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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

DAN HENDERSON, LARRY KUNZ, NEIL
MEMBREY, KASI HARVEY-JARVIS, &
NEIGHBORHOOD ALLIANCE OF SPOKANE,

Petitioners,

v.

SPOKANE COUNTY,

Respondent,

McGLADES, LLC,

Intervenors.

Case No. 08-1-0002

FINAL DECISION AND ORDER

I. SYNOPSIS

Petitioners, Dan Henderson, et al.,¹ filed a Petition for Review (PFR) challenging Spokane County's (County) adoption of Comprehensive Plan (CP) amendment 07-CPA-05, the concurrent Spokane County Zoning map amendment, and accompanying State Environmental Policy Act (SEPA) determination. These actions designated approximately 4.2 acres of land from Urban Reserve to Limited Development Area-Commercial (LDAC) outside of the Urban Growth Area (UGA). A SEPA checklist and Determination of Non-

¹ Dan Henderson, Larry Kunz, Neil Membrey, Kasi Harvey-Jarvis, and Neighborhood Alliance of Spokane.

1 significance (DNS) for this "non-project"² action were issued by the County for eight
2 rural amendments and zoning map changes, including amendment 07-CPA-05.

3 Petitioners contend the County failed to comply with SEPA, as set forth in RCW
4 43.21C; failed to implement and comply with the Growth Management Act (GMA), as
5 set forth in RCW 36.70A.070(5)(d); failed to comply with the County's CP and County
6 ordinances when it designated the area in question as an LDAC; failed to comply with
7 the GMA's critical area protection, the County's CP and critical area ordinance (CAO);
8 and substantially interfered with the GMA pursuant to RCW 36.70A.302.

9 The County and Intervenors (McGlades) argue the County found the proposed
10 amendment to the 4.2 acre property met the requirements and goals of the GMA and all
11 other applicable County regulations;³ environmental review previously occurred on
12 numerous occasions without identifying adverse environmental impacts;⁴ the County
13 issued a collective SEPA DNS for all the amendments;⁵ the LDAC designation was
14 appropriate for this site, which has existed as an agricultural stand and restaurant area
15 since 1984;⁶ and the County designated the area as a LAMIRD appropriately.

16 The Eastern Washington Growth Management Hearings Board (Board) has
17 determined from the parties' arguments, the record, past Hearings Boards' decisions,
18 case law, and the requirements set forth in the GMA that the Petitioners have carried
19 their burden of proof in the following issues: Issue No. 1 (SEPA); Issue No. 2 (LAMIRD);
20 Issue No. 3 (Comprehensive Plan and Ordinances); Issue No. 4 (GMA goals); and Issue
21 No. 5 (Critical area protection).

22 **II. INVALIDITY**

23 The Board further grants the Petitioners', Henderson, et al., request for a finding
24 of invalidity. The Board finds the County's adoption of amendment 07-CPU-05 was
25

26 ² Petitioners Exhibit #4, Spokane County's Determination of Non-significance.

³ Respondent HOM brief at 5.

⁴ Intervenors HOM brief at 2.

⁵ Id. at 6.

⁶ Id. at 2.

1 clearly erroneous and out of compliance with the GMA. The County's action substantially
2 interferes with the fulfillment of GMA Goals (1), (2) and (10) and is found invalid.

3 **III. PROCEDURAL HISTORY**

4 On February 8, 2008, DAN HENDERSON, LARRY KUNZ, NEIL MEMBREY, KASI
5 HARVEY-JARVIS, & NEIGHBORHOOD ALLIANCE OF SPOKANE, by and through their
6 representative, Rick Eichstaedt, filed a Petition for Review.

7 On March 10, 2008, the Board held the telephonic Prehearing conference.
8 Present were John Roskelley, Presiding Officer, and Board Member, Dennis Dellwo.
9 Board Member Joyce Mulliken was unavailable. Present for the Petitioners was Rick
10 Eichstaedt. Present for the Respondent was Dave Hubert.

11 On March 13, 2008, the Board received McGlades LLC's Motion and
12 Memorandum in Support of Motion to Intervene.

13 On March 17, 2008, the Board issued its Prehearing Order.

14 On March 19, 2008, the Board received Petitioner's Response to Motion to
15 Intervene.

16 On March 20, 2008, the Board issued its Order Granting Intervenor's Motion to
17 Intervene.

18 On March 31, 2008, the Board received Intervenor's Motion to Dismiss for Lack
19 of Subject Matter Jurisdiction.

20 On April 14, 2008, the Board received Petitioners' Response to Motion to Dismiss
21 and Declaration of Rick Eichstaedt in Support of Petitioners' Response to Motions to
22 Dismiss.

23 Also on April 14, 2008, the Board received Respondent's Response to
24 Intervenor's Motion to Dismiss.

25 On April 18, 2008, the Board received Petitioners' Errata to Response to Motion
26 to Dismiss.

1 On April 21, 2008, the Board received Intervenor's Reply to Petitioners' Response
2 to Motion to Dismiss. The Board also received Respondent's Reply to Petitioners'
3 Objection to Intervenor's Motion to Dismiss and Declaration of John Pederson.

4 On April 24, 2008, the Board received Petitioners' Motion to Strike or, in the
5 Alternative, Limited Motion to Supplement the Record.

6 On April 25, 2008, the Board received County's Response to Petitioners' Motion
7 to Strike.

8 On April 29, 2008, the Board held a telephonic motion hearing. Present were
9 John Roskelley, Presiding Officer, and Board Member, Dennis Dellwo and Joyce
10 Mulliken. Present for the Petitioners was Rick Eichstaedt. Present for the Respondent
11 was Dave Hubert. Present for Intervenors was F.J. Dullanty, Jr. and Nathan Smith.

12 On May 14, 2008, the Board issued its Order Denying Motions to Dismiss.

13 On May 21, 2008, the Board received a Stipulated Request for Continuance
14 requesting a 30-day extension signed by the parties in this matter

15 On May 23, 2008, the Board issued its Order Granting Stipulated Request for
16 Continuance.

17 On July 11, 2008, the Board received Intervenor's Motion for Reconsideration of
18 the Board's Order Denying Motions to Dismiss.

19 On July 15, 2008, the Board received Petitioners' Response to Intervenor's
20 Motion for Reconsideration.

21 On July 16, 2008, the Board received Respondent Spokane County's Response in
22 Support of Intervenor's Motion for Reconsideration.

23 On July 21, 2008, the Board issued its Order Denying Intervenor's Motion for
24 Reconsideration.

25 On August 8, 2008, the Board held the hearing on the merits. Present were John
26 Roskelley, Presiding Officer, and Board Member, Raymond Paoella. Present for the
Petitioners was Rick Eichstaedt. Present for the Respondent was Dave Hubert. Present
for Intervenors was F.J. Dullanty, Jr. and Nathan Smith.

1
2 **IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF**
3 **REVIEW**

4 Comprehensive plans and development regulations (and amendments thereto)
5 adopted pursuant to the Growth Management Act ("GMA" or "Act") are presumed valid
6 upon adoption by the local government. RCW 36.70A.320. The burden is on the
7 Petitioners to demonstrate that any action taken by the respondent jurisdiction is not in
8 compliance with the Act. The Board ". . . shall find compliance unless it determines that
9 the action by the . . . County. . . is clearly erroneous in view of the entire record before
10 the Board and in light of the goals and requirements of the [Growth Management Act]." RCW
11 36.70A.320. To find an action clearly erroneous, the Board must be ". . . left with
12 the firm and definite conviction that a mistake has been committed." *Department of*
13 *Ecology v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543,
14 552, 14 P.3d 133 (2000).

15 The Hearings Board will grant deference to counties and cities in how they plan
16 under the Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has
17 stated, "local discretion is bounded, however, by the goals and requirements of the
18 GMA." *King County v. Central Puget Sound Growth Management Hearings Board*, 142
19 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent
20 with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201,
21 the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent
22 with the requirements and goals of the GMA." *Thurston County v. Cooper Point*
23 *Association*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001).

24 The Hearings Board has jurisdiction over the subject matter of the Petition for
25 Review. RCW 36.70A.280(1)(a).
26

1 **V. ISSUES AND DISCUSSION**

2 **Issue No. 1:**

3 Did Spokane County fail to implement and comply with the substantive and
4 procedural requirements of the State Environmental Policy Act (SEPA), as set forth in
5 43.21C RCW, when it failed to properly identify, disclose, analyze, and/or mitigate
6 known and/or possible impacts associated with the approval of 07-CPA-05 by: (a)
7 unlawfully deferring analysis of impacts to a future, uncertain, and unidentified approval
8 process; (b) relying upon an environmental checklist and determination of
9 nonsignificance (DNS) that did not fully disclose, discuss, consider, or analyze known
10 and/or probable impacts of the action; (c) failing to assess the impacts of the maximum
11 potential development of the site; (d) failing to assess cumulative impacts associated
12 with the proposal; and (e) failing to mitigate any known and/or probable environmental
13 impacts?

14 **The Parties' Position:**

15 **Petitioners:**

16 Petitioners claim the following: (1) the County unlawfully deferred analysis and
17 mitigation of impacts of 07-CPA-05 to a future, uncertain, and unidentified approval
18 process; (2) the County relied upon an environmental checklist and DNS that did not
19 fully disclose, discuss, consider, analyze, or mitigate known and/or probable impacts of
20 the action; (3) the County failed to assess and mitigate the impacts of the maximum
21 potential development of the site; and (4) the County failed to assess cumulative
22 impacts associated with the proposal.

23 Under (1) above, Petitioners claim the SEPA checklist defers much of the analysis
24 of the impact of the County's amendment, 07-CPA-05, to a later time. According to
25 Petitioners, SEPA requires disclosure and full consideration of environmental impacts in
26 governmental decision making, including amendments to a county's comprehensive plan
and zoning changes.⁷ Petitioners contend SEPA regulations specifically require the
County to "carefully consider the range of probable impacts, including short-term and

⁷ *Polygon Corporation v. Seattle*, 90 Wn.2d 59, 61, 578 P. 2d 1309 (1978), citing *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976).

1 long-term effects” of a proposal⁸ and cite both WAC 197-11-060(4)(c) and (d).
2 Petitioners rely on *King County v. Washington State Boundary Review Board for King*
3 *County* to emphasize that a “land-use related action is not insulated from full
4 environmental review simply because there are no immediate land-use changes which
5 will flow from the proposed action.”⁹ In addition, the Court in *King County* recognized
6 that the purpose of SEPA is “to provide consideration of environmental factors at the
7 earliest possible stage to allow decisions to be based on complete disclosure of
8 environmental consequences,”¹⁰ and further indicated the point of SEPA is to “not
9 evaluate agency decisions after they are made, but rather to provide environmental
information to assist with making those decisions.”¹¹

10 Petitioners cite one Eastern Board case and three Western Board cases in
11 support of their position that comprehensive plan amendments require environmental
12 review;¹² that environmental documents prepared under SEPA require consideration of
13 likely impacts;¹³ that environmental impacts should be measured in terms of maximum
14 potential development of the property;¹⁴ that evaluation of environmental impacts
15 should not be deferred because the proposed action was a non-project action; and that
16 WAC 197-11-060(4)(c) and (d) require environmental consideration of a non-project
17 nature to include a range of probable impacts.¹⁵ Additionally, Petitioners point to the
18 State Environmental Policy Act Handbook (SEPA Handbook), which provides that the
19 review of a comprehensive plan amendment should include consideration of the future

21 ⁸ WAC 197-11-060(4)(c).

22 ⁹ *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860
P.2d 1024
(1993).

23 ¹⁰ *Id.*

24 ¹¹ *Id.* at 666.

25 ¹² *Superior Asphalt and Concrete v. Yakima County*, Case No. 05-1-0012, FDO (June 20, 2006).

