

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

CORINNE R. HENSLEY and JODY L. McVITTIE,)	
)	CPSGMHB Case No. 02-3-0004
)	
Petitioners,)	<i>(Hensley V)</i>
)	
v.)	
)	
SNOHOMISH COUNTY,)	ORDER FINDING
)	NONCOMPLIANCE
Respondent.)	

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I. Background

On June 17, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its Final Decision and Order (**FDO**) in the matter of *Hensley v. Snohomish County*, CPSGMHB Case No. 02-3-0004. ^[1] The FDO remanded the Ordinance No. 01-133 (the Clearview Rural Commercial development standards and zoning code) back to Snohomish County with direction to take the necessary legislative actions to comply with the Act. The FDO provided in relevant part:

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.

FDO, at 33. The FDO also established a compliance schedule and compliance hearing date.

On August 12, 2002, the Board issued an “Order on Reconsideration [Clearview],” pursuant to a request by the County. This Order affirmed, supplemented and clarified the Board’s analysis, conclusions and decision as set forth in the FDO regarding Ordinance No. 01-133’s noncompliance with the Act.

On September 11, 2002, Snohomish County filed an appeal of the Board's FDO in Snohomish County Superior Court under Cause No. 02-2-09336-0.

On October 2, 2002, the Board issued an "Order Extending Compliance Period." This Order was issued pursuant to a "Stipulation and Order Continuing Snohomish County's Motion to Stay." The Board's extension allowed the parties to proceed in their efforts to obtain a stay of the Board's FDO from Snohomish County Superior Court.

On November 15, 2002, Judge George N. Bowden, of Snohomish County Superior Court, **denied** the County's motion to stay the Board's FDO.

On December 23, 2002, the County passed Emergency Ordinance No. 02-106; in order to comply with the goals and requirements of the Act, yet preserve the County's appeal in Superior Court.

On December 23, 2002, the Board received "Statement of Actions Taken to Comply" (**SATC**). The SATC included a copy of Emergency Ordinance No. 02-106 (Ex. A), Remanded County Council Hearing Draft (Ex. B), and Excerpts of Minutes from Administrative Session Held Monday, December 23, 2002 (Ex. C).

On January 9, 2003, the Board received Petitioner Hensley's "Response to County's Statement of Actions to Comply" (**Hensley Comment**). The Board also received Petitioner McVittie's "Response to County's SATC" (**McVittie Comment**).

On January 15, 2003, the Board received "Reply to Petitioner's Comments Re: Snohomish County's Statement of Actions to Comply" (**County Reply**).

On January 21, 2003, the Board conducted the compliance hearing. Present for the Board were Board Members Edward G. McGuire, Lois H. North and Joseph W. Tovar. Petitioners McVittie and Hensley appeared *pro se* at the Board's Offices, Brent Lloyd, represented Snohomish County and participated telephonically. The County indicated that it had not held a public hearing on the adoption of Emergency Ordinance No. 02-106, but one was scheduled for February 10, 2003. The Board heard argument on this issue and compliance issues and indicated the compliance hearing would be continued to a date to be determined, but after the County's hearing on Emergency Ordinance No. 02-106. The Board also requested that the County provide a copy of the hearing notice and additional information regarding uses in the Clearview LAMIRD.

On January 22, 2003, the Board received a copy of the Legal Notice for Emergency Ordinance No. 02-106.

On January 23, 2003, the Board issued a "Notice and Order Continuing Compliance Hearing in

Hensley V [Clearview].” This Order required the County to file a Second SATC.

On January 27, 2003, the Board received a letter containing the additional information regarding the Clearview LAMIRD uses.

On February 18, 2003, the Board received “Snohomish County’s Second Statement of Actions to Comply” (**SATC2**). The SATC2 included six attached exhibits (Exs. A-F).

On February 18, 2003, the Board issued “Notice of Second Compliance Hearing In *Hensley V* [Clearview].” March 10, 2003 was established as the date for the Second Compliance Hearing, at the Board’s relocated offices.

