

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

CORINNE R. HENSLEY and JODY)	
)	Consolidated CPSGMHB
L. McVITTIE, [1])	Case No. 01-3-0004c (<i>Hensley IV</i>):
)	Compliance on Clearview CPSGMHB
Petitioners,)	Case No. 02-3-0004 (<i>Hensley V</i>)
)	
v.)	
)	ORDER FINDING COMPLIANCE in
SNOHOMISH COUNTY,)	<i>Hensley IV</i> and FINAL DECISION
)	AND ORDER in <i>Hensley V</i>
Respondent,)	[Clearview]
)	
_____)	

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I. Procedural Background

A. GeneralLy – Compliance proceeding and new Petition

Hensley IV – Compliance:

On August 15, 2001, the Board issued its “Final Decision and Order” (**FDO**) in the *Hensley IV*. In the FDO the Board determined:

Snohomish County’s adoption of Ordinance No. 00-091, as applied to the Clearview LAMIRD [limited area of more intense rural development] 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.

Hensley, et al., v. Snohomish County (Hensley IV), CPSGMHB Case No. 00-3-0004c, Final Decision and Order, (August 15, 2001), at 35. The FDO **remanded** the Ordinance that amended Snohomish County’s Plan, [\[2\]](#) with directions to Snohomish County (**County**) to take appropriate legislative action in order to comply with the GMA, by a date certain and provide the Board with copies of a Statement of Actions Taken to Comply (**SATC**). *Hensley IV*, FDO, at 36.

On September 7, 2001, pursuant to a motion by the County, the Board issued an “Order on Reconsideration [Clearview]” that adjusted the compliance schedule set forth in the FDO. The dates

established in the FDO for the County to act and provide an SATC were changed. The County was given until February 11, 2002 instead of November 14, 2001, to take legislative action to comply; and the date for filing its SATC was extended from November 21, 2001 to February 18, 2002. A date for a compliance hearing was not set in that Order.

On February 19, 2002,^[3] the Board received “Snohomish County’s Statement of Actions to Comply” (**SATC**), with copies of Ordinance Nos. 01-131, 01-132 and 01-133, and attached exhibits. The Board’s Order on Reconsideration required the County to serve copies of the SATC on Petitioners and Intervenors.

On February 20, 2002, the Board issued its “Order Scheduling Compliance Hearing [Clearview].” This Order established March 21, 2002 as the date for the Compliance Hearing and gave Petitioners until March 11, 2002 to comment on the SATC and the County and Intervenor until March 18, 2002 to reply to any comments.

On March 11, 2002, the Board received Petitioner Hensley’s “Reply to Snohomish County’s Statement of Actions to Comply” (**Hensley SATC Comment**) and Petitioner McVittie’s “Comments on County Statement of Action to Comply” (**McVittie SATC Comment**).

Hensley V – PFR 02-3-0004:

On February 8, 2002, Corinne Hensley filed a challenge to Snohomish County’s adoption of Ordinance No. 01-133, alleging noncompliance with the notice and public participation requirements of the Act. The matter was captioned *Hensley V v. Snohomish County* and assigned CPSGMHB Case No. 02-3-0004.

On February 14, 2002, the Board issued its “Notice of Hearing” (**NOH**) in *Hensley V*. The NOH, set March 8, 2002 as the date for a prehearing conference (**PHC**), established a briefing schedule, and established June 3, 2002 as the date for the hearing on the merits and August 7, 2002 as the deadline for issuing the Board’s FDO.

On March 6, 2002, the Board received Petitioner Hensley’s “Amended Petition for Review.” The Amended PFR challenged all three ordinances adopted by the County in its efforts to comply with the Act and FDO in *Hensley IV*. The Amended PFR presents five issues for review, including the notice and public participation challenge regarding the implementing ordinances (01-132 and 01-133).

On March 8, 2002, the Board conducted the PHC in Room AB of the Board’s Offices. Board Member Lois North, Presiding Officer (PO) in *Hensley V*, and Board Member Edward McGuire, PO in *Hensley IV*, attended. Petitioner Corrine Hensley appeared *pro se*. Potential Intervenor Jody McVittie was present. Attorney Brent Lloyd represented Respondent Snohomish County.

At the PHC, the County submitted “Snohomish County’s Index of the Record re: County’s Adoption of Ordinance Nos. 01-131, 01-132 and 01-133.” Ms. McVittie submitted “Motion to Intervene and to Support Petitioner’s Motion to Expedite Review of Legal Issue 1 and Request for Invalidity.” (**McVittie PHC Brief**). Ms. Hensley submitted “Motion for Expedited Review and Finding of Invalidity” (**Hensley PHC Brief**).

The parties and the Board then discussed the Index, supplementing the record, dispositive motions, the options for consolidating and coordinating the compliance proceeding and the proceeding for new PFR and briefly discussed the issues to be resolved by the Board.

Consolidated and Coordinated Proceeding – Hensley IV and V:

On March 11, 2002, the Board issued an “Order of Consolidation and Coordinated Schedule for Compliance and New Petition for Review (*Hensley IV and V*) [Clearview].” This Order indicated Board Member McGuire would serve as Presiding Officer (**PO**) in this matter, addressed the outstanding motions on the amended PFR, intervention, expedited review, proposed a final schedule for the case and set forth the Legal Issues to be resolved by the Board. The Order also established March 14, 2002 at 2:30 p.m. for a conference call to review, clarify or adjust provisions of the Order.

On March 14, 2002, the parties^[4] and the PO participated in the conference call to review the March 11, 2002 Order. As a result of that call, the Board issued an “Amended Order of Consolidation and Coordinated Schedule for Compliance and New Petition for Review (*Hensley IV and V*) [Clearview].” This Order set forth the five Legal Issues that encompass the issues in the compliance proceeding and the new PFR.

On April 8, 2002, the Board received a letter from Intervenor Olsen’s attorney indicating that Intervenor would not be participating in the compliance proceeding, but requested a copy of the Board’s Order when it is issued.

On April 19, 2002, the Board received a letter requesting that the Hearing on the Merits (**HOM**) be delayed for one week. All parties agreed to the change in the hearing date. On the same day, the Board issued an “Order Changing Date for Hearing on the Merits (*Hensley IV and V*) [Clearview].” The HOM was rescheduled for May 20, 2002.

B. Briefing and Hearing on the Merits

On April 3, 2002, the Board received “Petitioner Hensley’s Prehearing Brief,” with four attached exhibits (**Hensley PHB**), and McVittie’s “Prehearing Brief,” with four attached exhibits (**McVittie PHB**).

On April 24, 2002, the Board received “Snohomish County’s Prehearing Brief,” with 31 attached

exhibits” (**County Response**).

On May 1, 2002, the Board received “Hensley Reply Brief” (**Hensley Reply**).

On May 20, 2002, the Board held a hearing on the merits in Suite 1022 of the Financial Center, 1215 4th Avenue, Seattle, Washington. Board Members Lois H. North, Joseph W. Tovar and Edward G. McGuire, Presiding Officer, were present for the Board. Petitioners Hensley and McVittie appeared *pro se*. Brent T. Lloyd and Courtney Flora represented Respondent Snohomish County. Yvonne Gillette of Seattle Deposition Reporters provided Court reporting services. The hearing convened at 10:00 a.m. and adjourned at approximately --1:00 p.m.

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

Petitioners challenge Snohomish County’s adoption of the Clearview Plan amendments and development regulations, as adopted by Ordinance Nos. 01-131 (Plan), 01-132 (zoning map) and 01-132 (development regulations). Pursuant to RCW 36.70A.320(1), Snohomish County’s action of adopting these amendatory Ordinances is presumed valid.

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).

Pursuant to RCW 36.70A.3201 the Board will grant deference to Snohomish County in how it plans for growth, consistent with the goals and requirements of the GMA. However, as our State Supreme Court has stated, “Local discretion is bounded, however, by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561 (2000) (**King County**). Further, Division II of the Court of Appeals has stated, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a county’s plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, 108 Wn. App. 429 (2001).

iii. board jurisdiction, preliminary matters and Prefatory note

A. Board Jurisdiction

The Board finds that, pursuant to RCW 36.70A.290(2), Petitioner Hensley’s PFR was timely filed. Pursuant to RCW 36.70A.280(2), both Petitioners have standing to participate in the *Hensley IV* Compliance proceeding, Petitioner Hensley has standing to appear before the Board in *Hensley V* and

Ms McVittie may appear as an Intervenor. Pursuant to RCW 36.70A.280(1)(a), the Board has subject matter jurisdiction in the compliance proceeding and over the challenged ordinances, which amend the County’s Comprehensive Plan and development regulations.

B. preliminary matters

In its opening brief, the County moved to supplement the record with three items. County Response, at 4. In her reply brief, Petitioner Hensley objected to the inclusion of one item (*i.e.* E-mail exchange). Hensley Reply, at 2. The Board entertained argument at the HOM regarding the motion and the PO orally either took **official notice** or **granted** the County’s motion for all three items, noting that they would be accorded the appropriate weight in the Board’s deliberations. The summary table below assigns exhibit numbers to the three exhibits.

Proposed Exhibit: Documents	Exhibit No.
1. Motion No. 01-371 – Adopting the 2002-2007 Transportation Improvement Program.	Board takes notice - HOM – 1
2. Table showing “Unincorporated UGAs” in square miles.	Granted - HOM – 2
3. E-mail exchange from Brent Lloyd to Julia Gibb, dated 2/20/02; and Gibb response to Lloyd, dated 2/21/02.	Granted - HOM – 3

C. Prefatory Note

In the *Hensley IV* FDO, the Board found that the County’s designation of the Clearview area as a limited area of more intensive rural development (**LAMIRD**)^[5] failed to comply with the goals and requirements of the GMA. This noncompliant Clearview LAMIRD contained approximately 127 acres. It included land at the crossroad of SR-9 and 164th Street, land at the crossroad of SR-9 and 180th Street, and land in-between that connected these two crossroad nodes. In response to the Board’s remand, the County adopted three Ordinances - Nos. 01-131, 01-132 and 01-133. SATC, at 4.

