No. 30725-5

89407-8

SUPREME COURT
OF THE STATE OF WASHINGTON

SPOKANE COUNTY, a political subdivision of the State of Washington,

Appellant,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, a statutory entity,

and

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

Respondents.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

WASHINGTON CASES

STATUTES

REGULATIONS

OTHER

Growth Management Hearing Board Cases

I. IDENTITY OF PETITIONER

Petitioner in this action is the County of Spokane, a political subdivision of the State of Washington, hereinafter referred to as "Spokane County" or "Petitioner". Spokane County was the Respondent in the action before the Growth Management Hearings Board and subsequently the Petitioner before the Superior Court in and for the County Spokane.

II. CITATION TO COURT OF APPEALS DECISION

The decision of the Court of Appeals for which review is sought is Court of Appeals, Division III, case number 30725-5-III, which decision was filed by the Court of Appeals on September 10, 2013. The decision of the Court of Appeals is the result of review by the Superior Court of the Final Decision and Order of the Eastern Washington Growth Management Hearings Board, dated September 5, 2008, Hearings Board case number 08-1-0002.

III. ISSUES PRESENTED FOR REVIEW

The issues presented for review by this Court are:

1. Whether a site specific rezone, adopted immediately after the adoption of a comprehensive plan map amendment that

allows the rezone, and is adopted in the same legislative action (resolution), is subject to review by the Superior Court under the Land Use Petition Act (RCW 36.70C) or by the Growth Management Hearings Board under the Growth Management Act (RCW 36.70A)?

2. Whether the broad discretion mandated by RCW 36.70A.3201 is granted to the local jurisdiction, when the Growth Management Hearings Board substitutes its own judgment for that of the local jurisdiction and liberally construes the local jurisdiction's comprehensive plan policies as strict requirements of the Growth Management Act?

3. Whether SEPA requires that local jurisdictions re-evaluate existing impacts from existing development relative to a specific parcel when considering a non-project action to amend the comprehensive plan map and then a site specific rezone of that parcel?

IV. STATEMENT OF THE CASE

This Petition for Review comes to this Court following a decision of the Court of Appeals, Division III, in review of a Final

Decision and Order issued by the Eastern Washington Growth Management Hearings Board. The Growth Management Hearings Board's decision came upon review of Spokane County Resolution number 2007-1096 adopted on or about December 21, 2007.

Consistent with the policies of the Spokane County Comprehensive Land Use Plan, the Spokane County Board of County Commissioners adopted Resolution 2007-1096, which included both a Comprehensive Plan Map amendment and a zone change regarding a single parcel of land 4.2 acres in size, to allow the market and restaurant lawfully permitted and existing on the property (hereinafter referred to as the "McGlades' Property") to expand into a bistro and wine bar. Appendix I[1]. The Comprehensive Plan Map amendment and zone change were voted on separately by the Commissioners and passed or denied on its own merits. Appendix I.

Notwithstanding the lack of any challenge to the Comprehensive Plan under which the map amendment and zone change for the property were adopted, and in clear violation of the mandate of the Growth Management Act (GMA) and case law from

[1] Spokane County Resolution No. 2007-1096.

this Court, the Growth Management Hearings Board (Hearings Board) found that Spokane County's action violated both the requirements of the GMA and the policies of the Spokane County Comprehensive Plan. Appendix II[2]. In its decision, the Hearings Board substituted its own judgment for that of Spokane County, enforced its own interpretation of the Spokane County Comprehensive Plan rather than deferring to the interpretation given by Spokane County, and enforced its own interpretation of the Spokane County Comprehensive Plan as if it were a strict requirement of the Growth Management Act. Appendix II.

The comprehensive plan map amendment and the subsequent zone change were initiated by the property owner and involved only the specific parcel of property. The comprehensive plan map amendment was initiated solely for the purpose of allowing the site specific rezone to occur. Appendix III[3], p. 074. Contrary to established case law stating that site specific rezone actions are subject to the exclusive jurisdiction of the Superior Court under the Land Use Petition Act (LUPA), the Hearings Board reviewed and entered its

[2] Final Decision and Order, EWGMHB Case No. 08-1-0002.
[3] Spokane County Report to the Hearing Examiner, File #: 07-CPA-05.

decision regarding both the comprehensive plan map amendment and the site specific rezone. Appendix II.

By affirming the decision of the Growth Management Hearings Board, the Court of Appeals' decision is in conflict with decisions of the Supreme Court. The issues stated above in this Petition for Review are of substantial public interest that should be determined by the Supreme Court. The jurisdiction or lack thereof in the Growth Management Hearings Board over site specific rezone actions taken concurrently with comprehensive plan map amendments is a topic of dispute in recent appellate court cases, thus guidance from this Court is necessary on those issues. The deference required to be afforded to local jurisdictions when interpreting and implementing their local comprehensive plans is frequently the subject of dispute before the Hearings Board and in the courts. *Spokane County v. Eastern Washington Growth Management Hearings Board*, 173 Wn. App. 310, 293 P.3d 1248 (2013); *Yakima County v. Eastern Washington Growth Management Hearings Board*, 168 Wn. App. 680, 279 P.3d 434 (2012); *Phoenix Development v. City of Woodenville*, 171 Wn.2d 820, 256 P.3d 1150 (2011); *Clark County Washington v. Western*

Washington Growth Management Hearings Review Board, 161 Wn. App. 204, 254 P.3d 862 (2011). Finally, the Growth Management Hearings Board erred in its determination of the scope of the required review under SEPA of impacts that exist and are related to development that already exists relative to a non-project action.

Spokane County respectfully requests that this Petition for Review be granted and clarification regarding the above issues be given by the Supreme Court.

V. ARGUMENT

A. WHETHER A SITE SPECIFIC REZONE ADOPTED IMMEDIATELY FOLLOWING AND IN THE SAME LEGISLATIVE ACT AS A COMPREHENSIVE PLAN MAP AMENDMENT IS A SEPARATE ACTION REVIEWABLE SOLELY BY THE SUPERIOR COURT UNDER LUPA IS AN ISSUE OF STATEWIDE INTEREST AND SIGNIFICANCE.

It is well established law that jurisdiction over the review of a site specific rezone lies solely with the Superior Court pursuant to LUPA, RCW 36.70C.030. *Feil v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 367, 377-380, 259 P.3d 227 (2011); *Spokane County v. Eastern Washington Growth Management Hearings Board*, *supra* at 281–282; *Coffey v. City of*

Walla Walla, *supra*, at 440; *Woods v. Kittitas County*, 162 Wn.2d 597, 612–616, 174 P.3d 25 (2007); *Wenatchee Sportsman Association v. Chelan County*, *supra* at 178–179. The timing between the Comprehensive Plan Map amendment and a site specific rezone does not control the sole jurisdiction for review by the Superior Court of the adopted rezone. *Wenatchee Sportsman Association v. Chelan County*, *supra* at 178; See also, *Woods v. Kittitas County*, *supra* at 616.

The Court of Appeals below erroneously added words to the definition of "project permit" found in RCW 36.70B.020(4) by requiring that a rezone action rely upon a "*then existing*" comprehensive plan, meaning a comprehensive plan that was adopted by a separate action from that of the adoption of the rezone decision. Appendix IV[4], p. 090. To do so was to violate the rule that all language in a statute be given meaning if possible, and that words should not be added to the language of a statute even if the court believes that the legislature intended a different meaning than

[4] Court of Appeals, Division III, Decision, Case No. 30725-5-III, Filed Sept 10, 2013.

stated in the statute. *Cerrillo v. Esparsa*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

Even though the Court of Appeals attempts to reconcile its decision in this case with its decision in the case of *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 187 P.3d 272 (2008), this only highlights the need for this Court's opinion on the subject of the tension that has been created by the legislature between site specific rezone actions done concurrent with a comprehensive plan map amendment that enables the rezone and the comprehensive plan map amendment its self. *Coffey v. City of Walla Walla*, supra; *Phoenix Development v. City of Woodenville*, 171 Wn.2d 256 P.3d 820, 256 P.3d 1150 (2011); *Feil v. Eastern Washington Growth Management Hearings Board, supra*. The legislature has enacted two statutes that are clear on their application to most of the actions that can be and are taken under the GMA and or land use and zoning statutes and ordinances. The decision in *Coffey v. City of Walla Walla* recognizes that "concurrent" adoption of comprehensive plan map amendments and site specific rezone actions are routinely done in many counties across the State of Washington, thus this most recent

decision of the Court of Appeals brings this issue to the forefront and highlights the need to resolve the issue, either by statutory interpretation or by notice to the legislature of the confusion that has arisen. Additionally, the Court of Appeals decision in this case is in conflict with both decisions of the Supreme Court and of the *Coffey v. City of Walla Walla* decision notwithstanding it being dicta. *Phoenix Development v. City of Woodenville*, supra; *Feil v. Eastern Washington Growth Management Hearings Board*, supra.

Spokane County respectfully requests that this Court accept review of this issue and provide the clarity that as yet is missing.

B. THE FAILURE TO GRANT BROAD DISCRETION TO LOCAL JURISDICTIONS WHEN PLANNING FOR UNIQUE LOCAL CIRCUMSTANCES IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST REQUIRING CLARIFICATION BY THIS COURT.

The Growth Management Act requires meaningful public participation in the planning process mandated under the act. *Spokane County v. Eastern Washington Growth Management Hearings Board*, 160 Wn. App. 274, 250 P.3d 1050 (2011); RCW 36.70A.130 (2) (a). The act was never meant to allow the voice of a few who disagree with the local jurisdiction's actions to derail a

carefully and well planned action based upon overwhelming support for the action by the public for whom planning is being done. RCW 36.70A.140; RCW 36.70A.3201.

The Growth Management Hearings Board is required as a matter of law to grant deference to local governments in planning under the GMA. RCW 36.70A.3201states:

> In recognition of the *broad range of discretion that may be exercised by counties and cities* consistent with the requirements of this chapter, *the legislature intends for the boards to grant deference to counties and cities in how they plan for growth*, consistent with the requirements and goals of this chapter.

(Emphasis added).

That statute goes on to state:

> The legislature finds that while this chapter requires local planning to take place within a framework of stated goals and requirements, *the ultimate burden and responsibility for* planning, harmonizing the planning goals of this chapter, and *implementing a county's or city's future rests with that community.*

The Growth Management Hearings Board may not substitute its own judgment for that of the local jurisdiction and must defer to the local jurisdiction when reviewing the local jurisdiction's planning decisions regarding the unique circumstances of the

locality. RCW 36.70A.3201; *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Board*, 165 Wn. App. 677, 689, 269 p.3d 300 (2011) (citing, *Woods v. Kittitas County*, 162 Wn.2d 597, 603, 174 P.3d 25 (2007)); *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224,240 n.8, 110. Additionally the GMA is to be strictly construed. *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Board, supra.*

The Growth Management Hearings Board is clearly instructed not to micro-manage local governments in how they implement their comprehensive plans that have been developed in compliance with the GMA. RCW 36.70A.3201; *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.,* 154 Wn.2d 224, 236–237, 110 P.3d 1132 (2005).

Notwithstanding this well established law, the Growth Management Hearings Board has in this case, and in other cases continues to, enforce its own interpretation of local comprehensive plans and to substitute its judgment for that of the local jurisdictions. This continued practice by the Growth Management Hearings Board

is of consequence to all jurisdictions within the State of Washington and runs contrary to well settled law. *Kathy Miotke, Julia McHugh, Neighborhood Alliance of Spokane, Palisades Neighborhood v. Spokane County*, EWGMHB Case No. 07-1-0005 (http://www.gmhb.wa.gov/LoadDocument.aspx?did=1059); *CAUSE v. Spokane County, EWGMHB*, Case No. 10-1-0003 (http://www.gmhb.wa.gov/LoadDocument.aspx?did=3368); *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, EWGMHB Case No. 12-1-0002 (http://www.gmhb.wa.gov/CaseDetail.aspx?cid=1531).

The GMA shall not be liberally construed. *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Board*, 165 Wn. App. 677, 689, 269 p.3d 300 (2011) (citing, *Woods v. Kittitas County*, 162 Wn.2d 597, 603, 174 P.3d 25 (2007)). The Growth Board's authority is strictly limited to enforcing the clear and specific requirements of the GMA. T*hurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 341-342, 190 P.3d 38 (2008); *Woods v. Kittitas County*, 162 Wn.2d 597, 612 n. 8, 174 P.3d 25 (2007); *Quadrant Corp. v. State Growth*

Mgmt. Hearings Bd., 154 Wn.2d 224,240 n.8, 110 P.3d 1132 (2005). The Growth Management Hearings Board is clearly prohibited by statute and case law from liberally construing the GMA by extrapolating the general goals and policies of the Spokane County Comprehensive Plan into specific and rigid rules under the GMA. *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Board, supra.*

The decision of the Court of Appeals to uphold the Growth Management Hearings Board's Final Decision and Order in this case is in conflict with Supreme Court and Court of Appeals cases and is of substantial public interest. Spokane County respectfully requests that this Court accept review of this matter and provide the much needed guidance on this issue.

D. REQUIRING EXISTING IMPACTS OF EXISTING DEVELOPMENT RELATIVE TO A REZONE WHEN NO FUTURE DEVELOPMENT IS EXPECTED OR LIKELY IS DIRECT CONTRADICTION TO WELL ESTABLISHED LAW.

The opponents to Spokane County's action to amend the Comprehensive Plan Map and to rezone the property rely upon the impacts that currently exist as a result of the use of the property prior

to the amendment and rezone to allege that the SEPA analysis was inadequate. Appendix V[5], Petitioners' Hearing on the Merits Brief, p. 109 – 126; Appendix II, p. 056 – 061. Finding that the property could not be further developed under the development regulations that govern the use of the property, and that future development of the property is unlikely, the Growth Management Hearings Board found that Spokane County had erred by failing to reconsider the existing impacts from the current use of the property in the SEPA evaluation process. Appendix II, p. 056 – 061. This is clear error in light of well-established law.

A DNS is proper when the responsible agency determines that no significant adverse environmental impacts are probable. RCW 43.21C.031; *Davidson Serles & Associates v. City of Kirkland*, 159 Wn. App. 616, 635, 246 P.3d 822 (2011) (citing *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). In determining its significance, the severity of an impact should be weighed along with the likelihood of its occurrence. WAC 197-11-794.

[5] Petitioners' Hearing on the Merits Brief, EWGMHB Case No. 08-1-0002.

In this case the alleged impacts were the same as those that already existed resulting from the current and permitted use of the property. Appendix II, p. 056 – 061. Additionally the Growth Management Hearings Board found that future development of the property was unlikely. Appendix II, p. 056 – 061. Notwithstanding the lack of allegations of new impacts as a result of Spokane County's action and the unlikelihood of future development that would introduce new impacts the Growth Management Hearings Board found the SEPA analysis (DNS) to be inadequate. Appendix II, p. 056 – 061.