On February 27, 2003, the Board received Petitioner Hensley’s “Response to County Statement of Actions to Comply II” (**Hensley Comment 2**). The Board also received Petitioner McVittie’s “Response to County’s Second SATC” (**McVittie Comment 2**).

On March 7, 2003, the Board received the County’s “Reply in Support of Snohomish County’s Second Statement of Actions to Comply” (**County Reply 2**).

On March 10, 2003, the Board conducted the compliance hearing at the Board’s relocated offices. Present for the Board were Board Members Edward G. McGuire, Lois H. North and Joseph W. Tovar. Petitioners McVittie and Hensley appeared *pro se*, Brent Lloyd, represented Snohomish County. Andrew Lane, from Snohomish County, and Sherman Snow, Board extern, observed. The compliance hearing commenced at 10:00 a.m. and concluded at approximately 12:00 noon.

II. DISCUSSION

The Board’s June 17, 2002 FDO gave the County until September 23, 2002 to take legislative action to bring Ordinance No. 01-133 into compliance with the Act; the FDO also established November 4, 2002 as the date for the compliance hearing. The Board’s August 12, 2002 Order on Reconsideration did not modify, nor did the County ask for, an adjustment to the compliance schedule in its motion to reconsider. In lieu of taking actions to comply with the Act, the County filed an action in Snohomish County Superior Court seeking reverse the Board’s Order.

As part of its court appeal, the County sought a stay on the Board’s FDO. To allow time for the parties to argue the stay motion and pursuant to a stipulation of the parties, the Board issued its “Order Extending the Compliance Period in *Hensley V* [Clearview];” this Order gave the County the full 180-day compliance period authorized by statute. RCW 36.70A.300(3)(b). The Order gave the County until December 16, 2002 to take legislative action to comply and set January 21, 2003 as the compliance hearing date.

On November 15, 2002, Snohomish County Superior Court, **denied** the County's motion to stay the Board's FDO. A month following the denial of the stay, on the December 16, 2002 compliance date, the County did not take legislative action to comply with the Act. However, the County did take action, via Emergency Ordinance, the following week.

On December 23, 2002, Snohomish County adopted Emergency Ordinance No. 02-106, without providing notice or the opportunity for public testimony. Section 2(8) of Ordinance No. 02-106 provided:

The County Council finds that additional public participation is not required because under SCC 32.05.023, amendments to a GMA development regulation adopted pursuant to Snohomish County Charter, section 2.120, are not subject to the requirements of SCC 32.05.020, the County's GMA participation program. The County Council further finds that the amendments adopted by this ordinance fall within the range of alternatives studied under the DSEIS, and therefore do not require additional public participation under RCW 36.70A.035.

Notwithstanding this language, on January 21, 2003 (the day of the compliance hearing), the County published a Notice of Public Hearing on February 10, 2003 "to receive and consider public testimony on Emergency Ordinance No. 02-106." The notice was published in The Herald, Everett's local newspaper, on January 23, 2003. SATC2, Ex. B and C.

Emergency Ordinance 02-106 amended Ordinance No. 01-133 which amended the following County Code sections: SCC 18.32.040, 18.42.020 and 18.43.021. The following changes were made by the amendatory Emergency Ordinance: 1) the maximum allowable lot coverage for the CRC zone in the northern LAMIRD was reduced from 50% to 30% (*see* Section 5, at 34); 2) the perimeter buffer requirements in the CRC zone was increased from 25' to 50' (*see*, Section 5, at 36); and 3) the number of uses allowed in the CRC was reduced from approximately 75 to less than 50 (*see* Section 4, at 5-12). A copy of Ordinance No. 02-106 was attached to the SATC.