Ordinance No. 01-131 amended the County’s Future Land Use Map (**FLUM**), and the text of the County’s GMA Plan as it relates to the Clearview LAMIRD. In short, the logical outer boundaries (**LOB**) of the Clearview LAMIRD were drawn in and it was reduced in size. Approximately 27 acres of land that connected the two intersections of the original LAMIRD were eliminated. The Clearview LAMIRD now has a Northern crossroad node (portion at SR-9 and 164th Street) and a Southern

crossroad node (portion at SR-9 and 180th Street). The new LAMIRDs contain approximately 100 acres (about 16.5 acres in the north node and 79.2 acres in the south node^[6]) centered on these intersections. *See*: Ord. No. 01-131, Sec. 2 (D)(1), at 2 and Sec. 2 (D)(2), at 4. Exhibit B to the Ordinance depicts the boundaries for the two nodes of the Clearview LAMIRD on the FLUM and shows the Plan designations contained within the LAMIRD's two nodes. Approximately 95% of the total 100-acre area is "CRC" – Clearview Rural Commercial, and the remainder is "RR" – Rural Residential 1 du/5 acres. Exhibit A to the Ordinance contains the amendatory text to the land use policies for the Clearview area.

Ordinance Nos. 01-132 and 01-133 amend the County's development regulations to reflect the FLUM and Plan text changes adopted in Ordinance No. 01-131. Ordinance No. 01-132 amends the County's zoning map designations^[7] to implement the LAMIRD designation for the FLUM and Plan policies. A Clearview Rural Commercial "CRC" zoning designation is created and is applied to approximately 95% of the LAMIRD, an existing Rural-5 designation applies to the remainder. *See*: Ord. No. 01-132, Ex. A. Ordinance No. 01-133 amends various sections of the Counties Zoning Code - Title 18 of the Snohomish County Code (SCC) - including the text, use and bulk matrices. *See*: Ord. 01-133, at 3-44.

The Board will address the Legal Issue presented in this matter in the following order: Legal Issues 1, 3, 4, 5 and 2.

iv. legal issues and discussion

A. Legal Issue No. 1

The Board's PHO set forth Legal Issue No. 1

1. Did the County fail to comply with the public participation requirements of the Act (RCW 36.70A.020(11), RCW 36.70A.035, RCW 36.70A.140, because the public was not notified of the significant changes or amendments to the legislation prior to adoption of Ordinance Nos. 01-132 and 01-133? [Amended PFR, at 1-2.] [Note: Only two of the Clearview Ordinances (01-132 and 01-133 are at issue here.)

Applicable Law

The relevant portions of the GMA's notice and public participation requirements provide as follows:

RCW 36.70A.035:

(2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and *the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.*

(b) *An additional opportunity for public review and comment is not required under (a) of this section if:*

- (i) An environmental impact statement has been prepared under chapter 43.21C RCW for the pending resolution or ordinance and *the proposed change is within the range of alternatives considered in the environmental impact statement;*
- (ii) *The proposed change is within the scope of the alternatives available for public comment;*

(Emphasis supplied).

RCW 36.70A.140:

Each [GMA planning] county . . . shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. . . .

RCW 36.70A.020(11):

Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

Discussion

Position of the Parties:

Petitioner's challenge here focuses on the implementing development regulations for the Clearview LAMIRD designated in the County's Plan. Specifically, Hensley questions the notice and public participation process for Ordinance No. 01-133, ^[8] amending the County's development regulations.

For this issue, Petitioner Hensley relies upon argument offered in her Prehearing Conference Brief. Hensley SATC Comment, at 1; and Hensley PHB, at 2. On this issue, Intervenor McVittie also incorporates by reference argument offered in Petitioner Hensley's Prehearing Conference Brief. McVittie SATC Comment, at 3; and McVittie PHB, at 1.

Hensley argues that the County failed to inform the public of the substantial changes to the Planning Commission's recommendations that the Council was considering. Hensley further argues that once those amendments were introduced, there was no opportunity for public comment permitted. Hensley PHC Brief, at 5-6. Hensley also contends that the lack of notice and opportunity for public comment does not fit within the limited exceptions to the notice and public comment requirements recognized in RCW 36.70A.035(2)(b). Hensley PHC Brief, at 6-8.

The County counters that adopting, or not adopting, the LAMIRD restrictions recommended by the Planning Commission falls within the range of options available for public comment. County Response, at 63-64. Additionally, the County contends that its actions fully comply with the notice and public comment requirements of the Act. County Response, at 65-66.

In reply, Hensley asserts that only the development regulations recommended by the Planning Commission were what was noticed. These were the provisions available for public comment; but these were not the provisions adopted by the Council. Hensley Reply, at 3-5.

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Board Discussion:

The notice and public hearings for the three Clearview LAMIRD ordinances occurred concurrently. The county published a general notice related to all three ordinances and also published specific notice for each of the three ordinances. *See*: Findings of Fact (**FoF**) 1, 2 and 3. However, Petitioners do not challenge the notice and public participation process for Ordinance No. 01-131 (Plan), nor does Petitioner argue any defect in the notice or public participation process in the adoption of Ordinance No. 01-132 (zoning map). Issues not briefed are **abandoned**. WAC 242-02-570(1). Consequently, the Board will **dismiss** the challenge to Ordinance No. 01-132.

Hensley's challenge focuses *only* on the notice and public participation surrounding the adoption of Ordinance No. 01-133. The challenge is further focused on the notice and public participation process for the County Council hearing to consider the Planning Commission's recommendations on the Ordinance.

It is undisputed that there was adequate notice of the January 23, 2002 Council public hearing on Ordinance No. 01-133. FoF 4-7. On January 23, 2002 the Council in fact held the public hearing and received testimony on the Planning Commission's recommendations for all three proposed ordinances. At the conclusion of the meeting, the Council continued the hearing until February 6, 2002, but closed the hearing to further public testimony. FoF 8.

During the interim, staff was directed by individual members of the Council to prepare a series of potential amendments and findings for the February 6, meeting. FoF 9. It is undisputed that on February 6, 2002, the Council acted on the proposed amendments and adopted the Ordinances without giving the public the opportunity to review or comment on the findings or amendments. FoF 10.

Hensley asserts that the following changes, added to Ordinance No. 01-133 by the Council on February 6, 2002, were *substantial*, and merited additional notice and public review and comment: (1) the addition of 25 permitted or conditional uses to the proposed CRC zone; (2) reduction of the proposed rural buffer requirements from 50 to 25 feet; (3) removing the proposed impervious surface restrictions of 60% and replacing impervious surface requirements with limitations imposed by septic drain-field requirements; (4) eliminating entirely the proposed maximum building footprint of 6000 square feet; and (5) increasing the proposed maximum lot coverage from 25 to 50%. Hensley PHC Brief, at 4.

As the County's notices reflect, the Planning Commission is an advisory body that makes recommendations and proposals to the County Council that the Council may or may not agree with and adopt. FoF 4 and 5. The County Council has discretion, and is not bound only to the Planning Commission's recommendations. However, RCW 36.70A.035 does place bounds on the County Council's discretion. RCW 36.70A.035 generally requires the Council to provide the opportunity for public review and comment if the Council chooses to change or amend a proposal *after* the opportunity for public review and comment is closed. This additional review and comment period is required *unless* the proposed change is within the range of alternatives considered in an EIS or the proposed change is within the scope of the alternatives previously available for public comment. RCW 36.70A.035(2)(b)(i) and (ii). Here the Council adopted changes after the comment period was closed; therefore the question for the Board is whether the amendments adopted on February 6, 2002, fit within the exceptions of .035(2)(b)(i) or (ii). The alternatives discussed in the Draft Supplemental EIS and Table 7 from the DSEIS (Ex. 346) are instructive on this question.

The Clearview LAMIRDS as adopted by Ordinance No. 131, generally conforms to the *delineation* of Alternative 1 in the DSEIS. It contains approximately 100 acres in the two nodes centered on intersections along SR-9. The DSEIS suggests "Alternative 1 [No Action] would generally *retain the existing* Comprehensive Plan and *zoning designations* for the study area, with minor additions (approximately 5 acres) to the commercial area." DSEIS, Ex. 364, at i, I-1, II-4, (emphasis supplied). The existing zoning designations for the area included: Rural – 5 Acre (R-5), Neighborhood Business (NB), Community Business (CB) and General Commercial (GC). DSEIS, Ex. 364, Figure 2.

All twenty-five *uses* added to the CRC zone on February 6, 2002 were permitted in the prior CB and GC zoning and most were permitted in the NB zoning. *Compare*: Ex. 365 (Hensley PHC Brief, Attachment 6.) and Ordinance No. 133, Section 3, Use Matrix (SCC 18.32.040). Thus, *the addition of the 25 uses to the proposed CRC zone falls within the range of alternatives considered in the environmental impact statement and additional opportunity for public review and comment was not required.*

The Comparison Table below is derived from Table 7 in the DSEIS that depicts Existing and Proposed Development Standards for the Plan Alternatives. The last column indicates the provisions adopted in Ordinance No. 01-133. This Table provides a basis for assessing the other four February 6, 2002 amendments. Only the relevant provisions from Table 7 in the DSEIS are reflected below. *Compare:* DSEIS, Ex. 364, Table 7, at II-19 (Hensley PHC Brief, Attachment 2.); and Ordinance No. 01-133, Sections 4, 5, 6 and 12 (SCC 18.42.020; 18.43.021; and 18.65.040).

The Board notes that, although Alternative 1 in the DSEIS, the “No Action” Alternative, is intended to retain the “existing zoning designations,” it does include a “new requirement for a buffer along the exterior boundaries of the existing commercial zone.” DSEIS, Ex. 364, at I-1. This *new* exterior buffer is slated to be a “50-foot sight-obscuring buffer.” DSEIS, Ex. 364, at II-9.^[9] This *new* 50-foot sight-obscuring buffer is included as the base case in *all three Alternatives* evaluated in the DSEIS. *See:* DSEIS, Ex. 364, at I-1, II-8, 9, 14 and 16.^[10]

Comparison Table
[Portions of Table 7 from DSEIS and provisions of Ord. No. 01-133]

Existing and Proposed Development Standard	Existing Standards for NB and CB Zones	New Rural Commercial Zone [Planning Commission proposal for CRC Zone]	Clearview Rural Commercial Zone (CRC Zone) [Ord. No. 01-133]
Sight-obscuring landscaping next to rural residential	10 feet	50 feet ^[11]	25 feet
Limit impervious surface to	90 to 95%	60%	Limited by septic drain field req. ^[12]
Size restriction on buildings in sq. ft.	None	6000 sq. ft.	None
Maximum lot coverage by buildings	NB = 30% CB = 50%	25%	50%

As illustrated in the Comparison Table above, two of the additional amendatory provisions (impervious surface and building size) and part of the lot coverage amendment falls within the range of alternatives considered in the environmental impact statement and additional opportunity for public review and comment was not required. However, the reduction of the sight-obscuring buffer from 50’ to 25’ does not fall within the range of alternatives considered in the environmental impact statement, since all three Alternatives indicated a 50-foot sight-obscuring buffer would be included in the implementing regulations.

