

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

)	
CORINNE HENSLEY and 1000)	Case No. 03-3-0009c
FRIENDS OF WASHINGTON,)	
)	
Petitioners,)	<i>(Hensley VI)</i>
)	
v.)	
)	
SNOHOMISH COUNTY,)	ORDER ON RECONSIDERATION
)	
Respondent,)	
)	
and)	
)	
MARK VERBARENDSE, MBA/ SCCAR, SULTAN and MARYSVILLE)	
SCHOOL DISTRICTS, MacANGUS)	
RANCHES INC., AND YARMUTH- DAVIS PARTNERSHIP)	
)	
Intervenors.)	

I. Background

On September 22, 2003, the Board issued its “Final Decision and Order” (**FDO**) in the above captioned matter.

On October 2, 2003, the Board received “Petitioner 1000 Friends of Washington’s Motion for Reconsideration” (**1000 Friends Motion**).

On October 6, 2003, the Board received from the Department of Community Trade and Economic Development (**CTED**) a “Motion to File *Amicus Curiae* Brief in Support of Reconsideration” (**CTED Motion - Amicus**). Attached to this motion was “*Amicus Curiae* Brief of the Washington State Department of Community, Trade and Economic Development in Support of Reconsideration” (**CTED Brief**).

On October 6, 2003, the Board issued its “Order Requesting Response to Motion to Reconsider.” Per WAC 242-02-832(1), the Order solicited responses on the Motion to Reconsider from Respondent and Intervenors. October 10, 2003 was stated as the deadline for filing responses.

On October 10, 2003, the Board received the following responses to the 1000 Friends Motion and CTED Motion – Amicus: 1) “Snohomish County’s Response to 1000 Friends Motion for Reconsideration and Opposition to *Amicus Curiae* Status for CTED” (**County Answer**); 2) Snohomish County’s and Intervenor Verbarendse’s Partial Response to 1000 Friends Motion for Reconsideration” (**County and Verbarendse Answer**); 3) MBA/SCCAR’s Response to Motion to File *Amicus Curiae* Brief in Support of Reconsideration” (**MBA/SCCAR Response – Amicus**); 4) MBA/SCCAR’s Response to Petitioner 1000 Friends of Washington Motion for Reconsideration” (**MBA/SCCAR Answer**); and 5) School Districts’ Response to 1000 Friends’ Motion for Reconsideration and CTED’s *Amicus Curiae* Motion and Brief” (**School Districts Answer**).

The Board did not hold a hearing on the motions to reconsider.

II. DISCUSSION OF MOTIONS

A. CTED’s Amicus Curiae Motion

The Board’s Rules of Practice and Procedure allow for motions requesting *amicus* status. WAC 242-02-280. This rule of the Board provides, “In determining whether a person qualifies as an amicus, the presiding officer shall apply the applicable rules of appellate procedure (RAP) of the appellate courts of this state.” WAC 242-02-280(2). RAP 10.6 pertains to *amicus curiae*, and provides in relevant part:

- (a) The appellate court may on motion grant permission to file an amicus curiae brief only if all parties consent, or if the filing would assist the appellate court. . . .
- (b) A motion to file an amicus curiae brief must include a statement of (1) applicant’s interest and the person or group applicant represents, (2) applicant’s familiarity with the issues involved in the review and with the scope of the argument presented or to be presented by the parties, (3) specific issues to which the amicus curiae brief will be directed, and (4) applicant’s reason for believing that additional argument is necessary on these specific issues. The brief of amicus may be filed with the motion.
- (c) . . .
- (d) An objection to a motion to file an amicus curiae brief must be received by the appellate court and counsel of record for the parties and the applicant not later than

5 business days after receipt of the motion.

