

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 DRY CREEK COALITION and FUTUREWISE,

CASE NO. 07-2-0018c

4 Petitioners,

**COMPLIANCE ORDER
(LAMIRDS and RURAL LANDS)**

5
6 v.

7 CLALLAM COUNTY,

8
9 Respondent.

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12 This matter came before the Board on September 17, 2009 for a Compliance Hearing
13 following the submittal of two Clallam County Compliance Reports, one for Limited Areas of
14 More Intensive Rural Development (LAMIRDS) and the other dealing with rural lands.¹

15 These Compliance Reports describe the actions Clallam County (the "County") has taken in
16 response to the Board's April 23, 2008 Final Decision and Order (FDO)² as modified by the
17 January 30, 2009 Compliance Order³ and subsequent Orders on Reconsideration.⁴

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20 The Board conducted a telephonic compliance hearing. Dry Creek Coalition (DCC) was
21 represented by Gerald Steel. Futurewise was represented by Robert Beattey. Clallam
22 County was represented by Doug Jensen. With Mr. Jensen were John Miller, Director of
23 Community Development for Clallam County and Steve Gray, County Planning Director.
24 Board Members Nina Carter, William Roehl and James McNamara were present, with Mr.
25 McNamara presiding.
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27 1. LAMIRDS
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30 ¹ LAMIRDS: Compliance Report for Partial Compliance, filed August 6, 2009 and Rural Lands: Compliance
31 Report for Partial Compliance and Request for Partial Rescission of Invalidity, filed July 24, 2009.

² April 23, 2008 Final Decision and Order.

32 ³ January 30, 2009 Compliance Order.

⁴ June 9, 2008 Order on Motion for Reconsideration ;February 20, 2009 Order on Motion for Reconsideration.

1 In April 2008, this Board found twenty of the County's LAMIRDs failed to comply with the
2 GMA.⁵ In response, the County removed four LAMIRDs and adjusted the logical outer
3 boundaries (LOBs) on the remaining sixteen. Despite this, in the Board's January 30, 2009
4 Order Finding Noncompliance, the Board found that the County remained noncompliant with
5 GMA requirements relating to four remaining LAMIRDs.⁶ The Board also found the County
6 noncompliant in its use of the phrase "prior to" July 1, 1990 in its development regulations
7 as the relevant timeframe for the purposes of evaluating existing areas and uses under
8 RCW 36.70A.070(5)(d)(v).⁷

10
11 In order to address the remaining LAMIRD compliance orders, the County, on June 23,
12 2009, adopted Ordinance No. 850 and Resolution No. 62, 2009.

13
14 Based on the original holdings of the Board set forth in the April 2008 FDO and the January
15 2009 Compliance Order, the compliance issues currently before the Board are:

- 16 1. The phrase "the uses that existed in the areas *prior to* or as of July 1, 1990 . . . "
17 was clearly erroneous. [Conclusions of Law E-G];
- 18 2. Inclusion of the southeastern portion of the Dryke-West LAMIRD [aka Dryke-
19 Sherbourne] was clearly erroneous. [Conclusion of Law L];
- 20 3. Inclusion of the 10 acre Northwestern portion of the Merrill & Ring site and the
21 Peninsula Timber Company property [within the Laird's Corner-East LAMIRD],
22 were clearly erroneous. [Conclusion of Law P and Q];
- 23 4. Inclusion of the Port Angeles Gun Club property in the Deer Park LAMIRD was
24 clearly erroneous. [Conclusion of Law T]; and
- 25 5. The Lake Farm LAMIRD remained non-compliant. [Conclusion of Law U].
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31 ⁵ April 2008 FDO, Conclusion of Law M, at 101.

32 ⁶ January 30, 2009 Compliance Order, at 40-41 (Finding the Lake Farm LAMIRD, Laird's Corner East LAMIRD, Dryke-Sherbourne LAMIRD, and Deer Park LAMIRD still failed to comply with the GMA).

⁷ January 30, 2009 Compliance Order, at 40.