26 ¹³ *Better Brinnon Coalition v. Jefferson Co.*, Case No. 03-2-0007, Amended FDO (Nov. 3, 2003).

¹⁴ *Hood Canal v. Jefferson Co.*, Case No. 03-2-0006, FDO (Aug. 15, 2003).

¹⁵ *Seaview Coast Conservation Coalition v. Pacific Co.*, Case No. 96-2-0010, FDO (Oct. 22, 1996).

1 development allowed by that action,¹⁶ and updating an existing comprehensive plan is
2 an action that requires environmental review under SEPA.¹⁷

3 Petitioners further argue the County failed to analyze the probable impacts of
4 this amendment, but deferred this to a later unspecified date by characterizing the
5 amendment as a non-project action. Petitioners claim the County, by deferring the
6 environmental review, has ensured the impacts of 07-CPA-5 will not be analyzed
7 because development on the property has already taken place. According to the
8 Petitioners, this is not a bare piece of ground, but a fully developed project unlikely to
9 need more permits, so SEPA analysis will not be required in the future.¹⁸

10 Under (2) above, Petitioners argue the SEPA checklist did not disclose or discuss
11 areas of impact associated with the proposal, thereby failing to provide needed
12 information to the County to help decide whether an Environmental Impact Statement
13 (EIS) was required.¹⁹ According to Petitioners, the SEPA documents supporting the
14 County's decision are inadequate and fail to recognize the impacts: (a) to groundwater
15 through aquifer or neighboring drinking water contamination by an inadequate sewage
16 system and stormwater control; (b) from noise by authorized musical entertainment or
17 customers; (c) from additional lighting and inadequate screening from light; and (d)
18 from associated traffic, roads, and parking. Thus, Petitioners contend the County failed
19 to evaluate and consider all of the impacts of the proposal.

20 Under (3) above, Petitioners claim the County failed to assess and mitigate the
21 impacts of the maximum potential development of the site. In *Hood Canal, et al. v.*
22 *Jefferson County*, the Western Board determined that the impacts of a non-project
23 action must be measured in terms of the maximum development that might occur as a
24 result of the non-project action.²⁰

25 ¹⁶ State Environmental Policy Act Handbook, Washington State Dept. of Ecology (1998), at 66.

26 ¹⁷ Id. at 131.

¹⁸ Petitioners HOM brief at 13.

¹⁹ Id. at 14.

²⁰ *Hood Canal, et al. v. Jefferson County*, Case No. 03-2-0006, Compliance Order (Oct. 14, 2004).

1 Under (4) above, Petitioners contend the County failed to assess cumulative
2 impacts associated with the proposal. According to Petitioners, the SEPA documents
3 failed to address any cumulative impacts of the eight rural amendments through the
4 comprehensive plan amendment process, which it has a duty under SEPA to do so, and
5 points to regional transportation issues.

6 **Respondent:**

7 The Respondent, Spokane County, concurred with the assertions and argument
8 of the Intervenor and incorporated the Intervenor's Hearing on the Merits Brief by
9 reference.

10 **Intervenor (McGlades):**

11 McGlades argues the Spokane County Hearing Examiner determined Petitioners
12 failed to establish that the amendment by itself or in conjunction with the other rural
13 amendments would have any significant probable adverse impacts on the
14 environment²¹. According to McGlades, Petitioners have not identified any impacts that
15 would not be mitigated by current development regulations, policies or previous
16 permits. McGlades also contends Petitioners failed to recognize the "significant
17 environmental review" the Hearing Examiner "engaged in" during the Comprehensive
18 Plan process, ignore the adoption of the Critical Aquifer Recharge Area (CARA)
19 regulations and the current goals and policies in respect to LAMIRDS, and ignore the
20 substantial environmental review completed for building permit applications and for the
21 Conditional Use Permit prior to the initiation of the CP amendment process.²²

22 McGlades contends a continuous environmental review runs contrary to the
23 policy of finality associated with land use decisions or environmental review and cites
24 *Skamania County v. Columbia River Gorge Commission* to support this assertion.²³

25 ²¹ Petitioners timely appealed the County's SEPA determination to the County's Hearing Examiner (see
26 Petitioner's Exhibit 5). The Hearing Examiner denied the appeal on December 10, 2007 (see Petitioner's
Exhibit 6).

²² Intervenor's HOM brief at 9.

²³ *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 49,26 P.3d 241 (2001).

1 McGlades claims the following environmental review was completed: (1) site evaluated
2 in connection with permits obtained between 1984 and 2005; (2) site evaluated by the
3 County in connection with the Conditional Use Permit (CUP); (3) a Temporary Use
4 Permit (TUP) applied for by McGlades was not appealed or challenged by the Petitioners
5 for environmental concerns; and (4) the Comprehensive Plan amendment and rezone
6 were evaluated by the County pursuant to the SEPA process, with the County's DNS for
7 the amendment and rezone challenged by the Petitioners, but denied by the Hearing
8 Examiner. McGlades argues the Petitioners cannot identify a probable significant
9 adverse environmental impact that will result from the adoption of this amendment.

10 McGlades contends the "SEPA/GMA Integration Act"²⁴ permits the County to rely
11 on existing plans, laws and regulations that are already in existence when issuing a
12 threshold determination and cites to WAC 197-11-158(1). WAC 197-11-158, according
13 to McGlades, "is a flexible threshold which allows a local jurisdiction to rely upon local
14 regulations to mitigate the environmental impacts associated with a project."²⁵
15 Furthermore, WAC 197-11-158 does not require an environmental review of the
16 underlying CP and development regulations that are relied upon at the time of analyzing
17 the environmental impacts associated with a project.²⁶ McGlades contends that
18 substantial weight shall be given to the governmental agency in an action involving an
19 attack on a determination by a governmental agency.²⁷ According to McGlades, the
20 Petitioners' claims that certain environmental impacts have not been analyzed and
21 mitigated are incorrect. McGlades argues the impacts have been correctly and
22 appropriately mitigated by the County pursuant to its adopted regulations and the
23 Petitioners have not demonstrated specificity in their comments or what additional
24 information is required. According to McGlades, the following impacts have been

24 Intervenor's HOM brief at 12. There is no SEPA/GMA Integration "Act". The GMA and SEPA are separate Act's, which are integrated by WAC 197-11-210 to 235.

25 *Moss v. City of Bellingham*, 109 Wn.App. 6, 15, 31 P.3d 703 (2001).

26 *Id.* at 23; WAC 197-11-158(6).

27 RCW 43.21C.090.

1 mitigated: (1) groundwater impacts through the County's CARA and Health District
2 regulations as attested to by the Hearing Examiner and Mr. Steve Jones, Engineer; (2)
3 noise impacts are mitigated by Spokane County Code Chapter 6.12; (3) screening and
4 light impacts are mitigated by LDAC landscaping standards and exterior lighting
5 requirements; and (4) traffic impacts are mitigated by Spokane County Zoning Code,
6 sections 14.802.040 and .060, and the Hearing Examiner concluded impacts are
7 predicted not to pose probable adverse environmental problems.

8 McGlades further argues the Petitioners failed to challenge the environmental
9 impacts during the applications for the CUP and the TPU, so they cannot at this time
10 challenge these two applications. According to McGlades, if the Petitioners fail to
11 challenge or comment on environmental review, SEPA recognizes a lack of objection.²⁸
12 According to McGlades, Petitioners failed to raise a challenge to the issuance of a
13 Determination of Non-Significance (DNS) concerning the CUP and failed to challenge
14 environmental impacts associated with the TPU, although Petitioners did challenge the
15 consistency of the action with the County's land use codes and CP.

14 **Petitioners Reply:**

15 Petitioners contend the Hearing Examiner misapplied the law in denying the
16 SEPA appeal by ignoring the fact that the County unlawfully deferred analysis of the
17 impacts of 07-CPA-05 to a future, uncertain, and unidentified approval process.
18 According to Petitioners, the SEPA checklist deferred analysis of listed environmental
19 impacts by stating the action is a "Non Project Action: To be determined if site specific
20 developments are proposed for Rural Comprehensive Plan Amendments."²⁹ Petitioners
21 argue that SEPA requires a detailed and comprehensive review,³⁰ as well as "carefully
22 consider the range of probable impacts, including short-term and long-term effects" of a
23

24 ²⁸ WAC 197-11-545(2).

25 ²⁹ Petitioners HOM Reply brief at 2.

26 ³⁰ *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wn2d 475, 494, 513 P.2d 36 (1973).

1 proposal.³¹ Petitioners claim the law provides some flexibility in the level of detail
2 necessary in the review of a non-project action, but nothing that authorizes the County
3 to put off analysis to some later and unidentified process.³² Petitioners also cite *King*
4 *County v. Washington State Boundary Review Board for King County*³³ that a land-use
5 related action is not insulated from full environmental review simply because there are
6 no existing specific proposals to develop the land in question, and SEPA is to provide
7 consideration of environmental factors at the earliest stage to allow decisions to be
8 based on complete disclosure of environmental consequences. In addition, Petitioners
9 cite *Superior Asphalt and Concrete v. Yakima County*³⁴ to emphasize this Board also
10 found that an amendment to the Comprehensive Plan requires environmental review.
11 Petitioners also contend the Hearing Examiner ignored substantial evidence from Stan
12 Miller, former Spokane County Utilities Division Project Manager, and ignored his own
13 previous factual findings that affirm the Critical Aquifer Recharge Area (CARA)
14 problems.

15 Petitioners contend the County failed to adopt previous SEPA documents as
16 argued by McGlades. Petitioners claim adoption of an existing SEPA document requires
17 an explicit action on the part of the County and identification of the specific SEPA
18 document.³⁵ In this case, Petitioners claim the record indicates intent on the part of the
19 County to prepare additional SEPA documents at a future time, not adopt previously
20 prepared SEPA documents. Petitioners argue that if the County adopts existing
21 documents, it must follow certain steps outlined in *Thorton Creek Legal Defense Fund v.*
22 *City of Seattle*³⁶ and nothing in the record indicates this was done.

23 ³¹ WAC 197-11-060(4)(c).

24 ³² WAC 197-11-442(2).

25 ³³ *King County v. Washington State Boundary Review Board of King County*, 122 Wn.2d 648, 664, 860
26 P.2d 1024 (1993).

³⁴ *Superior Asphalt and Concrete v. Yakima County*, EWGMHB Case No. 05-1-0012, FDO (June 20, 2006).

³⁵ WAC 197-11-630(2).

³⁶ *Thorton Creek Legal Defense Fund v. City of Seattle*, 113 Wash.App. 34, 50, 52 P.3d 522 (2002).

1 Petitioners argue the "SEPA/GMA Integration Act",³⁷ RCW 43.21C.240, is not
2 applicable to this case as argued by McGlades because: (1) the County was not
3 reviewing a "project"; (2) the Integration Act requires an assessment and
4 understanding of project impacts that did not occur here; and (3) the County elected
5 not to use this section and reliance on this appears to be *post hoc* justification for the
6 inadequately completed SEPA process.

7 Petitioners contend they clearly objected to the SEPA documents applicable to
8 this appeal. According to the Petitioners, the County did not adopt any previous SEPA
9 documents in its SEPA process for the adoption of the subject Comprehensive Plan
10 amendment and rezone, so any previous SEPA documents are irrelevant. The SEPA
11 documents subject to this appeal are pertinent to this amendment and Petitioners claim
12 they provided comments as required.

13 **Board Analysis:**

14 To implement the purposes of SEPA, which is set forth in RCW 43.21C.010 and
15 reiterated in WAC 197-11, the SEPA Rules directs agencies to do, among other things,
16 the following: (1) consider environmental information (impacts, alternatives, and
17 mitigation) before committing to a particular course of action;³⁸ (2) identify and
18 evaluate probable impacts, alternatives and mitigation measures, emphasizing
19 important environmental impacts and alternatives, including cumulative, short-term,
20 long-term, direct and indirect impacts;³⁹ and (3) encourage public involvement in
21 decisions and provide documents that are concise, clear, and to the point, and are
22 supported by evidence that the necessary environmental analyses have been made.⁴⁰

23 The Supreme Court has referred to SEPA as an environmental full disclosure law.
24 SEPA requires agencies to identify, analyze, disclose, and consider mitigation of impacts
25 on both the natural and built environments resulting from a proposed action. The
26

³⁷ See Footnote 25.