The rule of this Court found in *Norway Hill Protection and Preservation Association v. King County Council*, 87 Wn.2d 267, 277, 552 P.2d 674 (1976) stating: Under SEPA, evaluation of a proposal's environmental impact requires examination of at least two relevant factors: "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions

or uses in the affected area", is still good law relied upon in recent appellate decisions. (Emphasis added.) *Chuckanut Conservancy v. Washington State Department of Natural Resources*, 156 Wn. App. 274, 285, 232 P.3d 1154 (2010); *Davidson Serles & Associates v. City of Kirkland*, 159 Wn. App. 616, 635, 246 P.3d 822 (2011).

In the case at bar, the Growth Management Hearings Board ignored the requirement that it consider whether the action taken by Spokane County would create impacts in excess of impacts from existing uses in the area or whether the action would contribute to the impacts of existing uses in the area, and the Court of Appeals condoned that approach. To prevent continued misapplication and misinterpretation of the law, this Court should remind the Board and the courts of this Court's rule and the correct statement of the law.

Spokane County respectfully requests that this Court affirm its rule again in this matter, as a matter of substantial interest and to avoid the conflict between decisions of the Court of Appeals and this Court.

VI. CONCLUSION

The decision below in the Court of Appeals, in upholding the Final Decision and Order of the Growth Management Hearings Board, is error by being in conflict with Supreme Court decisions and other Court of Appeals Decisions. The issues presented in this Petition for Review involve issues of substantial public interest that should be determined by this Court.

RCW 36.70A.280, RCW 36.70B.020, and decisions of this Court (*Woods* etc.) clearly state that the action of rezone of a specific parcel, as distinguished from an area wide rezone, is a land use action that is reviewable solely under the Land Use Petition Act by the Superior Courts. That clear rule is ignored in the decisions below.

In the case of *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, supra, this Court emphatically stated that local jurisdictions are to granted deference in how they plan for local circumstances within the broad framework of the GMA. That deference is blatantly missing in the decisions below in this matter, calling for clarification and affirmation of its prior rule by this Court.

SEPA is to be used to ensure that probable impacts of land use decisions be considered when making those land use decisions. It is not to be used as a tool to obstruct and delay planning and or development if it is not shown that the proposed action would have any excess impact or contribute to the impacts already existing from existing uses in the area. The affirmation of that rule is necessary to avoid the failure of the Growth Management Hearings Board and the courts to adhere to that rule.

Spokane County respectfully requests review of the issues raised in this Petition to this Court.

Respectfully submitted this 4th day of October, 2013.

STEVEN J. TUCKER
Spokane County Prosecutor

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Deputy Prosecuting Attorney
Attorneys for Spokane County

PROOF OF SERVICE

I hereby declare under the penalty of perjury and the laws of the State of Washington that the following statements are true.

On the 9th day of October, 2013, I caused to be served a true and correct copy of the **Petition for Review** by the method indicated below, and addressed to the following:

Richard K. Eichstaedt Center for Justice 35 West Main, Suite 300 Spokane, WA 99201	____ Personal Service __X__ U.S. Mail ____ Hand-Delivered ____ Overnight Mail ____ Facsimile
Eastern Washington Growth Management Hearings Board P.O. Box 40953 Olympia, WA 98504-0953	____ Personal Service __X__ U.S. Mail ____ Hand-Delivered ____ Overnight Mail ____ Facsimile
Jerald R. Anderson Assistant Attorney General P.O. Box 40110 Olympia, WA 98504	____ Personal Service __X__ U.S. Mail ____ Hand-Delivered ____ Overnight Mail ____ Facsimile
F. J. Dullanty 1100 US Bank Bldg 422 West Riverside Ave Spokane, WA 99201	____ Personal Service __X__ U.S. Mail ____ Hand-Delivered ____ Overnight Mail ____ Facsimile

Nathan Smith	____ Personal Service
1100 US Bank Bldg	__X__ U.S. Mail
422 West Riverside Ave	____ Hand-Delivered
Spokane, WA 99201	____ Overnight Mail
	____ Facsimile

DATED this 9th day of October, 2013 in Spokane, Washington.

Tamara Baldwin

APPENDIX

APPENDIX I

7 1096

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF SPOKANE COUNTY, WASHINGTON

IN THE MATTER OF ADOPTING ANNUAL AMENDMENTS TO THE SPOKANE COUNTY COMPREHENSIVE PLAN FOR 2007	)))	Findings of Fact and Decision

WHEREAS, pursuant to the provisions of Chapter 36.70 RCW, the Board of County Commissioners of Spokane County, Washington, hereinafter referred to as the "Board," has created a Planning Commission, hereinafter referred to as the "Commission" and a Department of Building and Planning, hereinafter referred to as the "Department"; and

WHEREAS, pursuant to the provisions of Chapter 36.70A RCW, the Board is required to adopt a Comprehensive Plan for the unincorporated areas of Spokane County and may amend the same; and

WHEREAS, pursuant to the provisions of Chapter 36.70A RCW, the Board adopted a Comprehensive Plan for Spokane County on November 5, 2001 (Board Resolution 1-1059 and 1-1060); and

WHEREAS, pursuant to the provisions of Chapter 36.70A. RCW, the Board is required to adopt a Zoning Code for the unincorporated areas of Spokane County and may amend the same; and

WHEREAS, pursuant to the provisions of Chapter 36.70A. RCW, the Board has adopted the Zoning Code for Spokane County; and

WHEREAS, pursuant to the provisions of Chapter 36.70A RCW, amendments to the Spokane County Zoning Code must be consistent with the goals and policies of the Spokane County Comprehensive Plan; and

WHEREAS, the Commission is authorized by Chapter 36.70A RCW to

recommend a Comprehensive Plan, and changes and amendments thereto, to the Board for its review and consideration for adoption; and

WHEREAS, the Comprehensive Plan provides that amendments may be initiated by the Planning Commission, the Board of Commissioners, or by the Planning Director, based on citizen requests, changed conditions or emergency circumstances which warrant adjustments to the Comprehensive Plan; and

WHEREAS, the Board adopted Resolution No. 7 -0616 on July 17, 2007 which adopted screening criteria for evaluating comprehensive plan rural and urban map amendments for the 2007 annual amendment process; and

WHEREAS, after reviewing over 300 public comments with the criteria adopted and contained in Resolution No. 7- 0616 the Planning Director initiated 13 rural and 8 urban comprehensive land use map amendments, and after further review of the criteria, these 21 potential amendments were reduced to 14 amendments; and

WHEREAS, one Comprehensive Plan amendment application and fee was paid prior to the deadline of March 31, 2007 for acceptance of annual Comprehensive Plan amendments and was initiated for review by the Planning Director; County file 07-CPA-1, and

WHEREAS, one Comprehensive Plan amendment initiated by the Planning Director was later withdrawn by the property owner; County file 07-CPA-6, and

WHEREAS, County Files; 07-CPA-1, 07-CPA-2, 07-CPA-3, 07-CPA-04, 07-CPA-5, 07-CPA-7, 07-CPA-8, 07-CPA-9, 07-CPA-10, 07-CPA-11, 07-CPA-12, 07-CPA-13, 07-CPA-14, 07-CPA-15, and 07-CPA-16, all Comprehensive Plan Map amendments and concurrent zone reclassifications were processed as the 2007 annual Comprehensive Plan Amendments for Spokane County; and

WHEREAS, pursuant to RCW 36.70A.100, on September 20, 2007 the Department sent the Comprehensive Plan amendments and concurrent zone reclassifications and related State Environmental Policy Act (SEPA) checklists to Spokane County jurisdictions and agencies for coordination, review, and comment; and

WHEREAS, pursuant to RCW 36.70A.106, on September 21, 2007 the Department sent a Notice of Intent to Adopt, to the Washington State Office of Community, Trade and Economic Development and agencies as listed and required by their Agencies Reviewing Comp Plans list (dated December 19, 2006) ; and

WHEREAS, pursuant to WAC 197-11-340 and Section 11.10.230 (3) of the Spokane County Environmental Ordinance, on September 20, 2007 the Department issued three Determinations of Nonsignificance (DNSs) on the proposed 2007 annual Comprehensive Plan amendments and concurrent zone reclassifications. One for 07-CPA-1, one for the Rural amendments and one for the Urban amendments; and

WHEREAS, pursuant to WAC 197-11-340 (2) the Department provided at least a 14-day comment period for DNSs issued on the proposed Comprehensive Plan amendments and concurrent zone reclassifications until October 5, 2007 at 4 p.m.; and

WHEREAS, the DNSs issued for 07-CPA-5, 07-CPA-9 and 07-CPA-16 and the
2007 Rural amendments, which were jointly evaluated on one Environmental Checklist, were appealed by area residents and property owners prior to the SEPA appeal deadline and a public hearing to consider the Department of Building and Planning's issuance of a DNS for the Rural amendments and specifically the above mentioned amendment files was held before the Spokane County Hearing Examiner on November 21, 2007; and

WHEREAS, pursuant to Findings of Fact, Conclusions, and Decision dated December 10, 2007 and December 14, 2007 respectively, the Hearing Examiner denied the appeal of the Determination of Nonsignificance (DNS) issued for 07-CPA-5 , 07-CPA-9, 07-CPA-16 upholding the Determination of Nonsignificance (DNS) issued by the Department; and

WHEREAS, pursuant to RCW 36.70A.130 (1), (2) and (3), the 2007 Comprehensive Plan amendment and concurrent zone reclassification process provides for continuous review and evaluation, public participation; and

WHEREAS, pursuant to RCW 36.70A.035 (1)(a) – (e) and RCW 36.70A.140, the 2007 Comprehensive Plan amendment and concurrent zone reclassification process is consistent with the public participation notice and Public Participation Program Guidelines adopted by the Board (Board Resolutions 98-0114 and 0788). Notice provisions are consistent with the Zoning Code - Section 14.402.080 and Section 14.402.160 where Comprehensive Plan amendments result in concurrent zone changes.

WHEREAS, the staff reports presented to the Planning Commission and available to the public, provided information on how public participation was accomplished. Legal notice of the proposed Comprehensive Plan and public hearing date was published in the Spokesman-Review newspaper on September 26, 2007 and a commercial display ad was published in the Spokesman-Review newspaper on the same day. The Spokane County internet site provided a map and summary of proposed Comprehensive Plan amendments and gave notice of opportunity for public comment.

WHEREAS, the Department required that Comprehensive Plan amendment sponsors provide site-specific signage, hearing notices and maps of the amendment proposal to owners and taxpayers and neighborhood associations in compliance with specific notice requirements found in the public notice

packets provided to applicants. Evidence of the required notice by the amendment sponsors was received by the Department. Additionally, the Commission held an informational workshop for the public on the 2007 Comprehensive Plan amendments and concurrent zone reclassifications on August 23, 2007; and

WHEREAS, after providing at least fifteen (15) days for the public participation notice provisions, the Commission held a public hearing on October 11, 2007 to consider public testimony concerning the proposed Comprehensive Plan amendments and concurrent zone reclassifications; and

WHEREAS, the Commission at the public hearings extended the written comment period on the proposed Comprehensive Plan amendments and concurrent zone reclassifications until October 18, 2007 at 4 p.m.

WHEREAS, the Commission considered all testimony from the public hearing and written comments received within the comment period at deliberation sessions on the proposed Comprehensive Plan amendments and concurrent zone reclassifications on October 25, 2007 and November 8, 2007; and

WHEREAS, the Commission after considering each amendment request, and the cumulative impacts of all amendments, concluded deliberations and agreed upon a recommendation regarding all of the 2007 annual Comprehensive Plan amendments and concurrent zone reclassifications on November 8, 2007; and

WHEREAS, the Board received the Commission's recommendation for the 2007 Annual Comprehensive Plan amendments and concurrent zone reclassifications at its regular public meeting on December 4, 2007 and set December 11, 2007 to consider the same; and

WHERAS, the Board discussed and considered the Planning Commission's recommendation for the 2007 Annual Comprehensive Plan amendments and concurrent zone reclassifications at its regular public meeting on December 11, 2007 and continued its consideration to December 18, 2007; and

WHEREAS, after considering the Commission's recommendation and all public testimony of record, as well as recognizing compliance with the Growth Management Act and the State Environmental Policy Act, the Board determined that the best interest of the public as well as its health, safety, and welfare, was met by the adoption the Commission's recommendation on Comprehensive Plan amendments and concurrent zone reclassifications 07-CPA-1, 07-CPA-2, 07-CPA-3, 07-CPA-4, 07-CPA-5, 07-CPA-7, 07-CPA-8, 07-CPA-9, 07-CPA-10, 07-CPA-11, 07-CPA-12, 07-CPA-14, 07-CPA-15 and 07-CPA-16 (except for 07-CPA-13) at its December 18, 2007 public meeting; and

WHEREAS, after considering the Commission's recommendation and all public testimony of record, as well as recognizing compliance with the Growth Management Act and the State Environmental Policy Act, the Board determined that the best interest of the public as well as its health, safety, and welfare, will not be met by adoption of the Commission's recommendation on Comprehensive Plan amendment and concurrent zone reclassification 07-CPA-13; and

NOW, THEREFORE, BE IT RESOLVED by the Board that in acting upon the Commission's recommendation on Comprehensive Plan amendments and concurrent zone reclassifications No: 07-CPA-1, 07-CPA-2, 07-CPA-3, 07-CPA-4, 07-CPA-5, 07-CPA-7, 07-CPA-8, 07-CPA-9, 07-CPA-10, 07-CPA-11, 07-CPA-12, 07-CPA-14, 07-CPA-15, and 07-CPA-16 on 2007 annual Comprehensive Plan amendments for land use map designations to the Spokane County Comprehensive Plan, as set forth in Attachments 'A', 'B', 'C', 'D', the Board does hereby enter the following Findings of Fact:

#1
Pursuant to the provisions of Chapter 36.70 RCW, the Commission has the legal authority to recommend changes to the Spokane County Comprehensive Plan.

#2
In making its recommendation regarding the Comprehensive Plan amendments and concurrent zone reclassifications referenced herein, the Commission considered the goals and the substantive and procedural requirements of all statutes, codes, regulations, policies and comprehensive plans applicable to this action, including but not limited to: the Growth Management Act (RCW 36.70A), the State Environmental Policy Act (RCW 43.21C, SEPA), WAC 365-195, WAC 197-11, the Spokane County Comprehensive Plan, the County Capital Facilities Plan, the Countywide Planning Policies, and the Spokane County Code (including the Zoning Code).

#3
The Department has complied with the State Environmental Policy Act (SEPA).

#4
The Commission recognized that Spokane County followed WAC 197-11-340, Environmental Checklist, for environmental review in updating the Comprehensive Plan and development regulations. The Planning Commission recognized that additional environmental review may be necessary to implement the Comprehensive Plan at the project level. The Planning Commission strongly urged the lead agency to again consider all environmental analyses, impacts, mitigating measures, and determinations under Chapter 197-11 WAC and the Spokane Environmental Ordinance under Chapter 11.10 of the Spokane County Code in subsequent project level actions.