Public Participation:

In another case involving a challenge to Snohomish County's notice and public participation process the Board concluded, "The public **notice** requirements (RCW 36.70A.035) apply to the adoption of **all** plan and development regulation amendments regardless of duration or urgency." *McVittie v. Snohomish County (McVittie V)*, CPSGMHB Case No. 00-3-0016, Final Decision and Order, (Apr. 12, 2001), at 37, (emphasis in original). In the same case, the Board also held, "Public participation (RCW 36.70A.140) is required **prior to** the adoption or amendment of **any** permanent development regulation." *Id.* (Emphasis in original).

The County's December 23, 2002 adoption of Emergency Ordinance No. 02-106 failed to

provide notice or allow for public participation as required by the Act. However, the County did provide notice and provide for public participation when the Emergency Ordinance was apparently readopted on February 10, 2003. Having taken this additional, but required, step, the Board finds that the notice and public participation requirements of the Act have been satisfied and the County has **complied**.

The Board notes that, as was held in *McVittie V*, “The **only** instance where **post adoption** public participation is allowed is when temporary or interim development regulations (RCW 36.70A.390) are adopted or amended. *Id.* In short, notwithstanding the County’s findings and conclusions as stated in Section 2(8) of Ordinance No. 02-106, the GMA’s notice and public participation provisions govern Snohomish County’s actions when adopting or amending its plan or development regulations.

50’ Site Obscuring Buffer and Maximum Lot Coverage:

In its FDO the Board concluded that the last minute increase in the maximum lot coverage and decrease in the site obscuring buffer were not within the range of alternatives discussed in the DEIS. Consequently, these actions did not comply with the notice and public participation provisions of the GMA. Ordinance No. 02-106 restores the site obscuring buffer distance to 50’ and restores the maximum lot coverage in the Northern LAMIRD to 50%. These standards were set forth in the DEIS and within the range of alternatives available for public comment. Therefore, the County’s restoration of these standards **complies** with the notice and public participation requirements of the GMA.

Uses Permitted in the CRC Zone:

In the Board’s FDO, the Board concluded, “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.” FDO, at 32.

Further, the Board stated,

[T]he existing urban pattern in the Clearview LAMIRD is not considered urban growth, by definition. However, the introduction into Clearview of new types (*i.e.*, those that did not exist in 1990) of commercial uses would constitute urban, not rural, development. Such development would be inconsistent with the preservation of the rural character of rural lands required for LAMIRDs. [RCW 36.70A.070(5)]
LAMIRDs are *Limited Areas of More Intense Rural Development*.

Hensley V, Order on Reconsideration [Clearview], (Aug. 12, 2002), at 5.

Ordinance No. 02-106 reduced^[2] the number of uses permitted in the CRC zone from approximately 75 to about 50. SATC2, at 3. The CRC zone now permits the following uses:

Agriculture, Antique Shop, Art Gallery, Auto Repair, Bakery, Carport, Church, Clinic, Community Club, Day Care Center, Home (Single Family and Mobile), Fallout Shelter, Family Day Care Home, Fix-it Shop, Private Garage, Government structures and Facilities, Greenhouse, Grocery Store, Grooming Parlor, Hardware Store, Home Improvement Center, Home Occupation, Livestock Auction Facility, Locksmith, Motor Vehicle & Equipment Sales, General Office, Public park, Small Park-and-Pool, Personal Services Shop, Railroad Right-of-Way, Recreational Facility not otherwise listed, Restaurant, Retail Store, Second Hand Store, Service Station, Small Animal Husbandry, Social Services Center, Specialty Store, Tavern, Tire Store, Tool Sales & Rental, Utility Facilities and Veterinary Clinic.

SATC2, at 3.

To support the selection of these uses the County asserts that: 1) the revised CRC zone does not mirror the County's urban commercial zoning; 2) in determining which uses to allow in the LAMIRDs, the County properly looked to the uses allowed under the more limited Planning Commission recommendation; 3) most of the uses allowed under the current ordinance were present on or before July 1, 1990, and the remainder fall within the "types of uses" that were present on or before July 1, 1990; 4) the uses allowed under the current ordinance will primarily serve the surrounding rural population; and 5) the County Council was entitled to consider the unique circumstances of the Clearview area and the very real economic interests of Clearview property owners in adopting Emergency Ordinance No. 02-106. SATC2, at 4-8.