³⁸ WAC 197-11-055 and 060.

³⁹ WAC 197-11-030 and 060.

⁴⁰ WAC 197-11-030.

1 disclosure of environmental impact information to the county decision makers and to
2 the public promotes the policy of fully informed decision making by government bodies
3 and better opportunities for meaningful public participation. RCW 43.21C.030; RCW
4 36.70A.035; *Norway Hill Preservation & Protection Assn. v. King County*, 87 Wn. 2d 267
(1976).

5 Thus, when a county or city amends its CP or changes zoning, a detailed and
6 comprehensive SEPA environmental review is required.⁴¹ SEPA is to function "as an
7 environmental full disclosure law",⁴² and the County must demonstrate that
8 environmental impacts were considered in a manner sufficient to show "compliance with
9 the procedural requirements of SEPA."⁴³ Although the County decision is afforded
10 substantial weight,⁴⁴ environmental documents prepared under SEPA require the
11 consideration of "environmental" impacts with attention to impacts that are likely, not
12 merely speculative,⁴⁵ and "shall carefully consider the range of probable impacts,
13 including short-term and long-term effects."⁴⁶

14 In *King County v. Washington State Boundary Review Board for King County*, the
15 Supreme Court recognized that the purpose of SEPA is "to provide consideration of
16 environmental factors at the earliest possible stage to allow decisions to be based on
17 complete disclosure of environmental consequences,"⁴⁷ and that SEPA is to provide
18 agencies environmental information *prior to making decisions, not after they are*
19 *made.*⁴⁸

21 ⁴¹ WAC 197-11-704(b)(ii).

22 ⁴² *Moss v. Bellingham*, 109 Wn. App. 6 (2001).

23 ⁴³ *Sisley v. San Juan County*, 89 Wn.2d 78, 64, 569 P.2d 712 (1977).

24 ⁴⁴ RCW 43.21C.090.

25 ⁴⁵ WAC 197-11-060(4)(a).

26 ⁴⁶ WAC 197-11-060(4)(c).

⁴⁷ *King County v. Washington State Boundary Review Board for King County*, 122 Wn2d 648, 664, 860
P.2d 1024 (1993).

⁴⁸ *Id.*

1 Generally, the first step in the analysis is the preparation of an Environmental
2 Checklist.⁴⁹ The checklist provides information to the County about the proposal and its
3 probable environmental impacts and it is the County's responsibility to review the
4 environmental checklist and any additional information available on a proposal to
5 determine any probable significant adverse impacts and identify potential mitigation.
6 Here, the County prepared a non-project environmental checklist for eight CP
7 amendments, including 07-CPA-05, and determined from the checklist that an
8 Environmental Impact Statement (EIS) was not required and that the proposal would
9 not have adverse environmental impact. The County issued a DNS on September 20,
10 2007. Amendment 07-CPA-05 changed the Spokane County CP map from Urban
11 Reserve (UR) to Limited Development Area Industrial/Commercial and concurrently
12 reclassified the zoning from Urban Reserve (UR) to Limited Development Area
13 Commercial (LDAC) on approximately 4.46 acres.⁵⁰

13 The Urban Reserve zone includes lands outside the Urban Growth Area that are
14 preserved for expansion of urban development in the long term, has low-density, large-
15 lot development, a density of one dwelling unit per 20 acres, and encourages public
16 water systems. The permitted uses are primarily single family and two family duplex
17 residential, with a variety of non-commercial and agricultural-related commercial uses.
18 The standard maximum building coverage is 20% of the lot area, but clustering allows
19 50% coverage.⁵¹

20 The LDAC zone identifies commercial, industrial and residential areas that were
21 established prior to July 1, 1993, but are not consistent with the criteria for designation
22 as a Rural Activity Center. The permitted uses include manufacturing and production,
23 medical and mortuary services, motor vehicle repair, business office, taverns and pubs,

24 ⁴⁹ WAC 197-11-960

25 ⁵⁰ Petitioners Exhibit #10, Report to the Hearing Examiner, File #: 07-CPA-5. The acreage is estimated at
26 4.46 acres by the Building and Planning Department, while the Petitioners list the property at 4.2 acres.

⁵¹ Spokane County Zoning Code, Section 14.606.

1 theaters, restaurants with alcohol service, and other commercial uses. The maximum
2 building coverage allowed in this zone is 55%.⁵²

3 The County's SEPA environmental checklist, dated September 19, 2007, was
4 completed for the eight rural CP amendments. Project 07-CPA-05, although mentioned
5 under "Name of proposed project", Section A Background - Question No. 1, was not
6 listed again, like the other seven projects. The County lists these CP amendments
7 repeatedly as a "non-project action".⁵³ Based on the wide variety of CP and zoning map
8 amendments, the checklist is devoid of any significant detail concerning most of the
9 environmental elements, such as earth, water, animals, energy and natural resources,
10 land and shoreline use, aesthetics, transportation, public services and utilities, with
11 many of the questions answered with "to be determined if site specific developments
12 are proposed".⁵⁴ A Supplemental Sheet for Non-Project Actions was also completed, but
13 as with the environmental checklist, the specifics for proposed measures to mitigate or
14 protect are placed on the County's many ordinances and regulations required for project
15 actions.

16 The Hearings Boards have been consistent in their decisions that agencies must
17 evaluate environmental impacts of non-project actions up-front and not wait until the
18 project level. The Western Board, in *Better Brinnon Coalition v. Jefferson County*, stated
19 (Emphasis Added).⁵⁵

20 SEPA does not require the County to evaluate a laundry list of unrelated
21 environmental considerations, but it does require that the County evaluate
22 probable significant environmental impacts. WAC 197-11-402(1). *Simply
23 providing, as Jefferson County has, that any impacts will be addressed on
24 a permit basis fails to assess the cumulative impacts and to fully inform
25 the decision makers of the potential consequences of the designations
26 challenged here.*

23 ⁵² Id at Section 14.612.

24 ⁵³ Petitioners HOM brief Exhibit No. 3, Environmental Checklist.

25 ⁵⁴ Environmental Checklist for Spokane County 2007 Rural Comprehensive Plan Amendments, Sept. 19,
2007.

26 ⁵⁵ *Better Brinnon Coalition v. Jefferson County*, CPSGMHB Case No. 03-2-0007, Amended FDO (Nov. 3,
2003).

1 In another Western Board case, *Whidbey Environmental Action Council v. Island*
2 *County*,⁵⁶ the Board's decision paralleled similarities to this case (Emphasis Added):

3 The [environmental] impacts that must be considered for this non-project
4 action are the impacts that are allowed by virtue of the change in
5 designation itself. While project level impacts may properly be deferred to
6 the permitting stage, the *County must evaluate the impacts allowed under*
7 *the changed designation at the time of that non-project action.*

8 The Board finds the County's SEPA document inadequate to determine the
9 possible environmental impacts of individual amendments. For example, among other
10 probable environmental impacts, there is an absence of evidence in the record that the
11 County considered the environmental effects on groundwater quality and traffic
12 associated with this change in LAMIRD boundaries. Amendment 07-CPA-05 is significant
13 in that it changes an area primarily residential, with UR zoning, to a zone that outright
14 permits commercial and industrial uses, such as taverns, pubs, motor vehicle repair
15 facilities, mortuaries and business office complexes, all within a residential area. In
16 other words, a small restaurant may be there presently, but even the best restaurants
17 fail, so what might come next that's legally permitted?

18 This was not the "detailed and comprehensive SEPA environmental review"
19 required by WAC 197-11-704(b)(ii). Given the fact that there is a full-scale restaurant
20 existing on this site, the County's environmental document fails to consider the
21 "environmental" impacts that are likely, not merely speculative, and it fails to carefully
22 consider the range of probable impacts, including short-term, long-term cumulative
23 effects.⁵⁷

24 As the Supreme Court said in *King County v. Washington State Boundary Review*
25 *Board for King County*, SEPA is "to provide consideration of environmental factors at the
26

⁵⁶ *Whidbey Environmental Action Council v. Island County*, CPSGMHB Case No. 03-2-0008, FDO (August 25, 2003).

⁵⁷ WAC 197-11-060(4)(a) and (c).

1 earliest possible stage to allow decisions to be based on complete disclosure of
2 environmental consequences."⁵⁸ In this case, the Spokane County Board of County
3 Commissioners (BOCC) relied on, among many documents, an inadequate
4 environmental checklist, which in this circumstance could only have been written
5 vaguely because it was to cover eight very different amendments, changing a variety of
6 non-related zoning, located in various areas throughout the County. The County
7 deferred environmental review to the project stage, which essentially makes the SEPA
8 process moot. SEPA is to provide agencies environmental information *prior to* making
9 decisions, *not after* they are made.⁵⁹ Thus, SEPA seeks a prospective review of the
10 environmental impacts of a proposal before the decision to authorize the action is
11 made. SEPA does not seek a post-hoc retrospective analysis once a decision has been
12 made and a project has been developed. Given the controversy surrounding the CP
13 amendment and zone reclassification for 07-CPA-05, the County failed in its obligation
14 to complete an environmental checklist for this amendment that fully disclosed present
15 and future adverse environmental impacts as required by RCW 43.21C.

15 The Board recognizes the subject property had a prior environmental checklist
16 completed by the applicant, McGlades, on November 30, 2005 in conjunction with an
17 application for a Conditional Use Permit. The Hearing Examiner in that action denied the
18 CUP based in part on "the proposed uses did not constitute expansion of a
19 nonconforming use; and did not evaluate the consistency of the proposed uses with the
20 public health, safety or general welfare."⁶⁰ But the County failed to adopt this
21 environmental checklist and/or other SEPA documents as required by WAC 197-11-600
22 to -640. This appeal is based on the adequacy of the SEPA environmental checklist done

23 ⁵⁸ *King County v. Washington State Boundary Review Board for King County*, 122 Wn2d 648, 664, 860
24 P.2d 1024 (1993).

25 ⁵⁹ *Id.*

26 ⁶⁰ Intervenor's HOM brief, Exhibit 3, Hearing Examiner's Findings of Fact, Conclusions of Law and
Decision; Appeal of an Administrative Determination approving a Temporary Use Permit...; Conclusions of
Law No. 9, pg.

1 specifically for the eight amendments, including 07-CPA-05, for a change to the CP map
2 and rezone from UR to LDAC, and the subsequent decision by the BOCC based on that
3 checklist. The Court of Appeals in *Thorton Creek Legal Defense Fund v. City of Seattle*
4 stated that an agency must: (1) assess the sufficiency of an existing document; (2)
5 identify the document; (3) state why it's being adopted; (4) make the adopted
6 document readily available; and (5) circulate the statement of adoption.⁶¹ The Board in
7 this case cannot find any documentation to indicate this was done.

8 The Board also finds RCW 43.21C.240 is not applicable to this case because the
9 County was reviewing a "non-project"⁶² action with the adoption of the eight
10 amendments and RCW 43.21C.240 is specific to "project"⁶³ review under the GMA.
11 There were no specific projects reviewed under the County's environmental checklist,
12 even though 07-CPA-05 has a project on the property and that project could have been
13 analyzed for impacts.