Consequently, the buffer reduction amendment is *beyond the range of alternatives considered in the DSEIS and additional opportunity for public review and comment is required*. Additionally, the prior

zoning in the Northern LAMIRD permitted only 30% maximum lot coverage, [\[13\]](#) yet the amendment increase the permissible lot coverage to 50%. Consequently, the lot coverage amendment for the Northern node is *beyond* the range of alternatives considered in the DSEIS and additional opportunity for public review and comment *is required*.

The Board notes that prior to adopting the development regulations to implement the CRC zone change, the County did receive correspondence questioning the 50-foot perimeter buffer. *See*: Exs. 348 and 361 and prior comment letters in Ex. 340. However, the County did not modify the DSEIS to evaluate a reduction in this buffer; nor does the record indicate that the County provided any notice that it was considering such an option; nor does the record indicate that the County provided the opportunity for public review and comment on this option. FoF 4 and 5.

The Planning Commission's recommendations regarding uses, bulk standards and performance standards can be characterized as an increased limitation over the development permitted under the base case allowed by the existing zoning in Alternative 1. While the Council has inherent discretion not to go as "far" as the Planning Commission recommended, it lacked the requisite SEPA documentation to decrease the limitations on development for the Clearview area below those described under Alternative 1.

Thus, with the exception of the 50-foot sight-obscuring buffer and the maximum lot coverage for the Northern LAMIRD, the performance standards and restrictions for the proposed CRC zone were within the scope of options discussed in the DSEIS and available for public comment. The Board finds that the amendment changing the 50-foot sight-obscuring buffer to 25-feet and increasing the maximum lot coverage to 50% for the Northern LAMIRD, without providing notice or the opportunity for public review and comment was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.035 and Ordinance No. 01-133 will be **remanded** with direction to the County to perform additional environmental analysis to evaluate the environmental impacts of a reduced buffer and increase in maximum lot coverage, if it chooses to consider such changes, and provide the opportunity for review and public comment on such changes. [\[14\]](#)

Having found that the County's notice and public comment procedures for Ordinance No. 01-133 regarding the 50-foot sight-obscuring buffer and maximum lot coverage for the Northern node does not comply with the requirements and exception provisions of RCW 36.70A.035(2)(b), the Board likewise finds that the County has **not complied** with the public participation requirements of RCW 36.70A.140, nor was the County guided by Goal 11 (RCW 36.70A.020(11)).

Conclusion

Petitioners' challenge to Ordinance No. 01-132 is **abandoned** and **dismissed**. The sight-obscuring buffer and maximum lot coverage for the Northern node amendments to Ordinance No. 01-133, added by the County Council at the February 6, 2002, hearing fell beyond the scope of the exceptions of RCW 36.70A.035(2)(b). Therefore, notice and the opportunity for additional public review and

comment was required on these amendments. The Board concludes that the County's lack of notice and opportunity for public review and comment on the adoption of these amendments and adoption of Ordinance No. 01-133 was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.035, .140 and .020(11).

B. Legal Issue No. 3

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

3. Did the County fail to comply with the LAMIRD requirements of RCW 36.70A.070(5) when it adopted the Clearview Ordinances? [Amended PFR, at 2.]

Applicable Law

RCW 36.70A.070(5) provides in relevant part:

(d) Limited areas of more intensive rural development. 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 intense 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) of this subsection, but shall not be subject to the requirements of (c)(ii) and (iii) of this subsection. An industrial area is not required to be principally designed to serve the existing and projected rural population;*

...

(iv) A county shall adopt measures *to minimize and contain the existing areas or uses* of more intensive rural development, as appropriate, authorized by this subsection. Lands included in such existing area 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 outer 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 prevention 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.)

Discussion

Position of the Parties:

Petitioner Hensley contends that of the combined 100-acre Clearview LAMIRD only 35 acres have structures on them and only 15 acres are vested. Therefore, approximately 50 acres are undeveloped and inappropriate as infill. Hensley PHB, at 3-4. Hensley continues, that the delineations for the two nodes in the Clearview LAMIRDs are not limited to “as built” uses that were in existence in July of 1990. Nor does the logical outer boundary (**LOB**) minimize and contain these uses – “limited infill should be limited.” Petitioner further contends that the two LAMIRDs encourage commercial development on all four corners of the main intersections and the LOBs are irregular^[15] since they include more area than the existing uses in 1990. Hensley SATC Comment, at 5-8; Hensley PHB, at 3 – 10. Hensley also asserts that the development regulations contained in Ordinance No. 01-133 do not minimize and contain the permitted uses within these LAMIRDs. Hensley PHB, at 8.

The County responds that in *Hensley IV*, the Board found fault with the 27-acres that connected the crossroad nodes. The County then asserts that the current configuration of two nodes complies with the Board’s FDO, since the 27-acres that connected the two nodes in *Hensley IV* have been eliminated. County Response, at 1-2. The County emphasizes that these are the only two LAMIRDs that the County has established and they are approximately .002% the size of the County unincorporated UGAs [it is not a mini-UGA].^[16] County Response, at 11; and Ex. HOM-2. The County contends that the two LAMIRDs include uses that existed in July of 1990 and that the County is allowed to include vacant undeveloped land within the area as infill since RCW 36.70A.070(5)(d) (i) refers to “existing areas” not existing lots. County Response, at 16. The County also argues that the Clearview LAMIRDs are contained within LOBs that minimize and contain existing areas of commercial development. County Response, at 17-22.

In reply, Hensley argues that just as the 27-acres of intervening land between the two crossroads nodes did not comply with the Act’s LAMIRD requirements so too does the present configuration not comply. Hensley also contends that the “LOBs are lands of existing areas or uses as of July 1, 19990, that are clearly identifiable and contained **predominately by the built environment** and may include **undeveloped lands if limited**. The County’s “built environment” does not distinguish between “built and “undeveloped” areas.” Further, the area is not limited. Hensley Reply, at 5, (emphasis in

original). Hensley also argues that the LOBs follow property lines and not physical boundaries and the boundaries are irregular. Hensley Reply, at 6.

Board Discussion:

The Board notes that RCW 36.70A.070 contains the mandatory elements for *Comprehensive Plans*, but it does not directly apply to development regulations. Consequently, the Board's review on this issue is limited to whether *Ordinance No. 01-131* complies with the GMA's requirements for the rural element. However, if the Board concludes that the Plan ordinance does not comply with the requirements of .070(5), the Board will then address the implementing ordinances. If the Board finds the Plan ordinance in compliance with .070(5), the challenge to Ordinance Nos. 01-132 and 01-133 will be dismissed.

In response to the Board's FDO in *Hensley IV*, the County appropriately removed the 27-acres of land connecting the two crossroad commercial nodes. Also, the Board's review of the delineation of the two Clearview LAMIRDs as depicted in Ordinance No. 01-133 and the map indicating the "Built Environment Clearview Commercial Study Area [\[17\]](#) correlate very closely.

The "Built Environment" map depicts: 1) commercial areas or uses in existence in July of 1990; 2) permitted or vested commercial uses prior to 1990; 3) permitted or vested uses between 1990 and 2000; [\[18\]](#) and 4) institutional use. These areas are all clearly identifiable and contained within the two nodes delineated in the Clearview LAMIRDs by Ordinance No. 01-133. Additionally, the Board finds that although the LOBs for the two LAMIRDs are not "regular" due to their alignment along SR-9, they are not abnormally irregular as that term is used in RCW 36.70A.070(5)(d)(iv). Also, the use of lot or property lines to delineate the LOBs is logical and is not prohibited by this section of the Act. Further, as anticipated and allowed by .070(5)(d)(i) and (iv), the two LOBs appropriately include undeveloped land for infill development or redevelopment of existing commercial areas and uses within the LOBs. The areas included within the LOBs are minimized and contained within the LOBs. Plan Policies LU-6.I.1 through LU-6.I.8 provide further appropriate policy guidance for minimizing and containing these LAMIRDs. Ordinance No. 01-131, Exhibit A.

The Board notes that the restrictions in the development regulations also support minimizing and containing infill development or redevelopment of the area confined within the LAMIRDs. These development regulations also require "access shall be taken from secondary roads whenever possible." *See*: Ordinance No. 01-133, at 43. Limiting access in this way assures that the focus of the LAMIRDs is internal within the LOB, not extending towards the periphery and encroaching on the surrounding designated rural area. Finally, Plan Policy LU 6.I.7(b) states, "New uses shall be *limited* to [*sic*] *primarily to those uses similar to and compatible with uses, that existed on July 1, 1990, and which serve the local rural population.*" Ordinance No. 01-131, Exhibit A, at 11, (emphasis supplied). Consequently, the Board concludes that the two Clearview LAMIRDs, as delineated in Ordinance No. 01-131, **comply** with the Board's FDO in *Hensley IV* and **comply** with the

requirements of RCW 36.70A.070(5)(d) as challenged in *Hensley V*. The Board will enter a **Finding of Compliance** regarding the County's Clearview LAMIRD designation in its Plan, as adopted in Ordinance No. 01-131.

Conclusion

The Board concludes that the two Clearview LAMIRDs as delineated in Ordinance No. 01-131 **comply** with the Board's *Hensley IV* FDO and **comply** with the requirements of RCW 36.70A.070(5)(d) as challenged in *Hensley V*. The Board will enter a **finding of compliance** in *Hensley IV* and finds **compliance** with RCW 36.70A.070(5)(d) regarding the County's Clearview LAMIRD designation in its Plan [*Hensley V*], as adopted in Ordinance No. 01-131. Petitioner's challenge of whether Ordinance Nos. 01-132 and 01-133 comply with RCW 36.70A.070(5) of the GMA is **dismissed**.

C. Legal Issue No. 4

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

4. Did the County fail to comply with the transportation element requirements of RCW 36.70A.070(6) when it adopted the Clearview Ordinances? [Amended PFR, at 2.]

Applicable Law

RCW 36.70A.070(6) sets forth the requirements for the transportation element of comprehensive plans. It requires "A transportation element that implements, and is consistent with, the land use element." RCW 36.70A.070(6)(a). It further requires that the transportation element contain:

Level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system. These standards should be regionally coordinated.