#5
Spokane County provided for timely and continuous public participation during the application and public hearing process for the proposed Comprehensive Plan amendments, consistent with RCW 36.70A.035 (1)(a) – (e), RCW 36.70A.140, WAC 365-195-600, and the adopted Public Participation Program Guidelines (Board Resolutions 98-0144 and 98-0788).

#6
A legal notice of proposed Comprehensive Plan amendments, concurrent zone reclassifications, and public hearing dates was published in the Spokesman-Review newspaper on September 26, 2007. A display ad for notice of public hearing was published in the Spokesman-Review newspaper on September 26, 2007. The Spokane County internet site provided a map and summary of proposed Comprehensive Plan amendments, concurrent zone reclassifications, and opportunity for public comment. The Department required sponsors of Comprehensive Plan amendments to provide site-specific signage, hearing notices and maps of the amendment proposal to owners and taxpayers and designated neighborhood associations in the general vicinity. The Commission held a workshop for the public on the 2007 annual Comprehensive Plan amendments on August 23, 2007.

#7
All public testimony, public hearing exhibits, written comments, and staff reports were considered by the Commission, and the Commission found that these supported the Commission's recommendation on the 2007 annual Comprehensive Plan amendments.

#8
The Board received the Commission's for the 2007 Annual Comprehensive Plan amendments and concurrent zone reclassifications at

its regular public meeting on December 4, 2007 and set December 11, 2007 to consider the same.

#9
The Board considered the Planning Commission's recommendation for the 2007 Annual Comprehensive Plan amendments and concurrent zone reclassifications at its regular public meeting on December 11, 2007 and continued its consideration to December 18, 2007.

#10
The Board adopted, by a unanimous vote, the Commission's recommendation regarding Comprehensive Plan amendments and concurrent zone reclassifications 07-CPA-1, 07-CPA-2, 07-CPA-3, 07-CPA-4, 07-CPA-7, 07-CPA-8, 07-CPA-9, 07-CPA-10, 07-CPA-11, 07-CPA-12, 07-CPA-14, 07-CPA-15 , and 07-CPA-16 at its December 18, 2007 public meeting.

#11
The Board adopted, by a majority vote (Mielke and Richard: Aye & Mager: Nay), the Commission's recommendation regarding Comprehensive Plan amendment and concurrent zone reclassification 07-CPA-5 at its December 18, 2007 public meeting.

#12
The Board rejected the Commission's recommendation regarding Comprehensive Plan amendment and concurrent zone reclassification 07-CPA-13 at its December 18, 2007 public meeting.

#13
The Board considered the planning goals of the Growth Management Act (RCW 36.70A.020) in making its recommendation, and the recommendation supports the goals of the Growth Management Act.

#14
The Board considered WAC Chapter 365-195, which provides administrative rules and guidelines for jurisdictions to develop Comprehensive Plans and Capital Facilities Plans consistent with the Growth Management Act.

#15
The Board considered the Countywide Planning Policies for Spokane County (CWPP's) in its decision, and the decision is consistent with the CWPP's (Board Resolutions 94-1719, 96-1205, 97-0297, and 04-1075).

#16
The Board considered the Goals and Policies of the Spokane County Comprehensive Plan and Capital Facilities Plan, adopted by the Board on November 5, 2001.

#17
The Board considered the Spokane County Zoning Code.

#18
The above identified comprehensive plan amendments that were recommended for approval by the Commission (with the exception of amendment file 07-CPA-13) are consistent with the goals and the substantive and procedural requirements of all statutes, codes, regulations, policies and comprehensive plans applicable to this action, including but not limited to: the Growth Management Act (RCW 36.70A), the State Environmental Policy Act (RCW 43.21C, SEPA), WAC 365-195, WAC 197-11, the Spokane County Comprehensive Plan, the County Capital Facilities Plan, the Countywide Planning Policies, and the Spokane County Code (including the Zoning Code).

NOW, BE IT HERBY RESOLVED by the Board that the proposed amendments to the Spokane County Comprehensive Plan and concurrent zone reclassifications are adopted or denied as set forth in Attachments, 'A', 'B', 'C', and 'D' hereto.

BE IT FURTHER RESOLVED that the files in the Spokane County Public Works Department of Building and Planning, Spokane County Planning Commission, and the Board of County Commissioners along with the record of all public hearings related to this matter are incorporated herein by this reference and all recitals herein are adopted as findings of fact.

BE IT FURTHER RESOLVED, that the Clerk of the Board is directed to publish a notice of adoption pursuant to RCW 36.70A.290 (b).

BE IT FURTHER RESOLVED, that the Clerk of the Board is hereby directed to send a copy of this decision to the Washington State Department of Community, Trade, and Economic Development (CTED) pursuant to RCW 36.70A.106 within 10 days of adoption.

ADOPTED by the Board of County Commissioners of Spokane County, Washington this 21st day of December 2007.

ABSENT

MARK RICHARD, Chair

BONNIE MAGER, Vice Chair

TODD MIELKE, Commissioner

ATTEST:

Daniela Erickson, Clerk of the Board

ATTACHMENT "A"
2007 Annual Comprehensive Plan Amendments **7 1096**

File #	*Owner/Agent*	*From*	*To*
07-CPA-01	Spokane Rock Products	RCV	M
07-CPA-02	Greg Blessing (Applicant) Rick Lungo (Owner)	STA	LDAC
07-CPA-03	Mike Schmitz	RCV	RT
07-CPA-04	Stanley Stanek & Gregory Blessing	RCV	RT
07-CPA-05	McGlades LLC	UR	LDAC
07-CPA-06	Withdrawn	LTA	RCV
07-CPA-07	Silver City Timber, LLC	RCV	RT
07-CPA-08	Ronald Lemery	RCV	RT
07-CPA-09	Wayne Christensen, LLC	STA & RT	R-5
07-CPA-10	Dwight Hume (Applicant) Gary Hramm (Owner)	LDR	HDR
07-CPA-11	Greg Blessing (Owner)	LDR	LI
07-CPA-12	Dwight Hume (Applicant) Edward A. Payne (Owner)	CC	RC
07-CPA-13	Bill Lawson	LDR	MDR
07-CPA-14	Glen Cloninger (Applicant) Riverside Development	LDR	MU & MDR
07-CPA-15	Melvin & Carolyn Lindauer	LDR/HDR	HDR
07-CPA-16	Reggie Hansen & Allan Manzak	STA	R-5

ATTACHMENT "B"
2007 COMPREHENSIVE PLAN
ANNUAL AMENDMENT

7 1096

File No.	*Owner/Agent*	*General Location*	*Existing Comprehensive Plan and Zoning Designation*	*Proposed Comprehensive Plan and Zoning Designation*	*Planning Commission Recommendation and Vote*	*Board of County Commissioners Decision & Vote*
07-CPA-01	Spokane Rock Products	North Spokane County	Rural Conservation	Mineral Land	Approval: 7-0	Approve:: 3-0
07-CPA-02	Greg Blessing	North Spokane/Half Moon Road	Small Tract Agriculture	Limited Development Area (Commercial)	Approval: 7-0	Approve:: 3-0
07-CPA-03	Mike Schmitz	West Spokane	Rural Conservation	Rural Traditional	Denial: 6-0	Denial: 3-0
07-CPA-04	Stanley Stanek & Gregory Blessing	NW Spokane County	Rural Conservation	Rural Traditional	Denial: 6-1	Denial: 3-0
07-CPA-05	McGlades L.L.C.	North Limited Development Area	Urban Reserve	Limited Development Area (Commercial)	Approval:6-0	Approve: 2-1 Mager Opposed
07-CPA-06			WITHDRAWN			
07-CPA-07	Silver City Timber, LLC	Northeast Spokane County	Rural Conservation	Rural Traditional	Denial: 5-2	Denial: 3-0
07-CPA-08	Ronald Lemery	North Spokane County	Rural Conservation	Rural Traditional	Denial: 4-3	Denial: 3-0
07-CPA-09	Wayne Christensen, LLC	Mead Area Peone Prairie	Small Tract Agricultural & Rural Traditional	Rural 5	Denial: 6-0	Denial: 3-0
07-CPA-10	Gary Cousin L.L.C.	N. Spokane/Gleneden Area	Low Density Residential	High Density Residential	Approval: 6-0	Approve: 3-0
07-CPA-11	Greg Blessing	West Plains UGA	Low Density Residential	Light Industrial	Approval: 6-0	Approve: 3-0
07-CPA-12	Edward Payne & Dwight Hume	West Plains UGA	Community Commercial	Regional Commercial	Approval: 6-0	Approve: 3-0

ATTACHMENT "B"
2007 COMPREHENSIVE PLAN
ANNUAL AMENDMENT

File No.	*Owner/Agent*	*General Location*	*Existing Comprehensive Plan and Zoning Designation*	*Proposed Comprehensive Plan and Zoning Designation*	*Planning Commission Recommendation and Vote*	*Board of County Commissioners Decision & Vote*
07-CPA-13	William Lawson & Stacy Bjordahl	Northwood Area	Low Density Residential	Medium Density Residential	Approval: 5-1	Denial: 3-0
07-CPA-14	Ben Swartout	South Spokane-Glenrose & Moran Prairie Area	Low Density Residential	Mixed Use & Medium Density Residential	Approval: 6-0	Approve: 3-0
07-CPA-15	Dr. Mel Lindauer	North Spokane-Hastings Road	Low Density Residential	High Density Residential	Approval: 6-0	Approve: 3-0
07-CPA-16	Reggie Hansen & Allen Manzack	Mead Area Peone Prairie	Small Tract Agricultural	Rural-5	Denial: 6-0	Denial 3-0

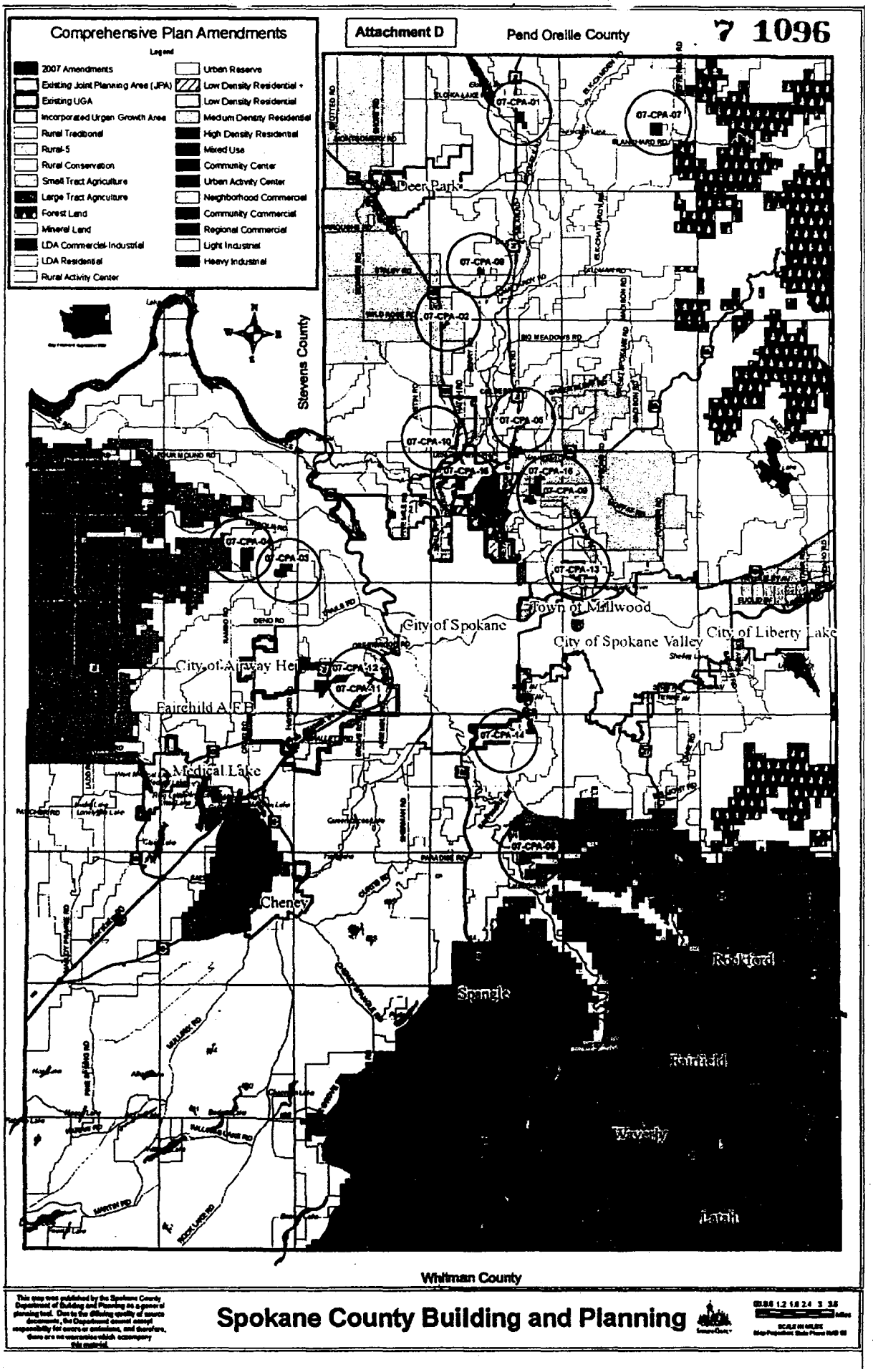
Attachment "C"
2007 Comprehensive Plan Annual Amendments

File No.	Designation	Request	Board of County Commissioners Decision	Cumulative Impacts
07-CPA-01	Rural Conservation	Mineral Lands	Approve: 3-0	The cumulative impact would add 130 acres to the mineral lands designation, for a total of 4,675 acres, and decrease the Rural Conservation category by 130 acres, for a total of 303,987 acres. Specific Impact would be addressed at the project review level, and are listed in the staff report.
07-CPA-02	Small Tract Agriculture	Limited Development Area (Commercial)	Approve: 3-0	The cumulative impact would add 5.7 acres to the Limited Development Area for a total of 112 acres, and decrease the Small Tract Agricultural by 5.7 acres, for a total of 47,952 acres. The site is already developed as a R.V. park.
07-CPA-03	Rural Conservation	Rural Traditional	Denial: 3-0	Not Applicable, denied
07-CPA-04	Rural Conservation	Rural Traditional	Denial: 3-0	Not Applicable, denied
07-CPA-05	Urban Reserve	Limited Development Area Commercial	Approve: 2-1 Mager Opposed	The cumulative impact would add 4.46 acres to the Limited Development Area (Commercial), for a total of 107 acres, and decrease the Urban Reserve category by 4.46 acres, for a total of 19,684 acres. Impacts to the Level of Service standards would be addressed upon the opening of the associated uses on-site. Specific impacts referenced in staff report.
07-CPA-06		WITHDRAWN		
07-CPA-07	Rural Conservation	Rural Traditional	Denial: 3-0	Not Applicable, denied