14 An environmental analysis should be done at each stage of the GMA planning
15 process and should address the environmental impacts associated with the planning
16 decisions at that stage. Impacts associated with later planning stages, such as when
17 there is a detailed project as in this case, may also be addressed to the extent that
18 sufficient information is known for the analysis to be meaningful. The County's
19 environmental review should have considered the full development potential of the site
20 under Limited Area of More Intensive Rural Development (LAMIRD) provisions, which
21 include the permitted uses within the LDAC zone, as opposed to residential
22 development, which is the primary feature of the UR zone. Amendment 07-CPA-05 was
23 not just a non-project action that would facilitate some future, unspecified action;
24 rather the analysis should have been more specific because the actual "future"
25 development on the site was already known.

26 _____
⁶¹ *Thorton Creek Legal Defense Fund v. City of Seattle*, 113 Wash.App. 34, 50, 52 P.3d 522 (2002).

⁶² Petitioners HOM brief Exhibit No. 3, Environmental Checklist.

⁶³ RCW 43.21C.240.

1 **Conclusion:**

2 Therefore, the Board finds and concludes the County's environmental checklist
3 under SEPA is non-compliant with the GMA, RCW 43.21C. The County failed to consider
4 the environmental impacts with attention to impacts that are likely, not merely
5 speculative, as required by WAC 197-11-060(4)(a), and failed to carefully consider the
6 range of probable impacts, including short-term and long-term effects, that 07-CPA-05
7 may have on the environment, including those that are likely to arise or exist over the
8 lifetime of a proposal or, depending on the particular proposal, longer, as required by
9 WAC 197-11-060(4)(c).

10 **Issue No. 2:**

11 Did Spokane County fail to implement and comply with the Growth Management
12 Act, 36.70A RCW, when it approved 07-CPA-05 by creating a 4.2 acres Limited Area of
13 More Intense Rural Development (LAMIRD) that: (a) extended commercial development
14 beyond the boundary of the existing area and use; (b) allowed a new use of the
15 existing rural area; (c) created irregular LAMIRD boundaries; and (d) conflicted with the
16 rural character and the character of existing natural neighborhoods and communities of
17 the area?

18 **The Parties' Position:**

19 **Petitioners:**

20 Petitioners argue that, although the GMA allows limited areas of more intense
21 rural development (LAMIRD), the Legislature placed certain criteria on these
22 developments, including restricting the areas to their existing use so as to minimize and
23 contain more intensive development. According to Petitioners, the County failed to
24 comply with RCW 36.70A.070(5)(d)(iv) and (v) by: (1) extending the commercial
25
26

1 development boundary beyond the boundary of existing use; (2) allowing new uses
2 within the LAMIRD; and (3) creating an irregular LAMIRD boundary.⁶⁴

3 **Respondent:**

4 Respondent, Spokane County, argues RCW 36.70A.070(5)(a), (b), (c) and (d)
5 support inclusion of the 4.2 acre LAMIRD in this area of rural development. According to
6 the County, the GMA allows development that has already occurred prior to the passage
7 of the GMA "with the understanding that as rural communities grow and evolve limited
8 expansion of the existing commercial development would make sense..."⁶⁵ The County
9 claims "LAMIRDs would consist of infill, development, or redevelopment of existing
10 commercial, industrial, residential or mixed-use areas."⁶⁶ The County argues that
11 LAMIRDs must be designed to serve the existing and projected rural population of the
12 area; development within a LAMIRD must be consistent with the character of the
13 existing area; LAMIRDs must be contained within logical outer boundaries, which
14 comply with GMA criteria; and the existing use must have been in existence on July 1,
15 1993 for Spokane County. The County claims all the criteria for the creation of a
16 LAMIRD have been met and support the subject property as a LAMIRD.

17 **Intervenors:**

18 McGlades claims RCW 36.70A.070(5)(d)(iv) authorizes the extension of urban-
19 type growth outside of an urban growth area (UGA) under the criteria in the statute.
20 McGlades contends the business was established in the area prior to July 1, 1990, and
21 was expanded by successive permits between 1984 and 1993. According to McGlades,
22 the Petitioners' two cited cases, *Gold Star Resorts, Inc. v. Futurewise*⁶⁷ and *Wilma v.*

23 _____
24 ⁶⁴ Petitioners HOM brief at 25 – 28.

25 ⁶⁵ Respondents HOM brief at 12.

26 ⁶⁶ Id. at 12 paraphrasing RCW 36.70A.070(5)(d)(i).

⁶⁷ *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn.App. 378, 383, 166, P.3d 748 (2007).

1 *Stevens County*⁶⁸ are "patently different"⁶⁹ from the present use, so do not pertain to
2 this case.

3 According to McGlades, in *Gold Star Resorts*, the Court discussed whether the
4 LAMIRD boundary minimized and contained the intensive development by adding
5 significant acreage outside of the built environment. The land in question in the instant
6 matter, according to McGlades, is much less acreage. In *Wilma*, McGlades contends the
7 two LAMIRDs in question in that case, Loon Lake and Kettle Falls, were significantly
8 larger than the McGlades property and were owned by multiple parties. McGlades
9 argues the parcel in question here "involves a single 4.9 acre parcel"⁷⁰ owned by a
single party.

10 As to the irregular boundary issue, McGlades argues there is no requirement or
11 authority for the contention that the LDAC zone and the LAMIRD must front Highway 2
12 in order to create a logical boundary. In addition, McGlades contends the LAMIRD is
13 only required to have a logical outer boundary, not frontage or access requirements.

14 **Petitioners Reply:**

15 Petitioners claim the record clearly indicates the County created an illogical
16 LAMIRD boundary, which does not comply with RCW 36.70A.070(5)(d)(iv). Petitioners
17 argue the County's own staff report indicated the addition of the subject property would
18 create a "peculiar"⁷¹ north extension to the existing Limited Development Area
19 Commercial (LDAC) zone. In addition, Petitioners contend the issue is not whether the
20 property fronts Highway 2,⁷² but whether the property fronts other existing LAMIRD
21 properties. In addition, Petitioners argue that McGlades interprets the LAMIRD
22 requirements too strictly concerning boundary requirements as indicated by the

23 ⁶⁸ *Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, Order on Compliance (May 22, 2008).

24 ⁶⁹ Intervenor's HOM brief at 20.

25 ⁷⁰ Intervenor's HOM brief at 21.

26 ⁷¹ Petitioners HOM Reply brief at 9.

⁷² Petitioners wrote "Highway 12" in their brief, which is a typo. It is Highway 2.

1 County's own CP Policy RL.5.2(a), which provides that the area subject to a LDAC must
2 be contained by logical boundaries to limit commercial development in rural areas.

3 Petitioners claim the County's action allows expansion of the area and use in the
4 proposed LAMIRD. Petitioners argue the subject parcel is 4.46 acres and only about a
5 one-quarter of the site is currently developed as commercial. By designating the entire
6 acreage as a LAMIRD allows an expansion of a commercial business by more than three
7 acres, which is contrary to the GMA. Petitioners also contend the site was originally
8 used for an agricultural product stand, an existing use, and efforts to open a restaurant,
9 a non-conforming use, did not begin until 2004.

9 **Board Analysis:**

10 The GMA allows for limited areas of more intensive rural development (LAMIRDs)
11 in the rural areas.⁷³ There are three types of LAMIRDs recognized in the GMA. Issue
12 No. 2 pertains exclusively to Type 1, which is rural development consisting of the infill,
13 development, or redevelopment of existing commercial, industrial, residential, or mixed-
14 use areas,⁷⁴ which development or redevelopment must be designed to serve the
15 existing rural population⁷⁵ and shall be consistent with the character of the existing
16 uses in terms of building size, scale, use or intensity,⁷⁶ and which must conform to the
17 requirements set forth in RCW 36.70A.070(5)(d)(iv).

18 RCW 36.70A.070(5)(d)(iv) requires, in part: (1) a county shall adopt measures to
19 minimize and contain the existing areas or uses of more intensive rural development;
20 (2) lands included in such existing areas or uses shall not extend beyond the logical
21 outer boundary of the existing area or use; (3) existing areas are those that are clearly
22 identifiable and contained and where there is a logical boundary delineated
23 predominately by the built environment; and (4) the county shall establish the logical
24 outer boundary of an area of more intensive rural development.

24 ⁷³ RCW 36.70A.070(5)(d).

25 ⁷⁴ RCW 36.70A.070(5)(d)(i).

26 ⁷⁵ RCW 36.70A.070(5)(d)(i)(B).

⁷⁶ RCW 36.70A.070(5)(d)(i)(C).

1 In establishing the logical outer boundary, the County shall address: (a) the need
2 to preserve the character of existing natural neighborhoods and communities; (b)
3 physical boundaries, such as bodies of water, streets and highways, and land forms and
4 contours, (c) the prevention of abnormally irregular boundaries, and (d) the ability to
5 provide public facilities and public services in a manner that does not permit low-density
6 sprawl.

7 The GMA defines an existing area or existing use as one that was in existence
8 either on July 1, 1990, or on the date upon which the Office of Financial Management
9 (OFM) certifies a county's population, which in Spokane County's case is on July 1,
10 1993. Therefore, the legal use in existence as of July 1, 1993, on this site was an
11 agricultural product sales stand, which was allowed outright in the zoning in place at
12 the time.

13 It's worth noting a brief history of the subject property. The McGlades property,
14 which is the subject of amendment 07-CPA-05, was used as a commercial agricultural
15 products stand as permitted in 1984. Since 1984, the County has issued a total of ten
16 different building permits⁷⁷ for the property, which allowed the business to expand to
17 what is now a non-conforming use described as an "agricultural product sales
18 stand/area" by the Spokane County Hearing Examiner.⁷⁸ According to the Hearing
19 Examiner, "[T]he unlawful conversion of the site over the years to uses, and use sizes,
20 not authorized by zoning regulations occurred through issuance of building permits,
21 unlawful conversion of structures to uses not authorized under zoning regulations by
22 the site owners at the time, and flawed review by the County."⁷⁹

23 Concerned that the owners were expanding their operation and non-conforming
24 use from an agricultural product sales stand to a commercial restaurant, the
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⁷⁷ Intervenor's HOM brief, Exhibit No. 1, Staff Report to Hearing Examiner, pg. 4.

⁷⁸ Petitioners HOM brief, Exhibit 7, Spokane County Hearing Examiner Findings of Fact, Conclusions of Law and Decision for a CUP, pg. 1, (April 7, 2006).

⁷⁹ Id. at 28.

1 Department of Building and Planning restricted the use to consistency "with the
2 previous/existing non-conforming land use."⁸⁰ Unable to expand the use of their
3 business, McGlades applied for a CUP to operate a restaurant with alcohol sales and a
4 drive-through espresso stand. The Spokane County Hearing Examiner denied their CUP
5 application, CUN-08-05, which was "for expansion of a non-conforming use in the UR
6 zone to allow the existing produce stand/store on the site (McGlades) to be expanded
7 or extended for espresso drive-through sales, on-premise wine consumption sales, and
8 outdoor dining and entertainment."⁸¹ Subsequent to the denial of the CUP, the issuance
9 of a Temporary Use Permit by the County's Department of Building and Planning was
10 affirmed by the Hearing Examiner at a later date.⁸² As testified to at the Board's hearing
11 and found in the Record, the parties agree that the requested change to the CP map
12 and zoning map is the result of the applicant's failure to obtain from the County the
13 necessary permits to expand their commercial enterprise from an agricultural product
14 sales stand to a restaurant with alcohol sales and drive-through espresso stand.

15 The question for the Board is whether the County's expansion of the LDAC to add
16 the 4.2 acre McGlades property, the subject of amendment 07-CPA-05, complies with
17 the requirements found in RCW 36.70A.070(5)(d)(iv). In review, the Planning
18 Commission recommended approval and the majority of the BOCC decided the
19 amendment complied, despite the County staff's belief that the site did not comply.
20 Staff's concern was "[T]he requested change from Urban Reserve to Limited
21 Development Area (Commercial) is generally not consistent with (Comprehensive Plan)
22 Policy RL.5.2."⁸³

23 Comprehensive Plan Policy RL.5.2 is Spokane County's LAMIRD policy and
24 stipulates that the intensification and infill of commercial or non-resource-related
25

26 ⁸⁰ Id. at 19, letter to Shawn Gabel, July 22, 2005.