RAP 12.4(i) governs *amicus* briefs in reconsideration proceedings. It provides:

Amicus Curiae Memorandum. When a motion for reconsideration has been filed, the appellate court may grant permission to file an amicus curiae memorandum for the purpose of addressing the court regarding the soundness of legal principles announced in the course of the opinion. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and any other amicus curiae not later than five days after the motion for reconsideration has been filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum, except that no answer to an amicus curiae memorandum should be filed unless requested by the court. An amicus curiae memorandum or answer should not exceed 10 pages.

The parties do not consent to CTED's request for *amicus curiae* status; therefore, it is left to the Board to decide.

1000 Friends Motion for Reconsideration was timely filed on October 2, 2003. CTED filed its motion for *amicus* and brief on October 6, 2003. The Board requested an answer to the motions from the parties by October 10, 2003. Answers lodging objections to CTED's motion for *amicus* were received from the County and MBA/SCCAR on October 10, 2003. All filings of motions and answers were timely.

The County's opposition to *amicus* status for CTED is based upon: its desire for an additional day to respond; its assertion that CTED should have intervened in the original proceeding; and its suspicion of CTED's reconsideration strategy in relation to another pending appeal before the Board. County Answer, at 1-3. The Board finds no merit or basis for denying the CTED motion in any of the County's complaints. Absent the Board's request for responses, the County's Answer to the motion to reconsider would have been due on October 7, 2003; the effect of the Board's request gave the County an additional three days to respond to that motion as well as time for the County to respond to the CTED motion which addressed the same issues. The Board notes that RAP 12.4, governing *amicus curiae* and reconsideration, only allows an answer to an *amicus* motion when requested. The Board gave the County this opportunity. The County also incorporated by reference the arguments presented in MBA/SCCAR's Answer. County Answer, at 2, footnote 1.

MBA's opposition to CTED's motion argues that "CTED does not satisfy the first, second and fourth elements of RAP 10.6(b). [See *supra*.]" MBA/SCCAR Response – Amicus, at 2-3. MBA's acknowledges that CTED has a role in relation to the Growth Management Act, but

grounds its objections for each of these elements on the notion that CTED has not demonstrated any interest or expertise in when and how UGA's can be expanded. Further MBA contends that CTED has not indicated why additional argument is necessary. *Id.*

Review of CTED's motion reveals that CTED has a significant role and *interest* in the implementation and interpretation of the Growth Management Act (GMA). CTED Motion – *Amicus*, at 2-3. The Board notes that accommodating population growth and the sizing, location and expansion and contraction of UGAs are a key component in the GMA and clearly within *CTED's interests and expertise* in assisting with the implementation of the GMA. Additionally, as a state agency with a significant statutory role in GMA, CTED is *familiar with the issues* involved in the reconsideration request. Finally, CTED contends that *additional argument is necessary to clarify the wording of the Board's holdings and the possible consequences of them being misinterpreted*. *Id.*, at 3. The Board agrees.

Based upon the Board's review of WAC 242-02-280, RAP 10.6 and RAP 12.4, CTED's Motion and the Answers of the County and MBA/SCCAR, the Board concludes that CTED's has met the requisite criteria for *amicus curiae* status and the motion to file an *amicus curiae* brief is

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granted. The Board will consider the CTED Brief filed with CTED's motion.

B. 1000 Friends Motion to Reconsider

1000 Friends asks that three passages in the FDO be reconsidered by the Board. Two of the passages appear in the Board's discussion of Plan Policy LU 1.A.9 and one is within the Board's discussion of the LAMIRD. The Board first considers the two LU 1.A.9 passages, then the LAMIRD passage.

1. Reconsideration of the FDO regarding Policy LU 1.A.9

“Working alone” passage:

The first passage 1000 Friends asks the Board to reconsider in its discussion of Plan Policy LU 1.A.9 is found within the following paragraph; it states:

As noted *supra*, RCW 36.70A.110 establishes the framework for sizing and locating the boundaries of UGAs and locating urban growth areas within UGAs. Working alone, it does not address the expansion of UGAs nor provide guidance for assessing whether UGAs are being successful in accommodating population or job growth. As the County suggests, this provision may not directly apply to the concerns raised by Petitioners at this point in time. Also, the County and Intervenor correctly point out

that the amendment to LU 1.A.9 does not expand any UGA. The Policy itself sets the parameters and conditions for possible UGA expansions for commercial, industrial and residential uses, but exempts churches and schools from these additional self imposed requirements. Neither the County nor the School Districts dispute that even if UGA expansions for churches and schools occur, they must comply with the goals and requirements of the Act. RCW 36.70A.215 is more directly on point regarding UGA expansions.