Attachment "C"
2007 Comprehensive Plan Annual Amendments

File No.	Designation	Request	Board of County Commissioners Decision	Cumulative Impacts
07-CPA-08	Rural Conservation	Rural Traditional	Denial: 3-0	Not Applicable, denied
07-CPA-09	Small Tract Ag & Rural Traditional	Rural 5	Denial: 3-0	Not Applicable, denied
07-CPA-10	Low Density Residential	High Density Residential	Approve: 3-0	The cumulative impact would add 13 acres to the Medium Density Residential acreage, for a total of 313, and decrease the Low Density Residential acreage by 13 acres, for a total of 11,915. The following impacts from full development would include: 1) Water=156,000 gallons residential water usage 2) Sewer=17,550 gallons per day 3) Transportation=1,950.additional trips 4) Stormwater=stormwater runoff to be contained per County requirements.5) Law Enforcement=.4 officers increase.6) Libraries=87 additional sq.t..7) Parks=.4 acres increase 8) Public Schools=58 additional sq. ft.
07-CPA-11	Low Density Residential	Light Industrial	Approve: 3-0	The cumulative impact would add 7.7 acres to the Light Industrial acreage, for a total of 9809.7, and decrease the Low Density Residential acreage by 7.7 acres, for a total of 11,895. Specific impacts would be addressed at the project review level upon development.
07-CPA-12	Community Commercial	Regional Commercial	Approve: 3-0	The cumulative impact would add 2.9 acres to the Regional Commercial acreage, for a total of 1213.9, and decrease the Community Commercial acreage by 2,9 acres, for a total of 106. Specific impacts would be addressed at the project review level upon development.
07-CPA-13	Low Density Residential	Medium Density Residential	Denial: 3-0	Not Applicable, denied

File No.	Designation	Request	Board of County Commissioners Decision	Cumulative Impacts
07-CPA-14	*Low Density Residential*	*Mixed Use & Medium Density Residential*	*Approve: 3-0*	The Cumulative impact would add 15 acres to the Medium Density Residential acreage, for a total of 325, and decrease the Low Density Residential acreage by 15 acres, for a total of 11,903. The following impacts from full development would apply: 1) Water=132,000 gallons residential water usage 2) Sewer=14,850 gallons per day 3) Transportation=1,650.additional trips 4) Stormwater=stormwater runoff to be contained per County requirements 5) Law Enforcement=.4 additional officer increase.6) Libraries=67 additional sq.t..7) Parks=.4 additional acreage 8) Public Schools=49 additional sq. ft.
07-CPA-15	*Low Density Residential*	*High Density Residential*	*Approve: 3-0*	The cumulative impact would add 1.6 acres to the High Density Residential acreage, for a total of 356.6, and decrease the Low Density Residential acreage by 1.6 acres, for a total of 11,926.4. The following impacts from full development would include: 1) Water=19,200 gallons residential water usage 2) Sewer=2,160 gallons per day 3) Transportation=240 additional trips 4) Stormwater=stormwater runoff to be contained per County requirements.5) Law Enforcement=.1 officer increase. 6) Libraries=9 additional sq.t..7) Parks=no change 8) Public Schools=7 additional sq. ft.
07-CPA-16	Small Tract Agricultural	Rural-5	Denial: 3-0	Not Applicable, denied


Comprehensive Plan Amendments
Legend
2007 Amendments
Existing Joint Planning Area (JPA)
Existing UGA
Incorporated Urban Growth Area
Rural Traditional
Rural-5
Rural Conservation
Small Tract Agriculture
Large Tract Agriculture
Forest Land
Mineral Land
LDA Commercial-Industrial
LDA Residential
Rural Activity Center
Urban Reserve
Low Density Residential +
Low Density Residential
Medium Density Residential
High Density Residential
Mixed Use
Community Center
Urban Activity Center
Neighborhood Commercial
Community Commercial
Regional Commercial
Light Industrial
Heavy Industrial
Attachment D
Pend Oreille County
7 1096
Stevens County
Deer Park
City of Spokane
Town of Millwood
City of Spokane Valley
City of Liberty Lake
City of Airway Heights
Fairchild AFB
Medical Lake
Cheney
Spangle
Rockford
Fairfield
Waverly
Latah
Whitman County
Spokane County Building and Planning

APPENDIX II

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.

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

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

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

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

II. INVALIDITY

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

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[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.

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

III. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

On April 29, 2008, the Board held a telephonic motion hearing. Present were John Roskelley, Presiding Officer, and Board Member, Dennis Dellwo and Joyce Mulliken. 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.

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

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

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

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

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

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

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

On August 8, 2008, the Board held the hearing on the merits. Present were John Roskelley, Presiding Officer, and Board Member, Raymond Paolella and Joyce Mulliken. 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.

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

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

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

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

V. ISSUES AND DISCUSSION

Issue No. 1:

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

The Parties' Position:

Petitioners:

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

Under (1) above, Petitioners claim the SEPA checklist defers much of the analysis of the impact of the County's amendment, 07-CPA-05, to a later time. According to Petitioners, SEPA requires disclosure and full consideration of environmental impacts in 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

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[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).

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

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

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[8] WAC 197-11-060(4)(c).
[9] *King County v.Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993).
[10] Id.
[11] Id. at 666.
[12] *Superior Asphalt and Concrete v. Yakima County*, Case No. 05-1-0012, FDO (June 20, 2006).
[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).

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

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

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

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

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

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

Respondent:

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

Intervenor (McGlades):

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

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

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[21] Petitioners timely appealed the County's SEPA determination to the County's Hearing Examiner (see 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).

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

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

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[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.

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

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

Petitioners Reply:

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

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[28] WAC 197-11-545(2).
[29] Petitioners HOM Reply brief at 2.
[30] *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wn2d 475, 494, 513 P.2d 36 (1973).

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

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

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[31] WAC 197-11-060(4)(c).
[32] WAC 197-11-442(2).
[33] *King County v. Washington State Boundary Review Board of King County*, 122 Wn.2d 648, 664, 860 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).

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

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

Board Analysis:

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

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

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[37] See Footnote 25.
[38] WAC 197-11-055 and 060.
[39] WAC 197-11-030 and 060.
[40] WAC 197-11-030.

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

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

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

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[41] WAC 197-11-704(b)(ii).
[42] *Moss v. Bellingham,* 109 Wn. App. 6 (2001).
[43] *Sisley v. San Juan County,* 89 Wn.2d 78, 64, 569 P.2d 712 (1977).
[44] RCW 43.21C.090.
[45] WAC 197-11-060(4)(a).
[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.

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

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

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

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[49] WAC 197-11-960

[50] Petitioners Exhibit #10, Report to the Hearing Examiner, File #: 07-CPA-5. The acreage is estimated at 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.

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

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

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

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

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[52] Id at Section 14.612.
[53] Petitioners HOM brief Exhibit No. 3, Environmental Checklist.
[54] Environmental Checklist for Spokane County 2007 Rural Comprehensive Plan Amendments, Sept. 19, 2007.
[55] *Better Brinnon Coalition v. Jefferson County*, CPSGMHB Case No. 03-2-0007, Amended FDO (Nov. 3, 2003).

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

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

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

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

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

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[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).

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

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

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

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

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

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

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[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.

Conclusion:

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

Issue No. 2:

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

The Parties' Position:

Petitioners:

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

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

Respondent:

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

Intervenors:

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

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[64] Petitioners HOM brief at 25 – 28.
[65] Respondents HOM brief at 12.
[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).

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

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

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

Petitioners Reply:

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

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[68] *Wilma v. Stevens County*, EWGMHB Case No. 06-1-0009c, Order on Compliance (May 22, 2008).
[69] Intervenor's HOM brief at 20.
[70] Intervenor's HOM brief ata 21.
[71] Petitioners HOM Reply brief at 9.
[72] Petitioners wrote "Highway 12" in their brief, which is a typo. It is Highway 2.

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

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

Board Analysis:

The GMA allows for limited areas of more intensive rural development (LAMIRDs) in the rural areas.[73] There are three types of LAMIRDs recognized in the GMA. Issue No. 2 pertains exclusively to Type 1, which is rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas,[74] which development or redevelopment must be designed to serve the existing rural population[75] and shall be consistent with the character of the existing uses in terms of building size, scale, use or intensity,[76] and which must conform to the requirements set forth in RCW 36.70A.070(5)(d)(iv).

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

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[73] RCW 36.70A.070(5)(d).
[74] RCW 36.70A.070(5)(d)(i).
[75] RCW 36.70A.070(5)(d)(i)(B).
[76] RCW 36.70A.070(5)(d)(i)(C).

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

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

It's worth noting a brief history of the subject property. The McGlades property, which is the subject of amendment 07-CPA-05, was used as a commercial agricultural products stand as permitted in 1984. Since 1984, the County has issued a total of ten different building permits[77] for the property, which allowed the business to expand to what is now a non-conforming use described as an "agricultural product sales stand/area" by the Spokane County Hearing Examiner.[78] According to the Hearing Examiner, "[T]he unlawful conversion of the site over the years to uses, and use sizes, not authorized by zoning regulations occurred through issuance of building permits, unlawful conversion of structures to uses not authorized under zoning regulations by the site owners at the time, and flawed review by the County."[79]

Concerned that the owners were expanding their operation and non-conforming 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.

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

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

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

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[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.

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

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

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

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

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[84] Only RCW 36.70A.070(5)(d) is at issue, not CP Policy RL.5.2.
[85] Intervernor HOM brief at 6.
[86] Id. at 21.

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

The County clearly established the logical outer boundary in 2001 by containing the built environment and commercial enterprises south of the County Rural Major Collector arterial, Day Mt. Spokane Road, and preserved the character of the existing natural neighborhood and community north of the arterial.[87] The McGlades property is surrounded by residential development on three sides[88] and is separated from the Limited Development Area Residential (LDAR) to the south by a four-lane highway designed as a Rural Major Collector arterial by Spokane County. This arterial is a major physical boundary and complies with RCW 36.70A.070(5)(d)(iv)(B). Thus, the subject property is not contiguous to any pre-existing LAMIRD.

The original LDAC zone determined by the built environment as of July 1, 1993 and adopted into the County's Comprehensive Plan in 2001 is south of Day Mt. Spokane 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

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[87] RCW 36.70A.070(5)(d)(iv)(A).
[88] Respondent HOM brief at 6.

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

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

What the County has done is create an isolated peninsula outside of the logical outer boundary. However, the County Commissioners made no findings or determinations that this peninsula would constitute a *logical outer boundary* of a LAMIRD. There is no substantial evidence in the record to support a determination that this isolated peninsula would form a *logical outer boundary* of an existing area of more intensive rural development. The record supports a determination that the Rural Major Collector, Day Mt. Spokane, is a logical outer boundary as defined by the GMA and prevents the abnormal irregular boundary[92] by adding the McGlades parcel in amendment 07-CPA-05.

Conclusion:

Therefore, the Board finds and concludes the County failed to comply with RCW 36.70A.070(5)(d) when it designated the 4.2 acre McGlades parcel within the LDAC 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).

the existing areas or uses of more intensive rural development and failed to establish a logical outer boundary delineated predominately by the built environment.[93] As such, the County failed to preserve the character of existing natural neighborhoods and communities[94], failed to establish a physical boundary[95], and failed to prevent abnormally irregular boundaries.[96]

Issue No. 3:

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

The Parties' Position:

Petitioners:

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

Respondent:

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[93] RCW 36.70A.070(5)(d)(iv)
[94] RCW 36.70A.070(5)(d)(iv)(A).
[95] RCW 36.70A.070(5)(d)(iv)(B)
[96] Id. footnote 82.
[97] Id. at 29.

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

Intervenors:

See McGlade response under Issue No. 2.

Petitioners Reply:

See Petitioners Reply under Issue No. 2.

Board Analysis:

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

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

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[98] Respondents HOM brief at 14.
[99] Spokane County Comprehensive Plan Policy RL.5.2.

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

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

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

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

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

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[100] Petitioners HOM brief at 32.
[101] Id. at 30-31.

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882

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

Conclusion:

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

Issue No. 4:

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

The Parties' Position:

Petitioners:

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

[102] RCW 36.70A.110(1).

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

Respondent:

The County did not argue this issue.

Intervenors:

McGlades did not argue this issue.

Petitioners Reply:

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

Board Analysis:

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

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[103] *Quadrant Corp. v. State Growth Management Hearings Board*, 119 Wash.App. 562, 567-68, 81 P.3d 918 (2003).
[104] RCW 36.70A.110(1).
[105] Id. at footnote 94.

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

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

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

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[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.

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

Conclusion:

Therefore, the Board finds and concludes the County failed 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, which frustrates GMA Goals (1) and (2) by failing to contain urban 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.

Issue No. 5:

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

The Parties' Position:

Petitioners:

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

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[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).

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886

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

Respondent:

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

Intervenors:

See McGlades response to Issue #1.

Petitioners Reply:

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

Board Analysis:

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

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

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

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

The McGlades commercial property, the subject of amendment 07-CPA-05, sits over a designated Critical Aquifer Recharge Area of high susceptibility to groundwater contamination.[113] Petitioners claim the County failed to follow its Comprehensive Plan goals and policies that provide that land use decisions in Spokane County shall protect critical areas[114] and that best available science will be used in the protection of critical areas.[115] Petitioners also argue the County failed to protect the CARA when it adopted amendment 07-CPA-05 because the County didn't protect the groundwater quality from development impacts or prevent degradation of groundwater quality.[116]In addition, Petitioners claim the County failed to follow its own CP Policies, specifically NE.17.4, which requires evaluation of proposed land use changes for both positive and negative impacts on groundwater quality, and NE.17.5, which requires development that would have a significant negative impact on the quality of an aquifer to provide measurable and attainable mitigation for the impact. In the case of this amendment, Policy NE.20.1 requires a higher level of protection for critical aquifer recharge areas of moderate to higher susceptibility stipulating alternative mitigation measures that provide protection of groundwater equal to or better than the stated regulations.

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

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[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.

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

In the Spokane County Staff Report to the Hearing Examiner[123] for the DNS appeal, staff notes that the DNS was circulated to over 60 agency/groups and only one comment from the Department of Ecology was received. Staff commented that further detailed environmental review will occur at such time that a specific development request is submitted to Spokane County for agency review or "in the case of 07-CPA-05 impacts will be mitigated by the applicable County Development Regulations and also by enforcement of applicable development regulations, such as but not limited to building and occupancy permits."[124]

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

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[117] Spokane County Hearing Examiners Findings of Fact, Conclusions of Law, and Decision; Appeal of DNS, Findings #'s 41-47, Dec. 10, 2007.
[118] Petitioners HOM brief, Exhibit 3, Environmental Checklist, pg. 4.
[119] Intervenor's HOM brief, Exhibit 2, Environmental Checklist for CUN-08-05, pg. 3.
[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.

