

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

1000 FRIENDS OF WASHINGTON,)	
)	CPSGMHB Case No. 03-3-0026
Petitioner,)	<i>(1000 Friends II)</i>
)	
v.)	
)	
SNOHOMISH COUNTY,)	FINAL DECISION AND ORDER
)	
Respondent,)	
and)	
)	
MOHAMMED YOUSSEFI,)	
)	
Intervenor.)	

SYNOPSIS

Snohomish County adopted an ordinance amending its Plan and zoning maps to expand the boundaries of an existing Type 1 LAMIRD in the Clearview area along SR-9. Snohomish County has two Type 1 LAMIRDs, both located along a short stretch of SR-9. 1000 Friends of Washington appealed the action alleging that it did not comply with the provisions of RCW 36.70A.070(5)(d) governing LAMIRDs. The Board concluded that the GMA does not prohibit the potential expansion or extension of LAMIRDs. The Board deferred to the County’s conclusion regarding the areas existing uses on July 1, 1990. However, the Board concluded these uses were simply rural uses already permitted in the rural area; they are not more intensive rural development meriting inclusion in a LAMIRD. Additionally, the Board found that the proposed logical outer boundary of the expanded LAMIRD did not correct an irregularity and did not minimize and contain more intensive rural development. Instead, the expansion encouraged sprawl in the form of strip commercial development and was not guided by Goal 2. The Board found noncompliance with RCW 36.70A.070(5)(d) and .020(2), remanded the ordinance, and entered a determination of invalidity.

I. BACKGROUND¹

On October 22, 2003, Snohomish County (the **County**) adopted Ordinance No. 03-106 (the **Ordinance**). The Ordinance was published on October 24 and 31, 2003. The

¹ See Appendix A – Procedural History for more detail on the filings in this matter.

Ordinance expands the northern Clearview LAMIRD [Type I] along SR-9, by adding 6.5 acres. This LAMIRD is one of two LAMIRDs located in Snohomish County along SR-9 in the Clearview area. The Plan and zoning maps are amended to reflect this change.

1000 Friends of Washington (**1000 Friends**) filed a timely petition for review (**PFR**) alleging noncompliance with RCW 36.70A.070(5)(d) and Goal 2 [RCW 36.70A.020(2)].

The Board conducted the prehearing conference and issued a prehearing order establishing the schedule and the legal issues to be decided in this matter. No motions to supplement the record or dispositive motions were filed.² All prehearing briefing³ was timely filed.

On May 6, 2004, the Board held the Hearing on the Merits in of the conference room adjacent to the Board's Offices, 900 Fourth Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Bruce C. Laing and Joseph W. Tovar were present for the Board. Petitioner 1000 Friends was represented by John T. Zilavy. Respondent Snohomish County was represented by Sean K. Howe. Intervenor Youseffi was represented by Molly Lawrence. Court reporting services were provided by Eva P. Jankovitz of Byers & Anderson, Inc. The hearing convened at 10:00 a.m. and adjourned at approximately 11:30 a.m. Andrew Lane and Mohammed Youseffi also attended. No transcript was ordered.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Petitioner challenges Snohomish County's amendment to its Future Land Use Map (**FLUM**) and corresponding zoning amendment that expands the northern Clearview LAMIRD, as adopted by Ordinance No. 03-106. Pursuant to RCW 36.70A.320(1), Snohomish County's Ordinance No. 03-106 is presumed valid upon adoption.

The burden is on Petitioner, 1000 Friends, to demonstrate that the actions taken by the 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).

² At the HOM, the Board did take official notice of several document and requested several post hearing submittals of documents. See Appendix A.

³ Full citations to the briefs submitted by the parties and the shortened citations referenced in this Final Decision and Order are contained in Appendix A.

Pursuant to RCW 36.70A.3201, the Board will grant deference to the County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, No. 26425-1-II, 108 Wn.App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

In affirming the *Cooper Point* court, the Supreme Court recently stated:

Although we review questions of law *de novo*, we give substantial weight to the Board’s interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed “[I]t is well settled that deference [to the Board] is appropriate where an administrative agency’s construction of statutes is within the agency’s field of expertise . . .”

Thurston County v. Western Washington Growth Management Hearing Board, Docket No. 71746-0, November 21, 2002, at 7.

III. BOARD JURISDICTION AND PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that: 1000 Friends’ PFR was timely filed, pursuant to RCW 36.70A.290(2); 1000 Friends has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amends the County’s Comprehensive Plan *i.e.*, FLUM and development regulations, pursuant to RCW 36.70A.280(1)(a).

B. PREFATORY NOTE

This is not the first case the Board has had dealing with Snohomish County’s creation of LAMIRDs along SR-9 in the Clearview area. In late 2000, the County attempted to create a **single** linear Clearview LAMIRD⁴ along SR-9. The County’s initial effort included properties surrounding the intersection of 164th Street SE and SR-9 and extended southward along SR-9 to include properties around its intersection with 184th Street SE. In *Corinne Hensley and Jody McVittie v. Snohomish County [Roger Olsen – Intervenor] (Hensley IV)*, Consolidated CPSGMHB Case No. 01-3-0004c, Final Decision and Order, (Aug. 15, 2001), the Board found this single Clearview LAMIRD to be noncompliant with the Act, and remanded it to the County.