Petitioner McVittie asserts that although the County has limited the *number* of uses permitted in the CRC zone it has not limited the *scale* of those uses. Petitioner contends that large grocery stores or mega home improvement centers would not just serve the residential population of the LAMIRD, nor primarily serve the rural residents in the surrounding area; rather such stores would serve the urban population within 1.5 miles of the LAMIRD. McVittie Comment 2, at 5. Petitioner Hensley also contests that the uses permitted in the CRC zone are not limited to small scale uses primarily serving the rural population. Hensley Comment 2, at 2 and 5.

The County makes several responses to Petitioners' arguments regarding **scale** as a criterion for appropriate uses in a LAMIRD. First, it argues that limiting the *number* of uses also limits the *scale* of uses permitted. Second, it suggests that various development standards (*e.g.*, lot size requirements, buffering requirements, etc.) would operate to limit the scale of development. Third, the County noted that no urban services are available to the LAMIRDs and contended that

this would have the effect of limiting the scale of development that could occur within a LAMIRD.

In answering this question, the Board begins by recounting its earlier holding that *types of uses* that did not exist in Clearview in 1990 would constitute urban, not rural, development. Order on Reconsideration, at 5. The Board further held that “Such development [*i.e.*, urban development] would be inconsistent with the preservation of the rural character of rural lands required for LAMIRDS.” *Id.* The crux of the matter before the Board here is whether **all** retail uses are of the same *type* regardless of their scale or size. If the answer is yes, then the CRC designations comply with RCW 36.70A.070(5). If the answer is no, then a retail use of an unlimited scale or size would constitute a *use type* that did not exist in Clearview in 1990 and therefore not be permitted in this LAMIRD.

The Board notes that the County itself initially raised the question of scale as an appropriate qualifier of uses within a LAMIRD. It amended Policy LU 6.I.4 to read “rural residents should have access to a mix of ***small scale*** retail sales, personal services and job opportunities within the CRC designation.” Emphasis added. This policy is a clear acknowledgment by the County that the **scale** of a retail use is a significant factor in determining whether a given use is appropriate in a LAMIRD. During the compliance hearing, the County confirmed that the CRC zoning places no limit on the floor area or footprint of a home improvement center.

Petitioners characterize retail uses of unlimited size or scale as “big-box” retail uses that are more appropriate to areas of *urban character* (*i.e.*, within the urban growth area) rather than *rural character* (*i.e.*, within a LAMIRD). More fundamentally, they argue that such “big-box” retail uses, because of their sheer size, serve not just the population of the LAMIRD, or its surrounding rural area, but rather a much broader market area. Here, the record shows that the urban growth areas of Woodinville, Mill Creek and the City of Snohomish are within close proximity to the south, west, and north, respectively.

The Board agrees with the Petitioners. “Big-box” uses are a fundamentally different use type than small-scale retail uses typically found in rural areas such those found in 1990 in Clearview and described in County Policy LU 6.I.4. Because no “big-box” retail uses existed in Clearview in 1990, a LAMIRD regulation that would permit this use type does not comply with RCW 36.70A.070(5) or .020(1) and (2). This reading of “big-box” retail as a distinct use type is necessary to give effect to the letter and intent of RCW 36.70A.070(5) and RCW 36.70A.020(1) and (2). To do otherwise suggests that very modest, small-scale, rural oriented retail uses that existed in the 1990’s could be used to bootstrap inappropriate urban scale development in LAMIRDS. ^[3]

The County’s arguments are unpersuasive. By limiting the number of permitted uses in the CRC,

the County arguably did reduce the *range* of permitted uses. However, eliminating a dozen or two-dozen uses from a prior use zone does nothing to cure the noncompliance wrought by even a small number of uses that plainly are urban in scale, size and character. As for the dimensional limitations imposed by the CRC development standards (*i.e.*, lot size, buffers, etc.), the Board notes that if these standards operate to limit the size of a retail use, it would be accidental rather than a deliberate outcome. Finally, while the absence of urban services, such as sewers, could pose a credible constraint on population intensive uses in this LAMIRD, the Board is not persuaded that such is the case with the commercial uses such as a large home improvement center.^[4]