FDO, at 13-14.

1000 Friends takes issues with the language underlined in this paragraph. 1000 Friends asserts that this sentence is contradictory to, “A fair reading of RCW 36.70A.110 and RCW 36.70A.215 is that RCW 36.70A.110 is a stand-alone provision governing UGA expansions.” 1000 Friends Motion, at 2. 1000 Friends argues that “Nothing in RCW 36.70A.110 suggests that its provisions are limited only to first establishment of a UGA. RCW 36.70A.215(1) states in part that “[t]his program shall be *in addition* to the requirements of RCW 36.70A.11.” *Id.*, at 4 (emphasis in original). Additionally, 1000 Friends argues that RCW 36.70A.215 does not apply to many counties in the state, yet this passage suggests that non-.215 counties “are not subject to any requirements regarding the redesignation or expansion of UGAs. *Id.*, at 5. 1000 Friends offers proposed language for the Board to consider. *Id.*, at 6 and 8.

CTED joins 1000 Friends in voicing concerns over the two passages in the Board’s LU 1.A.9 discussion. CTED argues that the Board should reconsider both passages noted by 1000 Friends, since the FDO “appears to exempt the expansion of UGAs from the requirements of RCW 36.70A.110 and .215.” CTED Brief, at 2. The basis for CTED’s concern is threefold: 1) RCW 36.70A.110 applies to UGA expansion; 2) RCW 36.70A.215 did not displace RCW 36.70A.110 regarding UGA expansion; and 3) the Board previously has held that UGA expansion is subject to the requirements in RCW 36.70A.110, including land capacity analysis. *See* CTED Brief, at 4-9. CTED supports the language proposed by 1000 Friends. *Id.*, at 4.

Regarding this passage of the FDO, the County suggests that 1000 Friends [and CTED] are reading the passage out of context. The County responds to the reconsideration request by contending 1000 Friends reading of the first passage is incorrect and asserting that “A more complete reading of the challenged passage reveals that the Board’s comments regarding section .110 simply provide context and are not material to its decision.” County Answer, at 3. The County suggests deleting the entire sentence and preceding sentence of the passage to resolve 1000 Friends concerns. *Id.*, at 6.

MBA/SCCAR apparently only looks to the language of .110 and contends that “[RCW 36.70A.110] informs the counties about how to designate UGAs and how to locate growth within

a UGA. The statute [apparently just RCW 36.70A.110] contains absolutely no express direction with respect to the expansion of a UGA. In fact, the word ‘expansion’ is not even contained in the statute.” MBA/SCCAR Answer, at 2.

The School Districts also argue the passage needs to be taken in the context of the entire Board decision. The School Districts contend that “The Board properly recognized that RCW 36.70A.110 works together with several other GMA provisions to provide the requirements for the expansion of GMAs.” *Citing* the FDO, at 9; School District Answer, at 2.

Given the various and contradictory interpretations assigned to this passage by the parties to this matter, the Board **grants** the motion to reconsider. The Board has reviewed and considered the language proposed by the parties and hereby **clarifies** and **amends** Section IV A. Plan Policy LU 1.A.9 Issues in the September 22, 2003 *Hensley VI* FDO, at 13-14, as follows [deleted language is in ~~strikeout~~, new language is underlined]:

