance No. 00-091, provide:

LU 6.I.1 Recognize the existing commercial development in the area of southeast Snohomish County along State Route 9 between 184<sup>th</sup> and 172<sup>nd</sup> Streets SE and at 164<sup>th</sup> Street SE as limited areas of more intensive rural development that provide retail goods and services to the immediate population and a larger surrounding service area and allow limited infill adjacent to existing commercial development.

LU 6.I.2 The limited areas of more intense rural development shall be included within the Clearview Rural Commercial (CRC) designation.

LU 6.I.3 Rural residents should have access to a mix of small scale retail sales, personal services and job opportunities within the CRC designation.

LU 6.I.4 Prevent strip development north of the intersection of 164<sup>th</sup>/SR 9 and south of the intersection of 184<sup>th</sup>/SR 9 by encouraging the concentration of infill and development between two existing commercial nodes in the Clearview area.

LU 6.I.5 The boundaries of the CRC designation are shown on the Future Land Use map. The boundaries are based on those found in the Cathcart-Maltby-Clearview area plan, generally follow parcel lines and include areas which meet the following criteria:

- a) The area does not contain extensive critical areas, and
- b) The area is developed with a lawfully established commercial use which was in existence on or before July 1, 1990; or
- c) The area is zoned Neighborhood Business [NB] or Community Business [CB] and a commercial use was vested or permitted prior to July 1, 2000; or
- d) The remaining area constitutes infill, as it is located between and adjacent to two larger areas meeting criteria b) or c) above, or is along the boundary edge and its exclusion would create an irregular boundary.

LU 6.I.6 Implement the CRC designation through zoning and development standards which reduce impacts to adjacent rural residential areas and rural character:

- a) For all new development or redevelopment within the Clearview Rural Commercial

designation, a fifty-foot wide landscape buffer shall be required adjacent to areas designated Rural Residential. The buffer should be designed to preserve native vegetation and existing trees of three-inch caliper or larger

b) New uses may include those otherwise allowed in NB and CB zones, and should be compatible with existing uses.

LU 6.I.7 In addition to the provisions of policy LU 6.I.6, the new CRC designation between the intersections of 172<sup>nd</sup>/SR 9 and 168<sup>th</sup>/SR 9 shall be implemented through zoning and development standards which reduce impacts adjacent to rural residential areas, protect rural character and limit development intensity with additional landscape areas and by restricting building size, height, and setback; the size and location of uses; and the areas of impervious surfaces.

LU.6.I.8 Development within the CRC designation shall be limited to development that can be supported by services typically delivered at rural levels of service. These services may include water, septic systems and transportation facilities.

[Amendment to text on page LU-61] Clearview Rural Commercial (CRC). This designation includes commercial uses and areas located around three SR 9 intersections in the Clearview area which have historically provided goods and services to the rural population and a larger service area. Commercial designations at these intersections are limited areas of more intensive rural development within which infill, limited new development and redevelopment of commercial uses is permitted. The boundaries of the Clearview Rural Commercial designation are delineated on the Future Land Use map. This designation generally allows for neighborhood, community, and rural commercial uses including but not limited to small grocery stores, restaurants, service stations, hardware stores and nurseries to serve the needs of the rural population; and tourist-oriented development such as art galleries, antique stores, and lodging facilities. Implementing Zones within the Clearview Rural Commercial designation consistent with LU 6.I.6 and LU 6.I.7 will be determined through future action.

Ex. 75, Attachment A, at 19-20.

[14] Hensley PFR, at 2 – Clearview Issue #4.

[15] 3/21 submittal – Hensley PFR, at 2 – Clearview Issue #6.

[16] 3/21 letter – McVittie Amended PFR, at 2 – Issue #4; and Issue #4 from original PFR.

[17] Hensley PFR, at 2 – Clearview Issue #3.

[18] 3/21/01 letter – McVittie Amended PFR, at 1 – Issue #2; and Issue #2 from original PFR.