⁸¹ Id. at 29.

⁸² Intervenor's HOM brief, Exhibit 3, Spokane County Hearing Examiner Findings of Fact, Conclusions of Law and Decision for a TUP, pg. 13 (Nov. 2, 2006).

⁸³ Petitioners HOM brief, Exhibit 12, Comprehensive Plan Staff Report, File No. 07-CPU-05.

1 industrial areas shall be allowed in rural areas consistent with the following guidelines
2 (in part): (a) the area is clearly identified and contained by logical boundaries; (b) the
3 character of neighborhoods and communities is maintained; (c) public services and
4 public facilities can be provided in a manner that does not permit or promote low-
5 density sprawl or leapfrog development; (d) the intensification is limited to expansion of
6 existing uses or infill of new uses within the designated area; and (e) the area was
7 established prior to July 1, 1993. These guidelines are similar, but in different order
8 than those requirements set forth in RCW 36.70A.070(5)(d)(iv).⁸⁴

9 The Board agrees with the Petitioners that changing the 4.2 acre McGlades
10 property from UR to LDAC is not in compliance with RCW 36.70A.070(5)(d)(iv). By
11 adding the McGlades 4.2 acre property to the existing LDAC, the County failed to
12 minimize and contain the existing areas or uses of more intensive development. The
13 Intervenor's claim that the re-designation of the property was viewed as "housekeeping
14 in nature as the property was overlooked when the LDAC designation was provided to
15 adjacent commercial properties"⁸⁵ or that the "County simply missed a previously
16 existing use"⁸⁶ is certainly not based on the record. The County staff report to the
17 Hearing Examiner was clear in that the original LDAC designation was comprehensive
18 and complete:

19 "[T]he Limited Development Area Industrial-Commercial was designated
20 south of Day Mt. Spokane Road and adjacent to both side (sic) of Highway
21 2 based on existing land uses, zones, comprehensive planning policies and
22 the public process that resulted in the adoption of the original GMA
23 Comprehensive Plan in November of 2001."

24 The original agricultural product sales stand was a permitted use in the zone in
25 1984 when it was constructed. Under that use, it is still permitted in the present UR
26 zone. The County is essentially asking the Board to legitimize and affirm an expansion

⁸⁴ Only RCW 36.70A.070(5)(d) is at issue, not CP Policy RL.5.2.

⁸⁵ Intervenor HOM brief at 6.

⁸⁶ Id. at 21.

1 of a non-conforming use through the GMA LAMIRD process because a property owner
2 desires to expand their business. That's not what is intended by the LAMIRD provisions
3 of the GMA. The County completed an exhaustive study when it determined the logical
4 outer boundary of its LDAC and LDAR zones in 2001. The existing business as
5 permitted, an agricultural product stand/store, although non-conforming in its present
6 state, was deemed by the County in 2001 to be appropriately located outside the LDAC
7 because it was a permitted use in the zone and it conformed to the neighborhood and
8 community characteristics as an agricultural product stand. In addition, the original
9 logical outer boundary of the LDAC and adjacent LDAR was predominately delineated by
10 the built environment and included some undeveloped land, in particular the seven
11 acres of LDAC the County points to as "[T]o the southwest of the property immediately
12 across the street (Day Mt. Spokane)" to the McGlades property.

13 The County clearly established the logical outer boundary in 2001 by containing
14 the built environment and commercial enterprises south of the County Rural Major
15 Collector arterial, Day Mt. Spokane Road, and preserved the character of the existing
16 natural neighborhood and community north of the arterial.⁸⁷ The McGlades property is
17 surrounded by residential development on three sides⁸⁸ and is separated from the
18 Limited Development Area Residential (LDAR) to the south by a four-lane highway
19 designed as a Rural Major Collector arterial by Spokane County. This arterial is a major
20 physical boundary and complies with RCW 36.70A.070(5)(d)(iv)(B). Thus, the subject
21 property is not contiguous to any pre-existing LAMIRD.

22 The original LDAC zone determined by the built environment as of July 1, 1993
23 and adopted into the County's Comprehensive Plan in 2001 is south of Day Mt. Spokane
24 and along Newport Highway (SR-2), a five lane state highway. The expansion of the
LDAC by amendment 07-CPU-05 would authorize a single parcel of land – a peninsula
or "bunny tooth" – to intrude across Day-Mount Road and extend into the UR zone of

25 ⁸⁷ RCW 36.70A.070(5)(d)(iv)(A).

26 ⁸⁸ Respondent HOM brief at 6.

1 residential development. The GMA wants boundaries clearly identified by the built
2 environment. Here the amendment doesn't visually conform to the GMA standard. In
3 addition, the amendment creates an "out-fill" type of expansion and the LAMRID
4 provisions of the GMA are geared more to "infill" development – with this premise
5 recently upheld in the *GoldStar*⁸⁹ case before Court of Appeals.

6 The County argues in its brief that the "logical boundaries of the LAMIRD created
7 by the amendment are the boundaries of the approximately 4.2 acres upon which the
8 market/bistro sits."⁹⁰ The Board agrees that individual parcels should not be split when
9 adding land to a LAMIRD, but isolating individual parcels is not what the statute implies
10 by a logical outer boundary. A logical outer boundary is delineated by "physical
11 boundaries such as bodies of water, streets, highways, and land forms and contours,"⁹¹
12 not specific parcel boundaries.

13 What the County has done is create an isolated peninsula outside of the logical
14 outer boundary. However, the County Commissioners made no findings or
15 determinations that this peninsula would constitute a *logical outer boundary* of a
16 LAMIRD. There is no substantial evidence in the record to support a determination that
17 this isolated peninsula would form a *logical outer boundary* of an existing area of more
18 intensive rural development. The record supports a determination that the Rural Major
19 Collector, Day Mt. Spokane, is a logical outer boundary as defined by the GMA and
20 prevents the abnormal irregular boundary⁹² by adding the McGlades parcel in
21 amendment 07-CPA-05.

22 **Conclusion:**

23 Therefore, the Board finds and concludes the County failed to comply with RCW
24 36.70A.070(5)(d) when it designated the 4.2 acre McGlades parcel within the LDAC
25 zone by adopting amendment 07-CPA-05. The County failed to minimize and contain
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⁸⁹ *Goldstar Resorts Inc. v. Futurewise*. See Footnote #68.

⁹⁰ *Id.* at 14.

⁹¹ RCW 36.70A.070(5)(d)(iv)(B).

⁹² RCW 36.70A.070(5)(d)(iv)(C).

1 the existing areas or uses of more intensive rural development and failed to establish a
2 logical outer boundary delineated predominately by the built environment.⁹³ As such,
3 the County failed to preserve the character of existing natural neighborhoods and
4 communities⁹⁴, failed to establish a physical boundary⁹⁵, and failed to prevent
5 abnormally irregular boundaries.⁹⁶

6 **Issue No. 3:**

7 Did Spokane County fail to implement and comply with the County
8 Comprehensive Plan and County ordinances when it approved 07-CPA-05 by creating
9 4.2 acres designated as Limited Development Area – Commercial (LDAC) that: (a)
10 allowed expanded commercial development in a rural area without a demonstrated
11 need; (b) altered the character of the neighborhood; and (c) lacked logical boundaries?

12 **The Parties' Position:**

13 **Petitioners:**

14 Petitioners argue the County ignored its own Comprehensive Plan requirements
15 governing the designation of a Limited Development Area Commercial (LDAC).
16 Petitioners claim the adoption of 07-CPA-05 was inconsistent with the four policies
17 found in Spokane County Comprehensive Plan policy RL.5.2 and staff acknowledged this
18 in their staff report.⁹⁷ The staff found the proposal did not front or was adjacent to the
19 original LDAC. In addition, Petitioners claim there is no demonstrated need to allow
20 expanded commercial development; the LDAC will alter the character of the
21 neighborhood, such as noise, lighting and traffic; and the LDAC lacks logical boundaries.

22 **Respondent:**

23

⁹³ RCW 36.70A.070(5)(d)(iv)

24 ⁹⁴ RCW 36.70A.070(5)(d)(iv)(A).

25 ⁹⁵ RCW 36.70A.070(5)(d)(iv)(B)

26 ⁹⁶ Id. footnote 82.

⁹⁷ Id. at 29.

1 The County argues the building size, scale, use and intensity of the market/bistro
2 is totally consistent with the character of the existing area surrounding the property and
3 the logical boundaries of the LAMIRD only encompass the 4.2 acres upon which the
4 market/bistro sits.⁹⁸ The business, according to the County, is part of the character of
5 the neighborhood and has been since its inception in 1984 and the public utilities will
6 continue to be provided as part of the capital facilities that are established in the area.

6 **Intervenors:**

7 See McGlade response under Issue No. 2.

8 **Petitioners Reply:**

9 See Petitioners Reply under Issue No. 2.

10 **Board Analysis:**

11 As mentioned under Issue No. 2, the County's CP Rural Lands Policy, RL.5.2 is
12 Spokane County's LAMIRD policy and stipulates that "[T]he intensification and infill of
13 commercial or non-resource-related industrial areas shall be allowed in rural areas
14 consistent with the following guidelines:"⁹⁹

- 14 (a) the area is clearly identified and contained by logical boundaries,
15 outside of which development shall not occur. These areas shall be
16 designated and mapped within the Limited Rural Development
17 category of the Comprehensive Plan map;
18 (b) the character of neighborhoods and communities is maintained;
19 (c) public services and public facilities can be provided in a manner
20 that does not permit or promote low-density sprawl or leapfrog
21 development;
22 (d) the intensification is limited to expansion of existing uses or infill of
23 new uses within the designated area; and
24 (e) the area was established prior to July 1, 1993.

25 ⁹⁸ Respondents HOM brief at 14.

26 ⁹⁹ Spokane County Comprehensive Plan Policy RL.5.2.

1 As stated earlier, these guidelines are similar, but in different order than those
2 requirements set forth in RCW 36.70A.070(5)(d)(iv). The Board relies on its Conclusion
3 under Issue No. 2 and addresses the additional arguments in the following paragraphs.

4 Petitioners argue that the County allowed expanded commercial development in
5 a rural area without a demonstrated need. The County's Comprehensive Plan, Goal
6 RL.5a, states:

7 Goal RL.5a: Provide for industrial and commercial uses in rural areas that
8 serve the needs of rural residents and are consistent with maintaining
9 rural character.

10 The Board agrees with the Petitioners that as argued, there is no demonstrated
11 need for a full-service restaurant in this area. Although the Respondent and McGlades
12 have shown there is a great deal of support for this use, community support is not the
13 same as demonstrated need for a facility. The property was originally permitted for an
14 agricultural product sales stand, which was consistent with the rural character and Goal
15 RL.5a and because of the demand for agricultural products produced on Greenbluff.
16 The Petitioners demonstrated in their brief and on maps that the area has numerous
17 eating establishments within close proximity to the rural community. Through the years,
18 though, the use has significantly changed from an agricultural product sales stand to a
19 restaurant business that no longer maintains the rural character. A full-scale restaurant
20 is not allowed in the UR zone and is urban in nature.

21 The Board agrees with the Petitioners that the County failed to contain the
22 intensification and infill of commercial use by clearly identifying and containing the
23 logical outer boundary, as adopted in 2001;¹⁰⁰ failed to maintain the character of the
24 neighborhood by allowing a commercial use that would significantly impact noise,
25 traffic, and lighting;¹⁰¹ and failed to limit the expansion of existing uses within the
26 LAMIRD to the present boundary. The Board agrees the property was established and

¹⁰⁰ Petitioners HOM brief at 32.

¹⁰¹ Id. at 30-31.