As noted *supra*, RCW 36.70A.110 establishes the framework for sizing and locating the boundaries of UGAs and locating urban growth areas within UGAs. ~~Working alone, it does not address the expansion of UGAs nor provide guidance for assessing whether UGAs are being successful in accommodating population or job growth.~~ As the County suggests, this provision may not directly apply to the concerns raised by Petitioners at this point in time. Also, the County and Intervenor correctly point out that the amendment to LU 1.A.9 does not expand any UGA. The Policy itself sets the parameters and conditions for possible UGA expansions for commercial, industrial and residential uses, but exempts churches and schools from these additional self imposed requirements. Neither the County nor the School Districts dispute that even if UGA expansions for churches and schools occur, they must comply with the goals and requirements of the Act. In the Central Puget Sound region, RCW 36.70A.215

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provides additional direction ~~is more directly on point~~ regarding UGA expansions.

“This section of the GMA” passage:

The second passage 1000 Friends asks the Board to reconsider in its discussion of Plan Policy LU 1.A.9 is found within the following paragraph; it states:

It is not disputed that CPP UG-14 was adopted in response to the direction provided in RCW 36.70A.215(1) (See Ordinance No. 99-121). The review of the language of RCW 36.70A.215 provides additional guidance in assessing the County’s action, since this section of the GMA specifically addresses the question of UGA expansions. Clearly, counties are discouraged, but not prohibited, from expanding

UGAs unless there is a need for more land demonstrated in their buildable land report. Both CPP UG-14 and LU 1.A.9 follow this direction, and provide that, “Expansion of a boundary of an individual UGA . . . *shall not be permitted* unless it complies with the [GMA] and one of the following four conditions are met.” (Emphasis supplied.) So what does the GMA require the County evaluate in assessing and evaluating whether its UGAs are appropriately sized?

FDO, at 15; (*italicized* emphasis in original).

1000 Friends also takes issue with the underlined language in this paragraph. 1000 Friends contends,

This passage is incomplete, ambiguous and misleading. One reading suggests that justifying UGA expansions is discretionary. Another reading suggests that the only way to justify a UGA expansion is to demonstrate a need through a buildable lands report, though it is unclear whether the report is mandatory or discretionary. Neither is an accurate or complete statement of the law.

1000 Friends Motion, at 3. 1000 Friends is concerned that this passage may suggest to some counties that they can “expand UGAs without any supporting analysis, whether or not there is demonstrated need for additional urban land.” *Id.*, at 7. 1000 Friends offers proposed deleted and inserted language for the Board to consider.

CTED’s concerns are the same three noted *supra*. Again, CTED supports the language proposed by 1000 Friends.

The County “believes that the language the Board used in the FDO accurately reflects the law. However, to appease 1000 Friends, the Board may consider deleting some of its language. To the extent the challenged Board discussion is not essential to its decision; the language could be deleted without diminishing the Board’s analysis and conclusions on this issue.” County Answer, at 6.

MBA/SCCAR opposes proposed language that 1000 Friends seeks to insert into the passage in question, arguing that it is not supported by the GMA. MBA/SCCAR Answer, at 3-5.

The School Districts look to the context of the Board’s FDO and the GMA regarding UGA expansions, noting that RCW 36.70A.110, .130 and .215, the CPPs and Plan Policies all provide guidance for UGA expansions. School District Answer, at 4.

Again, in light of the varying and contradictory interpretations the parties have assigned to the

passage in question, the Board **grants** the motion to reconsider. The Board has reviewed and considered the language proposed by the parties and hereby **clarifies** and **amends** Section IV A. Plan Policy LU 1.A.9 Issues in the September 22, 2003 *Hensley VI* FDO, at 15, as follows [deleted language is in ~~strikeout~~, new language is underlined]:

~~It is not disputed that CPP UG-14 was adopted in response to the direction provided in RCW 36.70A.215(1) (See Ordinance No. 99-121). The review of the language of RCW 36.70A.215 provides additional guidance in assessing the County's action, since this section of the GMA specifically addresses the question of UGA expansions. Clearly, counties are discouraged, but not prohibited, from expanding UGAs unless there is a need for more land demonstrated in their buildable land report. Both CPP UG-14, as adopted by Ordinance No. 99-121, and LU 1.A.9 follow this direction, and provide that, "Expansion of a boundary of an individual UGA . . . shall not be permitted unless it complies with the [GMA] and one of the following four conditions are met." (Emphasis supplied.) So what does the GMA require the County evaluate in assessing and evaluating whether its UGAs are appropriately~~

[3]

sized?