⁴ The single linear Clearview LAMIRD was approximately 125 acres in size.

On remand, the County created **two** Clearview LAMIRDs;⁵ essentially these are two nodes at different intersections of SR-9. A relatively small northern node (approximately 16.5 acres) is centered on the intersection of SR-9 and 164th Street SE; and a larger southern node (approximately 80 acres) is roughly centered on the intersection of SR-9 and 180th Street SE. Following the compliance hearing, the Board determined that the two node configuration and delineation of the two Clearview LAMIRDs, in the FLUM, **complied** with the goals and requirements of the Act. *See Corinne R. Hensley and Jody L. McVittie v. Snohomish County*, Consolidated CPSGMHB Case No. 01-3-0004c (*Hensley IV*) Compliance on Clearview CPSGMHB Case No. 02-3-0004 (*Hensley V*), Order finding Compliance in *Hensley IV* and Final Decision and Order in *Hensley V* [Clearview], (June 17, 2002), at 33.⁶

About 18 months later, the County passed the Ordinance that is the subject of the present case. The present challenge involves a 6.5 acre expansion to the southern logical outer boundary (**LOB**) of the smaller (16.5 acre) northern Clearview LAMIRD. The acreage in question was part of the single Clearview LAMIRD initially designated by the County, but found noncompliant by the Board in the *Hensley IV* FDO.

The challenged Ordinance amended both the County's FLUM and zoning map. Only one Legal Issue is presented in this matter – whether the expanded LAMIRD complies with RCW 36.70A.070(5)(d), the GMA's LAMIRD provisions, and is consistent with Goal 2 [RCW 36.70A.020(2)], reduction of sprawl.

IV. LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUE NO. 1

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

- 1. Does adoption of Ordinance No. 03-106, enlarging the northern Clearview LAMIRD by 6.5 acres fail to comply with RCW 36.70A.020(2) (inappropriate conversion of undeveloped land) and RCW 36.70A.070(5) (rural element of comprehensive plan) when the record fails to establish that this action is in compliance with RCW 36.70A.070(5)(d)?*

⁵ The two Clearview LAMIRDs combined are approximately 97 acres in size; approximately 27 acres connecting the two nodes were eliminated on remand.

⁶ In the *Hensley V* FDO, the Board found that the uses permitted in the CRC zone, which implemented the Clearview LAMIRD, did not comply with the GMA. Following a compliance hearing, the Board again remanded the CRC zoning and found continuing noncompliance. The compliance proceeding on this action is stayed pending review by the Courts.

Applicable Law

RCW 36.70A.020(2) – Goal 2 – provides:

Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

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

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

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

. . .
(iv) A county shall adopt measures to minimize and contain *the existing areas or uses of more intensive development*, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. *Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominantly by the built environment*, but that may also include undeveloped lands if limited as provided in this subsection. *The county shall establish the logical outer boundary of an area of more intensive rural development*. In establishing the logical outer boundary the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the 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

The Action:

As it relates to this challenge, Ordinance No. 03-106 amends the County's FLUM and zoning maps to add 6.5 acres [three parcels each being approximately 2 acres in size] to the existing 16.5 acre northern Clearview LAMIRD. The FLUM designation is changed from Rural Residential (1 du/5 acres basic) to Clearview Rural Commercial (**CRC**); the zoning designation is changed from R-5 to CRC. Ordinance No. 03-106, Sections 4 and 5, at 5-6.

Collectively, the three parcels are bounded on the north by the existing northern Clearview LAMIRD, on the east by SR 9, on the south by 168th Street and on the west by rural residential properties. PDS Report, Ex. 2, at 1.

Position of the Parties:

1000 Friends' arguments may be summarized as follows: 1) Once a Type I LAMIRD has been established it may not be expanded; 2) The Board has already rejected inclusion of these three parcels in a LAMIRD in *Hensley IV*, and nothing has changed since that time to merit inclusion now; 3) Although there were "existing uses" on the three parcels, they are not more intensive uses, but simply rural uses, that do not merit inclusion within a LAMIRD; and 4) The existing northern node Type I LAMIRD has a LOB, the proposed LOB is not logical, but irregular. 1000 Friends PHB, at 1-12, 1000 Friends Reply, at 1-9, and argument at the HOM.

To support its position, 1000 Friends cites to: 1) The Planning and Development Services (**PDS**) staff report and recommendation (**PDS Report**⁷), Ex. 2; 2) The Planning Commission (**PC**) report and recommendation (**PC Report**), Ex. 1; 3) The Department of Community, Trade and Economic Development (**CTED**) comment letter of August 12, 2003, (**CTED letter**), Ex. 28; and 4) Council Findings in Ordinance No. 03-106, Ex. 10. PDS, PC and CTED all recommended *denial* of this LAMIRD expansion. See Exs. 1, 2 and 28.