1 permitted as an agricultural product sales stand as early as 1985, but through the years
2 has changed to where it is currently a non-conforming use in the UR zone, thus no
3 longer conforms to the rural UR zone.

4 **Conclusion:**

5 Therefore, the Board finds and concludes the County failed to comply with
6 Spokane County Comprehensive Plan Goal RL.5a and Policy RL.5.2., when it designated
7 the 4.2 acre McGlades parcel within the LDAC zone by adopting amendment 07-CPA-05.
8 The County failed to demonstrate a need for the urbanized use as required by CP Goal
9 RL.5a and failed to follow CP Policy RL.5.2(a, b, and d).

10 **Issue No. 4:**

11 Did Spokane County fail to implement and comply with the goals of the Growth
12 Management Act, 36.70A RCW, by allowing development within designated rural areas?
13

14 **The Parties' Position:**

15 **Petitioners:**

16 Petitioners argue the County failed to comply with the requirements of the GMA
17 (LAMIRD) and its own Comprehensive Plan (LDAC) for designation of urban
18 development outside of the urban growth area (UGA). Petitioners cite to RCW
19 36.70A.110(1), which states that comprehensive plans adopted by counties must
20 "designate an urban growth area or areas within which urban growth shall be
21 encouraged and outside of which growth can occur only if it is not urban in nature."¹⁰²
22 Petitioners claim the intent of RCW 36.70A.110(1) is to confine urban growth to these
23 areas and not allow urban growth in the rural areas, which in turn helps to achieve
24 Goals 1 and 2 under RCW 36.70A.020. Petitioners cite to Washington Court of Appeals

25 ¹⁰² RCW 36.70A.110(1).

1 case *Quadrant Corp. v. State Growth Management Hearings Board* to emphasize their
2 point.¹⁰³ Petitioners contend the County's action of allowing urban development, such
3 as amendment 07-CPA-05, outside of the UGA frustrates the GMA goals. Despite some
4 limited exceptions, such as LAMIRDs, the Petitioners claim the County failed to comply
5 with the GMA requirements and the goals of the Act.

6 **Respondent:**

7 The County did not argue this issue.

8 **Intervenors:**

9 McGlades did not argue this issue.

10 **Petitioners Reply:**

11 Petitioners claim the County and McGlades failed to present any defense to this
12 issue, thus have abandoned this issue. WAC 242-02-570(1).

13 **Board Analysis:**

14 RCW 36.70A.110(1) states that "each county that is required or chooses to plan
15 under RCW 36.70A shall designate an urban growth area or areas within which urban
16 growth shall be encouraged and outside of which growth can occur only if it is not
17 urban in nature."¹⁰⁴ The Court in *Quadrant Corp v. State Growth Management Hearings*
18 *Board*¹⁰⁵ recognized that the GMA seeks to prohibit the inappropriate conversion of
19 undeveloped land in sprawling, low-density development. The Court also emphasized
20 the GMA's goals of reducing sprawl, encouraging development in areas already
21 characterized by urban development, preserving open spaces and the environment, and
22 encouraging availability of affordable housing. The Board believes this provision is not
23 relevant here, but the LAMIRD provision, RCW 36.70A.070(5)(d), is relevant.

24 ¹⁰³ *Quadrant Corp. v. State Growth Management Hearings Board*, 119 Wash.App. 562, 567-68, 81 P.3d
25 918 (2003).

26 ¹⁰⁴ RCW 36.70A.110(1).

¹⁰⁵ Id. at footnote 94.

1 RCW 36.70A.070(5)(d), which allows counties to create limited areas of more
2 intensive development (LAMIRDs) is a limited exemption to RCW 36.70A.110(1), but is
3 constrained within the parameters authorized under RCW 36.70A.070(5)(d).

4 The County created the Mead LDAC when it adopted its Comprehensive Plan in
5 2001, recognizing that past planning decisions had created pockets of urbanized
6 development in the rural area. Planning staff recommended the LDAC in the Mead area
7 be "designated south of Day Mt. Spokane Road and adjacent to both sides of Highway 2
8 **based on existing land uses, zones, comprehensive planning policies and the**
9 **public process** that resulted in the adoption of the original GMA County
10 Comprehensive Plan in November of 2001."¹⁰⁶ Expansion of the LDAC, as proposed by
11 amendment 07-CPA-05, fails to comply with the requirements of RCW 36.70A.070(5)(d)
12 by allowing urban-like growth within the rural area and outside of a designated UGA or,
13 in this case, the logical outer boundary of the original LDAC (LAMIRD). LAMIRDs are not
14 mini-UGAs and are not intended to accommodate growth, but areas recognized by a
15 county as more intensive rural development that was in place prior to entering into the
16 GMA process as required by RCW 36.70A.040.

17 The original agricultural product stand is an allowed use in the rural UR zone,
18 whereas a full-service restaurant is not an allowed use.¹⁰⁷ LAMIRDs allow commercial
19 businesses, such as restaurants, but since amendment 07-CPU-05 has been found to be
20 non-compliant with RCW 36.70A.070(5)(d)(iv), allowing the expansion of the LDAC into
21 the rural area frustrates Goal (1), Urban Growth, where the GMA encourages
22 development in urban areas where adequate public facilities and services exist or can
23 be provided in an efficient manner; and Goal (2) Reduce sprawl, where the GMA
24 encourages cities and counties to reduce the inappropriate conversion of undeveloped
25 land into sprawling, low density development. The Board has found the County out of
26

¹⁰⁶ Petitioners HOM brief at 32 referencing Exhibit 12 at 8, Spokane County Staff Report for 07-CPA-05.

¹⁰⁷ Spokane County Zoning Code, 14.612.220 Commercial Zone Matrix, and 14.618.220 Rural Zone Matrix.

1 compliance with RCW 36.70A.070(5)(d) under Issue No. 2, which clearly is where this
2 issue belongs and substantially interferes with Goals (1) and (2).

3 **Conclusion:**

4 Therefore, the Board finds and concludes the County failed to comply with RCW
5 36.70A.070(5)(d)(iv) by adopting amendment 07-CPU-05 and, thereby, failing to
6 minimize and contain the existing areas or uses of more intensive rural development,
7 which frustrates GMA Goals (1) and (2) by failing to contain urban development in
8 urban areas where public facilities and services exist or can be provided in an efficient
9 manner and reduce the inappropriate conversion of undeveloped land into sprawling,
10 low-density development.

11 **Issue No. 5:**

12 Did Spokane County fail to implement and comply with the requirements
13 regarding critical area protection of the Growth Management Act, 36.70A RCW, the
14 County Comprehensive Plan, and County ordinances, including the County's Critical Area
15 Ordinance, when it approved 07-CPA-05 without properly identifying, disclosing,
16 analyzing, and/or mitigating known and/or possible impacts to a designated critical
17 aquifer recharge area?

18 **The Parties' Position:**

19 **Petitioners:**

20 Petitioners contend the County failed to protect critical areas or adequately
21 consider environmental issues as required by the GMA when it approved 07-CPA-05.
22 According to Petitioners, this area is classified as a "Critical Aquifer Recharge Area"
23 (CARA) with a rating of high susceptibility.¹⁰⁸ The Petitioners claim no discussion or
24 evaluation was done to protect the recharge area from impacts related to the
25 development, such as adequacy of the septic system, stormwater impacts, presence of
26 wells and waste disposal.¹⁰⁹ Petitioners cite to *Miotke v. Spokane County*¹¹⁰ and *Friends*

¹⁰⁸ Petitioners HOM brief at 35.

¹⁰⁹ Petitioners HOM brief at 35.

¹¹⁰ *Miotke v. Spokane County*, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

1 of *Skagit County v. Skagit County*¹¹¹ to emphasize the GMA clearly requires protection
2 of critical areas and that “[T]he land speaks first.” Petitioners also cite to RCW
3 36.70A.020(10) to show the GMA requires and/or sets goals for jurisdictions to protect
4 critical areas and these GMA goals and requirements are reflected in the County’s own
5 CP at Goals NE.2 and NE.12., and CP Policies NE.17a-17b, NE.17.4, NE.17.5 and
6 NE.20.1. In addition, Petitioners claim the County’s Critical Areas Ordinance (CAO)
7 requires non-residential development outside of the UGA that produces more than 90
8 gallons per day to utilize an enhanced wastewater disposal system and follow certain
9 criteria. According to the Petitioners, testimony from former Water Quality Management
10 Program Manager for the County, Stan Miller, and the County Engineer recognize
11 potential problems to the aquifer from the development.

12 **Respondent:**

13 The County claims the subject property is under the Spokane County Critical
14 Areas Ordinance that was in effect at the time the amendment was adopted and
15 continues to be in effect.

16 **Intervenors:**

17 See McGlades response to Issue #1.

18 **Petitioners Reply:**

19 Petitioners claim the County and McGlades failed to present any defense to this
20 issue, thus have abandoned this issue.¹¹²

21 **Board Analysis:**

22 RCW 36.70A.020, Goal (10) Environment, directs counties and cities to protect
23 the environment and enhance the state’s high quality of life, including air and water

24 ¹¹¹ Friends of Skagit County v. Skagit County, WWGMHB Case No. 95-2-0075, FDO (Jan. 22, 1996).

25 ¹¹² Only a petitioner can abandon an issue as per WAC 242-02-570(1). The Board assumes the jurisdiction and other
26 parties are resting on the presumption of validity. The petitioner must then present a prima facie case that overcomes
that presumption.

1 quality, and the availability of water. In order to do so, the GMA requires each county
2 and city to adopt development regulations that protect critical areas that are required to
3 be designated under RCW 36.70A.170. Critical areas include: (a) Wetlands; (b) areas
4 with a critical recharging effect on aquifers used for domestic purposes; (c) fish and
5 wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geological
6 hazardous areas. In this case, Petitioners claim the County has failed to protect (b), also
7 known as Critical Aquifer Recharge Areas or CARAs.

8 The McGlades commercial property, the subject of amendment 07-CPA-05, sits
9 over a designated Critical Aquifer Recharge Area of high susceptibility to groundwater
10 contamination.¹¹³ Petitioners claim the County failed to follow its Comprehensive Plan
11 goals and policies that provide that land use decisions in Spokane County shall protect
12 critical areas¹¹⁴ and that best available science will be used in the protection of critical
13 areas.¹¹⁵ Petitioners also argue the County failed to protect the CARA when it adopted
14 amendment 07-CPA-05 because the County didn't protect the groundwater quality from
15 development impacts or prevent degradation of groundwater quality.¹¹⁶ In addition,
16 Petitioners claim the County failed to follow its own CP Policies, specifically NE.17.4,
17 which requires evaluation of proposed land use changes for both positive and negative
18 impacts on groundwater quality, and NE.17.5, which requires development that would
19 have a significant negative impact on the quality of an aquifer to provide measurable
20 and attainable mitigation for the impact. In the case of this amendment, Policy NE.20.1
21 requires a higher level of protection for critical aquifer recharge areas of moderate to
22 higher susceptibility stipulating alternative mitigation measures that provide protection
23 of groundwater equal to or better than the stated regulations.

24 The Board notes conflicting data from expert witnesses on both sides regarding
25 the current wastewater disposal system and just what is needed for an expanded
26

¹¹³ Staff Report to the Hearing Examiner for File #07-CPA-05, pg. 1.

¹¹⁴ Spokane County Comprehensive Plan Goal NE.2

¹¹⁵ Id., CP Goal NE.12.

¹¹⁶ Id., CP Goals NE.17a-17b.