RCW 36.70A.070(6)(a)(iii)(B);

Specific actions and requirements for bringing into compliance locally owned transportation facilities or services that are below the established level of service standard.

RCW 36.70A.070(6)(a)(iii)(D);

Identification of state and local system needs to meet current and future demands. Identified needs on state owned transportation facilities must be consistent with the state-wide multimodal transportation plan required under 47.06 RCW

RCW 36.70A.070(6)(a)(iii)(F);

After adoption of a comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with development.

RCW 36.70A.070(6)(b).

In brief, these GMA provisions require the County's transportation element to be consistent with, and implement, the land use element and include level of service (**LOS**) standards for local arterials, specific actions and procedures to bring local arterials that are below LOS up to LOS, identification of transportation needs to meet future demands, and a concurrency ordinance that prohibits development if the development causes the LOS to decline below LOS. The Board notes that Ordinance No. 01-131 amended the County's land use element but did not amend the County's transportation element or the County's concurrency ordinance.

Discussion

Position of the Parties:

Petitioners Hensley and McVittie's arguments suggest the following theory of the case on this issue. The County has established two commercial LAMIRDs along SR-9, one centered on 164th Street and one centered on 180th Street. The creation of LAMIRDs allows intensification of use through infill development and redevelopment within the LAMIRDs LOBs. Permitting the intensification of commercial uses will bring more traffic. There is already a traffic problem along SR-9 and two arterials in the Clearview area; traffic is getting worse and the new LAMIRD designations will exacerbate it.^[19] The DSEIS underestimated the traffic existing problems.^[20] There are already two arterials that the County concedes are "in arrears," or operating below the established LOS of "C."^[21] SR-9 is not a priority for the State – it is not a Highway of Statewide Significance. Neither the County, nor the State, have identified or programmed funding into their respective transportation improvement systems to remedy the traffic situation in Clearview within the next six-years.^[22] Further, the County's concurrency ordinance will prohibit any new development in the Clearview area if concurrency levels are exceeded.^[23] Therefore, given these circumstances, it is disingenuous and not responsible growth management^[24] for the County to designate the Clearview LAMIRDs in its land use element, since such designations are in violation of the transportation provisions of the GMA. *See*: Hensley PHB, at 11-16; McVittie PHB, at 2-8; and Hensley Reply, at 8-13.

The County does not dispute that there are traffic problems in the Clearview area, both on two arterials and SR-9.^[25] Nor does the County dispute that it has an obligation to improve the LOS for those arterials that are “in arrears” and attempt to seek improvements from the state on SR-9.^[26] The County also acknowledges that the DSEIS did not address the arterials “in arrears” since the problem did not exist at the time the DSEIS was prepared.^[27] However, the County has now included funding in its Transportation Improvement Program (TIP) to address the two arterials in arrears,^[28] and by designating the two Clearview LAMIRDs it has indicated to the State that SR-9 should be a regional priority that the State should include in its funding priorities.^[29]

Further, the County argues that it enforces its concurrency ordinance so that “any proposed development in the Clearview area that would impact these arterials cannot proceed unless improvements can be implemented within the six-year concurrency window.” County Response, at 37. The County suggests that Petitioners’ argument are based upon a “fundamentally flawed assumption,” namely, that the County’s concurrency system does not work.^[30] The County summarizes its position by stating:

The County does not intend to suggest that the GMA does not require concurrency considerations to inform the planning decisions of local jurisdictions. This is the clear purpose behind RCW 36.70A.020(12) (Goal 12). The County’s argument is simply that if an isolated land use designation were to theoretically allow development that could decrease the level of service below acceptable minimum standards, the concurrency mechanism mandated by RCW 36.70A.070(6)(b) is designed to ensure, on a project-level basis, that such development is not permitted. [Citing to Hensley’s PHB acknowledging her agreement on this point] The Council’s action was not “disingenuous,” but the County maintains that even if it were, the simple fact is that neither RCW 36.70A.070(6) nor Goal 3 prevent the Council from designating LAMIRDs within which development may occur only in accordance with concurrency requirements.

County Response, at 34.

Board Discussion:

As the Board stated in Legal Issue 3, RCW 36.70A.070 contains the mandatory elements for *Comprehensive Plans*, it does not directly apply to development regulations. Consequently, the Board’s review on this issue is limited to whether *Ordinance No. 01-131* complies with the requirements of RCW 36.70A.070(6) of the GMA for the transportation element. However, if the Board concludes that the Plan ordinance does not comply with the requirements of .070(6), the Board will then address the implementing ordinances. If the Board finds the Plan ordinance in compliance with .070(6), the challenge to Ordinance Nos. 01-132 and 01-133 will be dismissed.

The Board understands the crux of the arguments made by Hensley and McVittie on this issue to be that the creation of the two LAMIRDs (amendments to the land use element) creates a situation where the transportation element is not consistent with, and does not implement, the land use element. Petitioners do not dispute, nor can they dispute in this proceeding, that the County's transportation element: 1) has established LOS standards for arterials; 2) contains actions and a mechanism (*i.e.* the County's TIP to eventually bring local arterials that are below LOS up to LOS; 3) identified transportation needs to meet future demands; and 4) adopted a concurrency ordinance. Hensley PHB, at 11-16, McVittie PHB, at 2-8, Hensley Reply, at 9-13. Additionally, the Board acknowledges that: 1) the County's most recent amendments to its transportation element were found to comply with the requirements of the GMA, specifically RCW 36.70A.070(6), in *McVittie v. Snohomish County (McVittie VIII)*, CPSGMHB Case No. 01-3-0017, Final Decision and Order, (Jan. 8, 2002); and 2) the County's Concurrency Ordinance, Title 26B SCC, is not before the Board.

The Board is well aware of the daunting challenge that transportation infrastructure deficiencies present to the quality of life and efforts at growth management in this region. Coping with present congestion, to say nothing of the additional impacts of projected growth, commands the attention of the legislature, the Puget Sound Regional Council and cities and counties throughout this region.^[31] State and local governments are all stressed to find funding for needed transportation improvements. The traffic situation in the region is bad now and will likely get worse as we grow unless improvements are made. In this context, Petitioners' premise, that the traffic situation in the Clearview area is bad now and that the designation of the Clearview LAMIRDs will only make it worse, mirrors this concern.

However, unlike the situation for state highways and the state government, the GMA requires transportation concurrency for development at the local level. All local jurisdictions in the Central Puget Sound region, must "*prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development.*" RCW 36.70A.070(6)(b), (emphasis supplied). Petitioners' assume that development (infill development or redevelopment) will occur immediately, and such development will proceed unchecked and without regard for transportation concurrency is erroneous. The GMA requires growth to be managed.

As noted *supra*, Snohomish County has LOS standards adopted in the transportation element of its comprehensive plan, and it has a concurrency ordinance (Title 26B SCC) to implement .070(6)(b). FoF 18. It is undisputed that two arterial within the Clearview LAMIRD are operating below the established LOS, and therefore "in arrears." FoF 19. The County also has a TIP that schedules transportation improvements over a six-year period. The November 2002 TIP includes a corridor study to determine phases of future construction for 180th St. SE: 35th Ave. SE to Broadway Ave. [including the "in arrears"^[32] portions of 180th Street]. FoF 21, Ex. HOM-1, at 5, TIP#E.30. The

County is also clearly empowered to designate LAMIRDs, and it has now done so in the Clearview area. Are these LAMIRD designations inconsistent with the Transportation element? Or more precisely, is the transportation element consistent with, and does it implement the Land Use element? The Board finds that it is and does.

The GMA requires the County to have a system in place to enforce transportation concurrency. The Board has jurisdiction to review whether such a system is in place. The Board acknowledges that the County has a transportation concurrency ordinance in place (Title 26B SCC) and the County is duty bound to enforce it. The County has also amended its TIP to address potential impacts posed by the Clearview LAMIRD designation and has taken a stance before the State on the importance of the state planning for, and funding, transportation improvement in the area. The Board also finds that the 2002-2007 TIP *coupled with* the existing concurrency ordinance demonstrates that concurrency considerations informed the planning decisions of the County in designating the LAMIRDs. Therefore, the Board concludes that the County has maintained consistency between the land use and transportation elements of its Plan and the transportation element continues to implement the land use element.

The Board notes that if ongoing traffic concurrency problems (*i.e.*, segments of arterials in arrears with no funding for improvements programmed) stifle development opportunities in the Clearview area, ^[33] then the Petitioners' preferred solution (*i.e.*, not designating the two Clearview intersections as LAMIRDs) could be considered a more straightforward approach. However, since the County has a concurrency management system *and* it has funding for improvements programmed into its TIP (*i.e.*, no funding shortfall), the County's selected approach is not prohibited by GMA.

The Board observes that the relationship between the FLUM and concurrency regulations is analogous to the relationship between land use maps and critical areas regulations. A development proposal may be consistent with the FLUM and zoning requirements, say for commercial use with certain use and bulk restrictions; however, it is still subject to the requirement to comply with whatever critical areas setbacks or other restrictions that apply within the jurisdiction.

Conclusion

The County's designation of the Clearview LAMIRDs in Ordinance No. 01-131 **complies** with the requirements of RCW 36.70A.070(6). The County's transportation element remains consistent with, and implements, the land use element, as amended by Ordinance No. 01-131. Petitioner's challenge as to whether Ordinance Nos. 01-132 and 01-133 comply with RCW 36.70A.070(6) is **dismissed**.

D. Legal Issue No. 5

The Board's PHO set forth Legal Issue No. 5

5. *Did the County fail to comply with County-wide Planning Policy (CPP) consistency*

requirements of RCW 36.70A.210 (CPPs OD-5, OD-11, RU-1, RU-5, TR-4 and TR-8) and the internal consistency requirements of RCW 36.70A.070(preamble) (Plan Policies: LU-2.B, LU-5.A.7, LU-6, LU-6.A.1, LU-6.B, LU-6.F, LU-6.I.4 through LU-6.I.8, TR-1, TR-1.A.3, TR-1.B.3, TR-4.B, TR-4.D.1, 2, 4, 5, 6, 8 and 9, TR-4.E.5, TR-5.A.2, TR-7.A.6 and 7, TR-8.B, Tr-9, TR-9.A.2, TR-10.A.1 and CF-1.A.1) when it adopted the Clearview Ordinances? [Amended PFR, at 2.]

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Applicable Law

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RCW 36.70A.210 provides in relevant part:

(1) [County-wide planning policies are] 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 in RCW 36.70A.100.