The County and Intervenor's arguments may be summarized as follows: 1) Petitioners can cite to no authority for the proposition that designation of Type I LAMIRDs is a one-time event, therefore LAMIRD expansion is permissible; 2) Although the Board rejected the single LAMIRD in *Hensley IV*, it did not specifically address the three lots in

⁷ The Board notes that the PDS Report, PC Report and CTED letter all refer to the proposal under consideration as the "Jeff Cole" proposal. Apparently the Coles were, or are, owners of one of the lots in question; however, Mr. Youseffi, owner of at least one of the lots in question, carried this appeal forward.

question; 3) All three lots in question were developed and used commercially in July of 1990, and they need not be of urban commercial intensity; and 4) The proposed LOB fixes an irregularity, since the prior boundary split commercially developed lots. County Response, at 1-20, and argument at the HOM.

To support their position, the County and Intervenor assert that the recommendations of the PDS, PC and CTED are advisory, and that it is the Council that is the ultimate decision-maker. Additionally, the County and Intervenor refer to ESHB 2905 to illustrate legislative intent for Type I LAMIRDs and cite to an informational property report (**Property Report**) provided to PDS on behalf of the owner(s) of the three properties regarding the history of the parcels. This report was prepared by counsel for Intervenor and submitted to PDS in a letter dated May 28, 2003, with attachments. Ex. 3.

Board Discussion:

1. Can Type I LAMIRDs, once established, subsequently be expanded? - Yes

1000 Friends argues that a once a county establishes a [Type I] LAMIRD, it may not subsequently expand it. Their rationale is as follows: If Type I LAMIRDs must be limited to existing [7/1/90] areas and the uses, and these areas and uses must be minimized and contained within the LOB [*i.e.*, the LAMIRD boundary], then *subsequent expansion* of the same LAMIRD no longer minimizes and contains the existing uses and the new boundary is illogical and contrary to the Act.

However, the Board finds no authority, Board decisions or case law, which supports this interpretation. Further, the GMA acknowledges and recognizes that a comprehensive plan is not a static product, but part of a dynamic process⁸ The Act requires that plans [including UGAs and all plan elements], and development regulations are subject to ongoing review and evaluation, with periodic revisions and updates required and allowed. *See e.g.*, RCW 36.70A.130, .110 and .215. Therefore, in light of the broad and dynamic planning context of the GMA, this Board will not interpret RCW 36.70A.070(5)(d) to prohibit the potential expansion of established Type I LAMIRDs. The Board holds that **RCW 36.70A.070(5)(d) does not prohibit the potential expansion of Type I LAMIRDs**. However, just as an initial LAMIRD designation must meet the LAMIRD criteria of the Act, so too must any LAMIRD expansion.

⁸ It is the general sense of the Board that the 1997 amendatory LAMIRD provisions were added to the GMA to minimize the amount of nonconformity that was being created in rural areas as the Counties wrestled with how to manage and balance the costs and benefits of different types of development within these areas. LAMIRDs are a means of creating a degree of flexibility and recognizing the dynamics of planning.

2. Did the Board dispose of this case when it rendered its decision in Hensley IV? - No

In *Hensley IV*, the Board found the County’s designation of a **single** “strip commercial” Clearview LAMIRD noncompliant with the Act and remanded the action to the County to take corrective action. *See Hensley IV FDO, cited infra*. The three parcels at issue in this challenge were included in the single noncompliant Clearview LAMIRD that the Board remanded, and these parcels, among numerous others, *were subsequently deleted by the County* when it delineated **two** Clearview LAMIRDs on remand. The Board found this configuration to be in compliance with the Act. *See Hensley IV Compliance Order, cited infra*.

In the *Hensley IV* proceeding, the Board did not specifically analyze whether these three parcels met the criteria for inclusion in a Type I LAMIRD. However, in reaching its decision, the Board did look to the findings in the challenged Ordinance, noting that they addressed two commercial nodes, not a continuous commercial strip. The Board stated:

The Act requires the LOB to minimize and contain the existing areas of commercial development. The record [particularly Exs. 83 and 84] supports Petitioners contention that the LOB goes beyond the existing area creating a commercial strip – the “infill” goes beyond the existing development, it is not limited. *The County’s own findings and conclusions regarding the LAMIRD designation (See Finding J and K in Ordinance No. 00-091, at 6-8, (footnotes omitted) do not support the delineation of the Clearview LAMIRD as a commercial strip. These findings address two existing commercial nodes at intersections along SR-9, but not the designated infill area between them.* However, the County does attempt to justify a change to the FLUM for this strip commercial infill area, but this justification does not comply with the requirements of .070(5) for including the area in a LAMIRD.

In essence, *the County concludes that including 27 acres [including the three parcels at issue here] of infill between the two commercial nodes is not as bad as the original proposal to include 103 acres of infill between them* (footnote citing Ordinance finding omitted). A smaller version of a noncompliant designation creating a commercial strip does not change the nature of the noncompliant action. The LAMIRD designation is not limited to the existing area. . . . The County’s designation of the Clearview LAMIRD does not comply with the requirements of RCW 36.70A.070(5).