1 use.¹¹⁷ As already determined in Issue No. 1, the SEPA Environmental Checklist is void
2 of any useful information concerning the CARA and/or potential mitigation measures.¹¹⁸
3 What is apparent, though, is that the applicant, through their attorney, Mr. Hume,
4 believes the expanded proposal is "grandfathered as old improvement"¹¹⁹ concerning
5 the CARA and stormwater and no new facilities would be needed for the expanded
6 facility.¹²⁰ In addition, Spokane County issued a blanket DNS on September 20, 2007
7 for the eight proposed amendments for this non-project action under SEPA.¹²¹ The DNS
8 was appealed by the Petitioners in this case, but the appeal was denied by the Hearing
9 Examiner.¹²²

10 In the Spokane County Staff Report to the Hearing Examiner¹²³ for the DNS
11 appeal, staff notes that the DNS was circulated to over 60 agency/groups and only one
12 comment from the Department of Ecology was received. Staff commented that further
13 detailed environmental review will occur at such time that a specific development
14 request is submitted to Spokane County for agency review or "in the case of 07-CPA-05
15 impacts will be mitigated by the applicable County Development Regulations and also
16 by enforcement of applicable development regulations, such as but not limited to
17 building and occupancy permits."¹²⁴

18 This is exactly what Petitioners are concerned about – significant development
19 has already taken place, so the possibility of a future environmental review for the
20 impact of 07-CPA-05 are unlikely. The impacts of the development currently in place are
21 already being realized. Future impact from changing the zoning from UR to LDAC is

22 ¹¹⁷ Spokane County Hearing Examiners Findings of Fact, Conclusions of Law, and Decision; Appeal of
23 DNS, Findings #'s 41-47, Dec. 10, 2007.

24 ¹¹⁸ Petitioners HOM brief, Exhibit 3, Environmental Checklist, pg. 4.

25 ¹¹⁹ Intervenor's HOM brief, Exhibit 2, Environmental Checklist for CUN-08-05, pg. 3.

26 ¹²⁰ Id. at 15.

¹²¹ Petitioners HOM brief, Exhibit 4, Spokane County Environmental Ordinance, DNS.

¹²² Petitioners HOM brief, Exhibit 6, Hearing Examiner Findings of Fact, Conclusions of Law, and Decision,
Appeal of Determination of Non-significance.

¹²³ Petitioners HOM brief, Exhibit 10.

¹²⁴ Id. at 3.

1 speculative. The re-designation of the property by adoption of 07-CPA-05 will legitimize
2 the restaurant use as proposed. Petitioners fear that no additional development
3 proposals or SEPA analysis will ever be required for the use at this site, which calls into
4 question the adequacy of the present septic system and stormwater controls for an
5 enhanced operation of a full-service restaurant. Essentially, the County cannot rely upon
6 future SEPA processes and development review when the realities of what is presently
7 on the ground and the impacts associated with it calls for a complete SEPA review prior
8 to a change in zoning. The County also can't ignore the fact a full-service restaurant has
9 been built on this site and that amendment 07-CPA-05 will cause impacts associated
10 with that use, primarily the enhanced use of the septic system and increased
11 stormwater impacts, to be realized.

11 The Spokane County Hearing Examiner recognized in his Findings of Facts¹²⁵
12 written for the McGlades' application for a CUP that the Critical Areas Ordinance (CAO)
13 requires non-residential development outside of the UGA that produce more than 90
14 gallons per day/acre to utilize an enhanced wastewater disposal system as described
15 under Spokane County Code (SCC) 11.20.075(c), item 2.a under L.3.¹²⁶ Furthermore,
16 CARA provisions would require an enhanced disposal system, if the use generates
17 approximately 378 gallons/day (i.e. 4.2-acre site times 90 gpd) and such generation
18 exceeds the volume of wastewater generated by lawful uses of the site prior to the
19 remodeling and proposed expansion.¹²⁷ The Hearing Examiner also found that the
20 remodeled business as proposed appears to generate 20% more than the previous
21 business and that the water flow for the remodeled business, projected to average 450
22 gpd, cannot exceed the wastewater flow generated by the previous business without
23 providing treatment at least equal to one of the enhanced treatment systems described
24 by SCC 11.20.075(c), item 2.a of L-3 of the CAO. In addition, the Hearing Examiner

24 ¹²⁵ Spokane County Hearing Examiner Findings of Fact, Conclusions of Law, and Decision; Re: Conditional
25 Use Permit for Expansion of a Non-conforming Produce Stand/Store; McGlades, LLC, April 7, 2006

25 ¹²⁶ Id. at 23, Finding #131.

26 ¹²⁷ Id. at 23, Finding #132.

1 states “[T]he County Building and Planning Department, and not the Spokane Regional
2 Health District, is responsible for applying the CARA provision of the County Critical
3 Areas Ordinance.”¹²⁸

4 The Hearing Examiner, under his decision in the applicants appeal of the DNS,¹²⁹
5 took a different tact, possibly because this appeal concerned a DNS developed for eight
6 amendments, not just 07-CPA-05. The Hearing Examiner determined that the
7 “[A]ppellant did not establish that the current amendment, by itself or in conjunction
8 with the other rural amendments addressed in the DNS, would have any significant
9 probable adverse impacts on the environment. The Impacts cited by the appellant have
10 either been addressed, or will be addressed, through applicable development
11 regulations, or are not environmentally significant.”¹³⁰ Furthermore, the Hearing
12 Examiner determined that “the DNS issued by County Building and Planning is entitled
13 to substantial weight under WAC 197-11-680” and that “the DNS is clearly not
14 erroneous, or arbitrary and capricious.”

15 RCW 36.70A.170(1)(d) requires the County to designate critical areas, which it
16 has done. The CARA referenced here is a designated critical area in Spokane County.
17 RCW 36.70A.172 requires the County to use best available science “[I]n designating
18 and protecting critical areas.” The Petitioners claim the County has not followed its own
19 CP Policies to protect the CARA found in this area. Given the inadequacy of the SEPA
20 and that Policy NE.20.1 requires a higher level of protection for critical aquifer recharge
21 areas of moderate to higher susceptibility, the County failed to its duty to protect a
22 designated critical area or, at the very minimum, use best available science to
23 determine future impacts to the CARA from the increased septic affluent and
24 stormwater runoff from an expansion of the business.

24 ¹²⁸ Id. at 29, Conclusion #9.

25 ¹²⁹ Spokane County Hearing Examiners Findings of Fact, Conclusions of Law, and Decision; Appeal of
DNS, Dec. 10, 2007.

26 ¹³⁰ Id. at 11; Conclusion #7.

1 The Board finds the record incomplete as to the possible impacts amendment 07-
2 CPA-05 will have on the CARA. The Building and Planning Department's DNS for the
3 eight amendments may have been appropriate for the eight amendments as a group,
4 but failed to provide the necessary information to determine whether the adoption of
5 amendment 07-CPA-05 would impact the environment, specifically the CARA. Given the
6 conflicting information provided by both parties, the Hearing Examiner's Findings of Fact
7 and Conclusions of Law for the application for the CUP, the inadequate SEPA review for
8 the eight amendments, including amendment 07-CPU-05, the fact that the County failed
9 to evaluate the property based on the build out and use in existence on the property,
10 and the potential build out in the future, the Board agrees with the Petitioners that the
11 County failed to implement and comply with the GMA, the County's Comprehensive
12 Plan, and the County's CAO, when it failed to identify, disclose, analyze, and/or mitigate
13 known and/or possible impacts to a designated critical aquifer recharge area.

14 **Conclusion:**

15 Therefore, the Board finds and concludes the County failed to comply with RCW
16 36.70A.020(10), the County's CP and CAO for failing to adequately address, analyze
17 and/or mitigate the impacts of 07-CPU-05 on the CARA from the enhanced use of the
18 property from an agricultural product stand to a full-service restaurant.

19 **Issue No. 6:**

20 Does 07-CPA-05 substantially interfere with the fulfillment of the goals of the
21 Growth Management Act such that the enactment at issue should be held invalid
22 pursuant to RCW 36.70A.302?

23 **The Parties' Position:**

24 **Petitioners:**

25 Petitioners claim the amendment is not only out of compliance with the GMA, but
26 should be declared invalid because 07-CPA-05 unlawfully authorizes urban development
and services in an area outside of the UGA in violation of Goals (1) and (2) of the GMA.
Petitioners contend an order of invalidity will ensure that further development of the

1 subject property will not occur. Petitioners ask for the Board to declare 07-CPA-05
2 invalid.

3 **Respondent:**

4 The County did not respond to this issue.

5 **Intervenors:**

6 McGlades did not respond to this issue.
7
8

9 **Petitioners Reply:**

10 Petitioners claim the County and McGlades failed to present any defense to this
11 issue, thus have abandoned this issue.¹³¹

12 **Applicable Law:**

13 The GMA's Invalidity Provision, RCW 36.70A.302, provides:

14 (1) A board may determine that part or all of a comprehensive plan or
development regulation are invalid if the board:

15 (a) Makes a finding of noncompliance and issues an order of remand
16 under RCW 36.70A.300;

17 (b) Includes in the final order a determination, supported by findings of
18 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
19 the goals of this chapter; and

20 (c) Specifies in the final order the particular part or parts of the plan or
21 regulation that are determined to be invalid, and the reasons for their
invalidity.
22

23 (2) A determination of invalidity is prospective in effect and does not extinguish
24 rights that vested under state or local law before receipt of the board's order by the city
or county. The determination of invalidity does not apply to a completed development

25 ¹³¹ See Footnote #111.

1 permit application for a project that vested under state or local law before receipt of the
2 board's order by the county or city or to related construction permits for that project.

3 A finding of invalidity may be entered only when a board makes a finding of non-
4 compliance thus, the Board may enter an order of invalidity upon a determination that
5 the continued validity of a non-compliant city or county enactment substantially
6 interferes with fulfillment of the goals of the GMA. RCW 36.70A.302(1)(b).

7 The Petitioners, Henderson et al., ask that this Board issue a finding that the
8 actions of the County substantially interfere with the fulfillment of the Goals of the GMA.
9 In the discussion of the legal issues in this case, the Board found and concluded that
10 Spokane County's adoption of amendment 07-CPU-05 was clearly erroneous and non-
11 compliant with the requirements of RCW 43.21C and RCW 36.70A.070(5)(d). The Board
12 further found and concluded the County's action was not guided by the Goals of the
13 Act, specifically Goals (1), (2) and (10).

14 **Goal (1)** of the GMA, RCW 36.70A.020(1), provides that "Urban growth:
15 Encourage development in urban areas where adequate public facilities and services
16 exist or can be provided in an efficient manner." Clearly, from our findings herein, the
17 actions of the County have substantially interfered with this goal. The County, by
18 adopting amendment 07-CPU-05, allowed urban-like commercial growth to expand into
19 the rural area, thereby substantially interfering with Goal (1).

20 **Goal (2)** of the GMA, RCW 36.70A.020(2), provides that reducing sprawl is a
21 key objective of the Act: "Reduce the inappropriate conversion of undeveloped land into
22 sprawling, low density development." Adoption of amendment 07-CPU-05 again
23 substantially interferes the County's ability to engage in GMA-compliant planning and
24 with the goals of the GMA. The County established a LAMIRD boundary in 2001
25 encompassing those areas of more intensive development. The adoption of amendment
26 07-CPU-05 expands the LAMIRD for a single non-conforming use on a largely

1 undeveloped parcel of land, thereby creating and encouraging sprawling, low density
2 development.

3 **Goal (10)** of the GMA, RCW 36.70A.020(10), provides that the environment
4 must be protected: "Protect the environment and enhance the state's high quality of
5 life, including air and water quality, and the availability of water." Adoption of
6 amendment 07-CPU-05 intensifies development within a high susceptibility aquifer
7 thereby threatening water quality. In addition, the intensification of development has
8 the potential for increased traffic and noise pollution. SEPA review of these impacts was
9 inadequate and no mitigation measures are in place which clearly denoted the
10 environment and the neighboring resident's quality of life will not be adversely
11 impacted.