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

The Spokane County Hearing Examiner recognized in his Findings of Facts[125] written for the McGlades' application for a CUP that the Critical Areas Ordinance (CAO) requires non-residential development outside of the UGA that produce more than 90 gallons per day/acre to utilize an enhanced wastewater disposal system as described under Spokane County Code (SCC) 11.20.075(c), item 2.a under L.3.[126] Furthermore, CARA provisions would require an enhanced disposal system, if the use generates approximately 378 gallons/day (i.e. 4.2-acre site times 90 gpd) and such generation exceeds the volume of wastewater generated by lawful uses of the site prior to the remodeling and proposed expansion. [127]The Hearing Examiner also found that the remodeled business as proposed appears to generate 20% more than the previous business and that the water flow for the remodeled business, projected to average 450 gpd, cannot exceed the wastewater flow generated by the previous business without providing treatment at least equal to one of the enhanced treatment systems described by SCC 11.20.075(c), item 2.a of L-3 of the CAO. In addition, the Hearing Examiner

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[125] Spokane County Hearing Examiner Findings of Fact, Conclusions of Law, and Decision; Re: Conditional Use Permit for Expansion of a Non-conforming Produce Stand/Store; McGlades, LLC, April 7, 2006
[126] Id. at 23, Finding #131.
[127] Id. at 23, Finding #132.

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

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

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

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[128] Id. at 29, Conclusion #9.
[129] Spokane County Hearing Examiners Findings of Fact, Conclusions of Law, and Decision; Appeal of DNS, Dec. 10, 2007.
[130] Id. at 11; Conclusion #7.

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

Conclusion:

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

Issue No. 6:

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

The Parties' Position:

Petitioners:

Petitioners claim the amendment is not only out of compliance with the GMA, but 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

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

Respondent:

The County did not respond to this issue.

Intervenors:

McGlades did not respond to this issue.

Petitioners Reply:

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

Applicable Law:

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

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

> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
>
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(2) A determination of invalidity is prospective in effect and does not extinguish 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

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[131] See Footnote #111.

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

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

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

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

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

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

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

Board Analysis:

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

Discussion:

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

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

Conclusion:

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

VII. FINDINGS OF FACT

1. Spokane County is a county located East of the crest of the Cascade Mountains and opted to plan under the GMA and is therefore required to plan pursuant to RCW 36.70A.040.

2. Spokane County adopted amendment 07-CPU-05 through Resolution 07-1096 on December 21, 2007.

3. A SEPA environmental checklist and Determination of Nonsignficance were issued by Spokane County cumulatively for eight rural amendments and zoning map changes, including 07-CPU-05, on September 20, 2007.

4. Spokane County failed to implement and comply with SEPA as set forth in RCW 43.21C by failing to identify, disclose, analyze and/or mitigate known and/or possible impacts associated with the approval of 07-CPU-05.

5. There is no substantial evidence in the record to support a determination that this isolated peninsula would form a *logical outer boundary* of an existing area of more intensive rural development.

6. Spokane County failed to comply with RCW 36.70A.070(5)(d) when it approved 07-CPU-05 and failed to (1) minimize and contain the existing areas or uses of more intensive rural development; (2) establish a logical outer boundary delineated predominately by the built environment; (3) preserve the character of existing natural neighborhoods and communities; (4) establish a physical boundary; and failed to (5) prevent abnormally irregular boundaries.

7. Spokane County failed to comply with its Comprehensive Plan Goal RL.5a and Policy RL.5.2., when it designated the 4.2 acre McGlades parcel within the LDAC zone by adopting amendment 07-CPA-05.

8. Spokane County failed to comply with RCW 36.70A.070(5)(d)(iv) by adopting amendment 07-CPU-05, which substantially interferes with GMA Goals (1) and (2) by failing to contain urban development and reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

9. Spokane County failed to comply with GMA Goal (10), the County's CP and CAO for failing to adequately address, analyze and/or mitigate the environmental impacts of 07-CPU-05.

VIII. CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this action.
2. This Board has jurisdiction over the subject matter of this action.
3. Petitioners have standing to raise the issues raised in the Petition 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.

6. Spokane County failed to comply with the LAMIRD provision, RCW 36.70A.070(5)(d) and is found out of compliance with the GMA.

7. Spokane County failed to comply with its Comprehensive Plan, specifically Goal RL.5a and Policy RL.5.2.

8. Spokane County failed to comply with RCW 36.70A.070(5)(d)(iv), and, as such, its action substantially interferes with RCW 36.70A.020(1) and (2) warranting both a finding of non-compliance and a determination of invalidity.

9. Spokane County failed to comply with its Comprehensive Plan and Critical Areas Ordinance, thereby substantially interfering with RCW 36.70A.020(10), the GMA's goal seeking to protect the environment, warranting both a finding of non-compliance and a determination of invalidity.

10. Any Conclusion of Law herein after determined to be a Finding of 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:

1. The Board finds and concludes that the County's action to adopt amendment 07-CPU-05 substantially interferes with Goals (1) and (2) of the GMA for failing to contain urban-style development to UGAs or GMA designated LAMIRDs and to reduce sprawl in the rural areas.

2. The Board finds and concludes that the County's failure to follow the GMA, specifically RCW 36.70A.070(5)(d) and its own CP goals and policies substantially interferes with Goal (10) of the GMA for failing to protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of 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.

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

- The County shall file with the Board by **March 11, 2009, an original and four copies** of a **Statement of Actions Taken to Comply** (SATC) with the GMA, as interpreted and set forth in this Order. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on the parties. **By this same date, the County shall file a "Remanded Index," listing the procedures and materials considered in taking the remand action.**

- By no later than **March 25, 2009**[132], Petitioners shall file with the Board an **original and four copies** of Comments and legal arguments (Petitioners' Compliance Brief) on the County's SATC. Petitioners shall simultaneously serve a copy of their Comments and legal arguments on the parties.

- By no later than **April 8, 2009,** the County and Intervenors shall file with the Board an **original and four copies** of their Response to Comments and legal arguments (Respondent's and Intervenors' Compliance Brief). The County and Intervenors shall simultaneously serve a copy of such on the parties.

- 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.

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[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).

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

900

- Pursuant to RCW 36.70A.330(1) and WAC 242-02-891[133] the Board hereby schedules a telephonic Compliance Hearing for **April 21, 2009, at 10:00 a.m. to 12:00 p.m. The compliance hearing shall be limited to consideration of the Legal Issues found noncompliant and remanded in this FDO**. The parties will call **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.

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

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

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document 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.

Judicial Review:

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

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[133] The Presiding Officer may issue an additional notice after receipt of the SATC to set the format and additional procedures for the compliance hearing.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

Enforcement:

The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in 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.

Service:

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

SO ORDERED this 5th day of September 2008.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

John Roskelley

John Roskelley, Board Member

Raymond L. Paolella

Raymond L. Paolella, Board Member

Joyce Mulliken

Joyce Mulliken, Board Member

APPENDIX III

SPOKANE COUNTY

REPORT TO THE HEARING EXAMINER

FILE #: 07-CPA-5

BUILDING AND PLANNING DEPARTMENT

HEARING DATE: November 21st, 2007 at 9 a.m. **FILE #:** 07-CPA-5

Assigned Planner: Paul Jensen

ACTION DESCRIPTION: Appeal of the issuance of a Determination of Nonsignificance (DNS) issued for 07-CPA-5, a request to amend the Spokane County Comprehensive Plan Map designation and zone reclassification from Urban Reserve to Limited Development Area (Commercial), pursuant to Section 11.10.170 of the Spokane County Environmental Ordinance and WAC 197-11-680.

Appeal Data

Project Location:	The property is generally located in the North Spokane County, on the Northeast Corner of Day Mt. Spokane Road and Yale Road, in the Southwest ¼ of Section 26, Township 27, Range 43 EWM, Spokane, County, Washington.
Parcel Number(s):	37263.9025
Appellants:	Dan Henderson, PO Box 33; Colbert, WA 99005. Larry Kunz , 15915 N. Yale Rd. Colbert, WA 99005. Trevert Shelly, 4411 E. Day Mt. Spokane Road, Colbert, WA 99005. Neil Membrey 4423 E. Day Mt. Spokane Rd. AGENT: Rick Eichstaedt, Attorney 35 W. Main Ste 300 Spokane, WA 99201
Proposal Sponsor:	McGlades, L.L.C. N. 26715 Ptarmigan Drive, Chattaroy, WA 99003. AGENT: F.J. Dullanty, Attorney Witherspoon, Kelly 422 W. Riverside, Suite 1100 Spokane, WA 99201. Dwight Hume 9101 Mt. View Lane, Spokane WA 99218 Spokane WA 99201 509-242-1000
Existing Land Use:	Vacant Structure with associated parking landscaping and sign known as McGlades the rest of the site is undeveloped.
Neighborhood Association:	Not within a Neighborhood Association boundary

- This proposal is located outside the Urban Growth Area in an Urban Reserve Area.

GMA/Critical Areas

Aquifer Recharge Area:	The site is located within a Critical Aquifer Recharge Area (CARA) area of High Susceptibility.
Fish & Wildlife Habitat Conservation Areas:	None identified on the Spokane County Critical Areas Maps.
Floodplain:	FEMA maps do not identify any floodplain associated with the subject site.
Geologically Hazardous Areas:	None identified on Spokane County Critical

	Areas Maps.
Wetlands:	None Identified on County Critical Areas Maps.

Background

A request for amending the Spokane County Comprehensive Plan was submitted by Dwight Hume on behalf of owner Sean and Theresa Gabel, to the Spokane County Department of Building and Planning on May 12, 2006. The request was made to Change the Comprehensive Plan and rezone the 4.46 acre parcel from Urban Reserve to Limited Development Area (Commercial). This request was submitted as part of a public comment period when several hundred comments were received by the county for consideration of the 5 year update of the Comprehensive Plan. The request to amend the Comprehensive Plan Map along with comments and information from adjacent property owners is contained in County comment # AC- 32 and this information is posted on the County Building and Planning website. Most of the Information submitted by neighbors was related to a hearing held before the Hearing Examiner and his findings of fact conclusions of law and decision dated April 7, 2007 relating to the expansion of a non-conforming use located on the site. The expansion was denied and shortly after the owner submitted this Comprehensive Plan Amendment and Rezone request. The County Commissioners in July of 2007 adopted criteria to screen the hundreds of public comments and requests. Those public comments/ requests that met the adopted criteria then could be processed thru the County 2007 Annual Comprehensive Plan Process. Fifteen (15) proposals were scheduled for a public hearing before the Planning Commission on October 11, 2007.

A non-project environmental checklist was prepared by the Dept. of Building and Planning and a Determination of Nonsignificance (DNS) was issued on September 20, 2007, with a comment and appeal period ending on October 5, 2007. The environmental checklist addressed rural amendments to the Comprehensive Plan map and concurrent zone reclassifications: county files 07-CPA-2, 07-CPA-3, 07-CPA-4, 07-CPA-5, 07-CPA-7-CPA-7, 07-CPA-8, 07-CPA-9, & 07-CPA-16. (07-CPA-1 submitted a separate SEPA Checklist by applicant and 07-CPA-6 was withdrawn by the owner). The DNS was circulated to agencies of jurisdiction and published in the Spokesman Review on September 20, 2007. The DNS was circulated to over 60 agency/groups one comment were received from the department of Ecology, letter dated Oct. 5, 2007 attached to this report; (see bottom of page 2). None of the comments raised by the Department of Ecology persuaded the Building and Planning Department to withdraw the DNS determination. The DNS issued by the County Dept. of Building and Planning was appealed on October 5th 2007 by Rick Eichstaedt with the Center for Justice on the behalf of 4 property owners who live adjacent to or in the immediate vicinity of County file 07-CPA-5. The DNS appeal along with supporting information submitted to the Dept. of Building and Planning was forwarded to The Hearing Examiner. The Hearing Examiner after consulting the parties of record established Nov. 21st at 9:00 AM to consider the DNS appeal. The DNS appeal document submitted contains over 200 pages of information.

The proposal was initially circulated for agency comments on August 31, 2007 with a comment deadline of September 14th 2007 to 19 agencies.

The following table summarizes the responses.

AGENCIES NOTIFIED	Response Received	Date Received	Agencies Notified	Response Received	Date Received
Spokane County Department of Building and Planning	No		Spokane Regional Transportation Council	Yes	9-14-07
Spokane County Engineering	Yes	9-14-07	Fire Protection District No. 4	No	

Spokane County Utilities	Yes	9-19-07	Spokane Regional Clean Air Agency	No	
Spokane County Sheriff	No		Washington State Dept of Transportation	No	
Spokane Regional Health District	No		Washington State Dept of Ecology	No	
City/County Historic Preservation Office	No		Washington State Dept of Fish & Wildlife	Yes	9-11-07 NC

Mead School District	No		Washington State Department of Health	No	
Spokane Transit Authority	No		Washington State Department of Transportation Aviation	No	

These agency comments are part of the file for 07-CPA-5.

The request is to change the Comprehensive Plan Map from Urban Reserve to Limited Development Area Industrial/ Commercial and to change the Zoning Map from Urban Reserve to Limited Development Area Commercial on approximately 4.46 acres on the Northeast corner of Day Mt Spokane Road and Yale Road.

Summary of Appeal

An appeal of the Determination of Nonsignificance (DNS) was submitted to the Spokane County Department of Building and Planning on October 5, 2007, and the appeal fee was paid the same day. The appellants included the various reasons for the appeal in a document that was hand delivered to Michael Dempsey Spokane County Hearing Examiner on October 5th 2007.

The appellants contend that the State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS) was incorrectly issued for the Rural Comprehensive Plan Amendments; that SEPA requires analysis of impacts associated with nonproject actions; that no additional review or approval will occur of actions on the property subject to 07-CPA-5; that the County prepared an inadequate Checklist and DNS disclosures and analysis and ignored known and probable impacts associated with the approval of 07-CPA-5; The appellant provides information to support the above arguments with references to legal cases, submittal of affidavits from property owners adjacent and in the vicinity of 07-CPA-5, pictures and other information submitted.

Response to Appeal

The 2007 Annual Rural Comprehensive Plan Amendments were circulated for initial review to agencies and no SEPA related comments were made on any of the rural amendments by reviewing agencies. The Department of Building and Planning then prepared the SEPA Environmental Checklist with a Nonproject supplemental attachment for the above referenced rural amendments. The DNS and SEPA Checklist with Nonproject attachment was circulated to over 60 agencies/groups. One comment was received from the Department of Ecology a reviewing agency regarding the DNS. This comment letter dated October 5, 2007 did not cause the Building and Planning Department to withdraw the Nonproject DNS. Further detailed environmental review will occur at such time that a specific development request is submitted to Spokane County for agency review or in the case of 07-CPA-5 impacts will be mitigated by the applicable County Development Regulations and also by enforcement of applicable development regulations; such as but not limited to building and occupancy permits, Critical Areas Ordinance (which currently limits the amount of septic effluent regardless of the zoning of the site), zoning regulations, drainage, access and road requirements.