The Board has previously held that “Comprehensive plans must be consistent with county-wide planning policies.” *See: Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008c, Final Decision and Order, (Oct 23, 1995), at 34.

RCW 36.70A.070(preamble) provides in relevant part:

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

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Discussion

Position of the Parties:

Regarding consistency of the LAMIRD Plan Policies with the CPPs, Petitioner Hensley argues that the new Plan Policies: 1) intensify uses and allow sprawl (conflicting with CPP OD-11^[34]); 2) encourage nearby UGA residents to shop in this area (conflicting with CPP RU-5^[35]); 3) will increase traffic (conflicting with CPPs RU-1,^[36] OD-5,^[37] TR-4^[38] and TR-8^[39]). Hensley PHB, at 18-22; Hensley Reply, at 13-15

The County counters that the new Plan Policies and LAMIRD designation protect the rural area by minimizing and containing commercial infill and development within the LOBs to serve the surrounding rural area and are consistent with CPPs OD-11, OD-5, RU-5 and RU-1. County Response, at 58-59. The County also argues that the transportation facilities, including its TIP and concurrency procedures, support these land use designations, and are consistent with CPPs TR-4 and

TR-8. County Response, at 54-55.

Regarding the consistency of the LAMIRD Plan Policies with existing Plan Policies, Petitioner Hensley argues that the findings of fact^[40] in the LAMIRD Ordinances are inconsistent with the Clearview LAMIRD Plan Policies. Hensley PHB, at 22-23. Additionally, Hensley asserts that the new LAMIRD Policies: 1) are not consistent with the transportation element (TR-1^[41]); 2) cannot maintain concurrency (TR-1.B.3^[42]); 3) concurrent safety improvements cannot be provided (TR-4.E.5^[43]); 4) inhibit concurrency from being used as a growth management tool (TR-5.A.2^[44]); 5) make the land use element, transportation element, specifically the financing plan, inconsistent (TR-7.A.7^[45]); and 6) do not direct urban growth to the urban areas (TR-8.B and CR-1.A.1^[46]) Hensley PHB, at 23-25; Hensley Reply, at 14-15.

The County simply counters that the new LAMIRD policies are consistent with the existing Plan Policies and that Hensley merely restates arguments made in Legal Issues 3 and 4. County Response, at 56-60.

Board Discussion:

Again, the Board notes that, RCW 36.70A.210 and .070(preamble) govern the development of *Comprehensive Plans*, these sections do not directly apply to development regulations. Consequently, the Board's review on this issue is limited to whether *Ordinance No. 01-131* complies with the requirements of RCW 36.70A.210 and .070(preamble) of the GMA for internal Plan consistency and Plan consistency with the CPPs. However, if the Board concludes that the Plan ordinance does not comply with the consistency requirements of .210 or .070(preamble), the Board will then address the implementing ordinances. If the Board finds the Plan ordinance in compliance with .210 and .070 (preamble), the challenge to Ordinance Nos. 01-132 and 01-133 will be dismissed.

The County notes that Petitioner has abandoned the internal consistency challenge pertaining to the LAMIRDs and Plan Policies TR-1.A.3, TR-4.B, TR-4.D.1, 2, 4, 6, 8 and 9, TR-7.A.6, TR-9, TR-9.A.2 and TR-10.A.1. After review of Hensley's PHB, at 16-25, the Board **agrees** with the County and also finds that Petitioner has failed to brief and argue internal consistency with Plan Policies LU-2.B and LU-5.A.7 and LU-6.A.1. Legal issues not briefed are deemed abandoned. WAC 242-02-570(1). These portions of Legal Issue 5 are **abandoned**.

The remaining challenged CPPs that are referenced in Petitioners PHB are: CPPs OD-5, OD-11, RU-1, RU-5, TR-4 and TR-8. Hensley PHB, at 16-25. The remaining challenged Plan Policies that are referenced in Petitioners PHB are: LU-6, LU-6.B, LU-6.F, LU-6.I.4 through LU-6.I.8, TR-1, TR-1.B.3, TR-4.E.5, TR-5.A.2, TR-7.A.7, TR-8.B and CF-1.A.1. Hensley PHB, at 16-25.

The challenged LAMIRD Plan Policies:

The County adopted nine Plan Policies to accompany the designation of the two LAMIRDs; it is five of these Policies that Petitioners assert are inconsistent with the CPPs and existing Plan Policies. The Clearview Rural Commercial LAMIRD Plan Policies are as follows (the challenged policies are *italicized*):

Objective LU 6.I Within the rural Clearview area and along State Route 9, establish two limited areas of more intensive rural development within logical outer boundaries that are based on commercial uses in existence as of July 1, 1990, and which permit limited infill, development or redevelopment within existing areas.

Policy LU 6.I.1 Recognize the existing commercial and residential settlement pattern in the area of the southeast Snohomish County along State Route 9 between 184th and 172nd Streets SE and 164th Street SE as limited areas of more intense rural development (LAMIRDs) 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.

Policy LU 6.I.2 Areas within an existing commercial designation or zoning within LAMIRD boundaries shall be designated Clearview Rural Commercial (CRC).

Policy LU 6.I.3 Areas designated Rural Residential within LAMIRD boundaries shall retain the existing Rural Residential designation.

Policy LU 6.I.4 Rural residents should have a mix of small scale retail sales, personal services and job opportunities within the CRC designation.

Policy LU 6.I.5 Prevent strip development by minimizing and containing infill and redevelopment within the logical outer boundaries of two distinct commercial nodes in the Clearview area.

Policy LU 6.I.6 The boundaries of the Clearview LAMIRD 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 parcels which meet the following criteria:

- a. The area does not contain extensive critical areas, and*
- b. The area is developed with a commercial use which was in existence on or before July 1, 1990; or*
- c. The area is zoned Neighborhood Business or Community Business and is a cohesive part of the existing commercial settlement pattern; 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 a boundary edge and*

its exclusion would create an irregular boundary.

Policy LU 6.I.7 Implement the CRC designation through zoning and development standards which reduce impacts of new infill development or redevelopment to adjacent rural residential areas and rural character.

- a. Require a twenty-five foot wide sight obscuring landscape buffer adjacent to the LAMIRD boundaries. The buffer should be designed to preserve native vegetation and existing trees of three inch caliper or larger; and*
- b. New uses shall be limited to primarily to [sic] those uses similar to and compatible with uses, that existed on July 1, 1990, which serve the local rural population.*

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

Text Amendment: 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. The implementing zone within the Clearview Rural Commercial designation is the Clearview Rural Commercial zone.

Ordinance No. 01-131, at 10-12, (emphasis supplied to denote the challenged Policies).

CPP Consistency:

Review of the LAMIRD Plan Policies and the noted CPPs leads the Board to agree with the County, the LAMIRD Plan Policies are not inconsistent with the CPPs. As discussed in Legal Issue 3 and 4 *supra*, the County has appropriately delineated the Clearview LAMIRDs and it has maintained consistency between its Land Use and Transportation element. The designation of the LAMIRDs and Plan Policies: 1) curtail strip development along SR-9; 2) allow for limited infill development or redevelopment to serve the rural area within the LOBs of the two areas; and 3) are supported by rural services. The Clearview LAMIRD Plan Policies do not conflict with the existing CPPs, and **comply** with the consistency requirements of RCW 36.70A.210.

Existing Plan Policy Consistency:

Review of the challenged LAMIRD Plan Policies and the existing Plan Policies also leads the Board to agree with the County, the LAMIRD Plan Policies are not inconsistent with the noted existing Plan Policies. The Board sees no inconsistency between the Clearview LAMIRD Plan Policies and the noted findings of fact in Ordinance No. 01-131. Urban services are not to be provided within the LAMIRD.

The Board has already concluded that the Clearview LAMIRDs comply with the requirements of RCW 36.70A.070(5) and .070(6). Petitioner simply reiterates her arguments from those issues in the context of internal and external consistency. This line of argument does not persuade the Board. The designation of the LAMIRDs in the Plan and Plan Policies: 1) are consistent with the transportation element; 2) do not inhibit concurrency enforcement, including safety improvements, nor inhibit its use as a growth management tool; 3) do not prevent urban growth from being directed into the urban areas. The Clearview LAMIRD Plan Policies do not conflict with the noted findings of fact in Ordinance No. 01-131 nor are they inconsistent with the noted existing Plan Policies. Ordinance No. 01-131 **complies** with the internal consistency requirements of RCW 36.70A.070(preamble).

Conclusion

As noted *supra*, Petitioner has **abandoned** portions of this issue. The new Clearview LAMIRD Plan Policies, adopted in Ordinance No. 01-131 **comply** with the consistency requirements of RCW 36.70A.210 and the internal consistency requirements of RCW 36.70A.070(preamble). Petitioner's challenge of whether Ordinance Nos. 01-132 and 01-133 comply with the requirements of RCW 36.70A.070(preamble) and .210 is **dismissed**.

E. Legal Issue No. 2

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

2. Did the County fail to be guided by goals RCW 36.70A.020(1), (2) and (3) when it adopted the Clearview Rural Commercial area (CRC) rezone and zoning code in Ordinance Nos. 01-131, 01-132 and 01-133 (Clearview Ordinances) for the limited area of more intensive rural development (LAMIRD)? [Amended PFR, at 2.]

Applicable Law

Petitioners challenge the County's compliance with the following GMA goals: [\[47\]](#)

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in and 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.

RCW 36.70A.020.

Discussion

The Board notes that RCW 36.70A.020 – the Goals section of the GMA – is to provide guidance for the development of *comprehensive plans and development regulations*. Therefore, all three ordinances adopted by the County fall within this provision of the GMA and are subject to Board review.

Goal 3 - Transportation:

As discussed in Issue 4, the Board found compliance with the requirements of RCW 36.70A.070(6). The County is not only working with the state, but also trying to influence the state’s views of regional priorities. Having found compliance with .070(6), the Board concludes that the County’s action of adopting Ordinance Nos. 01-131 has been guided by the direction of Goal 3 (RCW 36.70A.020(3)). Likewise, since the Board has found that Goal 3 guides the Plan amendments, the Board concludes that Goal 3 guides the regulations implementing these Plan amendments. Consequently, the Board concludes that Ordinance Nos. 01-131, 01-132 and 01-133 all **comply** with RCW 36.70A.020(3).