11 **Board Analysis:**

12 The request for an order of invalidity is a prayer for relief and, as such, does not
13 need to be framed in the PFR as a legal issue. *See King 06334 Fallgatter VIII v. City of*
14 *Sultan (Feb. 13, 2007) #06-3-0034 Final Decision and Order Page 12 of 17 County v.*
15 *Snohomish County, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13,*
16 *2003) at 18. Petitioners, Henderson, et al., request that the Board to find amendment*
17 *07-CPU-05 invalid because it unlawfully authorizes urban development and services*
18 *outside of the UGA.*

18 **Discussion:**

19 In the discussion of the Legal Issues in this case, the Board found and concluded
20 that Spokane County's approval of Resolution 07-1096, adopting Comprehensive Plan
21 Amendment 07-CPA-05, was clearly erroneous in regards to the environmental review
22 required pursuant to SEPA, RCW 43.21C, and the GMA provisions for LAMIRDS, RCW
23 36.70A.070(5)(d), and was **found to be non-compliant** with the GMA. The Board is
24 remanding Resolution 07-1096 with direction to the County to take legislative action to
25 comply with the requirements of the GMA as set forth in this Order. A Board may enter
26 any order of invalidity upon a determination that the continued validity of a non-

1 compliant jurisdiction's legislative enactment substantially interferes with the fulfillment
2 of the goals of the GMA. Within the discussion of this matter, the Board further found
3 and concluded that the **County's action was not guided by the goals of the GMA**,
4 specifically Goal (1) – Urban Growth, Goal (2) – Preventing Urban Sprawl, and Goal (10)
5 – Protecting the environment. In light of Spokane County's deficiencies to adequately
6 analyze the environmental impacts of the proposed amendment and to restrain urban-
7 style growth within the rural areas to properly designated LAMIRDS, the Board enters a
8 **determination of invalidity** with respect to Resolution 07-1096 and the amendment
9 it authorized, 07-CPA-05.

9 **Conclusion:**

10 The Board, *supra*, found that the adoption of amendment 07-CPU-05 was non-
11 compliant with the GMA and further finds the action of the County would substantially
12 interfere with Goals (1), (2) and (10). Therefore, a determination of invalidity is
13 warranted in this matter.

14 **VII. FINDINGS OF FACT**

- 15 1. Spokane County is a county located East of the crest of the
16 Cascade Mountains and opted to plan under the GMA and is
17 therefore required to plan pursuant to RCW 36.70A.040.
- 18 2. Spokane County adopted amendment 07-CPU-05 through
19 Resolution 07-1096 on December 21, 2007.
- 20 3. A SEPA environmental checklist and Determination of Nonsignificance
21 were issued by Spokane County cumulatively for eight rural amendments
22 and zoning map changes, including 07-CPU-05, on September 20, 2007.
- 23 4. Spokane County failed to implement and comply with SEPA as set
24 forth in RCW 43.21C by failing to identify, disclose, analyze and/or
25 mitigate known and/or possible impacts associated with the
26 approval of 07-CPU-05.

- 1 5. There is no substantial evidence in the record to support a
2 determination that this isolated peninsula would form a *logical*
3 *outer boundary* of an existing area of more intensive rural
4 development.
- 5 6. Spokane County failed to comply with RCW 36.70A.070(5)(d) when
6 it approved 07-CPU-05 and failed to (1) minimize and contain the
7 existing areas or uses of more intensive rural development; (2)
8 establish a logical outer boundary delineated predominately by the
9 built environment; (3) preserve the character of existing natural
10 neighborhoods and communities; (4) establish a physical boundary;
11 and failed to (5) prevent abnormally irregular boundaries.
- 12 7. Spokane County failed to comply with its Comprehensive Plan Goal
13 RL.5a and Policy RL.5.2., when it designated the 4.2 acre McGlades
14 parcel within the LDAC zone by adopting amendment 07-CPA-05.
- 15 8. Spokane County failed to comply with RCW 36.70A.070(5)(d)(iv) by
16 adopting amendment 07-CPU-05, which substantially interferes
17 with GMA Goals (1) and (2) by failing to contain urban development
18 and reduce the inappropriate conversion of undeveloped land into
19 sprawling, low-density development.
- 20 9. Spokane County failed to comply with GMA Goal (10), the County's
21 CP and CAO for failing to adequately address, analyze and/or
22 mitigate the environmental impacts of 07-CPU-05.

VIII. CONCLUSIONS OF LAW

- 23 1. This Board has jurisdiction over the parties to this action.
- 24 2. This Board has jurisdiction over the subject matter of this action.
- 25 3. Petitioners have standing to raise the issues raised in the Petition
26 for Review.
4. Petition for Review in this case was timely filed.
5. Spokane County failed to comply with RCW 43.21C (SEPA) and to
consider the environmental impacts as required by WAC 197-11-
060(4)(a) and (c) and is found out of compliance with the GMA.

- 1 6. Spokane County failed to comply with the LAMIRD provision, RCW
2 36.70A.070(5)(d) and is found out of compliance with the GMA.
- 3 7. Spokane County failed to comply with its Comprehensive Plan,
4 specifically Goal RL.5a and Policy RL.5.2.
- 5 8. Spokane County failed to comply with RCW 36.70A.070(5)(d)(iv),
6 and, as such, its action substantially interferes with RCW
7 36.70A.020(1) and (2) warranting both a finding of non-compliance
8 and a determination of invalidity.
- 9 9. Spokane County failed to comply with its Comprehensive Plan and
10 Critical Areas Ordinance, thereby substantially interfering with RCW
11 36.70A.020(10), the GMA's goal seeking to protect the
12 environment, warranting both a finding of non-compliance and a
13 determination of invalidity.
- 14 10. Any Conclusion of Law herein after determined to be a Finding of
15 Fact, is hereby adopted as such.

IX. INVALIDITY FINDINGS OF FACT
Pursuant to RCW 36.70A.300 (2)(a)

The Board incorporates the Findings of Fact above and adds the following:

- 16 1. The Board finds and concludes that the County's action to adopt
17 amendment 07-CPU-05 substantially interferes with Goals (1) and
18 (2) of the GMA for failing to contain urban-style development to
19 UGAs or GMA designated LAMIRDs and to reduce sprawl in the
20 rural areas.
- 21 2. The Board finds and concludes that the County's failure to follow
22 the GMA, specifically RCW 36.70A.070(5)(d) and its own CP goals
23 and policies substantially interferes with Goal (10) of the GMA for
24 failing to protect the environment and enhance the state's high
25 quality of life, including air and water quality, and the availability of
26 water.
3. The Board finds and concludes that the continued validity of these
 actions of the County would substantially interfere with the goals of
 the GMA.

X. CONCLUSIONS OF LAW
Pursuant to RCW 36.70A.300 (2) (a)

1. The Board has jurisdiction over the parties and subject matter of this case.
2. Spokane County's failure to comply with RCW 36.70A.070(5)(d)(iv) by adopting amendment 07-CPU-05 and, thereby, failing to minimize and contain the existing areas or uses of more intensive rural development, substantially interferes with GMA Goals 1 and 2 by failing to contain urban-style development in urban areas where public facilities and services exist or can be provided in an efficient manner, and reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
3. Spokane County's failure to comply with its CP and CAO by failing to adequately address, analyze and/or mitigate the impacts of 07-CPU-05 on the CARA, substantially interferes with Goal 10 of the GMA by failing to protect the environment.

XI. ORDER

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

1. Spokane County's adoption of amendment 07-CPU-05 through Resolution 07-1096 is clearly erroneous and does not comply with the requirements of the GMA, specifically RCW 43.21C (SEPA), RCW 36.70A.070(5)(d), and is not guided by GMA Goals (1), (2), and (10) found in RCW 36.70A.020. Spokane County is found out of compliance in Issue Nos. 1, 2, 3, 4, and 5 to the extent herein ruled.
2. Spokane County's adoption of Resolution 07-1096, which adopted amendment 07-CPU-05, substantially interferes with GMA Goals 1, 2, and 10 and the Board finds amendment 07-CPU-05 invalid.

1 3. Therefore the Board remands Ordinance No. 07-1096 to Spokane
2 County with direction to the County to take legislative action to
3 achieve compliance with the Growth Management Act pursuant to
4 this decision no later than **March 4, 2009, 180 days** from the
5 date issued. The following schedule for compliance, briefing and
6 hearing shall apply:

- 7 • The County shall file with the Board by **March 11, 2009, an**
8 **original and four copies** of a **Statement of Actions Taken to**
9 **Comply** (SATC) with the GMA, as interpreted and set forth in this
10 Order. The SATC shall attach copies of legislation enacted in order
11 to comply. The County shall simultaneously serve a copy of the
12 SATC, with attachments, on the parties. **By this same date, the**
13 **County shall file a "Remanded Index," listing the**
14 **procedures and materials considered in taking the remand**
15 **action.**
- 16 • By no later than **March 25, 2009¹³²**, Petitioners shall file with the
17 Board an **original and four copies** of Comments and legal
18 arguments (Petitioners' Compliance Brief) on the County's SATC.
19 Petitioners shall simultaneously serve a copy of their Comments
20 and legal arguments on the parties.
- 21 • By no later than **April 8, 2009**, the County and Intervenors shall
22 file with the Board an **original and four copies** of their Response
23 to Comments and legal arguments (Respondent's and Intervenors'
24 Compliance Brief). The County and Intervenors shall simultaneously
25 serve a copy of such on the parties.
- 26 • By no later than **April 15, 2009**, Petitioners shall file with the
Board an **original and four copies** of their Reply to Comments
and legal arguments (Petitioners Optional Compliance Reply Brief).
Petitioners shall serve a copy of their brief on the parties.

¹³² March 25, 2009, 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).

- 1 • Pursuant to RCW 36.70A.330(1) and WAC 242-02-891¹³³ the Board
2 hereby schedules a telephonic Compliance Hearing for **April 21,**
3 **2009, at 10:00 a.m. to 12:00 p.m. The compliance hearing**
4 **shall be limited to consideration of the Legal Issues found**
5 **noncompliant and remanded in this FDO.** The parties will call
6 **360-407-3780 followed by 167970 and the # sign.** Ports are
reserved for: **Mr. Eichstaedt, Mr. Hubert and Mr. Dullanty.** If
additional ports are needed please contact the Board to make
arrangements.

7 If the County takes legislative compliance actions prior to the date set
8 forth in this Order, it may file a motion with the Board requesting an adjustment
9 to this compliance schedule.

10 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**

11 **Reconsideration:**

12 Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of
13 this Order to file a petition for reconsideration. Petitions for reconsideration
14 shall follow the format set out in WAC 242-02-832. The original and four (4)
15 copies of the petition for reconsideration, together with any argument in
16 support thereof, should be filed by mailing, faxing or delivering the document
17 directly to the Board, with a copy to all other parties of record and their
representatives. Filing means actual receipt of the document at the Board
office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for
reconsideration is not a prerequisite for filing a petition for judicial review.

18 **Judicial Review:**

19 Any party aggrieved by a final decision of the Board may appeal the decision
20 to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
21 review may be instituted by filing a petition in superior court according to the
22 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

23
24
25 ¹³³ The Presiding Officer may issue an additional notice after receipt of the SATC to set the format and
26 additional procedures for the compliance hearing.

1 **Enforcement:**

2 The petition for judicial review of this Order shall be filed with the
3 appropriate court and served on the Board, the Office of the Attorney
4 General, and all parties within thirty days after service of the final order, as
5 provided in RCW 34.05.542. Service on the Board may be accomplished in
6 person or by mail. Service on the Board means actual receipt of the document
at the Board office within thirty days after service of the final order.

6 **Service:**

7 This Order was served on you the day it was deposited in the United States
8 mail. RCW 34.05.010(19)

9 SO ORDERED this 5th day of September 2008.

10 EASTERN WASHINGTON GROWTH MANAGEMENT
11 HEARINGS BOARD

12 _____
13 John Roskelley, Board Member

14 _____
15 Raymond L. Paoella, Board Member

16 _____
17 Joyce Mulliken, Board Member