1 In response, the County took the following actions:

- 2 1. With regard to the County's use of the phrase "the uses that existed in the areas *prior*
3 *to* or as of July 1, 1990" and which the Board held was not consistent with RCW
4 36.70A.070(d)(v), the County changed its Code language to reference "an existing
5 area or existing use that was in existence: (A) On July 1, 1990" All "prior to"
6 language and the phrase "prior to or" were deleted throughout the relevant County's
7 code sections to be consistent with the GMA statutory language.⁸
8
- 9 2. The Dryke/West LAMIRD (the western section) was amended to exclude the
10 remainder of the eastern highway frontage parcel and the Comprehensive Plan Land
11 Use and Zoning Map for this location updated from Rural Commercial (RC) to Rural
12 Low (R5).⁹
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- 14 3. The County notes that the 1990 aerial photograph of the Laird's Corner-East LAMIRD
15 showed built environment existing on Peninsula Timber Short Plat Parcel "A"
16 consisting of buildings used for commercial activities justifying its inclusion in the
17 Lairds' Corner LAMIRD. Peninsula Timber Short Plat Parcel "B" was used for wood
18 products wholesaling from 1970 to 1993. The County amended the Laird's Corner
19 East LAMIRD to exclude the Peninsula Timber Short Plat Parcel "B" and Crown
20 Pacific Survey Parcel "A" and rezone these portions from Rural Limited Commercial
21 (RLC) to RCC3. The Peninsula Timber Short Plat Parcel "A" was retained as part of
22 the LAMIRD.¹⁰
23
- 24 4. The Deer Park LAMIRD was amended to exclude the Port Angeles Gun Club
25 property and the Comprehensive Plan Land Use and Zoning Map for this location
26 was updated from Rural Commercial (RC) to Rural Low (R5).¹¹
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31 ⁸ LAMIRDS Compliance report at 10-11.

32 ⁹ Id. at 5.

¹⁰ Id. at 7.

¹¹ Id. at 6.

1 5. The County initially considered redaction of the entire Lake Farm LAMIRD but
2 received additional information from landowners and the Public Utility District (PUD)
3 regarding the installation of public infrastructure as of July 1, 1990. Based on this
4 new information, the County redrew the LAMIRD boundaries to reflect the extent to
5 which the PUD water mains were installed and existed to service individual lots as of
6 July 1, 1990.¹²
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9 Both Petitioners Dry Creek Coalition and Futurewise have filed responses to the County's
10 LAMIRD compliance report in which they state that they do not object to a finding of
11 compliance with respect to the LAMIRD issues.¹³ However, Futurewise raised objections to
12 the new Solmar and Marine Drive LAMIRDs as too broadly drawn.¹⁴
13

14 As to the Marine Drive LAMIRD, the County pointed out that those parcels included within
15 this LAMIRD to which Futurewise objected were redacted from the LAMIRD.¹⁵ The Board
16 finds no clear error in the Marine Drive LAMIRD.
17

18 With regard to the Solmar LAMIRD, Futurewise objected to "larger parcels along Highway
19 101 that were not developed in 1990 and are not developed now."¹⁶ These four "larger
20 parcels" range in size from 1.7 to 2.5 acres¹⁷ and, as they cannot be further divided given
21 the underlying zoning, are consistent with the proposed maximum density of 1du/2.4 acre
22 for this area. The County has chosen to use Highway 101 as the southern border of the
23 Logical Outer Boundary (LOB) for this LAMIRD. This is consistent with RCW
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28 ¹² Id. at 8-9.

29 ¹³ Futurewise's Responses to LAMIRDs Compliance Report at 5; DCC Objections Regarding LAMIRDs at 2.

30 ¹⁴ Futurewise's Objection in Part to a Finding of Compliance at 13.

31 ¹⁵ County Response at 16. See, Resolution No. 67, 2009, Finding 11 a. describing areas removed from the
LAMIRD LOB.

32 ¹⁶ Futurewise Objection at 13.

¹⁷ County Response at 16. The Board notes that the May 12, 2009 County Memorandum to the Planning
Commission describes the largest of the parcels as 3.8 acres. Exhibit 155 at 928.