WAC 197-11-340(3) (a) specifically identifies the circumstances under which an agency shall withdraw a DNS. These circumstances include substantial changes to a proposal likely to have significant impacts, significant new information on probable adverse environmental impacts, and the procurement of a DNS based on misrepresentation or lack of material disclosure. None of these circumstances apply to the subject appeal.

In summary, the issuance of a Determination of Nonsignificance (DNS) for the 2007 Annual Rural Comprehensive Plan Amendments, including 07-CPA-5, by the Department of Building and Planning was appropriate and predicated that the subject amendment is a 'nonproject' action. Future development of the site will require specific review of probable environmental impacts at the time that detailed development plans are submitted to Spokane County for agency review or are subject to mitigation of impacts as required by enforcement of applicable County development regulations.

Attachments:

A. Appeal letter with out exhibits submitted October 5 , 2007
B. SEPA Checklist and Supplemental Sheet for Nonproject Actions, DNS SEPA Determination
C. Agency SEPA comments

APPENDIX IV

FILED
SEPT. 10, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SPOKANE COUNTY, a political subdivision of the State of Washington, Appellant, v. EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, a statutory entity, and KASI HARVEY-JARVIS, DAN HENDERSON, LARRY KUNZ, McGLADES, INC., NEIL MEMBREY, and NEIGHBORHOOD ALLIANCE OF SPOKANE, Respondents.	)	No. 30725-5-III PUBLISHED OPINION

BROWN, J. — Spokane County appeals for the second time an Eastern Washington Growth Management Hearings Board decision that invalidated the County's planning actions in amendment 07-CPA-05. *See Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd.* (*Spokane County* I), 160 Wn. App. 274, 250 P.3d 1050, *review denied*, 171 Wn.2d 1034 (2011) (holding the hearings board had subject matter jurisdiction to review amendment 07-CPA-05). The hearings board decided the County had failed to comply with the Growth Management Act (GMA), chapter 36.70A RCW, and the State

Environmental Policy Act (SEPA), chapter 43.21C RCW, when it adopted amendment 07-CPA-05. The superior court affirmed on remand from *Spokane County* I.

Although *Spokane County* I explained the hearings board's jurisdiction extended to both the comprehensive plan amendment and the concurrent rezone, the County asserts the hearings board lacks jurisdiction over the rezone. Specifically, the County contends the hearings board lacked authority to review the rezone because it is a site-specific land use decision within the superior court's exclusive jurisdiction under the Land Use Petition Act (LUPA), chapter 36.70C RCW. We again reject this contention because the rezone was not authorized by the then-existing comprehensive plan, but rather implements the comprehensive plan amendment, over which the hearings board had jurisdiction. Additionally, we reject the County's contentions that the hearings board's decision fails to accord proper deference, lacks substantial evidence, erroneously interprets and applies the law, and is arbitrary and capricious. Accordingly, we affirm.

FACTS

In December 2004, McGlades LLC purchased a 4.2 acre land parcel in Spokane County, on which the prior owners had operated a produce store that did not conform to the property's Urban Reserve zone designation. In June 2005, McGlades obtained building and restaurant permits, and expanded its nonconforming use into a market and bistro. McGlades soon applied unsuccessfully for a conditional use permit, requesting further expansion to include an asphalt driveway and drive-through espresso service, asphalt parking lot with spaces for 39 vehicles, outdoor dining and entertainment with

seating for 64 patrons, and on-site alcohol consumption. McGlades then proposed amendments to the County's comprehensive plan map and zoning map that would change the property's comprehensive plan category and zone designation to Limited Development Area (Commercial). In July 2006, while the County contemplated the proposal, McGlades obtained a temporary use permit and presumably began expansion. But McGlades soon closed its business when the temporary use permit expired in January 2007. McGlades does not participate in this second appeal. The facts are unchanged from *Spokane County* I, 160 Wn. App. at 278-80.

In September 2007, the County issued a SEPA environmental checklist and corresponding determination of nonsignificance for McGlades's proposal and seven others. The County concluded SEPA did not require environmental impact statements because the proposals presented "no probable significant adverse impacts." Administrative Record (AR) at 59, 63. Specifically, the County characterized the proposals as nonproject actions, leaving much of the required environmental analysis "[t]o be determined if site specific developments are proposed." AR at 43. Neighboring landowners Dan Henderson, Larry Kunz, and Neil Membrey unsuccessfully appealed the County's threshold determination to the County Hearing Examiner.

On December 21, 2007, the Board of County Commissioners passed Resolution 07-1096, adopting McGlades's proposal along with seven others during the annual comprehensive plan amendment cycle. The resolution incorporated McGlades's proposal as amendment 07-CPA-05. Neighboring landowners Kasi Harvey-Jarvis, Dan Henderson, Larry Kunz, and Neil Membrey, along with the Neighborhood Alliance of

Spokane (collectively the Neighbors), successfully appealed the resolution to the hearings board. The hearings board decided (1) amendment 07-CPA-05 designated a new Limited Area of More Intensive Rural Development (LAMIRD) without observing applicable GMA requirements, (2) the environmental checklist was inadequate under SEPA because it did not fully disclose or carefully consider amendment 07-CPA-05's probable long-term effects, and (3) amendment 07-CPA-05 is invalid because its continued validity would substantially interfere with fulfilling the GMA's goals of promoting urban growth, reducing sprawl, and protecting the environment.

The superior court reversed the hearings board's decision upon the County's appeal and this court reversed the superior court's decision upon the Neighbors' appeal. *Spokane County* I, 160 Wn. App. 274. On remand, the superior court affirmed the hearings board's decision. The County again appealed to this court.

REVIEW STANDARD

We review a hearings board decision under the Administrative Procedure Act (APA), chapter 34.05 RCW. *Feil v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 367, 376, 259 P.3d 227 (2011); *see* RCW 34.05.510. We apply APA standards directly to the hearings board record, performing the same function as the superior court. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998); *see* RCW 34.05.526. The party challenging the hearings board decision (here the County) bears the burden of proving it is invalid. RCW 34.05.570(1)(a). The decision is invalid if it suffers from at least one of nine enumerated infirmities. RCW 34.05.570(3). We must grant relief from the decision if, as relevant here:

> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> (d) The agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record . . . ; [or]
> . . . .
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3)(b)-(e), (i).

Our review is de novo under RCW 34.05.570(3)(b) through (d), determining whether the decision contains a legal error. *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011). We accord a hearings board's interpretation of the GMA "substantial weight." *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). But the interpretation does not bind us. *City of Redmond*, 136 Wn.2d at 46.

We apply the substantial evidence review standard to challenges under RCW 34.05.570(3)(e), determining whether there exists "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *City of Redmond*, 136 Wn.2d at 46 (quoting *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). We view the evidence "in the light most favorable to . . . 'the party who prevailed in the highest forum that exercised fact-finding authority.'" *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)). Doing so "'necessarily entails accept[ing] the factfinder's views regarding the

credibility of witnesses and the weight to be given reasonable but competing inferences.'" *Id.* (quoting *Lige & Wm. B. Dickson Co.*, 65 Wn. App. at 618).

We apply the arbitrary and capricious review standard to challenges under RCW 34.05.570(3)(i), determining whether the decision constitutes "'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *City of Redmond*, 136 Wn.2d at 46-47 (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)). "'Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.'" *Id.* at 47 (quoting *Kendall*, 118 Wn.2d at 14).

ANALYSIS

A. Law of the Case

The Neighbors argue *Spokane County* I precludes the County's contention that the hearings board lacked subject matter jurisdiction over the rezone. The County responds *Spokane County* I solely decided the hearings board had jurisdiction over the comprehensive plan amendment. We agree with the Neighbors but, as explained below, we choose to clarify the principles we established in *Spokane County* I.

"The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) (citing *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). Thus, "'questions determined on appeal, or which might have been determined had they been presented,

will not again be considered on a subsequent appeal if there is no substantial change in the evidence.'" *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)). We retain discretion on whether to apply the doctrine:

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c)(2).

In *Spokane County* I, the superior court ruled the hearings board lacked jurisdiction to review the comprehensive plan amendment and concurrent rezone because they together constituted a site-specific land use decision within the superior court's exclusive jurisdiction under LUPA. 160 Wn. App. at 280. The Neighbors sought this court's relief, contending "the change here, site specific or not, amounted to an amendment of the County's comprehensive plan and therefore review was properly with the Hearings Board" under the GMA. *Id.* McGlades responded "this was a site-specific rezone over which the Hearings Board had no jurisdiction." *Id.* The County deferred to McGlades's argument on this issue. Resp't Spokane County's Resp. Br. at 5, *Spokane County* I, 160 Wn. App. 274 (No. 28350-0-III). We reversed the superior court and affirmed the hearings board, reasoning:

> Growth management hearings boards have exclusive authority to rule on challenges alleging that a governmental agency is not in compliance with the requirements of the GMA. The hearings boards have jurisdiction to review petitions challenging whether a county's comprehensive plan, development regulations, and permanent amendments to the plan comply with the GMA. A hearings board does "not have jurisdiction to decide

> challenges to site-specific land use decisions because site-specific land use decisions do not qualify as comprehensive plans or development regulations."
>
> *Site-specific rezones authorized by an existing comprehensive plan are treated differently from amendments to comprehensive plans or development regulations.* [LUPA] governs site-specific land use decisions and the superior court has exclusive jurisdiction over petitions that challenge site-specific land use decisions. However, "[t]he superior court may decide only whether a site-specific land use decision complies with a comprehensive plan and/or development regulation," *not whether the rezone complies with the GMA*. LUPA does not apply to local land use decisions "that are subject to review by a quasi-judicial body created by state law, such as . . . the growth management hearings board."
>
> . . . .
>
> The GMA does not make a distinction between site-specific and general comprehensive plan map amendments. Nor does the GMA recognize a single reclassification approach of "site specific Comprehensive Plan Maps," urged by McGlades. The Hearings Board had jurisdiction to review the petition.
>
> . . . .
>
> We . . . reverse the decision of the superior court ruling that the Eastern Washington Growth Management Hearings Board did not have jurisdiction over the comprehensive plan amendment.

Id. at 280-81, 283, 286 (second alteration and first omission in original) (emphasis added) (citations omitted).

In sum, *Spokane County* I held the hearings board had GMA authority to consider the Neighbors' petition. Because the Neighbors' petition alleged "Spokane County unlawfully amend[ed] the Spokane County Comprehensive Plan *and County Zoning map*," AR at 1 (emphasis added), the *Spokane County* I court explained the hearings board had subject matter jurisdiction to review both the comprehensive plan amendment and concurrent rezone under the GMA, thereby rejecting McGlades's site-specific rezone arguments. Contrary to law of the case principles, the County again contends, as did McGlades in *Spokane County* I, that the hearings board lacked

jurisdiction to review the rezone because it is a site-specific land use decision within the superior court's exclusive jurisdiction under LUPA. Even so, we exercise our discretion to further clarify the rule we established in *Spokane County* I.

B. Jurisdiction

The issue is whether the hearings board had subject matter jurisdiction to review amendment 07-CPA-05's rezone under the GMA. The County contends the rezone is within the superior court's exclusive jurisdiction under LUPA. We review the hearings board's assertion of jurisdiction de novo. RCW 34.05.570(3)(b); *Kittitas County*, 172 Wn.2d at 155.

Certain local governments like Spokane County must "adopt a comprehensive plan under [the GMA] and development regulations that are consistent with and implement the comprehensive plan." RCW 36.70A.040(3)(d), (4)(d), (5)(d). If a county amends its comprehensive plan, it must concurrently adopt or amend consistent implementing development regulations. WAC 365-196-805(1). A comprehensive plan is a county's "generalized coordinated land use policy statement." RCW 36.70A.030(4). Development regulations are a county's "controls placed on development or land use activities . . . , including . . . zoning ordinances." RCW 36.70A.030(7). But a "decision to approve a project permit application" is not a development regulation, even if it appears in a legislative resolution or ordinance. *Id.* Instead, a project permit approval is a "land use decision" under LUPA. RCW 36.70C.020(2)(a). Project permit applications include proposals for "site-specific rezones authorized by a comprehensive plan" but

exclude proposals for "the adoption or amendment of a comprehensive plan . . . or development regulations." RCW 36.70B.020(4).

Regional hearings boards have exclusive jurisdiction to review petitions alleging a county did not comply with the GMA in adopting or amending its comprehensive plan or development regulations.[1] Former RCW 36.70A.280(1)(a) (2003); former RCW 36.70A.290(2) (1995); *Somers v. Snohomish County*, 105 Wn. App. 937, 945, 21 P.3d 1165 (2001). Additionally, hearings boards may review petitions alleging a county did not comply with SEPA in adopting or amending its comprehensive plan or development regulations. Former RCW 36.70A.280(1)(a), .290(2). But hearings boards "do not have jurisdiction to decide challenges to site-specific land use decisions because [those] decisions do not qualify as comprehensive plans or development regulations." *Woods v. Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007); *see* RCW 36.70A.030(4), (7); RCW 36.70B.020(4); RCW 36.70C.020(2)(a). Instead, the superior court has exclusive jurisdiction under LUPA to review site-specific land use decisions not subject to review by quasi-judicial agencies like hearings boards. Former RCW 36.70C.030(1)(a)(ii) (2003); *Woods*, 162 Wn.2d at 610.

Here, whether the hearings board had subject matter jurisdiction to review amendment 07-CPA-05's rezone depends on whether it is an amendment to a development regulation under the GMA or a project permit approval under LUPA. *Woods*, 162 Wn.2d at 610; *see* RCW 36.70A.030(7); RCW 36.70B.020(4). The rezone

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[1] The Eastern Washington Growth Management Hearings Board has jurisdiction over such petitions arising from counties "east of the crest of the Cascade Mountains," including Spokane County. Former RCW 36.70A.250(1)(a) (1994).

was certainly site specific. *See Woods*, 162 Wn.2d at 611 n.7 (stating a site-specific rezone is a change in the zone designation of a "'specific tract'" at the request of "'specific parties'" (quoting *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981))). But the parties dispute whether the rezone was or needed to be "authorized by a comprehensive plan." RCW 36.70B.020(4).[2]

Under RCW 36.70B.020(4), a site-specific rezone is a project permit approval solely if "authorized by a comprehensive plan"; otherwise, it is "the adoption or amendment of a . . . development regulation[]." We must interpret this language so as to give it meaning, significance, and effect. *See In re Parentage of J.M.K.*, 155 Wn.2d 374, 393, 119 P.3d 840 (2005) (stating a court must not "simply ignore" express terms when interpreting a statute); *State ex rel. Baisden v. Preston*, 151 Wash. 175, 177, 275 P. 81 (1929) (stating a court must interpret a statute as a whole so that, if possible, "'no clause, sentence, or word shall be superfluous, void, or insignificant'" (quoting *Wash. Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-16, 25 L. Ed. 782 (1879))); *Murray v. Dep't of Labor & Indus.*, 151 Wash. 95, 102, 275 P. 66 (1929) (a court must, if possible, interpret a statute so as to give every word or phrase "meaning" as well as "significance and effect" (internal quotation marks omitted)). As we noted in *Spokane County I*, to be "authorized by a comprehensive plan" within the meaning of RCW 36.70B.020(4), the rezone had to be "allowed by an *existing* comprehensive plan." 160 Wn. App. at 281-83

[2] We address the same dispute in a similar case with consistent reasoning. *See Kittitas County v. Kittitas County Conservation Coal.*, No. 30728-0-III (Wash. Ct. App. Aug. 13, 2013).

