

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

CORINNE R. HENSLEY,	)	
	)	<b>Case No. 03-3-0010</b>
Petitioner,	)	<i>(Hensley VII)</i>
	)	
v.	)	
	)	
SNOHOMISH COUNTY,	)	<b>ORDER ON MOTIONS</b>
	)	
Respondent.	)	
	)	

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**I. PROCEDURAL Background**

On April 10, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Corinne R. Hensley (**Petitioner** or **Hensley**). The matter was assigned Case No. 03-3-0010, and is hereafter referred to as *Hensley VII v. Snohomish County* (**Hensley VII**). Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges Snohomish County’s (**Respondent** or **County**) adoption of Emergency Ordinance No. 02-106 amending the County’s development regulations for the Clearview LAMIRD. The basis for the challenge is noncompliance with the Growth Management Act (**GMA or Act**).

On April 17, 2003, the Board issued a “Notice of Hearing” in the above-captioned case. The Order set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On May 8, 2003, the Board received “Snohomish County’s Index to the Record” (**Index**).

On May 12, 2003, the Board conducted the PHC and issued a “Prehearing Order” (**PHO**), establishing the final schedule and Legal Issues for this matter. The PHO established the deadlines for filing motions.

On July 25, 2003, the Board received “Snohomish County’s Dispositive Motion to Dismiss Petition for Review” (**County Motion**).

On August 1, 2003, the Board received “Hensley Response to Snohomish County’s Motion to Dismiss” (**Hensley Response**).

On August 5, 2003, the Board received “Snohomish County’s Reply Re: Dispositive Motion to Dismiss Petition for Review” (**County Reply**). Later that same day, the Board received a letter from the County, via fax, noting a typographical error in the County Reply.

## II. BACKGROUND ON *Hensley IV* AND *HENSLEY V* AS CONTEXT FOR *HENSLEY VII*

### *Hensley IV*:

*Hensley IV* involved Snohomish County’s creation of the Clearview limited area of more intensive rural development (**LAMIRD**). The County designated the Clearview LAMIRD on the future land use map (**FLUM**) and added policies to its GMA General Policy Plan regarding this LAMIRD. The County did not adopted zoning or other implementing regulations for the LAMIRD; it only amended its Plan.

Petitioners Hensley and McVittie challenged the LAMIRD policies and FLUM designation based on noncompliance with various provisions of the GMA. After review and argument, the Board found the County’s action noncompliant and remanded the LAMIRD to the County. *See Corrine Hensley and Jody McVittie v. Snohomish County [Roger Olsen – Intervenor] (Hensley IV)*, CPSGMHB Case No. 01-3-0004c, Final Decision and Order, (Aug. 15, 2001).

On remand, the County revised its LAMIRD designation and Plan Polices (Ordinance No. 01-131) and also adopted, by separate ordinances, zoning designations to implement the LAMIRD. The adoption of the implementing regulations (Ordinance Nos. 01-132 and 01-133) precipitated a new action by Petitioners – *Hensley V* [*See infra*]. To minimize duplication of effort, the Board coordinated the compliance proceeding and new challenge, pertaining to the implementing regulations.

Ultimately, the Board found the Clearview LAMIRD Plan policies and FLUM designation, complied with the Act.

Snohomish County’s adoption of Ordinance No. 01-131 [Clearview LAMIRD provisions in the Plan and FLUM] **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 not closed.”

*Corrine Hensley and Jody McVittie v. Snohomish County*, CPSGMHB Consolidated Case No. 01-3-0004c (*Hensley IV*): Compliance on Clearview and CPSGMHB Case No. 02-3-0004 (*Hensley*

V), Order Finding Compliance in *Hensley IV* and Final Decision and Order in *Hensley V* [Clearview], (Jun. 17, 2002), at 33. (**June 17, 2002 Order**)

The question of whether the *Plan policies and FLUM designation* for the Clearview LAMIRD [Ordinance No. 01-131] were guided by and complied with RCW 36.70A.020(1) and (2) was specifically addressed by the Board in this Order.