1 36.70A.070(5)(d)(iv) which provides that physical boundaries such as highways can be
2 used to establish the LOB and the LOB may contain undeveloped lands if properly limited.¹⁸
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4 In addition, while Futurewise alleges that two properties to the east of Rubens Road were
5 not developed in 1990, this claim is contested by the County. The 1990 aerial photograph
6 clearly shows this property to have been cleared. While the mere clearing of land may not
7 be sufficient for its inclusion in a LAMIRD, this is a newly created LAMIRD and the burden is
8 on Futurewise to demonstrate that these properties were included in error. Futurewise has
9 not carried its burden in this regard.
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12 The Board does not find that the County was clearly erroneous in establishing the LOB for
13 the Solmar LAMIRD.
14

15 **Conclusion:** Based on the Board's review of the County's compliance efforts with regard
16 to LAMIRDs, the Board concludes that the County has achieved compliance with the GMA
17 as to those portions of the County's adoption found noncompliant in the January 2009
18 Compliance Order, Conclusions of Law E-G, L, Q, T and U. These revisions remove the
19 basis for a finding of noncompliance from these LAMIRDs and the code sections in
20 question. In addition the Board finds that Petitioner has not shown the County's actions in
21 establishing the Marine Drive or Solmar LAMIRDs to be clearly erroneous.
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23 2. Rural Lands 24

25 In the Board's April 23, 2008 FDO, the Board found that with such a large portion of the
26 County's existing land use pattern characterized by a parcel size of 4.81 acres, zoning that
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30 ¹⁸ See e.g. RCW 36.70A.070(5)(d)(i) Rural development consisting of *infill*; *Dry Creek Coalition, et al v.*
31 *Clallam County*, Case No. 07-2-0018c, FDO at 46-49 (Distinguishing between impermissible "outfill" as
32 opposed to vacant lands establishing a LOB tied to a natural or manmade feature, such as Highway 101);
Friends of Skagit County v. Skagit County, Case No. 07-2-0025c, FDO at 35 (May 12, 2008); *1000 Friends v.*
Thurston County, Case No. 05-2-0002, Compliance Order at 18 (Nov. 30, 2007); *Panesko v. Lewis County*,
Case No. 00-2-0031c, FDO (March 5, 2001).

1 authorized lower densities failed to maintain the County's traditional rural lifestyles. The
2 Board wrote that:

3
4 ... [T]he rural character of Clallam County, specifically its visual landscape and
5 farm-based economy, is dominated by lots of greater than five acres in size. With
6 such a large percentage of the County's existing land use pattern at a parcel size
7 of 4.81 acres and farms within the County averaging 25 acres, the existing rural
8 landscape supports a finding that the rural character of Clallam County is a rural
9 density of 1 du/5 acre.

10 The Board recognizes the GMA mandate for Clallam County to provide for a
11 variety of rural densities and permits it discretion in making planning decisions.
12 However, the densities the County selects must be *rural* in nature. The
13 importance of rural lands and their character is specific, looking to land use
14 patterns for establishing rural character and seeking to foster traditional rural
15 lifestyles and economies that a County has historically provided. By authorizing
16 densities that do not reflect the existing landscape or economy of the area, the
17 County has failed to maintain the traditional rural lifestyles of the residents of
18 Clallam County as required by the GMA.

19 ... the Board finds that the following rural zoning district within Clallam County
20 violates RCW 36.70A.110, 36.70A.020(1) and, 36.70A.020(2) because these
21 zoning districts permit urban, not rural, densities outside of an urban growth area:

22
23 CCC 33.10.030 R2 zone: Permits 1 du/2.4 acres
24 CCC 33.10.035 RW2 zone: Permits 1 du/2.4 acres ¹⁹

25 ...