(emphasis added); *see also Woods*, 162 Wn.2d at 612 n.7, 613; *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 179-80, 4 P.3d 123 (2000).

The County argues it initially sought a site-specific rezone of McGlades's property but, under local zoning codes, the rezone was not possible without changing the property's existing comprehensive plan category from Urban Reserve to Limited Development Area (Commercial). The County explains it made the necessary change by amending the comprehensive plan and concurrently rezoning the property. Nonetheless, the County contends the rezone was "separate and distinct" from the comprehensive plan amendment. Appellant Spokane County's Opening Br. at 11. We disagree. Notably, the County concedes the rezone required a comprehensive plan amendment to take effect. This inexorably intertwined the rezone and the comprehensive plan amendment, making them interdependent and putting them in the same basket for hearings board review. In other words, the rezone was premised on and carried out the comprehensive plan amendment. Therefore, the rezone is not a project permit approval under LUPA because the then-existing comprehensive plan did not authorize it. Instead the rezone is an amendment to a development regulation under the GMA because it implements the comprehensive plan amendment. Thus, the hearings board's decision is within its statutory authority. *See* RCW 34.05.570(3)(b).

Dictum in *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 187 P.3d 272 (2008), does not require a different conclusion. There, the city amended its comprehensive plan but did not rezone the property. *Id.* at 438. The *Coffey* court held the superior court lacked subject matter jurisdiction to review the comprehensive plan amendment

under LUPA because the hearings board had exclusive jurisdiction to do so under the GMA. *Id.* at 441. The *Coffey* court continued,

> It is not uncommon for those hoping to develop property to seek both a comprehensive plan amendment and a rezone of property in the same proceeding. Anyone seeking to challenge both aspects of a ruling granting both requests would by statute have to appeal to two entities: the [hearings board] for the comprehensive plan amendment and superior court for the rezone.

Id. at 442. This statement was unnecessary to the *Coffey* court's holding because the city amended its comprehensive plan but did not rezone the property. Additionally, this statement is true solely if a rezone is site specific and authorized by a then-existing comprehensive plan. In making this statement, the *Coffey* court did not consider whether a rezone that implements a comprehensive plan amendment can be an amendment to a development regulation.

Considering all, we hold a site-specific rezone is a project permit approval under LUPA if it is authorized by a then-existing comprehensive plan and, by contrast, is an amendment to a development regulation under the GMA if it implements a comprehensive plan amendment. In sum, the hearings board had subject matter jurisdiction to review amendment 07-CPA-05's rezone for compliance with both the GMA and SEPA. *See* former RCW 36.70A.280(1)(a), .290(2).

C. Hearings Board Decisions

The issue is whether the hearings board erred by invalidating amendment 07-CPA-05 on grounds the County did not comply with the GMA or SEPA in adopting it. We review the hearings board's factual findings for substantial evidence, legal

conclusions de novo, and order for arbitrariness or capriciousness. RCW 34.05.570(3)(d)-(e), (i); *Kittitas County*, 172 Wn.2d at 155; *City of Redmond*, 136 Wn.2d at 46-47.

A hearings board may decide a petition alleging a county did not comply with the GMA or SEPA in adopting or amending its comprehensive plan or development regulations. Former RCW 36.70A.280(1)(a), .290(2). The petitioner (here the Neighbors) bears the burden of proving noncompliance. RCW 36.70A.320(2). But a county has "broad discretion in adapting the requirements of the GMA to local realities." *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 154 Wn.2d 224, 236, 110 P.3d 1132 (2005); *see* former RCW 37.70A.320(1) (1997). Thus, a hearings board must presume validity and find compliance unless the county's planning action is "clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(1), (3). A county's planning action is clearly erroneous if it leaves a hearings board with a "'firm and definite conviction that a mistake has been committed.'" *King County*, 142 Wn.2d at 552 (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

Where a hearings board finds noncompliance with the GMA or SEPA, it may wholly or partially invalidate the county's planning action if "continued validity . . . would substantially interfere with the fulfillment of the goals of [the GMA]." Former RCW 36.70A.302(1) (1997). The GMA's goals include, as relevant here:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
> . . . .
> (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water. . . .

RCW 36.70A.020(1)-(2), (10). On appropriate facts, SEPA noncompliance may substantially interfere with fulfilling the GMA's environmental protection goal. *Davidson Series & Assocs. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 159 Wn. App. 148, 158, 244 P.3d 1003 (2010); *see* WASH. STATE DEP'T OF ECOLOGY, STATE ENVIRONMENTAL POLICY ACT HANDBOOK § 7, at 75 (1998 & Supp. 2003).

We begin with GMA noncompliance. The County challenges the hearings board's decision that amendment 07-CPA-05 designated a new LAMIRD without observing applicable GMA requirements. A comprehensive plan amendment must "conform to [the GMA]." RCW 36.70A.130(1)(d). But "the GMA is not to be liberally construed." *Woods*, 162 Wn.2d at 612 & n.8, 614 (citing *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 565, 958 P.2d 962 (1998)). Thus, a comprehensive plan must obey the GMA's clear mandates. *See Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 341-42, 190 P.3d 38 (2008). A newly adopted or amended development regulation must be "consistent with and implement the comprehensive plan." RCW 36.70A.040(3)(d), (4)(d), (5)(d); RCW 36.70A.130(1)(d); *see* WAC 365-196-805(1). But "a comprehensive plan is a 'guide' or 'blueprint' to be used when making land use decisions." *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997) (quoting *Barrie v.*

Kitsap County, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980)). Thus, a development regulation need not strictly adhere but must "generally conform" to the comprehensive plan. *Id.* (quoting *Barrie*, 93 Wn.2d at 849).

A county's comprehensive plan must contain "a rural element including lands that are not designated for urban growth." RCW 36.70A.070(5); *see* WAC 365-196-425. This rural element "may allow for limited areas of more intensive rural development, including necessary public facilities and public services." RCW 36.70A.070(5)(d); *see* WAC 365-196-425(6). A county must "minimize and contain the existing areas or uses of more intensive rural development" by adopting measures providing they "shall not extend beyond the[ir] logical outer boundary . . . , thereby allowing a new pattern of low-density sprawl." RCW 36.70A.070(5)(d)(iv); *see* WAC 365-196-425(6)(c)(i)(B)-(E). Existing areas "are clearly identifiable and contained [within] . . . a logical boundary delineated predominately by the built environment." RCW 36.70A.070(5)(d)(iv); WAC 365-196-425(6)(c)(i)(C). In fixing a LAMIRD's logical outer boundary, the county must address "the need to preserve the character of existing natural neighborhoods and communities," "physical boundaries, such as . . . streets and highways, and land forms and contours," and "the prevention of abnormally irregular boundaries." RCW 36.70A.070(5)(d)(iv)(A)-(C); *see* WAC 365-196-425(6)(c)(i)(D)(I)-(III).

Consistent with these rules, the County's rural element allows for LAMIRDs in Policy RL.5.2:

> The intensification and infill of commercial . . . areas shall be allowed in rural areas consistent with the following guidelines:

> a) The area is clearly identified and contained by logical boundaries, outside of which development shall not occur. These areas shall be designated and mapped within the Limited Rural Development category of the Comprehensive Plan map.
> b) The character of neighborhoods and communities is maintained.
> . . . .
> d) The intensification is limited to expansion of existing uses or infill or new uses within the designated area. . . .

SPOKANE COUNTY COMPREHENSIVE PLAN (SCCP): RURAL LAND USE Policy RL.5.2(a)-(b), (d). The County designed this policy to advance Goal RL.5a: "Provide for . . . commercial uses in rural areas that serve the needs of rural residents and are consistent with maintaining rural character." SCCP: RURAL LAND USE Goal RL.5a.

Here, the hearings board decided the comprehensive plan amendment did not conform to RCW 36.70A.070(5)(d)(iv)(A) through (C), while the concurrent rezone was not consistent with and did not implement Goal RL.5a or Policy RL.5.2(a) through (b) and (d). The County raises four arguments in opposition.

First, the County argues the hearings board erroneously found amendment 07-CPA-05 noncompliant with the GMA because it is based on the pre-amendment comprehensive plan and development regulations, which complied with the GMA. However, an amendment's GMA compliance is independent from that of a pre-amendment planning document. *See* RCW 36.70A.040(3)(d), (4)(d), (5)(d); RCW 36.70A.070; RCW 36.70A.130(1)(d). Notably, the hearings board found amendment 07-CPA-05 failed to minimize and contain the intensification and infill of commercial use within the logical outer boundary the comprehensive plan originally fixed in 2001. This finding is a verity on appeal because the County did not assign error to it. *See* RAP

10.3(g)-(h); *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). Indeed, a staff report to the county commissioners supports this finding, stating,

> The requested change from Urban Reserve to Limited Development Area (Commercial) is generally not consistent with Policy RL.5.2 [and, thus, the GMA].
>
> The Limited Development Area . . . Commercial was designated south of Day Mt Spokane Road and adjacent to both side [sic] of Highway 2 based on existing land uses, zones, comprehensive planning policies and the public process that resulted in the adoption of the original GMA County Comprehensive Plan in November of 2001. If approved the Limited Development Area Commercial would be extended to the north side of Day Mt. Spokane Road and to property which is not fronting or adjacent to Limited Development Areas with actual frontage of Highway 2.

AR at 553. Accordingly, the County's argument fails.

Second, the County argues the hearings board erroneously interpreted Goal RL.5a and Policy RL.5.2 as requiring public necessity for McGlades's market and bistro because the GMA does not require such need and the comprehensive plan is a mere guide. But the GMA provides LAMIRDs may contain "necessary public facilities and public services." RCW 36.70A.070(5)(d). And, amendment 07-CPA-05 would not generally conform to the comprehensive plan if it provided commercial uses in rural areas regardless of local need. The County cannot escape its obligation to observe Goal RL.5a and Policy RL.5.2 by characterizing them as a mere guide.

Third, the County argues the hearings board erroneously found no demonstrated public necessity for McGlades's market and bistro, considering the full-service restaurants existing nearby, because the community gave widespread support for the

business. But desires are different than needs. The County does not identify any evidence demonstrating public need. Instead, the County suggests public desire is enough because the GMA offers flexibility, ensuring community-oriented planning responsive to local circumstances. We do not reweigh the evidence. Even if we disagreed with the hearings board, it is a verity that amendment 07-CPA-05 established an improper outer LAMIRD boundary.

Finally, the County argues the hearings board erroneously found McGlades's market and bistro disrupted the neighborhood's rural character because the business assimilated well in an increasingly urban area. But the County does not dispute the hearings board's assessment of increased traffic, noise, and lighting. Again, we do not reweigh the evidence. And again, even if we disagreed with the hearings board, it is a verity that amendment 07-CPA-05 established an improper outer LAMIRD boundary.

In sum, the record shows the comprehensive plan amendment does not conform to the GMA, while the concurrent rezone is not consistent with and does not implement the comprehensive plan. A sufficient quantity of evidence exists to persuade a fair-minded person the County did not comply with the GMA in adopting amendment 07-CPA-05. In reaching this decision, the hearings board correctly interpreted and applied the law upon thorough reasoning with due consideration for the facts. Therefore, the hearings board did not err in finding GMA noncompliance.

We turn now to SEPA noncompliance. The County challenges the hearings board's decision that the environmental checklist was inadequate under SEPA because it did not fully disclose or carefully consider amendment 07-CPA-05's probable long-

term effects. Under SEPA, a county must include an environmental impact statement with any proposal the lead agency's responsible official decides would "significantly affect[] the quality of the environment." RCW 43.21C.030(2)(c); WAC 197-11-330(1). An agency must make this threshold determination where, as here, the proposal is an "action"[3] and is not "categorically exempt."[4] Former WAC 197-11-310(1) (2003). The agency must use an environmental checklist to assist its analysis and must document its conclusion in a determination of significance or nonsignificance. Former WAC 197-11-315(1) (1995); WAC 197-11-340(1), -360(1).

The agency must base its threshold determination on "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335. In GMA planning, the agency should tailor the "scope and level of detail of environmental review" to fit the proposal's specifics. WAC 197-11-228(2)(a). Thus, for a nonproject action, such as a comprehensive plan amendment or rezone, the agency must address the probable impacts of any future project action the proposal would allow. WASH. STATE DEP'T OF ECOLOGY, *supra*, § 4.1, at 66; *see* WAC 197-11-060(4)(c)-(d). The purpose of these rules is to ensure an agency fully discloses and carefully considers a proposal's environmental impacts before adopting it and "at the earliest possible stage."

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[3] *See* WAC 197-11-704(2)(b)(ii). Specifically, amendment 07-CPA-05 is a nonproject action because it involves "[t]he adoption or amendment of comprehensive land use plans or zoning ordinances." *Id.*

[4] *See* RCW 43.21C.229, .450; WAC 197-11-305, -800; SPOKANE COUNTY CODE 11.10.070-.075, .180. Additionally, while a county may forego SEPA analysis if its comprehensive plan and development regulations "provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action," this exception does not apply to amendment 07-CPA-05 because it is a nonproject action. RCW 43.21C.240(1); *see also* RCW 43.21C.240(2); WAC 197-11-158.

King County v. Wash. State Boundary Review Bd., 122 Wn.2d 648, 663-64, 666, 860 P.2d 1024 (1993); *see* WAC 197-11-060(4)(c)-(d). An agency may not postpone environmental analysis to a later implementation stage if the proposal would affect the environment without subsequent implementing action. RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT § 13.01[1], at 13-15 to -16 (1987 & Supp. 2010); *see* WAC 197-11-060(5)(d)(i)-(ii).

Here, the hearings board found the County's checklist ignored the probable impacts of any future commercial development amendment 07-CPA-05 would allow and improperly postponed environmental analysis to the project review stage. The County raises two arguments in opposition.