. . . Clearview Ordinance(s) No. 01-131. . . [has] been guided by the direction provided by Goal(s) 2. . . and **compl(ies)** with RCW 36.70A.020(2). . . Clearview Ordinance(s) No. 01-131. . . [has] been guided by the direction provided by Goal 1 and **compl(ies)** with RCW 36.70A.020(1).

June 17, 2002 Order, at 32. **Thus, the County’s Plan provisions and FLUM designations related to the Clearview LAMIRDS were determined by the Board to comply with the GMA, and specifically comply with RCW 36.70A.020(1) and (2).**

*Hensley V:*

*Hensley V* involved the County’s adoption of a zoning map designation (Ordinance No. 01-132) and zoning regulations (Ordinance No. 01-133) to govern the Clearview LAMIRDS. The Board found that the zoning map designation merely reflected the FLUM designation for the Clearview LAMIRDS and concluded “. . . Ordinance No. 01-132 **complies** with the goals and requirements of the GMA.” June 17, 2002 Order, at 33.

However, the Board reached a different conclusion related to the implementing regulations for the Clearview LAMIRD zoning designation.

. . . Ordinance No. 01-133 [zoning regulations governing uses and development standards for the Clearview LAMIRDS zones] 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.

June 17, 2002 Order, at 33. Consequently, the Board remanded the Clearview zoning regulations (Ordinance No. 01-133) to the County with direction to take appropriate legislative action to comply with the Act. The Board’s Order established a compliance schedule and compliance hearing date.

The County filed a request for reconsideration asking the Board to reconsider its conclusion related to Goal 1. On August 12, 2002, the Board issued its Order on Reconsideration [Clearview]. That Order provided:

The Board **affirms** its analysis, conclusions and decision, as found in the FDO, at 29-

34, regarding Ordinance No. 01-133's noncompliance with Goal 1 of the Act [RCW 36.70A.020(1)].

Additionally, the Board **supplements** and **clarifies** its analysis, conclusions and decision as set forth in this Order, regarding Ordinance No. 01-133's noncompliance with Goal 1 [RCW 36.70A.020(1)].

*Hensley IV/V*, Order on Reconsideration [Clearview], (Aug. 12, 2002), at 6. Thus the Board continued to adhere to the position that the Clearview LAMIRD implementing regulations were not guided by, and did not comply with RCW 36.70A.020(1).

On September 11, 2002, Snohomish County filed an appeal of the Board's FDO [June 17, 2002 Order] in Snohomish County Superior Court [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 time 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. (Emphasis supplied).

The Board received the County's statement of actions taken to comply (SATC) (*i.e.*, Ordinance No. 02-106), comments from Petitioners, and a reply from the County and held a compliance hearing on January 21, 2003. During the compliance hearing, the parties and the Board discussed continuing the compliance hearing to allow the County the time to take additional action regarding compliance. A "Notice and Order Continuing Compliance Hearing in *Hensley V* [Clearview]" was issued on January 23, 2003. This Order set a new compliance schedule and compliance hearing date of March 10, 2003.

The Board received a second round of SATC, comments, and reply memoranda regarding the County's adoption of *Ordinance No. 02-106*; and on March 10, 2003, the Board conducted the second compliance hearing. One of the issues addressed at the compliance hearing and in the Board's order was whether the uses permitted in the CRC zone – the Clearview LAMIRD zoning and implementing regulations were guided by, and complied with Goals of the Act, including

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Goal 1. The majority of the Board concluded:

Based upon the Board's discussion and Finding of Fact 1-10 *supra*, the Board concludes, that Snohomish County's enactment of Ordinance No. 02-106 was **clearly erroneous** and **does not comply** with the goals and requirements of the Growth [\[2\]](#)

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 [*sic* 2002] FDO and the August 12, 2002 Order on Reconsideration.

Based upon review of the Board's June 17, 2001 [*sic* 2002] 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 arguments 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.

*Corrine Hensley and Jody McVittie v Snohomish County (Hensley V)*, CPSGMHB Case No. 02-3-0004, Order Finding Noncompliance, (Mar, 28, 2003), at 9 (**March 28, 2003 Order**). This March 28, 2003 Order established a compliance schedule and scheduled the compliance hearing for July 17, 2003.