26 Thus, the Board found that the R2 and RW2 zones effectively permitted urban, not rural,
27 densities outside of an urban growth area.²⁰

28 In order to achieve compliance, the County first enacted interim Rural Low (R5) zoning in
29 place of the invalid R2 and RW2 zones. Then, with the adoption of Resolution No. 67, 2009

30 ¹⁹ FDO at 63-64. This portion of the Board's FDO also found the County's R1 and RW1 zones non-compliant.
31 However, these areas were addressed by the Board in its January 2009 Compliance Order which noted that
32 Clallam County had provided clarification that R1/RW1 lands were confined to LAMIRD zones within the
various planning regions identified by Futurewise and the R1/RW1 lands removed or excluded from the
noncompliant LAMIRDS were rezoned under compliant rural zoning. Compliance Order, at 30-31.

²⁰ Id. at 63-64.

1 and Ordinance No. 852 on July 21, 2009, the County replaced the R5 zoning on lands
2 outside of LAMIRDs which were previously zoned R2 and RW2 with the following
3 designations:²¹

- 4 1) Neighborhood conservation zoning and techniques were applied in and
5 about developed lands;
- 6 2) Four new LAMIRDs were designated for some lands developed prior to July
7 1, 1990;
- 8 3) Federal, State and County park lands were re-designated as Public (P)
9 zones;
- 10 4) State forest lands were re-designated as Commercial Forest (CF) zones;
- 11 5) 220 acres near the Forks UGA were re-designated with Western Region
12 Rural Low (RW5) zoning; and
- 13 6) The Battelle site east of the Sequim UGA was re-designated with Rural Low
14 (R5) zoning.

15 Since the County's action essentially established a rural density of five acres, at issue in this
16 compliance proceeding is the County's newly adopted Rural Neighborhood Conservation
17 (NC) zoning, with a base density of one dwelling unit per five acres, along with the
18 associated Rural Neighborhood Conservation Overlay (NCO) and Rural Neighborhood
19 Conservation Cluster (NCC) residential development alternatives. These amendments are
20 contained under amended comprehensive plan sections and a newly created Clallam
21 County Code (CCC) section 33.10.015.²²

22 The newly adopted NCO provision addresses neighborhoods which are already
23 substantially developed and characterized by densities greater than the underlying
24 maximum NC zone density of 1 dwelling unit per 5 acres. As described in the County's
25 Rural Land Policy 4,²³ infill is allowed "at a density consistent with the substantial residential
26 development already existing" and that "will be consistent with the visual compatibility of
27 rural development with the surrounding rural area". In order to qualify for a NCO
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31 ²¹ Compliance Report at 2.

32 ²² Id. at 4.

²³ CCC 31.04.230(2)(d)

1 development, the surrounding neighborhood character must demonstrate that at least 70%
2 of parcels within 500 of the property boundary are developed with an average lot size of
3 less than 5 acres.²⁴ Developed lots located within LAMIRDS and urban growth areas are not
4 included in calculating the average lot density.²⁵
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6 The County has also adopted a provision to allow clustering in the NC zone under the
7 provisions of the Neighborhood Conservation Cluster (NCC). The stated intent of the NCC
8 provision is “to encourage creative site designs of subdivisions to encourage keeping larger,
9 contiguous rural lots and open space tracts, retain features of rural character associated
10 with the land to be divided, and reduce the area of rural lands used for roads, utilities,
11 driveways, and other pervious surfaces.”²⁶
12
13

14 As described by the County, while the NCO review looks at the surrounding neighborhood
15 to ensure that future divisions of a subject parcel will be consistent and compatible with an
16 existing, rural neighborhood, an NCC review examines the specified rural parcel to ensure
17 that any division of that parcel maximizes the retention of a larger lot acreage and the
18 preservation of open space.²⁷ Landowners who preserve open space by clustering receive
19 density bonuses and reduced infrastructure costs. CCC 33.10.015 (10) provides for a
20 maximum residential density of 1 dwelling unit per 2.4 acres and requires that a minimum of
21 70% of the gross acreage of the NCC development be retained as a large rural lot, set aside
22 under a permanent open-space easement, or set aside as permanent open space owned
23 and maintained by a homeowners’ association.
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26 While Futurewise acknowledges that “[W]hether a particular density is rural in nature is a
27 question of fact based on the specific circumstances of each case.”²⁸ it nevertheless
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30 ²⁴ CCC 33.10.015(9)(b).