Hensley IV, FDO, at 13-16, (emphasis supplied).

It is correct that the Board previously rejected a 27-acre commercial strip that connected two commercial nodes and that the three parcels at issue here were included within the 27-acres. It is also important to note that the County rejected the 27-acre commercial strip, including these three parcels, as being inappropriate for a LAMIRD since it deleted

these acres from its designation of the northern node of the Clearview LAMIRD. Nonetheless, these prior Board decisions are not dispositive to the present case. As the Board concluded *infra*, RCW 36.70A.070(5)(d) does not prohibit the potential expansion of a LAMIRD. Consequently, the Board will review the present action notwithstanding the decisions made 18 months prior to the adoption of the present challenged Ordinance.

3. Did commercial uses exist on the three parcels on July 1, 1990? – No, the County Council concluded only one parcel contained an existing commercial use on July 1, 1990.

The parties disagree on the characterization of what the existing uses on the three parcels were in July of 1990. For purposes of this discussion, the Board will refer to the southernmost parcel as Parcel A, the middle parcel as Parcel B, and the northernmost parcel as Parcel C.

It is undisputed that Parcel A [1.78 ac.] was, and is, developed with a retail plant nursery, including several greenhouses, and a drive through espresso stand. *See* PDS Report, Ex. 2, at 1-2; and Property Report, Ex. 3, at 2 and attached Metroscan Property Profile (MPP) which indicates the parcel use code is commercial, other retail.

Parcel B [2.8 ac.] was, and is, developed with a single family residence and several outbuildings. *See* PDS Report, Ex. 2; and Property Report, Ex. 3, at 2 and attached MPP which indicates the parcel use code is residential, single family detached and vacant undeveloped unused land. However, Intervenor argues, the Property Report states that “several outbuildings were used [by the prior owner] until February of 1999 for dog kenneling and as a dog and bird breeding and sales facility.” *See* Property Report, Ex. 3, at 2.

Parcel C [1.89 ac.] was, and is, developed with a single family residence. *See* PDS Report, Ex. 2; and Property Report, Ex. 3, at 2 and attached MPP which indicates the parcel use code is residential, single family detached. Again, Intervenor argues that the Property Report states that the property “was improved with an equestrian training and breeding facility, including a horse barn and riding arena.” Property Report, Ex. 3, at 2.

Clearly there was conflicting evidence available in the record as to the existing uses on the properties. The Council concluded:

The 6.5-acre area added to the northern Clearview LAMIRD by these amendments is located within an existing area of commercial and residential uses that existed on or before July 1, 1990 at levels more intense than typically found in rural areas. The southernmost property [Parcel A] within this 6.5-acre area qualifies for inclusion in the LAMIRD because it was commercially developed on or before July 1, 1990 with commercial uses that were part of the natural neighborhood of more intensive uses currently included within the northern Clearview LAMIRD.

Including the properties located between this southernmost property and the current boundary of the northern LAMIRD is justified as infill under the GMA requirements for LAMIRDs.

Ordinance No.03-106, Section 2, findings and conclusions D, at 2-3, (emphasis supplied).

This Ordinance finding and conclusion indicates that, notwithstanding the information provided by Intervenor's attorney to PDS, the County Council only recognized **one** existing commercial use on the three subject properties. In light of the record before the Council, and the record before the Board, the Board defers to the Council's conclusion that the existing use on July 1, 1990 for Parcel A was an existing commercial use and the existing uses on July 1, 1990 for Parcels B and C were existing residential uses, intended as infill.

4. Do the uses that existed in 7/1/90 on the three parcels constitute more intensive rural development? - No

On this question, the Board characterizes the arguments of the parties as follows. In essence, Petitioners argue that the existing uses in 1990 were simply rural uses, not "more intensive" rural development as required by the Act;⁹ Respondent and Intervenor contend that the 1990 existing uses were "more intensive," since those existing uses are not now generally permitted in the rural area.¹⁰ To answer this question, the Board first turns to the Ordinance and the record provided to the Board.

The PDS Report, in discussing the County's Plan criteria for being included in a LAMIRD, explains how the County determines more intensive uses. The Board notes that the administration of the County's zoning code falls to PDS. The PDS Report explains,

To be included within the Clearview LAMIRD, the proposal must be consistent with GPP Policy LU 6.I.5, which provides the following criteria for establishing the LAMIRD boundaries in Clearview:

...

The southernmost parcel [Parcel A] was developed with a nursery as of July 1, 1990, which was lawfully established as a conditional use in the R-5 zone. This parcel was not included within the CRC LAMIRD boundaries because a nursery is not considered a commercial use for the purposes of creating a LAMIRD ("Limited Area of More Intense Rural Development") boundary. *A commercial use is one that can only be permitted outright or conditionally within one of the commercial or industrial zones – NB, CB, GC, PCB, PIP, IP, LI and BP. This ensures that the boundaries of the LAMIRD are limited to include those areas that*

⁹ 1000 Friends PHB, at 8-11; 1000 Friends Reply, at 5-6.