Snohomish County filed a petition for judicial review of the Board's "Order Finding Noncompliance" in Snohomish County Superior Court. The Court issued an Order staying the Board's Order. On June 23, 2003, the Board issued "Order Acknowledging Stay and Staying Compliance Schedule" in *Hensley V*, CPSGMHB Case No. 02-3-0004. The status of *Hensley V*, regarding the Clearview LAMIRD zoning regulations, now resides in Snohomish County Superior Court.

However, the Board's last word on this case [*i.e.*, the March 28, 2003 Finding of Noncompliance] is that **the County's zoning regulations (Ordinance No. 02-106) related to the Clearview LAMIRDS do not comply with the GMA, and specifically do not comply with RCW 36.70A.020(1) and (2) and .070(5).**

#### *Hensley VII:*

As noted *supra*, Petitioner Hensley filed a new PFR on April 10, 2003, specifically challenging the County's adoption of Ordinance No. 02-106. In this PFR, Petitioner alleges that Ordinance No. 02-106 does not comply with RCW 36.70A.020(1), (2); RCW 36.70A.040; RCW 36.70A.130 and RCW 36.70A.210. (Emphasis supplied). The County subsequently brought its Motion to Dismiss, discussed *infra*.

### III. Motion to Dismiss

#### A. Position of the Parties

The County argues, “By first pursuing a non-compliance order in the compliance phase of *Hensley V* and then mounting a second challenge to the very same legislation in *Hensley VII*, Petitioner Hensley invites the Board to cover old ground – zoning for the Clearview LAMIRD – and asks, in effect, for a second bite at the apple.” County Motion, at 1.

The County offers three different rationales for the Board to dismiss the PFR: 1) RCW 36.70A.330; 2) *res judicata*; and 3) *collateral estoppel*. Although the County acknowledges that the Board has rejected the argument that it has jurisdiction over equitable doctrines, such as *res*

[3]

*judicata* and *collateral estoppel*, the County urges the Board to reconsider its position. County Motion, at 2, 8-9. The County relies on RCW 36.70A.330, related to compliance proceedings. The County notes that the purpose of the compliance hearing is “determining whether [the noncompliant jurisdiction] is in compliance with the requirements of this chapter.” County Motion, at 4. The County goes on to state, “Specifically, where a party challenges the same ordinance both at a compliance hearing and in a subsequent PFR, the Board should dismiss the new PFR unless genuinely new issues are raised . . . which couldn’t be raised in the compliance hearing.” County Motion, at 6.

In response, Hensley counters, “The Board does not have jurisdiction over equitable doctrines or to determine whether these doctrines have been violated. *See Cities of Tacoma, Milton, Puyallup and Sumner v. Pierce County*, CPSGMHB Case No. 94-3-0001, Order on Dispositive Motions, (Mar. 4, 1994).” Hensley Response, at 3.

Hensley also argues, “In this particular case before the Board now [*Hensley VII*], Petitioner is relying on more than just the County’s ability to harmonize or thwart the Goals of the Act, but compliance and consistency of development regulations/uses and the comprehensive plans through RCW 36.70A.040(3).” Petitioner continues, “The issues [in *Hensley V* compliance, and *Hensley VII*] are not the same.” Hensley Response, at 3.

In reply, the County asserts that the Ordinance under review in the compliance proceeding – Ordinance No. 02-106 – and the Ordinance challenged in the new PFR are the same – Ordinance No. 02-106. The County then states, “Contrary to Petitioner’s assertions, *Hensley VII* is simply a rehashing of the exact same issues that were raised in *Hensley V*.” County Reply, at 2.

Regarding the question of whether the Clearview LAMIRD development regulations were consistent with the County’s Plan, the County directs the Board to “*See* Petitioner Hensley’s ‘Response to County Statement of Actions to Comply II,’ Feb. 27, 2003, at 1 and 5 (arguing

about consistency with provisions of the General Policy Plan (GPP)); and Petitioner McVittie's 'Response to County's Second SATC' in *Hensley V*, (February 27, 2003), at 5-6 (arguing about consistency with the provisions of the GPP)." County Reply, at 4-5.