31 ²⁵ Id.

32 ²⁶ CCC 33.18.015(10).

²⁷ Compliance Report at 7.

²⁸ *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 358 (2008).
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1 maintains that a density of 1 dwelling unit per 2.4 acres is “characterized by urban growth”²⁹
2 and inconsistent with the density otherwise allowed in the rural zones. However, if it is
3 agreed that the determination of rural density is based on the specific circumstances of
4 each case, it is not appropriate to dismiss a 1du/2.4 acre density out-of-hand, but instead to
5 apply the density, if at all, where it is consistent with existing rural development. In fact,
6 there are areas in Clallam County where a density of 1du/2.4 acre can be consistent with a
7 rural environment, when appropriately limited in a manner such as the County now provides.
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9
10 In fact, this is the approach the County has taken. In the case of the NCO, densities of
11 1du/2.4 acre may be applied only where this density is “consistent with the developed
12 neighborhood character and uses”³⁰. Under the NCC provisions, the stated intent is to
13 “encourage keeping larger, contiguous rural lots and open space tracts, retain features of
14 rural character associated with the land to be divided, and reduce the area of rural lands
15 used for roads, utilities, driveways, and other impervious surfaces.”³¹ In both cases,
16 consistency with the existing rural development is the goal. Both techniques, therefore,
17 address the flaw the Board previously found in the R2 and RW2 zones – that they
18 authorized densities that did not reflect the *existing landscape of the area*.
19

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21 Dry Creek Coalition (“DCC”) notes that it does not object to the rezoning of some of the R2
22 lands to R5 (Battelle) and RW5 (Western Central 2 Neighborhood)³² but it does object to the
23 creation of the NCO overlay and the NCC options in the NC zone.³³ DCC argues that these
24 allow urban growth outside urban areas and, therefore, discourage urban development in
25 urban areas. DCC acknowledges that RCW 36.70A.070(5)(b) encourages clustering,
26 density transfer, design guidelines, conservation easements and other innovative
27 techniques that will accommodate appropriate rural densities, but maintains that these
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31 ²⁹ Futurewise Objections at 8.

32 ³⁰ CCC 33.10.015 (9)

³¹ CCC 33.10.015(10)

³² DCC Objections at 3.

³³ Id.

1 techniques “cannot be used to increase density to a level that is inconsistent with the
2 maximum density of 1 du/5 acres”.³⁴

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4 To be clear, while this Board found that the rural character of Clallam County is a rural
5 density of 1 du/5 acre,³⁵ the Board has not held that no variation from that density is allowed
6 under any circumstances. In fact, the clear language of the GMA, which requires “a variety
7 of rural densities,”³⁶ would not permit such a holding. Instead, the Board found that the
8 visual landscape and farm-based economy of the County was dominated by lots of greater
9 than five acres in size and that, by authorizing densities “that do not reflect the existing
10 landscape or economy of the area, the County has failed to maintain the traditional rural
11 lifestyles of the residents of Clallam County.”³⁷ With either the NCC or the NCO technique,
12 the base density in the NC zone is maintained at not greater than 1du/5 acres.
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14
15 RCW 36.70A.070(5) provides that the rural element of a plan shall provide for a variety of
16 rural densities through techniques that “are consistent with rural character.” The County’s
17 NCO provision recognizes that, in Clallam County, there are areas where the pattern of rural
18 development has occurred at densities below the average of 4.8 acres and limits the
19 application of this overlay to areas so as to allow “infill at a density consistent with the
20 substantial residential development already existing”³⁸. In those areas where, as required
21 by the County, 70% of the parcels within a neighborhood boundary of 500 feet are already
22 developed at higher densities and contain mature infrastructure and services, it cannot be
23 said that densities of 1 dwelling unit/ 2.4 acres are inconsistent with rural character of that
24 area. In addition, because infill allowed by the NC overlay is limited to neighborhoods that
25 have already been substantially developed, this will not lead to the “inappropriate
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31 ³⁴ Id. at 4.

32 ³⁵ FDO at 63.