¹⁰ County Response, at 13- 15.

were developed with more intensive commercial uses, not uses that are conditionally allowed in all rural zones. This limits the extent of the LAMIRD consistent with the intent and requirements of RCW 36.70A.070(5)(d)(iv). Since a nursery is a conditional use in the Rural Residential zone, it is not considered a commercial use for the purposes of these criteria. The other two parcels were not developed with commercial uses as of July 1, 1990.

...

The area proposed to be added is not and has never been zoned Neighborhood Business [NB] or Community Business [CB]

PDS Report, Ex. 2, at 2, (underlining emphasis in original, italicized emphasis supplied).

The PC Report, which recommended denial of the proposal, indicated that the basis of its recommendation was, “because it is not consistent with the criteria found in policy LU 6.I.5 for establishing boundaries of the Clearview LAMIRD.” PC Report, Ex. 1, at 4. Thus, the PC appeared to concur with the rationale in the PDS Report.

CTED also drew a similar conclusion, “This particular parcel [the 6.5 acres including Parcels A, B and C] contains a use that is permitted under its current designation and is a permitted use in rural areas. This parcel does not meet the criteria to be included within the Clearview LAMIRD because it contains a rural use. CTED letter, Ex. 28, at 3.

The only other evidentiary item provided to the Board is the Property Report. The Board finds no discussion in the Property Report that addresses whether the three parcels are more intensive rural development or more intensive than typically found in the rural area. Ex. 3, at 1-7 and attachments.

Based on this record, the Council made the following finding (it is the only finding that mentions “more intensive rural development”): “The 6.5-acre area added to the northern Clearview LAMIRD by these amendments is located within an existing area of commercial and residential uses that existed on or before July 1, 1990 *at levels more intense than typically found in rural areas.*” Ordinance No.03-106, Section 2, findings and conclusions D, at 2, (emphasis supplied). The Board can find no support for this conclusion in the record. Could there have been a different source for the Council to have drawn this conclusion?

The Board notes with interest that while the GMA defines “rural development” and “rural character,” it does not define “more intense.” Neither the definitions of “rural development”¹¹ nor the definition of “rural character”¹² shed much light on the meaning

¹¹ RCW 36.70A.030(15) defines “rural development” as:

[Rural development] refers to development outside the urban growth area and outside agricultural, forest and mineral resource lands designated pursuant to RCW 36.70A.170.

of “more intense.” However, .030(14) suggests *the County* as the entity that identifies rural character, and refers to the GMA’s rural element provisions. RCW 36.70A.070(5)(a) provides, in relevant part, “Because circumstances vary from county to county, in establishing patterns of rural densities and uses, *a county may consider local circumstances. . . .*” Thus, the determination of what “more intensive rural development” is falls to the counties. Consequently, absent other relevant authority, resort to the County’s current zoning code¹³ is the appropriate document for making this decision.

Although PDS explained in its report (quoted *infra*) its basis for determining whether the existing uses on the three parcels were more intense, perhaps an alternative interpretation of the code would support the Council’s conclusion. Are the existing uses on the parcels more intense than those permitted under the County’s current GMA zoning for those parcels?

The zoning on the parcels prior to the adoption of Ordinance No. 03-106 was R-5, a County zoning designation adopted to implement the County Plan, pursuant to the GMA. Resort to SCC 30.22.110 indicates: 1) Single Family Dwellings are permitted-outright in the R-5 zone; and 2) both retail and wholesale Nurseries/Greenhouses are permitted-outright in the R-5 zone. Interestingly, even those uses advocated by Intervenor, but not accepted by the Council, as existing commercial uses in 1990, are permitted-outright in

Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.

¹² RCW 36.70A.030(14) defines “rural character” as:
[Rural character] refers to the patterns of land use and development *established by a county* in the rural element of its comprehensive plan:

- a. In which open space, the natural landscape, and vegetation predominate over the built environment;
- b. That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in the rural areas;
- c. That provide visual landscapes that are traditionally found in the rural areas and communities;
- d. That are compatible with the use of the land by wildlife and for fish and wildlife habitat;
- e. That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;
- f. That generally do not require the extension of urban governmental services; and
- g. That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

(Emphasis supplied).

¹³ At the HOM, the Board took official notice of portions of the current zoning code provided by Intervenor. The Board also requested and received copies of the relevant provisions of the County zoning code as it existed on July 1, 1990. See HOM Ex. 1. The Board thought the prior code might be helpful in its deliberations. However, upon reflection, the Board now declines to consider the pre-July 1, 1990 zoning code provisions since that code was a Pre-GMA enactment. [July 1, 1990 was the date the GMA became effective – ESHB 2929.]

the R-5 zone. SCC 30.22.110 establishes: 1) Commercial Kennels¹⁴ (also private breeding and private non-breeding kennels) are permitted-outright in the R-5 zone; 2) Mini-equestrian centers¹⁵ are permitted-outright in the R-5 zone; and 3) Equestrian centers¹⁶ are allowed by conditional use permit.¹⁷ Even this analysis illustrates that if the existing uses are permitted-outright, or even conditionally, in the existing rural zone in which they are located; one cannot conclude that they constitute more intense rural development or more intense development than is typically found in the rural area.