## **B. Discussion**

### *Res judicata and collateral estoppel:*

The Board **declines** the County's invitation to revisit its holding regarding equitable doctrines. The Board **affirms** its reasoning and conclusion that it lacks the requisite specific jurisdiction to determine whether equitable doctrines have been violated. *See discussion in: City of Tacoma, City of Milton, City of Puyallup and City of Sumner v. Pierce County*, CPSGMHB Case No. 94-3-0001, Order on Dispositive Motions, (Mar. 4, 1994), at 3-11; and *Peninsula Neighborhood Association v. Pierce County*, CPSGMHB Case No. 95-3-0071, Order Denying Pierce County's Motion to Dismiss, (Jan. 9, 1996), at 2-3.

### RCW 36.70A.330:

The County is correct in asserting that the purpose of the compliance hearing [*i.e.*, RCW 36.70A.330] is to determine whether the noncompliant jurisdiction has taken action to comply with the GMA, not just the Board's FDO. Sometimes new GMA issues arise in the compliance process that can easily be addressed in the context of a compliance hearing. This was the case in the *Hensley V* compliance proceeding; wherein a new issue regarding adequate notice and public participation for Ordinance No. 02-106 was presented and was addressed by the Board in that Order.

However, the Board also agrees with the County that a new PFR at the compliance phase *may* be appropriate if new issues arise or new petitioners appear opposing the legislative action taken on remand. In these situations, a new index, record, clarification of the issues and briefing schedule allow the parties to fully articulate their positions, and the Board has adequate time to thoroughly deliberate and resolve the issues. In short, in collaboration with the parties, the Board will exercise its judgment and discretion to use the method that will resolve the issues as expeditiously as possible.

Here, the County correctly notes that Petitioner Hensley is challenging Ordinance No. 02-106; the same petitioner and the same ordinance that was the subject of the compliance hearing in *Hensley V*. The County also asserts that the issues are the same. Petitioner does not dispute that she is challenging the same ordinance, but asserts that the issues are not the same. Petitioner Hensley argues that the new PFR challenges compliance with RCW 36.70A.040, a new issue not presented in the compliance proceeding. Therefore a new PFR is justified. The Board now reviews the new PFR to determine whether it is appropriately filed.

In the PFR 03-3-0010, Petitioner Hensley alleges noncompliance with the following GMA provisions: RCW 36.70A.210; RCW 36.70A.020(1) and (2); RCW 36.70A.040; and RCW 36.70A.130. Each alleged violation of the GMA is discussed, *infra*, in the context of the *Hensley IV* and *Hensley V* proceedings.

RCW 36.70A.210. The challenged ordinance revises the County’s zoning development regulations for the Clearview LAMIRD – the CRC zone provisions. The Board has previously held that RCW 36.70A.210, related to County-wide Planning Policies, does not apply to

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development regulations. Petitioner’s challenge on the point is without merit, and does not justify filing a new PFR.

RCW 36.70A.020(1) and (2). These two GMA Goals address encouraging development in urban areas and reducing sprawl. The Board specifically addressed whether Ordinance No. 02-106 was guided by, and complied with, these Goals in its March 28, 2003 Order Finding Noncompliance in *Hensley V*, at 9 – with discussion at 5-8. Petitioner’s challenge on this point is without merit, and does not justify filing a new PFR.

RCW 36.70A.040 and RCW 36.70A.130. The relevant portions of these challenged GMA sections provide: “[T]he county shall *adopt* a comprehensive plan under this chapter and *development regulations that are consistent with and implement the comprehensive plan.*” RCW 36.70A.040(3), (emphasis supplied). Likewise RCW 36.70A.130(1)(b) requires, “*Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.*” (Emphasis supplied). The question of whether the Clearview LAMIRD zoning regulations, adopted by Ordinance No. 02-106, implement the provisions of the County’s Comprehensive Plan has never been placed squarely in front of the Board – not in the original *Hensley V* FDO, nor in the compliance proceeding for *Hensley V*. See July 17, 2002 FDO and March 28, 2003 Finding of Noncompliance. Petitioner is correct that this is a new issue not previously presented to or addressed by the Board and *may* be appropriate for a new PFR. However, does it merit the time and expense of a new or additional proceeding? The Board thinks not, for the following reason:

In *Hensley IV*, the Board specifically determined that Snohomish County’s **Plan**, pertaining to the Clearview LAMIRD, was guided by and **complied with Goals 1 and 2**. See *Hensley IV* - June 17, 2002 Order, at 32-33, and discussion *supra*, at 2-3. In *Hensley V*, the Board specifically determined that Snohomish County’s **development regulations**, pertaining to the Clearview LAMIRD, were not guided by and **did not comply with Goals 1 and 2**. See *Hensley V* – March 28, 2003 Order, at 9 and discussion *supra*, at 4-5.

If the Plan complies with the Goals of the Act, but the development regulations do not comply

with the Goals of the Act, it logically follows that the noncompliant development regulations do not, and cannot, implement a compliant Plan. Therefore the Board concludes that Ordinance No. 02-106 **does not comply** with the requirement of RCW 36.70A.040(3) and .130 that development regulations implement the Plan. The Board reaches this determination in the context of an Order on Motions, without the need for further briefing or a hearing on the merits.

### C. Conclusion

The County's Motion to Dismiss is **denied**. Ordinance No. 02-106 **does not comply** with the requirement of RCW 36.70A.040(3) and .130 that development regulations implement the Plan.

### IV. ORDER

Based upon review of the Petition for Review, prior Board Orders in *Hensley IV* and *Hensley V*, the briefs and materials submitted by the parties, the Act, and prior decisions of the Courts, this Board and other Growth Management Hearings Boards, the Board enters the following Order:

- The County's Motion to dismiss the *Hensley VII* PFR is **denied**.
- The hearing on the merits in *Hensley VII*, scheduled for September 15, 2003 is **cancelled**.
- Having previously found that the Clearview LAMIRD *Plan provisions comply* with the GMA; and having previously found that the Clearview LAMIRD *development regulations do not comply* with the GMA; the Board now determines that Ordinance No. 02-106 (adopting the Clearview LAMIRD development regulations) **does not comply** with the requirement of RCW 36.70A.040(3) and .130, that development regulations implement the Plan.
- The Board will neither remand nor schedule a compliance hearing on this issue at this time. Further Board proceedings on this case and this issue will be coordinated with the *Hensley V* matter once it is decided by the Snohomish County Superior Court. Following the Superior Court's decision on *Hensley V*, the County shall promptly notify the Board so the Board can determine what further proceedings, if any, are necessary.

So ORDERED this 11<sup>th</sup> day of August, 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member (Board Member McGuire files a separate  
concurring opinion)

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Joseph W. Tovar, AICP  
Board Member

**Concurring Opinion of Board Member McGuire**

Although I offered a dissenting opinion in the *Hensley V* compliance proceeding, I concur in the conclusion reached here. Notwithstanding my dissent in that matter, the Board has determined that the Clearview LAMIRD Plan provisions comply with the Act while the Clearview LAMIRD development regulations do not comply with the Act. Consequently, I concur in the conclusions established by prior Board Orders, that the noncompliant Clearview LAMIRD zoning regulations do not implement the compliant Clearview LAMIRD provisions found in the Plan.

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

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[1]

Board Members Tovar and North formed the majority; Board Member McGuire filed a separate dissenting opinion that would have found compliance.

[2]

The Board's discussion of RCW 36.70A.020(1), (2) and .070(5) is found at 5-8 of this March 28, 2003 Order.

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The County refers generally to the Board's decision in *PNA v. Pierce County*, CPSGMHB Case No. 95-3-0071, Order Denying Pierce County's Motion to Dismiss, (Jan. 9, 1996).

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See *Children's Alliance and Low Income Housing Institute v. City of Bellevue (Children's I)*, CPSGMHB Case No. 95-3-0011, Order Partially Granting Bellevue's Dispositive Motion, (May 17, 1995), at 7.