Goal 2 – Reduce sprawl:

As discussed in Issue 3, the Board found compliance with the requirements of RCW 36.70A.070(5) as it relates to the creation of LAMIRDs and the prevention of low-density sprawl. These LAMIRDs are predominantly *commercial* enclaves and infill development and redevelopment will be contained and minimized within the LOBs. Having reached this determination, the Board concludes that the County’s action of adopting Ordinance No. 01-131 has been guided by the direction of Goal 2 (RCW 36.70A.020(2)). Likewise, since the Board has found that Goal 2 has guided the Plan amendments, the Board concludes that Goal 2 has guided the regulations implementing this Plan amendment. Consequently, the Board concludes that the County’s action of adopting Ordinance Nos. 01-131, 01-132 and 01-133 all **comply** with RCW 36.70A.020(2).

Goal 1 – Urban growth:

The question of whether Goal 1 has guided the County in developing the Clearview LAMIRDs and implementing regulations is a more troublesome one. While the Plan Policy language adopted in Ordinance No. 01-131 recognizes existing “urban uses,” it also discourages the development of future

urban uses within the LAMIRDS.

The Plan Policies supporting the LAMIRD designations provide:

- “[The LAMIRDS LOBs are] based on commercial uses in existence as of July 1, 1990.” (LU-6.I),
- “Recognize the existing commercial. . . pattern in the area. . . that provide retail goods and services to the immediate population and a larger surrounding service area.” (LU-6.I.1),
- “Rural residents should have a mix of small scale retail sales, personal services and job opportunities.” (LU-6.I.4),
- “New uses shall be limited to those uses similar to and compatible with uses, that existed on July 1, 1990, and which serve the local rural population.” (LU-6.I.7.b),
- “Development within the CRC designation shall be limited to development that can be supported by services typically delivered at rural levels of service.” (LU-6.I.8), and
- “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.” (Text amendment on page LU-65).

Ordinance No. 01-131, Exhibit A, at 10-12.

The Board finds the LAMIRD designations and the Plan Policies to be guided by Goal 1. While these designations acknowledge existing commercial uses, they also appropriately limit new commercial uses to smaller scale retail and personal service activities to serve the rural population. Additionally, since Ordinance No. 01-132 simply delineates the Clearview LAMIRDS on the zoning map and indicates the new CRC zoning, the Board finds this designation to be guided by Goal 1. Therefore, Ordinance Nos. 01-131 and 01-132 **comply** with RCW 36.70A.020(1).

However, Ordinance No. 01-133 is more expansive than the Plan Policies suggest. The Board acknowledges that several dozen existing commercial uses are within the LAMIRD areas. Some of these uses are indistinguishable from the commercial uses typically found in urban areas, such as large [square-footage] grocery stores, fast food restaurants, professional offices and financial institutions. How these existing uses came to be in a rural area of the County is not germane to this inquiry. In fact, it is permissible under the GMA, and appropriate for the County to limit non-conforming uses and acknowledge these existing commercial uses by including them as permitted or conditional uses in the new CRC zoning. These permitted uses (urban or not) are those that existed on July 1, 1990 per RCW 36.70A.070(5)(d)(v).^[48] Consequently, new uses that are of a like nature

and scale are permissible and do not conflict with Goal 1.

Also appropriate in a LAMIRD is infill commercial development and redevelopment that serves the rural area. The Clearview LAMIRD Plan Policies noted *supra*, support and also reflect this direction (*i.e.*, “provide retail goods and services *to the immediate population* and a larger surrounding service area.” (LU-6.I.1), “*Rural residents* should have a mix of *small scale* retail sales, personal services and job opportunities.” (LU-6.I.4), “New uses shall be limited to those uses. . .which *serve the local rural population.*” (LU-6.I.7.b), “Development within the CRC designation shall be limited to development that can be *supported by services typically delivered at rural levels of service.*” (LU-6.I.8), and “This designation generally allows for [uses] *to serve the needs of the rural population.*” (Text amendment on page LU-65). Ordinance No. 01-131, Exhibit A, at 10-12.

To discern the consistency of the uses permitted by the CRC with these County policy statements and the statute itself, the Board must answer a simple question: Are the commercial uses permitted in the CRC zone either (1) based on existing uses or (2) limited to those small-scale uses that will serve the needs of the surrounding rural area? The Board answers in the negative.

The Board notes that prior to the creation of the Clearview LAMIRDs and the CRC zoning designation, the implementing commercial zones within this portion of the County’s *rural area* were: commercial business (CB), neighborhood business (NB) and general commercial (GC). *See*: Ordinance No. 01-132, Section 2, at 5, and Exhibit 2 to the Ordinance, FoF 22. These zones are used within the urban areas. Each of these commercial zoning designations is an *urban* commercial designation, not a *rural* commercial zoning designation.^[49] FoF 23. This fact lends credibility and weight to Hensley’s assertion that the County is *not* “Encourag[ing] development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.” Rather, the County is encouraging *urban* development within a limited area of more intense *rural* development within the *rural* area. Hensley PHB, at 27. Petitioner has met her burden of proof to show clear error.

Review of the urban commercial zones on the County’s Use Matrix reveals that the County’s general commercial (GC) zone allows approximately 127 different uses. The County’s commercial business (CB) zone allows approximately 108 uses. The County’s neighborhood business (NB) zone allows approximately 75 uses. The new Clearview Rural Commercial (CRC) zone for the *rural* Clearview LAMIRDs allows approximately 75 uses. Ordinance No. 01-133, Section 3, at 7-15. The Board notes that twenty-five of these uses were added at the February 6, 2002 meeting. Ex. 365, (Hensley PHC Brief, Attachment 6.) This suggests that prior to the February 6, 2002 meeting the CRC zone was more limited in scope and scale and allowed only 50 different uses (approximately). Mirroring the scope and scale of uses permitted in an urban area within a LAMIRD is not consistent with “*limited areas of more intensive rural development*” and encourages urban growth in the rural area.

The Board concludes that Ordinance No. 01-133 was not guided by the direction of Goal 1 since the

CRC zone permits extensive new urban commercial growth within the LAMIRDs. Therefore, Ordinance No. 01-133 **does not comply** with RCW 36.70A.020(1) and will be **remanded**. On remand, in order to comply with RCW 36.70A.020(1), the County must limit the commercial uses permitted in the CRC zoning designation to those that comply with RCW 36.70A.070(5) *and* the County's Planning Policies adopted in Ordinance No. 01-131 – those commercial uses that existed in July of 1990 and those small scale uses that primarily serve the rural population.

Conclusions

The Clearview Ordinances – Nos. 01-131, 01-132 and 01-133 have been guided by the direction provided by Goals 2 and 3 and **comply** with RCW 36.70A.020(2) and (3). The Clearview Ordinances – Nos. 01-131 and 01-132 have been guided by the direction provided by Goal 1 and **comply** with RCW 36.70A.020(1). However, Goal 1 did not guide the development of Ordinance No. 01-133. The extensive urban uses permitted in the CRC zone was **clearly erroneous** and **does not comply** with RCW 36.70A.020(1) and will be **remanded**. On remand, in order to comply with RCW 36.70A.020(1), the County must limit the commercial uses permitted in the CRC zoning designation to those that comply with RCW 36.70A.020(1), .070(5) and the County's Planning Policies adopted in Ordinance No. 01-131 – those commercial uses that existed in July of 1990 and those small scale uses that primarily serve the rural population.

v. Request for Invalidity

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 Amended PFR, at 2-3, Hensley PHC Brief, at 9-10 and McVittie PHC Brief, at 1 [related to Goal 11], Hensley PHB, at 33; McVittie PHB, at 7 [related to Goal 3]; and Hensley Reply, at 18.

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.

In Legal Issues 1 and 2, the Board has found that the County's adoption of Ordinance No. 01-133 was not been guided by the direction provided in Goals 1 and 11 and did not comply with RCW 36.70A.020(1) and (11) or RCW 36.70A.035 and .140. The question now becomes whether the continued validity of Ordinance No. 01-133 during the period of remand would substantially interfere with the fulfillment of Goals 1 or 11. The Board's review of the facts and circumstances presented in this matter leads the Board to conclude that such a determination is **not appropriate**. While the County's action is noncompliant, the continued validity of the Ordinance during the period of remand would **not substantially interfere** with Goals 1 or 11. Adjustments to the uses permitted in the CRC zone and additional public notice and opportunity for review and public comment is all that is necessary for the County to come into compliance with the goals and requirements of the GMA. Therefore, the Board **declines** to enter a determination of invalidity.

VI. ORDER

Based upon review of the Board's FDO in *Hensley IV*, the SATC and comments thereon, the new PFR, the record, the multiple 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. 01-131 **complies** with the goals and requirements of the GMA. The Board hereby enters a **Finding of Compliance** in *Hensley IV*, regarding the Plan designations for the Clearview LAMIRDs. The *Hensley IV* case is now *closed*.

Snohomish County's adoption of Ordinance No. 01-132 **complies** with the goals and requirements of the GMA.

Snohomish County's adoption of Ordinance No. 01-133 was **clearly erroneous** and **does not comply** with the notice and public participation requirements of RCW 36.70A.035, .140 and .020(11) – Goal 11, related to the 50-foot sight-obscuring buffer and maximum lot coverage for the Northern LAMIRD. Additionally, Ordinance No. 01-133 was not guided by the direction provided in Goal 1, was **clearly erroneous** and **does not comply** with RCW 36.70A.020(1), related to uses permitted in the CRC zone.

The Board therefore, **remands** Ordinance Nos. 01-133 to the County with the following directions:

1. By no later than **September 23, 2002**, the County shall conduct the necessary additional environmental review, provide notice and the opportunity for public review and comment and take appropriate legislative action regarding the Clearview Rural Commercial uses and restrictions, as adopted in Ordinance No. 01-133, to comply with the requirements of RCW 36.70A.035, .140, and be guided by the GMA goals of RCW 36.70A.020(1) and (11) as interpreted and applied in this FDO.
2. By no later than **September 30, 2002**, 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 Petitioner Hensley and Intervenor McVittie.
3. By no later than **October 14, 2002**, the Petitioner and Intervenor may file with the Board an original and four copies of Comments on the County's SATC. Petitioner and Intervenor shall simultaneously serve a copies of their Comments on the County's SATC on the County.
4. By no later than **October 21, 2002**, the County may file with the Board an original and four copies of the County's Reply to Comments. The county shall simultaneously serve a copy of such reply on Petitioner and Intervenor.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Compliance Hearing** in this matter for **10:00 a.m. November 4, 2002** at the Board's offices.