In summary, the Board concludes that, as written, the County's CRC designation is **clearly erroneous**; it allows retail uses of any scale or size, and thereby allows retail uses of a type that did not exist in 1990. For example, the Board concludes that the CRC use listing for a home improvement center use could allow a use that is indistinguishable from such a listing in the County's urban zones and thus is inconsistent with rural character. For these reasons, the Board finds that such a use listing **does not comply** with RCW 36.70A.070(5) and RCW 36.70A.020(1) and (2) and it will **remand** the CRC development regulations to the County for further legislative action consistent with the conclusions set forth in this Order.

III. FINDINGS and CONCLUSIONS

Findings of Fact:

1. The Board's June 17, 2001 FDO remanded Ordinance No. 01-133, and directed Snohomish County to take appropriate legislative action regarding the Clearview Rural Commercial zone to achieve compliance with the Act.
2. On December 23, 2002 and on February 10, 2003, the County adopted Ordinance No. 02-106, pursuant to the Board's remand.
3. On December 23, 2002, the County filed its SATC, with an attached copy of Ordinance No. 02-106.
4. On February 18, 2003, the County filed its SATC2, with an attached copy of Ordinance No. 02-106.
5. RCW 36.70A.330 requires the Board to conduct a compliance hearing. The Board conducted two compliance hearings on this matter. The first on January 21, 2003; the second on March 10, 2003.
6. The County provided notice and opportunity for public comment on the adoption of

Ordinance No. 02-106 on February 10, 2003.

7. Ordinance No. 02-106 reduced the maximum allowable lot coverage for the CRC zone in the northern LAMIRD from 50% to 30% - consistent with the alternatives addressed in the DEIS (*see* Section 5, at 34).

8. Ordinance No. 02-106 increased the perimeter buffer requirements in the CRC zone from 25' to 50' – consistent with the alternatives addressed in the DEIS (*see*, Section 5, at 36).

9. Ordinance No. 02-106 reduced the number of uses allowed in the CRC zone from approximately 75 to less than 50 (*see* Section 4, at 5-12).

10. Ordinance No. 02-106 amending the County's CRC designation, allows retail uses of any scale or size, and thereby allows retail uses of a type that did not exist in 1990. (*See* Section 4, at 5-12).

Conclusions of Law:

1. Based on the Board's discussion and Findings of Fact 1-10 *supra*, the Board concludes, that Snohomish County's enactment of Ordinance No. Ordinance No. 02-106 was **clearly erroneous** and **does not comply** with the goals and requirements of the Growth Management Act [RCW 36.70A.070(5) and RCW 36.70A.020(1) and (2)] as set forth and interpreted in the Board's June 17, 2001 FDO and the August 12, 2002 Order on Reconsideration.

IV. ORDER AND FINDING OF NONCOMPLIANCE

Based upon review of the Board's June 17, 2001 FDO, the Board's August 12, 2002 Order on Reconsideration, the County's SATC and SATC2, Ordinance No. 02-106, the briefing provided, comments and argument offered at the compliance hearing, Findings of Fact 1-10 and the conclusion of law, *supra*, the Board finds that Snohomish County **has not complied** with the goals and requirements of the GMA as set forth in the aforementioned Board Orders. The Board therefore enters a **Finding of Noncompliance** for Snohomish County re: the Clearview LAMIRD portion of *Hensley v. Snohomish County (Hensley V)*, CPSGMHB Case No. 02-3-0004.

The Board therefore, remands Ordinance No. 02-106 to the County with the following directions:

1. By no later than **June 20, 2003**, the County shall take appropriate legislative action, regarding the uses and restrictions in the CRC zone, to comply with the GMA as set forth in this Order.