The existing uses on the three parcels within this 6.5 acre area are simply rural uses, as asserted by Petitioner. Neither the PDS interpretation, nor the alternative analysis discussed *infra*, supports the Council's finding and conclusion that the existing uses are "at levels more intense than typically found in rural areas." Additionally, if the existing use on the southernmost parcel is not more intensive commercial development, but merely a permitted rural use, there is no basis for including it in a LAMIRD. Consequently, there is no basis or rationale for including the other two parcels as infill. This Council finding and conclusion to the contrary was **clearly erroneous**. The Board concludes that the existing uses on the parcels within this 6.5 acre area are simply permitted rural uses, not more intensive rural uses, and do not comply with the requirements of RCW 36.70A.070(5)(d)(i),(iv) or (v).

5. Does the logical outer boundary (LOB) for the expanded LAMIRD minimize and contain the existing uses (if they had been more intensive rural development) or correct an irregular LOB? - No

Assuming, *arguendo*, that: 1) the existing uses were more intense rural development, and appropriate for inclusion in a LAMIRD; or 2) the provisions of ESHB 2905 [Ch. 196 Laws of 2004 – amending .070(5)(d)(i)] were in effect; the Board will address whether the uses and area is minimized and contained within the new LOB.

1000 Friends argued that the existing LOB was logical and the proposal would not minimize and contain existing uses. 1000 Friends PHB, at 8-11. The County and Intervenor countered that the proposal corrected an irregular boundary since the existing boundary "split two commercially developed and operated properties." County Response,

¹⁴ "A place where (a) four or more adult dogs, cats or combination thereof are kept whether or not for compensation, including facilities known and operated as animal shelters and boarding facilities, (b) the occupant of the property keeps and owns more than 10 and not more than 25 adult dogs, or (c) dogs are sold, but not including small animal hospitals where pets are kept for treatment only, pet shops, private kennels or zoological parks." See SCC 30.91K.010

¹⁵ "A facility where 24 or fewer horses are used for rentals, riding lessons, rodeos, shows or training, where training may include horses not boarded on site." See SCC 30.91E.140.

¹⁶ The definition was not provided, but it is reasonable to assume that it is a facility able to accommodate more horses than the Mini-equestrian center.

¹⁷ The Board notes that at the HOM, Intervenor's counsel argued that kennels and mini-equestrian centers would not be permitted outright in the R-5 zone because a minimum of five acres was required for these uses. However, the Council had determined that the existing uses on the two parcels were not commercial, as advocated by Intervenor.

at 10. In reply, Petitioners contend that the Council did not identify the two northernmost parcels [Parcels B and C] as commercial, but only as potential infill areas, and the LOB would not minimize or contain the character of an existing commercial neighborhood. 1000 Friends Reply, at 7.

In discussing the boundary edge (the LOB) for including the 6.5 acres, the PDS Report stated:

The site is along the boundary edge of the northern 164th Street SE/SR 9 LAMIRD east of SR 9. The existing boundary of the 164th Street boundary adjacent to the site follows the property line of a mini-mart, gas station and the Berry Bowl Restaurant. The existing boundary is logical, following a property line, the built environment and pre-existing Neighborhood Business zone line, and was upheld by the [CPSGMHB]. Excluding the proposal site does not create an irregular boundary.

PDS Report, Ex. 2, at 2. In other words, the existing boundary was an appropriate LOB that did not need to be “fixed” to remove an irregularity. The PDS Report also concludes that the expansion does not comply with the GMA, and explains:

[E]xpanding the Clearview LAMIRD to include lands that were not part of the existing commercial area as of July 1, 1990, is not consistent with the provisions of RCW 36.70A.070(5)(d)(iv). Existing areas are those that are clearly identifiable and contained where there is a logical boundary delineated predominately by the built environment. The existing boundary is clearly identifiable and delineated by the built environment as it follows the property line of a mini-mart, gas station and restaurant and the NB zone line that existed on July 1, 1990. The proposed new boundary would not be delineated by the built environment.

PDS Report, Ex. 2, at 3.

Additionally, CTED commented:

This proposal also extends the LAMIRD along SR-9. This pattern of development is of special concern given that it extends toward another LAMIRD node to the south and this area is located between two UGAs. This type of strip commercial development is one of the three types of development that typify sprawl [footnote omitted] and that the GMA was enacted to prevent. This is the problem noted by the [CPSGMHB in *Hensley VI*] [footnote omitted]. As a result, this proposal is difficult to reconcile with the county’s duty to prevent sprawl and contain LAMIRDS within a logical outer boundary. . . .

CTED letter, Ex. 28, at 4.

However, the conclusions in the Property Report differ from those drawn by PDS, the PC and CTED. It concludes that: 1) the addition of the three parcels will continue to be contained within a LOB, the present boundary splits commercial operations, an arterial is an appropriate boundary; 2) the character of the surrounding community and neighborhood will not be upset, nor encourage low density strip development type sprawl; and 3) the boundary will be regular and public facilities and services will not be affected by the expansion. Property Report, Ex. 3, at 5-6.