If the County takes legislative compliance actions prior to the September 23, 2002 deadline set forth in section 1 of this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 17th day of June 2002.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member (Board Member North files a separate dissenting

opinion on Legal Issue 4, *infra.*)

Joseph W. Tovar, AICP
Board Member (Board Member Tovar files a separate concurring
opinion on Legal Issue 4, *infra.*)

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.

Dissenting Opinion of Board Member North

I respectfully dissent from the conclusion drawn by my colleagues regarding Legal Issue 4. I believe that Petitioner Hensley has carried the burden of proof showing that the County's LAMIRD designation was in error. I do not believe that the GMA permits a county to increase the land use intensity for an area, such as Clearview, when it admits that its transportation system is deficient.

Concurring Opinion of Board Member Tovar

I concur with both my colleagues as to the outcome of Legal Issues 1, 2, 3 and 5 and with the majority as to Legal Issue 4. I write here separately, however, with respect to Legal Issue 4 to clarify my conclusions and express several concerns. I concur with Board Member McGuire that the County's admission of concurrency problems on certain Clearview area roads does not, on its face, preclude the adoption of a LAMIRD and implementing regulations that may eventually lead to more intensive land use proposals.

At the same time, I also agree with the sentiment, if not the substance, of Board Member North's dissent. It does seem counter-intuitive for the County to authorize an increase in land use intensity for an area served by roads that presently function below adopted LOS standards. I would even agree that it might not be the wisest or most prudent choice to do so. However, as this Board has frequently observed, it is not our role to identify a "best" or "preferred" choice from among a range of GMA-compliant alternatives. That is local government's role. Rather, the Board's role is to determine if a local government's selected choice falls within the range of GMA-compliant alternatives. For the reasons outlined below, I believe that the County's choice falls within this range.

The Board must presume that the County will maintain and enforce its concurrency ordinance. This is true notwithstanding the County's present, or potential future, action to increase the potential land use intensity in Clearview. The fact that the County has adopted a Future Land Use Map and zoning

that establishes permitted land uses does not trump the GMA’s concurrency requirements nor excuse the County from its duty to enforce its locally adopted concurrency ordinance. The Board adopts this view in its discussion of Legal Issue 4 by noting, *supra*, an analogy between concurrency and critical areas regulations. Significantly, both concurrency and critical areas regulations apply to new development proposals *regardless* of the land use densities or intensities shown on adopted future land use and zoning maps.

Finally, a word of caution is in order. It would be a mistake to conclude that this Board’s decision in this case stands for the proposition that land use designations, or re-designations, are now unlinked from transportation capacity. The fact that the challenged action was a LAMIRD designation, and a non-residential LAMIRD at that, is significant. In the first instance, LAMIRDs are discretionary creatures, which is to say counties have no GMA duty to create them. Moreover, no facts or argument was presented to suggest that actual buildout of the Clearview LAMIRDs is necessary to satisfy a population or employment target set forth in a comprehensive plan or county-wide planning policy. Thus, while Petitioners were distressed by the scenario of concurrency mechanisms thwarting the fulfillment of the land use “potentials” set forth in the Clearview LAMIRDs, such a result would pose no threat to GMA-mandated county-wide growth accommodation.

This is in sharp contrast to the situation facing cities. Growth accommodation is a paramount GMA duty for cities, including meeting the population and (if any) employment allocations provided to them by their counties. Thus, cities must assure that they can continue to meet this important growth accommodation duty even in the face of capacity-reducing restrictions such as concurrency and critical areas regulations.

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APPENDIX A

Findings of Fact

1. The County provided a general notice for the Council’s January 23, 2002 public hearings for the three Clearview LAMIRD ordinances. Exs. 374, 379, 380, 386 and 388.

2. The County also published specific notice for the Council's January 23, 2002 public hearing for each of the three ordinances. Exhibits 368, 371, 374, 375, 381 and 383 [regarding Ordinance No. 01-131 (Plan)]; Exhibits 369, 372, 374, 377, 380, and 384 [regarding Ordinance No. 01-132 (zoning map)]; and Exhibits 370, 373, 374, 378, 383 and 385 [regarding Ordinance No. 01-133 (development regulations)].

3. The notices were published on December 31, 2001, January 2, 2002 or January 14, 2002, depending upon the publication. See: Exhibits noted in Finding of Fact 1 and 2.

4. The general notice provides general background on the Clearview LAMIRD and the remand from the Board. It then summarizes the Planning Commission recommendations regarding the Clearview LAMIRD for all three ordinances. It includes the following summary for the development regulations:

Proposed Code Amendments may include the following [Ordinance No. 01-133]: *The establishment of a 50-foot wide, Type A landscape buffer, adjacent to rural zones, a new Clearview Rural Commercial (CRC) zone with uses similar to and compatible with the existing commercial uses as [of] July 1, 1990, impervious surfaces limited to 60% of the site, building size limited to 6,000 square feet, access shall be taken from secondary roads whenever possible, and maximum lot coverage should not exceed 25%. Existing binding site plans should be grand fathered and exempt from additional standards.*

Exs. 374, 379, 380, 386 and 388 (emphasis supplied).

5. The general notice also includes the following:

Range of Possible Actions the County Council May Take on These Proposals: At the conclusion of its public hearing(s) the County Council may make one of the following decisions regarding the proposed action: (1) adopt the Planning Commission recommendations; (2) adopt an amended version of the Planning Commission recommendations; (3) decline to adopt the Planning Commission recommendations; (4) remand in whole or in part to the Planning Commission for further consideration; (5) adopt one of the alternatives that were considered by the Planning Commission or amend versions of those proposed alternatives; (6) adopt such other proposals as were considered by the Council at its own hearing; or (7) take any other action permitted by law.

Exs. 374, 379, 380, 386 and 388.

6. The specific notice indicates that Ordinance No. 01-133 reflects the Planning Commission's recommended alternative to an ordinance proposed by Planning and Development Services that was considered at a public hearing on November 20, 2001. The section-by-section summary, in

relevant part, provides as follows:

Section 4. Adds a new column to the use matrix contained in Section 18.32.040 SCC, which specifies the permitted and conditional, uses for the CRC zone. . . .

Section 5. Adds a new column to the bulk matrix contained in Section 18.42.020 SCC which specifies setback, height and lot coverage requirements within the new CRC zone. . . .

Section 6. *Amends Section 18.43.045 SCC by adding the CRC zone to the Title that specifies the buffer character requirements for rural zones.* The Type A landscape buffer proposed to be required in the CRC zone should include existing native vegetation.

Section 7. Adds a new column to the landscape matrix contained in Section 18.43.050 SCC, which specifies the landscape requirements for the new CRC zone. *It also adds reference note (ii) which requires a 50-ft. wide, Type A, landscape buffer along property lines adjacent to a rural zone, in addition to the requirements of 18.43.050 SCC.* Perimeter width averaging is allowed, as long as the minimum buffer width remains at least 50% of the required width and the total area equates or exceeds the required are.

. . .

Section 13. Amends Section 18.65.040 SCC, performance standards, by adding a new subsection (5): in addition to the general performance standards of SCC 18.65.040(1), the following additional development standards apply to development within the CRC zone not subject to an approved Binding Site Plan or Official Site Plan:

- Total impervious surface shall not exceed 60% of the net useable area of the site;
- Maximum area of each building footprint = 6,000 sf [square feet]
- Access shall be taken from secondary roads when possible; and
- Maximum lot coverage by building = 25%

Exs. 370, 373, 374, 378, 382 and 385, (emphasis supplied).

7. The notice for Ordinance No. 01-133, like the general notices, also includes the language describing the Range of Possible Actions the County Council May Take on These Proposals noted *supra*. See: Exs. 370, 373, 374, 378, 382 and 385.

8. On January 23, 2002 the Council held a public hearing on the Planning Commission's recommendations for all three proposed ordinances. At the conclusion of the meeting, the Council continued the hearing until February 6, 2002, but closed the continued hearing to further public testimony. Hensley PHC Brief, at 4; SATC, at 4; and County Response, at 62.

9. During the interim, staff was directed by individual members of the Council to prepare a series of potential amendments and findings for the February 6, meeting. Ex. 365, 366 and 367. Hensley PHC Brief, Attachments 6, 7 and 8; and County Response, at 62.

10. On February 6, 2002, the Council acted on the proposed amendments and adopted the Ordinances without giving the public the opportunity to review or comment on the findings or amendments. Hensley PHC Brief, at 4; SATC, at 4; and County Response, at 3.

11. Ordinance No. 01-131 amends the County's FLUM, and the text of the County's GMA Plan as it relates to the Clearview LAMIRD. Instead of one LAMIRD, the County created two LAMIRDs, thereby reducing the overall size. Approximately 27 acres of land that connected the two intersections of the original LAMIRD were eliminated. The Clearview LAMIRD now has a Northern crossroad node (portion at SR-9 and 164th Street) and a Southern crossroad node (portion at SR-9 and 180th Street). The new LAMIRDs contain approximately 100 acres (about 16.5 acres in the north node and 79.2 acres in the south node^[50]) centered on these intersections. *See*: Ord. No. 01-131, Sec. 2 (D)(1), at 2 and Sec. 2 (D)(2), at 4. Exhibit B to the Ordinance depicts the boundaries for the two nodes of the Clearview LAMIRD on the FLUM and shows the Plan designations contained within the LAMIRD's two nodes. Approximately 95% of the total 100-acre area is "CRC" – Clearview Rural Commercial, and the remainder is "RR" – Rural Residential 1 du/5 acres. Exhibit A to the Ordinance contains the amendatory text to the land use policies for the Clearview area.

12. Ordinance Nos. 01-132 and 01-133 amend the County's development regulations to reflect the FLUM and Plan text changes adopted in Ordinance No. 01-131.

13. Ordinance No. 01-132 amends the County's zoning map designations^[51] to implement the LAMIRD designation for the FLUM and Plan policies. A Clearview Rural Commercial "CRC" zoning designation is created and is applied to approximately 95% of the LAMIRD, an existing Rural-5 designation applies to the remainder. *See*: Ord. No. 01-132, Ex. A.

14. Ordinance No. 01-133 amends various sections of the Counties Zoning Code - Title 18 of the Snohomish County Code (SCC) - including the text, use and bulk matrices. *See*: Ord. 01-133, at 3-44.

15. The delineation of the two Clearview LAMIRDs as depicted in Ordinance No. 01-133 and the map indicating the "Built Environment Clearview Commercial Study Area" in Ex. 83, correlate very closely.