2. Reconsideration of the FDO regarding the LAMIRD designation

1000 Friends asks the Board to reconsider language in a passage in the Board's September 22, 2003 FDO that states:

First, the Board notes that the *Panesko* case, the *Sky Valley* case and *Hensley IV* case all dealt with LAMIRDs created pursuant to RCW 36.70A.070(5)(d)(i) – Type I LAMIRDs, and therefore are not directly on point. Additionally, the "GMA noncompliance" found by the Western Board in the *Dawes* case was based on the absolute lack of mapping to show where any of the LAMIRDs (Type 1 Or 3) were to be located. Existing uses were not at issue in that case; therefore the *Dawes* decision is not on point.

FDO, at 46.

Regarding the underlined language, 1000 Friends asserts that in *Sky Valley et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Second Order on Compliance (Darrington Portion), (Sep. 8, 1998) (**Second Order**), the LAMIRD in question was not a Type 1 LAMIRD. 1000 Friends Motion, at 8. 1000 Friends states, "The reference to "cottage industries" [in the Second Order] makes it clear that the LAMIRD in question is Type 3, as that is the only type that explicitly allows cottage industries as appropriate development within the LAMIRD." *Id.*, at 9.

1000 Friends requests that, in the noted passage, “the reference to *Sky Valley* indicating it is a Type 1 LAMIRD be removed from the Final Decision and Order.” *Id.*, at 10.

The County and Verbarendse suggest that 1000 Friends may be trying to rewrite, or alter the effect of the Board’s Second Order in *Sky Valley*. County and Verbarendse Answer, at 1-5. They correctly note that in the Board’s Second Order,

[T]he Board reviewed the Darrington area designation against each of the three LAMIRD types to determine whether the County’s designation could be justified under any of these [LAMIRD – RCW 36.70A.070(5)(d)(i-iii)] provisions.

Ultimately, the Board concluded that the Darrington area designation did not meet the criteria for any of the three LAMIRD types and therefore, could not be justified as a LAMIRD. The Board wrote in its Conclusion: “Applying the 1997 amendments to the GMA, the Board determines that the RR-RD designation does not satisfy the exception from the prohibition on urban growth in rural areas provided by RCW 36.70A.070(5)(d).” *Sky Valley* [Second Order], at 8.

Id., at 2. Respondent and Intervenor contend that the LAMIRD discussion in the Second Order is not controlling in *Hensley VI*, but suggest clarifying language if the Board chooses to modify the passage in question. *Id.*, 5.

The Board **agrees** with 1000 Friends, that the LAMIRD in question in the *Sky Valley* Second Order was not a Type 1 LAMIRD. The Board also **agrees** with the County and Verbarendse that the language in the *Sky Valley* Second Order is not controlling in the *Hensley VI* case. Therefore, the Board **grants** the motion to reconsider. The Board has reviewed and considered the language proposed by the parties and hereby **corrects** and **amends** Section IV E. LAMIRD Issue in the September 22, 2003 *Hensley VI* FDO, at 46, as follows [deleted language is in ~~strikeout~~, new language is underlined]:

First, the Board notes that the *Panesko* case, ~~the *Sky Valley* case~~ and the *Hensley IV* case all dealt with LAMIRDs created pursuant to RCW 36.70A.070(5)(d)(i) – Type 1 LAMIRDs, and therefore are not directly on point. Similarly, the *Sky Valley* case did not establish the Board’s parameters for evaluating RCW 36.70A.070(5)(d)(iii) –

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Type 3 LAMIRDs – and is therefore also not directly on point.