The Council concluded that the new boundary:

- [H]elps further compliance with the GMA criteria for LAMIRD boundaries set forth at RCW 36.70A.070(5)(d)(iv). These criteria require the use of clear, regular boundaries delineated predominantly by the built environment and existing natural and manmade physical features, as well as preserving the character of natural neighborhoods. See Ordinance No. 03-106, Section 2, Finding B, at 2.
- [T]he current boundary (1) destroys the character of the natural neighborhood, which logically includes the properties owned by proponent Jeff Cole [now Mr. Youssefi] and his immediate neighbors; and (2) fails to utilize the existing physical boundary provided by 168th St. SE and SR 9, which are existing physical features. *Id.*, Finding C, at 2.
- The proposed FLU Map amendments and areawide rezone will discourage strip development generally north of the intersection of 164th/SR 9 and south of the intersection of 184th/SR 9 by *limiting future commercial development to areas between and adjacent to two distinct existing commercial nodes.* *Id.*, Finding G, at 3; (emphasis supplied).

Reviewing these findings, in light of the record, the Board concludes that Finding C is clearly erroneous. The evidence does not support the conclusion that the character of the existing neighborhood will be destroyed. PDS, the PC and CTED offer no such suggestion; likewise, the Property Report also indicates the surrounding neighborhood will “not be upset.” There is no evidence suggesting destruction is being caused by the existing boundary. Nor is there any evidence to suggest that property lines, which also correspond to prior zoning district boundaries, are inappropriate boundaries.

As to Finding G, the Board concludes that while this finding indicates that strip development to the north of the northern LAMIRD will be discouraged, it acknowledges that commercial strip development is directed to the south and between the two existing LAMIRDS. This is contrary to the provisions of .070(5)(d)(iv) prohibiting the expansion of sprawl.

The Board concurs with the analysis contained in the PDS Report and especially the concerns voiced by CTED related to sprawl in the form of commercial strip development. The new LOB does not correct an irregularity; instead it would allow existing LAMIRDs to inch closer together, creating the same strip commercial development that the Board found noncompliant in *Hensley VI*. The Council's action was **clearly erroneous**. The Board concludes that the LAMIRD boundary expansion that includes the 6.5 acres is not a LOB that minimizes and contains exiting more intensive rural uses, and does not comply with the requirements of RCW 36.70A.070(5)(d)(iv). Further, the extension of the boundary to the south of the northern LAMIRD encourages sprawl in the form of strip commercial development and is not guided by, or in compliance with, RCW 36.70A.020(2).

Conclusions

Based upon the discussion and analysis, *supra*, the Board concludes:

- RCW 36.70A.070(5)(d) does not prohibit the potential expansion of Type I LAMIRDs.
- The Board's prior decisions, in *Hensley IV* and *V*, are not dispositive to the present case.
- The Board defers to the Council's conclusion that the existing use on July 1, 1990 for Parcel A was an existing commercial use and the existing uses on July 1, 1990 for Parcels B and C were existing residential uses, intended as infill.
- The existing uses on the parcels [A, B and C] within this 6.5 acre area are simply permitted rural uses, not more intensive rural uses, and **do not comply** with the requirements of RCW 36.70A.070(5)(d)(i),(iv) and (v).
- The LAMIRD boundary expansion that includes the 6.5 acres is not a LOB that minimizes and contains exiting more intensive rural uses, and **does not comply** with the requirements of RCW 36.70A.070(5)(d)(iv). Further, the extension of the boundary to the south of the northern LAMIRD directs strip commercial development (sprawl) to the south between the two existing LAMIRDs and **is not guided by, or in compliance with, RCW 36.70A.020(2)**.
- Snohomish County's adoption of Ordinance No. 03-106 was **clearly erroneous**.

V. INVALIDITY

RCW 36.70A.302 provides in relevant part:

- (1) A board may determine that part or all of a comprehensive plan or development regulations 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 . . .

The Board has concluded, *supra*, that Snohomish County's adoption of Ordinance No. 03-106 was clearly erroneous and **does not comply** with the requirements of RCW 36.70A.070(5)(d)(i),(iv) and (v); nor was it guided by Goal 2 – RCW 36.70A.020(2). The Board's Order, *infra*, **remands** Ordinance No. 03-106 to the County with direction to take legislative action to bring it into compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

At the HOM, Intervenor asserted that Petitioner could not ask the Board to enter a determination of invalidity since it had not been requested in the PFR. As Snohomish County is aware, the Board has stated that invalidity is a remedy available to the Board rather than a legal issue that must be posed in a PFR. "The Board has authority to consider invalidity *sua sponte* regardless of whether or not a party raises it during the proceeding. RCW 36.70A.302(1) and WAC 242-02-831(2)." *King County v. Snohomish County [Cities of Renton and Edmonds – Intervenors]*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 23, 2003), at 18.