16. The "Built Environment" map depicts: 1) commercial areas or uses in existence in July of 1990; 2) permitted or vested commercial uses prior to 1990; 3) permitted or vested uses between 1990 and 2000; and 4) institutional use. Ex. 83. These areas are all clearly identifiable and

contained within the two nodes delineated in the Clearview LAMIRDs by Ordinance No. 01-133.

17. The County's most recent amendments to its transportation element were found to comply with the requirements of the GMA, specifically RCW 36.70A.070(6), in *McVittie v. Snohomish County (McVittie VIII)*, CPSGMHB Case No. 01-3-0017, Final Decision and Order, (Jan. 8, 2002).

18. The County has a concurrency ordinance (Title 26B SCC) to implement .070(6)(b).

19. 180th Street SE from Broadway Ave to SR-9 and 180th Street SE from SW UGB to SR-9 are "in arrears." Ex. 326, Snohomish County Transportation Concurrency Report, September 6, 2001, at 4, 6 and 7.

20. An "in arrears" designation is based upon: a determination by the County Traffic Engineer that the arterial unit is operating below the County's adopted level-of-service (LOS) standard and a determination by Public Works that there are no programmed and funded projects that will remedy the LOS deficiency within six years. *Id.*, at 6.

21. The County has a Transportation Improvement Program (TIP) to implement the financing provisions of its transportation element. The TIP schedules transportation improvements over a six-year period. The November 2002-2007 TIP includes a corridor study to determine phases of future construction for 180th St. SE: 35th Ave. SE to Broadway Ave. [including the "in arrears" portions of 180th Street]. Ex. HOM-1, at 5, TIP # E.30.

22. The Clearview area is outside the County's UGAs, it is within the rural area. The County's implementing zones for *commercial* use in the rural Clearview area, prior to the challenged actions, were: commercial business (CB), neighborhood business (NB) and general commercial (GC). Ordinance No. 01-132, Section 2, at 5, and Exhibit 2 to the Ordinance.

23. The CB, NB, and GC zoning designations are urban commercial designation, not rural commercial zoning designation. The County clearly identifies rural commercial zoning designations, such as rural business (RB) and rural freeway service (RFS), in its zoning regulations supports this conclusion. See: Ordinance No. 01-133, Section 3, at 5-6.

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- [1] Ms. Hensley and Ms. McVittie were Petitioners in *Hensley IV*. In *Hensley V*, Ms. Hensley is the Petitioner and Ms. McVittie is an Intervenor. Roger Olsen was also an Intervenor in *Hensley IV*, but has indicated he would not be participating in the compliance proceeding.
- [2] The Board's FDO only addressed the County's amendment to its *Plan* pertaining to Clearview. The County had not adopted implementing regulations for the Clearview Plan LAMIRD at the time of the challenge.
- [3] February 18, 2002 was a legal holiday. Therefore, the County's filing of the SATC was timely.
- [4] Ms. Hensley spoke on behalf of Ms. McVittie who was not able to participate.
- [5] The County had not adopted implementing development regulations [zoning] for the Clearview LAMIRD when it was challenged in *Hensley IV*.
- [6] These acreages do not include right-of-way acreage.
- [7] Ordinance No. 01-132 also amends the County Assessors maps for each parcel within the LAMIRD.
- [8] Although Legal Issue 1 references Ordinance No. 01-132, Petitioner's argument in briefing on this issue is directed only the provisions of Ordinance No. 01-133.
- [9] The County agrees with this conclusion: "Zoning in the adopted LAMIRDs is identical to that in the DSEIS Alternative 1 with the sole exception of a 25-foot buffer reduction." County Response, at 45.
- [10] *See also*: FoF 4 and 5.
- [11] This new proposed code requirement for a 50-foot sight-obscuring buffer is included in all three Alternatives evaluated in the DSEIS.
- [12] Instead of adopting a set prescriptive standard for impervious surface, the County adopted a performance-based standard will limit the amount of impervious surface permitted on any given parcel within the ranges discussed in the DSEIS.
- [13] Exhibit B to Ordinance No. 01-132 shows that the zoning for Northern node changes from neighborhood business (NB) to CRC.
- [14] The Board's conclusion on this issue goes *only* to the lack of notice and the lack of opportunity for public review and comment on the perimeter buffer and maximum lot coverage for the Northern LAMIRD. The Board offers no opinion on the extent of such a buffer or maximum lot coverage. However, the Board notes that Ordinance No. 01-131, Exhibit A, at 11, amends Plan Policy LU 6.I.7 to delete the reference to a fifty-foot sight-obscuring buffer and include a twenty-five foot sight-obscuring buffer. On remand, the Board expects the County to ensure that consistency exists between the Plan Policies and the development regulations.
- [15] The Board notes that Hensley concedes "[I]t is nearly impossible to draw regular boundaries when SR-9 runs diagonally through this area. . . . If a square boundary were required, this LAMIRD would be intensely large." Hensley SATC Comment, at 7.
- [16] The County offers this information to distinguish its designation of LAMIRDs from that of Lewis County which had 35 LAMIRDs that exceeded the size of Lewis County's unincorporated UGAs struck down. Hensley references the Western Board's Final Decision and Order in that case [*Panesco/Butler*] in her PHB.
- [17] *Compare*: Ordinance No. 01-133 and map attached to Ex. 83
- [18] It is within the County's purview to include previously vested lots in its deliberations in delineating a LAMIRD.
- [19] Hensley PHB, at 11-13, Hensley Reply, at 10.

[20] Hensley PHB, at 12, McVittie PHB, at 2, Hensley Reply, at 10.

[21] Hensley PHB, at 12, McVittie PHB, at 5, Hensley Reply, at 9.

[22] Hensley PHB, at 12, McVittie PHB, at 6, Hensley Reply, at 9.

[23] Hensley PHB, at 14.

[24] Hensley PHB, at 14, McVittie PHB, at 6.

[25] The County indicates that part of its problem on arterials is the operation of SR-9 at intersections. County Response, at 36.

[26] County Response, at 36-38.

[27] County Response, at 44, also noting that the TIP now addresses these concerns.

[28] County Response, at 38.

[29] County Response, at 43.

[30] County Response, at 33.

[31] The Board's regional perspective is informed by detailed records and argument presented in the many Snohomish County cases brought by Petitioner McVittie, as well as King County cases, including the recent case of, *Bennett v. City of Bellevue*, CPSGMHB Case No. 01-3-0022c, Final Decision and Order, (Apr. 8, 2002). Moreover, the Board takes official notice of the actions of the Washington State Legislature during the 2002 session targeted to improving transportation funding, including ESHB 6140 and SSB 6347. ESHB 6140 is a regional funding measure to allow local voters to approve new regional resources to accelerate locally important projects. SSB 6347 is a measure that proposes to fund \$7.7 billion in state improvements with a gas tax subject to a public vote.

[32] The County explains that, "An arrears designation, by definition, means that no programmed or funded projects will remedy the deficiency within six-years." County Response, at 37. The County also acknowledges that "Improvements to a corridor of this size will likely extend into a third construction year outside the six-year TIP window, and refinements to this project will likely be programmed in the 2003 TIP." County Response, at 38. The Act provides that, "concurrent with development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to *complete* the improvements or strategies within six-years." RCW 36.70A.070(6)(b), (emphasis supplied).

[33] *See*: footnote 32, *supra*. Two segments of 180th Street are admittedly below the established LOS and programmed improvements will not be *completed* within six-years, therefore the operation of the County's concurrency system leads to the conclusion that the County could not approve development that would create impacts on these segments of 180th Street until the needed improvements were scheduled to be completed within the six-years covered in the TIP. Based upon the way the concurrency system is intended to operate, this is not an unreasonable conclusion to draw, even absent project-level proposals. Assessing and evaluating road capacity to determine available capacity within existing LOS standards is an appropriate policy and legislative exercise.

[34] CPP OD-11 provides: Establish low intensities of development and uses in areas outside of urban growth areas to preserve resource lands and protect rural areas from sprawling development.

[35] CPP RU-5 provides: Establish strict guidelines to limit commercial development outside of urban growth areas. . . . In general, all of the comparison-shopping and much of the convenience shopping needs of rural residents should be served by commercial development within the UGAs.

[36] CPP RU-1 requires the County to establish LOS standards for rural development.

[37] CPP OD-5 requires the County to differentiate between LOS for rural and urban area.

[38] CPP TR-4 requires the County's transportation facilities and services to be appropriate to support designated land uses.

[39] CPP TR-8 requires the County to have and enforce a concurrency system as a growth management tool.

[40] Hensley specifies the following FoFs regarding the LOB for the LAMIRD centered on 164th St and the LAMIRD centered on 180th St.:

The ability to provide public facilities and public services in a manner that does not permit low-density sprawl. The properties included in this LAMIRD are served by public water system, but are not served by sanitary sewer. Development will continue to be served only by on-site sewage disposal systems. No extension of public water or sewer system is needed to serve future development as uses are regulated by limiting lot coverage, impervious surfaces and building sizes to a rural level.

Ordinance No. 131, Section 2(D)(1)(iii)(4) and Section 2(D)(2)(iii)(4).

[41] TR-1 requires, "Develop transportation systems that complement the land use element of the county comprehensive plan." Hensley PHB, at 23.

[42] TR-1.B.3 provides, "land use designations be reviewed where roadway construction or upgrading to serve designated land use intensities is not feasible or where concurrency cannot be achieved." Hensley PHB, at 24.

[43] TR-4.E.5 requires safety improvements concurrent with development. Hensley PHB, at 24.

[44] TR-5.A.2 states, "level of service shall be used as a growth management tool to manage the rate of growth in rural areas and encourage more intense development within urban areas." Hensley PHB, at 24.

[45] TR-7.A.7 states, "The land use element, the planned transportation improvement, and the finance plan shall be coordinated and consistent." Hensley PHB, at 24.

[46] CF-1.A.1 and TR-8.B provide "The county shall extend facilities and services in a manner which directs future growth to urban areas." Hensley PHB, at 25.

[47] Petitioners also challenged the County's compliance with goal 11, pertaining to public participation. *See*: Legal Issue 1, *supra*.

[48] In the Board's view in this case, this includes vested commercial uses.

[49] The fact that the County clearly identifies rural commercial zoning designations, such as rural business (RB) and rural freeway service (RFS), in its zoning regulations supports this conclusion. *See*: Ordinance No. 01-133, Section 3, at 5-6.

[50] These acreages do not include right-of-way acreage.

[51] Ordinance No. 01-132 also amends the County Assessors maps for each parcel within the LAMIRD.