[19] The Board notes that RCW 36.70A.070(6)(a)(iii)(C), a 1998 amendment to the GMA [Laws of 1998, Ch. 171, Sec. 2], requires the Transportation Element to include LOS standards for state highways. Since this requirement was allegedly included in the **remanded** Transportation Element (Exhibits C and C-1 to Ordinance No. 00-091), the Board has no basis to address it in the context of the challenge to the Clearview amendments. Further, since the TE was remanded there is no basis for McVittie to brief this portion of the issue.

[20] The Board's discussion of Goal 12 is contained within Legal Issue 1, the last issue discussed within the Clearview LAMIRD portion of this case.

[21] 180<sup>th</sup> St. SE from Broadway Ave. to SR 9, 180<sup>th</sup> St. SE from SW County UGA to SR 9 and Marsh Road from Lowell Larimer Rd. to SR 9.

[22] Ex. 233, 1995 Transportation Element, at 34.

[23] Ex. 155, DSEIS, Table 19, at III-63, (disclosing probable impacts).

[24] Ex. 326, Transportation Concurrency Report on the LOS provided by Snohomish County Arterials, as of December 31, 2000, dated 3/7/01.

[25] *See*: Prior Board order in this case, *Hensley IV*, CPSGMHB Case No. 01-3-0004c, Order on Dispositive Motion [Motion to Invalidate], (Apr. 30, 2001), wherein the most recent Transportation Element amendments were remanded to be reconsidered after effective notice and public hearing. A compliance hearing on this matter is pending.

[26] The Board also acknowledges that Petitioner McVittie has subsequently challenged the County's adoption of the recent Transportation Element amendments. *See*: CPSGMHB Case No. 01-3-0017.

[27] Hensley PFR, at 2 – Clearview Issue #5.

[28] Hensley PFR, at 2 – Clearview Issue #1.

[29] Petitioner McVittie briefed Goal 12 as part of her Legal Issue No. 2.

[30] Petitioner McVittie also briefed goal 12 as part of Legal Issue 2/3, *supra*, those arguments are considered here.

[31] The Board notes that McVittie has preserved here argument regarding whether the County's amended TE was guided by goal 12 in McVittie's VIII, CPSGMHB Case No. 01-3-0017, Legal Issue 1. This issue can be more appropriately addressed in the context of the County's current, and amended, TE.

[32] There is no dispute regarding the applicability of UG-14(d)(1-3), these provisions do not apply to the Maltby amendments.

[33] Plan Policy LU 1.A.9 provides:

LU 1.A.9 - UGA boundaries shall be re-evaluated at least every five years to determine whether or not they are capable of meeting the county's 20-year population and employment projections. This re-evaluation shall be consistent with Snohomish County's "buildable lands" review and evaluation program requirements established in Countywide Planning Policy UG-14. **[The text of UG-14(d) begins here]** Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it complies with the Growth Management Act, and one of the following four conditions are met:

1. The expansion is the result of the five-year buildable lands review and evaluation required by RCW 36.70A.215.
2. The expansion is the result of the review of UGAs at least every ten years to accommodate the succeeding twenty years of projected growth, as required by RCW 36.70A.130(3).
3. All of the following conditions are met for expansion of the boundary of an individual UGA to include additional residential land [Three conditions are specified relating to population growth, land capacity analysis and reasonable measures to accommodate growth without expanding the UGA.]

4. Both of the following conditions are met for expansion of the boundary of an individual UGA to include additional commercial and industrial land:

- a). The county and the city or cities within that UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the Procedures Report required by UG-14(a), may also be considered as a basis for expansion of a boundary of an individual UGA to include additional commercial or industrial land; and
- b). The county and the city or cities within the UGA consider reasonable measures adopted as an appendix to the Countywide Planning Policies pursuant to UG-14(b) that could be taken to increase commercial or industrial land capacity inside the UGA without expanding the boundaries of the UGA.

Ex. 75, Ordinance No. 00-091, Exhibit A, at 2-3.

[\[34\]](#) The County also provides a brief history of concomitant agreements as a traditional zoning instrument and argues such agreements retain vitality in the GMA context.

[\[35\]](#) In the pre-GMA world, planning was optional, plans were advisory and there were not requirements in state law for: the designation of UGAs, state goals, mandated plan elements, consistency requirements and required implementation of plans.