In light of the findings and conclusions included in the discussion *supra*, the Board finds and concludes that the continued validity of Ordinance No. 03-106 during the period of remand would substantially interfere with the fulfillment of RCW 36.70A.020(2). The expansion of the northern Clearview LAMIRD, as set forth in Ordinance No. 03-106, will allow sprawl in the form of strip commercial development along SR 9. Therefore, the Ordinance does not reduce sprawl as directed by Goal 2 – RCW 36.70A.020(2). Therefore, the Board enters a **determination of invalidity** for Ordinance No. 03-106.

VI. ORDER

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

Snohomish County's enactment of Ordinance No. 03-106, expanding the northern Clearview LAMIRD, was **clearly erroneous**. Ordinance No. 03-106 does **not comply** with the requirements of RCW 36.70A.070(5)(d)(i), (iv), (v); and was **not guided by, and in compliance with**, Goal 2 – RCW 36.70A.020(2). Furthermore, because the continued validity of Ordinance No. 03-106 would substantially interfere with the fulfillment of Goal 2, by allowing sprawl in the form of strip commercial development, the Board enters a **determination of invalidity**.

The Board **remands** Ordinance No. 03-106 to the County with the following directions:

1. By no later than **September 13, 2004**, the County shall take appropriate legislative action to bring its Plan and implementing development regulations and maps into compliance with the goals and requirements of the GMA [RCW 36.70A.070(5)(d) and .020(2)], as interpreted and set forth in this Final Decision and Order (**FDO**).
2. By no later than 4:00 p.m. on **September 20, 2004**, 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 interpreted and 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 and Intervenor. By this same date, the County shall file a "**Remand Index**," listing the procedures and materials considered in taking the remand action.
3. By no later than 4:00 on **September 27, 2004**,¹⁸ the Petitioner or Intervenor may file with the Board an original and four copies of Comments on the County's SATC. Petitioner and Intervenor shall each simultaneously serve a copy of its Comments on the County's SATC on the County and each other.
4. By no later than 4:00 on **September 30, 2004**, 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. October 4, 2004** at the Board's offices. With the consent of the parties, the compliance hearing may be conducted telephonically.

If the County takes legislative compliance actions prior to the September 13, 2004 deadline set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

¹⁸ September 27, 2004 is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2).

So ORDERED this 21st day of June 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, FAICP
Board Member

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.

APPENDIX A

Procedural Background

A. General

On December 29, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from (**Petitioner** or **1000 Friends**). The matter was assigned Case No. 03-3-0026, and is hereafter referred to as *1000 Friends II v. Snohomish County*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges Snohomish County's (**Respondent** or **County**) adoption of Ordinance No. 03-106 amending the Clearview limited area of more intensive rural development (**LAMIRD**). The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On January 7, 2003, the Board issued a "Notice of Hearing;" on February 5, 2004 the Board held the prehearing conference (**PHC**) in this matter and issued the Prehearing Order (**PHO**) establishing the final schedule and Legal Issues to be addressed by the Board. At the PHC, the parties stipulated and agreed to Intervenor status of Mr. Youseffi.

B. Motions: to Supplement [the record] and Dispositive

On January 29, 2004, the Board received "Snohomish County's Index to the Record," listing 27 items.

On February 2, 2004, the Board received "Snohomish County's Revised Index to the Record" (**Index**), still listing 27 items.

There were no motions to supplement the record or dispositive motions.

C. Briefing and Hearing on the Merits

On March 29, 2004, the Board received "1000 Friend's of Washington Opening Brief," with three attached exhibits" (**1000 Friends PHB**).

On April 26, 2004, the Board received "Respondent Snohomish County's Prehearing Brief – Joined by Intervenor Youseffi," with three attached exhibits" (**County Response**). Although Intervenor did not file a separate brief, Intervenor shared argument time with the County at the Hearing on the Merits (**HOM**).

On May 3, 2004, the Board received "1000 Friends of Washington Hearing on the Merits Reply Brief" (**1000 Friends Reply**).

On May 6, 2004, the Board held the HOM in Suite 2470 of the Board's Offices, 900 Fourth Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Bruce C. Laing and Joseph W. Tovar were present for the Board. Petitioner 1000 Friends was represented by John T. Zilavy. Respondent Snohomish County was represented by Sean K. Howe. Intervenor Youseffi was represented by Molly Lawrence. Court reporting services were provided by Eva P. Jankovitz of Byers & Anderson, Inc. The hearing convened at 10:00 a.m. and adjourned at approximately 11:30 a.m. Andrew Lane and Mohammed Youseffi also attended.

At the HOM, the Board took **official notice** of the following documents: 1) Chapter 196, Laws of 2004 [ESHB 2905, amending RCW 36.70A.070(5)(d)(i) -Type I LAMIRDS, effective June 10, 2004]; 2) House Bill Report on ESHB 2905; and 3) Snohomish County Code (SCC) 30.22.110 and .130, 30.91E.140 and 30.91K.010. At the close of the HOM, the Board asked the County to provide a copy of the use matrix, reference notes and zoning map (or existing zoning on the three parcels in question) as of July 1, 1990.

On May 10, 2004, the Board received a letter from the County that summarized the attachments that were requested by the Board. (**HOM Ex. 1**).