³⁶ RCW 36.70A.070(5)(b).

³⁷ FDO at 63.

³⁸ CCC 31.04.230(2)(d).

1 conversion of undeveloped lands into sprawling, low-density development”³⁹ as DCC
2 suggests. In addition, as the County noted, the NCO and NCC address the rural character
3 of existing NC neighborhoods and some NC parcels within a limited number of previously
4 unchallenged and formerly GMA compliant R2 and RW2 areas, which were built out
5 between the mid-1990's and the entry of the FDO.⁴⁰ NC parcels and parcels in other rural
6 areas characterized by larger lot sizes would not qualify for NCO, and must meet the
7 County's size limitations, site development criteria and open space requirements.
8

9
10 The County also points out that the former R2/RW2 zones comprise less than 25% of the
11 County's total rural acres. The proposed NC zone lands account for only 2% of the
12 County's total acreage.⁴¹ Thus, the risk of “inappropriate conversion of undeveloped lands
13 into sprawling, low-density development” is more imagined than real.
14

15 As to the hypothetical posed by DCC in which the NCO overlay would be applied to a
16 cluster of 18 half acre developed residential lots within 500 feet of an undeveloped ten acre
17 parcel, and 13 five acre developed residential lots, resulting in densities of 1du/2.4 acre,
18 even though only 9 of the surrounding acres have higher density development, the Board
19 need not rely on such hypotheticals but can instead defer to the County's assertion that
20 clusters of one-half acre lots in this amount are presently contained in LAMIRDS or UGAs,
21 which are specifically excluded from the calculations of the average lot size for determining
22 an NC overlay density. The County points out that there are no such clusters within 500
23 feet of any proposed NC zone.
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26 **Conclusion:** By eliminating the use of the R2 and RW2 zones the County has removed the
27 basis for finding that these zones substantially interfere with Goals 1 and 2 of the GMA. The
28 NCO and NCC provisions of the County Comprehensive Plan and development regulations
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31 ³⁹ See, RCW 35.70A.070.020(2).

32 ⁴⁰ County Response at 7.

⁴¹ Id. at 10 fn. 14.

1 contain adequate provisions to protect the existing rural landscape in those areas where
2 they will be permitted.

3
4 **ORDER**

5 Based on the foregoing, the Board finds that the County has achieved compliance with the
6 GMA as to those portions of the County's adoption found noncompliant in Conclusions of
7 Law E-G, L, Q, T and U of the FDO. These revisions remove the basis for a finding of
8 noncompliance from these LAMIRDS and invalidity from the code sections in question. In
9 addition the Board finds that Petitioner has not shown the County's actions in establishing
10 the Marine Drive or Solmar LAMIRDS to be clearly erroneous.

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13 The Board rescinds its finding of invalidity as to lands formerly zoned R2 and RW2 and finds
14 that the Petitioners have not demonstrated that the provisions of the Clallam County
15 Comprehensive Plan and development regulations authorizing the NCC and NCO zones
16 are clearly erroneous.

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18 SO ORDERED this 3rd day of November, 2009.

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21 _____
James McNamara, Board Member

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William Roehl, Board Member

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Nina Carter, Board Member

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

31 **Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date**
32 **of mailing of this Order to file a petition for reconsideration. The original and three**

1 copies of a motion for reconsideration, together with any argument in support
2 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
3 original and three copies of the motion for reconsideration directly to the Board, with
4 a copy to all other parties of record. Filing means actual receipt of the document at
5 the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing
6 of a motion for reconsideration is not a prerequisite for filing a petition for judicial
7 review.

7 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the
8 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
9 judicial review may be instituted by filing a petition in superior court according to the
10 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
11 Enforcement. The petition for judicial review of this Order shall be filed with the
12 appropriate court and served on the Board, the Office of the Attorney General, and all
13 parties within thirty days after service of the final order, as provided in RCW
14 34.05.542. Service on the Board may be accomplished in person or by mail, but
15 service on the Board means actual receipt of the document at the Board office within
16 thirty days after service of the final order. A petition for judicial review may not be
17 served on the Board by fax or by electronic mail.

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