III. ORDER

Based upon review of the Motions, Answers, the FDO, the GMA, prior decisions of this Board and the other Boards, case law, the Board’s Rules of Practice and Procedure, the Rules of Appellate Procedure, and having deliberated on the written arguments presented in this matter,

the Board ORDERS:

- CTED's Motion to File *Amicus Curiae* Brief in Support of Reconsideration is **granted**.
- 1000 Friends Motion for Reconsideration, regarding the two LU 1.A.9 passages in the FDO is **granted**. The Board **clarifies** and **amends** its September 22, 2003 Final Decision and Order, in *Hensley VI*, CPSGMHB Case No. 03-3-0009c, at 13-4 and 15, as noted *supra*.
- 1000 Friends Motion for Reconsideration, regarding the LAMIRD passage in the FDO is **granted**. The Board **corrects** and **amends** its September 22, 2003 Final Decision and Order, in *Hensley VI*, CPSGMHB Case No. 03-3-0009c, at 46, as noted *supra*.

So ORDERED this 21st day of October, 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300. Pursuant to WAC 242-02-832(3), a board order on a motion for reconsideration is not subject to a motion for reconsideration.

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The Board notes that the CTED Brief is 9 pages long, within the page limitation established in RAP 12.4(i).

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The entire paragraph in the September 22, 2003, *Hensley VI*, FDO, as corrected and amended, at 13-14, now reads:

As noted *supra*, RCW 36.70A.110 establishes the framework for sizing and locating the boundaries of UGAs and locating urban growth areas within UGAs. As the County suggests, this provision may not directly apply to the concerns raised by Petitioners at this point in time. Also, the County and Intervenor correctly point out that the amendment to LU 1.A.9 does not expand any UGA. The Policy

itself sets the parameters and conditions for possible UGA expansions for commercial, industrial and residential uses, but exempts churches and schools from these additional self imposed requirements. Neither the County nor the School Districts dispute that even if UGA expansions for churches and schools occur, they must comply with the goals and requirements of the Act. In the Central Puget Sound Region, RCW 36.70A.215 provides additional direction regarding UGA expansions.

Hensley VI, CPSGMHB Case No. 03-3-0009c, FDO, (September 22, 2003), at 13-14; as clarified and amended by this October 22, 2003 Order on Reconsideration.

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The entire paragraph in the September 22, 2003, *Hensley VI*, FDO, as corrected and amended, at 15, now reads:

Both CPP UG-14, as adopted by Ordinance No. 99-121, and LU 1.A.9 provide that, “Expansion of a boundary of an individual UGA . . . *shall not be permitted* unless it complies with the [GMA] and one of the following four conditions are met.” (Emphasis supplied.) So what does the GMA require the County evaluate in assessing and evaluating whether its UGAs are appropriately sized?

Hensley VI, CPSGMHB Case No. 03-3-0009c, FDO, (September 22, 2003), at 15; as clarified and amended by this October 22, 2003 Order on Reconsideration.

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The entire paragraph in the September 22, 2003, *Hensley VI*, FDO, as corrected and amended, at 46, now reads:

First, the Board notes that the *Panesko* case and the *Hensley IV* case dealt with LAMIRDs created pursuant to RCW 36.70A.070(5)(d)(i) – Type 1 LAMIRDs, and therefore are not directly on point. Similarly, the *Sky Valley* case did not establish the Board’s parameters for evaluating RCW 36.70A.070(5)(d)(iii) – Type 3 LAMIRDs – and is therefore also not directly on point. Additionally, the “GMA noncompliance” found by the Western Board in the *Dawes* case was based on the absolute lack of mapping to show where any of the LAMIRDs (Type 1 or 3) were to be located. Existing uses were not at issue in that case; therefore the *Dawes* decision is not on point.

Hensley VI, CPSGMHB Case No. 03-3-0009c, FDO, (September 22, 2003), at 46; as corrected and amended by this October 22, 2003 Order on Reconsideration.