2. By no later than **June 27, 2003**, the County shall file with the Board an original and four copies of a Statement of Actions Taken to Comply (**SATC**) with the GMA as set forth in this Order. 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 **July 7, 2003**, the Petitioner and Intervenor may file with the Board an original and four copies of Comments on the County's SATC. Petitioner and Intervenor may simultaneously serve a copy of their Comments on the SATC upon the County.

4. By no later than **July 10, 2003**, 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. **July 17, 2003** at the Board's offices.

So ORDERED this 28th day of March 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member [Files a separate dissenting opinion]

Lois H. North
Board Member

Joseph W. Tovar, AICP
Board Member

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Dissenting Opinion of Board Member McGuire

I respectfully dissent from the conclusion of the majority regarding the *scale* of uses permitted in the CRC zone for the reasons set forth below. In all other conclusions of this opinion, I agree.

At the compliance hearing, in response to Petitioners' assertions regarding the scale of uses permitted, the County argued that limiting the number of uses also limits the scale of uses permitted. Additionally, the lot size requirements, buffering requirements and other CRC standards would also limit the scale of development. Finally, the County noted that no urban services are available to these LAMIRDs. Therefore, in the County's opinion, these factors and its Plan provisions have the effect of limiting the scale of development that may occur within the LAMIRDs. Petitioners countered that lots could be aggregated or combined to increase the scale of use allowed on any such parcel.

The scope of the arguments advanced in the compliance proceeding seem to be narrower than the *scale* of the various uses permitted in the CRC zone; it seems to focus on the *scale* of *grocery stores* and, more significantly, *home improvement centers* – potentially “big box” developments.

The record does not indicate that any such “big box” projects are proposed or pending for these LAMIRDs. Further, much of the land in these LAMIRDs is already built out, and even Petitioners indicate that some type of lot combination would likely be required for such a proposal to be feasible. For the Board to accept such speculation regarding lot combinations as fact, and focus on this level of detail – the *potential* scale of one or two uses in the CRC zone, is inappropriate.

The County has reduced the number of uses permitted in the CRC zone by approximately 1/3. The County has reinstated minimum lot size requirements and sight obscuring buffers and retained other site development standards for the CRC zone. These factors combined with the County's Plan provisions, concurrency ordinance, and with the fact that urban services are not available to either of the Clearview LAMIRDs leads me to a different conclusion than my colleagues. I concur with the County's assessment, that the permitted uses in the CRC zone are appropriate uses for serving the rural population, and the scale of such uses can be regulated through the development standards that apply within the CRC zone. I would find that the uses permitted in the CRC zone, coupled with the development standards that apply within that zone, comply with the GMA, specifically Goal 1 [RCW 36.70A.020(1)].

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.

[1] The case was coordinated with another Hensley case, and the Order was entitled, Order Finding Compliance in *Hensley IV* (01-3-0004c) and Final Decision and Order in *Hensley V* (02-3-0004) [Clearview], (Jun. 17, 2002).

[2] The SATC2, at 4, lists the following uses as being deleted from the CRC zone:

Accessory Apartment (Attached and Detached), Cleaning Establishments, Club, Craft Shop, Drug Store, Family Care Home, Family Rehabilitation Home, Financial Institutions, Foster Home, Guest House, Gym, Kennel (Commercial, Private Breeding, Private Non-Breeding), Library, Licensed Practitioner, Museum, Park and Ride Lots, Pet Shop, Photo Processing Shop, Print Shop, Storage/Retail Sales, Livestock Feed Storage Structure over 100 sq. ft. on <3acres, Studio and Transit Center.

[3] For example, a 1990's vintage 7-11 convenience store (typically less than 5,000 square feet in area) in a rural area could be used as justification for allowing future "big-box" uses as Wal-Mart, Lowe's or Home Depot, uses which typically have a footprint in the 50,000 to 100,000 square foot range.

[4] The Board notes that a large Albertson's store, constructed after 1990, exists in the Clearview LAMIRD without sewer service.