First, the County argues the hearings board contradicted its later statement that future commercial development is speculative given the property's existing growth. This claimed inconsistency makes no difference because McGlades clearly intended to reopen and expand its market and bistro under the proposal.[5] And, the proposal would allow McGlades or its successors to replace the business with a variety of other commercial uses.[6] Either result could significantly affect environmental quality, as

[5] McGlades's application for a conditional use permit requested expansion to include an asphalt driveway and drive-through espresso service, asphalt parking lot with spaces for 39 vehicles, outdoor dining and entertainment with seating for 64 patrons, and on-site alcohol consumption. The hearing examiner noted this expansion "is likely if the site is rezoned." AR at 178. The hearing examiner clarified, "McGlades . . . seeks to reopen the business, and to expand it under the [Limited Development Area (Commercial)] zone." AR at 172.

[6] The Limited Development Area (Commercial) zone designation allows taverns and pubs, theaters and performing arts centers, circuses, storage facilities, business complexes, financial institutions, vehicle repair shops, mortuary service centers, medical

discussed below. Regardless, the hearings board properly recognized the checklist could not postpone environmental analysis to the project review stage because amendment 07-CPA-05 approved the property's existing nonconforming use, thereby affecting the environment even if McGlades or its successors never pursue subsequent project action.

Second, the County argues the hearings board undervalued the checklist's thorough contents. But the checklist failed to adequately address the proposal. Apart from reciting it in a background section with seven other comprehensive plan amendments and concurrent rezones, the checklist did not mention amendment 07-CPA-05. Assuming this omission was a scrivener's error, the checklist still lacked required particularity. Though amendment 07-CPA-05 varied greatly from the other seven proposals, the checklist attempted to address them all with broad generalizations. The checklist did not tailor its scope or level of detail to address the probable impacts on, for example, water quality, resulting from amendment 07-CPA-05 specifically. While the property is near potable water wells in a Critical Aquifer Recharge Area with high susceptibility, the proposal could "allow an on-site [wastewater disposal] system that will fail thus resulting in the degradation of the local environment." AR at 562. Despite these concerns, the checklist repeated formulaic language postponing environmental analysis to the project review stage and assuming compliance with applicable standards. Thus, the checklist lacked information reasonably sufficient to evaluate the proposal's environmental impacts.

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service centers, and scientific research facilities. SPOKANE COUNTY ZONING CODE

In sum, the record shows the County failed to fully disclose or carefully consider amendment 07-CPA-05's environmental impacts before adopting it and at the earliest possible stage. This is a sufficient quantity of evidence to persuade a fair-minded person the County did not comply with SEPA in adopting the proposal. In reaching this decision, the hearings board correctly interpreted and applied the law upon thorough reasoning with due consideration for the facts. Therefore, the hearings board did not err in finding SEPA noncompliance.

We turn now to invalidity based on GMA and SEPA noncompliance. The County challenges the hearings board's determination that amendment 07-CPA-05 is invalid because its continued validity would substantially interfere with fulfilling the GMA's environmental protection goal. To fulfill this goal, the GMA requires a county to designate critical areas and adopt development regulations protecting them. RCW 36.70A.060(2), .070(5)(c)(iv), .170(1)(d); WAC 365-196-485(2), (3)(a), (c)-(d). Critical areas include "areas with a critical recharging effect on aquifers used for potable water." RCW 36.70A.030(5)(b); WAC 365-196-200(5)(b). A county must use "the best available science in developing policies and development regulations to protect the functions and values of critical areas." RCW 36.70A.172(1); WAC 365-196-485(1)(b), (3)(d).

Here, the hearings board found by failing to comply with SEPA in adopting amendment 07-CPA-05, the County threatened a Critical Aquifer Recharge Area with high susceptibility and disused the best available science for mitigating probable environmental impacts. This, the hearings board concluded, substantially interfered

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with fulfilling the GMA's environmental protection goal. The County argues the hearings board ignored the permit review McGlades's market and bistro underwent at each expansion in the years preceding the comprehensive plan amendment and concurrent rezone. But the County failed to adopt any such environmental analysis, incorporate it by reference, or include it by addendum. *See* WAC 197-11-600, -625 to -635. The mere existence of additional supporting documents cannot excuse the County's failure to include them in the planning process.

The record shows the County's SEPA noncompliance threatened a Critical Aquifer Recharge Area with high susceptibility and disused the best available science for mitigating probable environmental impacts. This is a sufficient quantity of evidence to persuade a fair-minded person amendment 07-CPA-05's continued validity would substantially interfere with fulfilling the GMA's environmental protection goal. In reaching this decision, the hearings board correctly interpreted and applied the law upon thorough reasoning with due consideration for the facts. Therefore, the hearings board did not err in determining invalidity on SEPA grounds.

Moreover, we note the hearings board additionally determined invalidity on GMA grounds, specifying that amendment 07-CPA-05's continued validity would substantially interfere with fulfilling the GMA's urban growth promotion and sprawl reduction goals. The County vaguely assigned error to this determination then abandoned the error claim by failing to argue it. *See* RAP 10.3(a)(6), (g)-(h); *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991). Thus, the hearings board did not err in determining invalidity on GMA grounds.

Considering all, the hearings board's decision is supported by substantial evidence in light of the whole record, does not erroneously interpret or apply the law, and is not arbitrary or capricious. *See* RCW 34.05.570(3)(d)-(e), (i). Therefore, we conclude the hearings board did not err by invalidating amendment 07-CPA-05.

D. Deference

The issue is whether the hearings board erred by failing to accord the County's planning actions proper deference. The County contends the hearings board engaged in an unlawful procedure or decision-making process, or failed to follow a prescribed procedure, by withholding such deference. We review the hearings board's procedures and decision-making processes de novo. RCW 34.05.570(3)(c); *Kittitas County*, 172 Wn.2d at 155.

A hearings board must defer to a county's planning action if it is consistent with the GMA's goals and requirements. Former RCW 36.70A.3201 (1997); *Quadrant Corp.*, 154 Wn.2d at 238. GMA deference to county planning actions supersedes APA deference to administrative adjudications. *Quadrant Corp.*, 154 Wn.2d at 238. Thus, we will not defer to a hearings board if it fails to accord a county the required deference. *Id.* But a hearings board accords a county the required deference by properly applying the GMA's clearly erroneous review standard. *Id.*

Here, the hearings board initially presumed the County's comprehensive plan amendment and concurrent rezone were valid but ultimately found them clearly erroneous in light of the entire record and the GMA's goals and requirements. Again, the hearings board's decision is supported by substantial evidence in light of the whole

record, does not erroneously interpret or apply the law, and is not arbitrary or capricious. Thus, the hearings board properly applied the GMA's clearly erroneous review standard. *See* RCW 36.70A.320(1), (3); *King County*, 142 Wn.2d at 552. By doing so, the hearings board accorded the County's planning actions the required deference. *See Quadrant Corp.*, 154 Wn.2d at 238. In sum, the hearings board did not engage in an unlawful procedure or decision-making process, or fail to follow a prescribed procedure. *See* RCW 34.05.570(3)(c).

E. Attorney Fees and Costs

The Neighbors request an award of attorney fees and costs, citing chapter 4.84 RCW. The Regulatory Reform Act, RCW 4.84.370, does not authorize an award because it does not apply to the County's comprehensive plan amendment or concurrent rezone, and the Neighbors did not prevail before the county commissioners or hearing examiner. *See Heller Bldg., LLC v. City of Bellevue*, 147 Wn. App. 46, 64, 194 P.3d 264 (2008); *Tugwell v. Kittitas County*, 90 Wn. App. 1, 15, 951 P.2d 272 (1997). Likewise, the Equal Access to Justice Act, RCW 4.84.340 through .360, does not authorize an award because it does not apply against the hearings board. *See Duwamish Valley Neighborhood Pres. Coal. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 97 Wn. App. 98, 100-01, 982 P.2d 668 (1999). Therefore, we deny the Neighbors' request.

Affirmed.

Brown, J.

WE CONCUR:

Kulik, J.

Siddoway, A.C.J.

APPENDIX V

**BEFORE THE EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

DAN HENDERSON, LARRY KUNZ, NEIL MEMBREY, KASI HARVEY-JARVIS, and NEIGHBORHOOD ALLIANCE OF SPOKANE, Petitioners, vs. SPOKANE COUNTY, a political subdivision of the State of Washington, Respondent.	Case No.: 08-1-0002 **PETITIONERS' HEARING ON THE MERITS BRIEF**

Petitioners, Dan Henderson, Larry Kunz, Neil Membrey, Kasi Harvey-Jarvis, and Neighborhood Alliance of Spokane respectfully submit this Petitioners' Hearing on the Merits Brief in support of its Petition for Review. As set forth below and illustrated by the record in this matter, the County ignored the requirements of the GMA and its own planning documents when it authorized an urban use outside the urban growth area. Moreover, the County failed to comply with SEPA in its action in that it deferred virtually all analysis of impacts of the project until an unspecified and uncertain date. Accordingly, Petitioners respectfully request that the Board find that the redesignation is not in compliance with the GMA, SEPA, and other applicable legal requirements, as set forth below.

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II. RELEVANT FACTS

A. PROCEDURAL HISTORY OF 07-CPA-05

This case involves review of a Comprehensive Plan and concurrent County Zoning map amendment and the accompanying SEPA determinations. These actions redesignated approximately 4.2 acres of land from Urban Reserve outside of the Urban Growth Area (rural lands) to Limited Development Area-Commercial outside of the Urban Growth Area. This amendment, labeled as 07-CPA-05, was approved by Spokane County Resolution 07-1096 on December 21, 2007. A copy of this resolution is included as Exhibit 1. Resolution 07-1096 involved the review of 15 proposed changes to the Comprehensive Plan and zoning map and resulted in the approval of eight such changes (the remainder were denied) by legislative action of the Spokane County Commissioners. Notice was published on December 24, 2007 and is evidenced by Spokane County Resolution 07-1097. *See* Exhibit 2.

A SEPA checklist and Determination of Nonsignificance (DNS) were issued by the Spokane County cumulatively for eight rural amendments and zoning map changes, including 07-CPA-05, on September 20, 2007. *See* Exhibits 3, 4. These document purported to disclose the environmental impacts for eight comprehensive plan amendments and concurrent Zoning map amendments , specifically 07-CPA-2, 07-CPA-3, 07-CPA-4, 07-CPA-5, 07-CPA-7, 07-CPA-8, 07-CPA-9, and 07-CPA-16.

As stated in the DNS, the proposal subject to SEPA review is the "2007 annual Spokane County Comprehensive Plan rural map amendments with concurrent zone reclassifications to the Spokane County Zoning map" Exhibit 4 at 1. The DNS further provides, "This is a nonproject action under SEPA." *Id.*

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Rather than conduct any meaningful environmental assessment and evaluation of the eight proposed comprehensive plan amendments. The DNS concludes, "The lead agency for this proposal has determined that it does not have a probable significant adverse impact on the environment. This decision was made after review of a completed environmental checklist and other information on file with the lead agency. This information is available to the public on request" Exhibit 4 at 1. However, the record contains no additional information meaning that the sole basis for this conclusion was the environmental checklist.

Both the SEPA environmental checklist and DNS were completed by the County, itself. *See* Exhibits 3, 4. The checklist lacked analysis of any impacts and, in fact, deferred much of the analysis until a later time stating, "Non Project Action: To be determined if site specific developments are proposed for Rural Comprehensive Plan Amendments." *See, e.g.,* Exhibit 3 at 5. This was the case for all or a great portion of the sections of the checklist addressing stormwater, earth, air, water, groundwater, stormwater/runoff, plants, animals, energy and natural resources, environmental health, noise, aesthetics, light and glare, transportation, public services, and utilities. *See generally* Exhibit 3. The remaining portions of the checklist either generically referred to existing laws/codes/regulations, failed to provide any discussion of any impacts, or provided a cursory description of impacts without any specific discussion of each properties current condition and the changed condition that will likely occur as a result of the comprehensive plan amendments. *Id.* Both documents lack any specific mitigation measures to address any impacts associated with the County's actions. *See generally* Exhibits 3, 4.

The SEPA documents were timely appealed to the County Hearing Examiner by Petitioners Dan Henderson, Larry Kunz, and Neil Membrey on October 5, 2007. *See* Exhibit 5.

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A decision denying this appeal was issued on December 10, 2007. *See* Exhibit 6. A timely appeal of Resolution 08-1096, focusing on 07-CPA-05 and the concurrent Zoning map amendment (and related SEPA documents) was filed February 8, 2008.

B. BACKGROUND OF DEVELOPMENT OF SITE

Development of the subject property has a long history. A detailed discussion about the permitting history of the site is provided in a 2006 decision of the Spokane County Hearing Examiner denying a conditional use permit for the site at ¶¶ 83-126 (included as Exhibit 7). The Hearing Examiner's decision indicated that this property is "approximately 4.2 acres." Exhibit 7 at ¶1, ¶10, 20. The surrounding property is residential "primarily developed with single-family homes on acreage parcels." *Id.* at ¶26. The site most recently operated as a restaurant "featuring a varied menu of hot and cold food items prepared on or off-sites, and espresso products, in a 'deli'-type setting." *Id.* at ¶1, 12. However, this use was not in conformance with zoning and land use designation. *Id.* at Conclusion of Law ¶1-12. This resulted in the denial of a conditional use permit. *See generally* Exhibit 7.

Previously, this site was used for agricultural products sale (a "fruit and vegetable stand") since 1984. Exhibit 7 at ¶83. In 1985, the County issued a building permit for a 3,024 square-foot pole building on the site and a 1,000 gallon septic tank with 150 feet of drainfield was installed pursuant to County Health Department approval. *Id.* at ¶84. In 1986, the County issued a plumbing permit for four plumbing fixtures on the site, including bathroom, kitchen, and laundry. *Id.* at ¶85. In 1990, the County issued a permit for a 576 square-foot addition. *Id.*

In 1992, the County issued a permit for a 1,280 square-foot addition to the building. Exhibit 7 at ¶91. In 1996 and 1998, the County issued mechanical permits for gas piping and air

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conditioners. *Id.* at ¶93. In 2002, the County issued a sign permit for the site. *Id.* at ¶100. On June 15, 2005, the County issued a building permit for a "produce store and food service" on the site authorizing remodel of the site. *Id.* at ¶112. The County also issued separate permits to install mechanical and plumbing fixtures. *Id.* at ¶112.

On September 6, 2005, the County issued a building permit to install a fire suppression system in a portion of the building on the site. Exhibit 7 at ¶116. In November, 2005, operation of the restaurant began after completion of the remodeling project. *Id.* at ¶122. The record indicates that the owner of the site obtained a commercial restaurant license from Spokane Regional Health District. *Id.* at ¶126. On December 2, 2005, the site received an occupancy permit from the County. *See* Exhibit 8.

The record indicates that the site had unlawfully operated from late 2005 until 2006 as a restaurant prior to the enactment of the Comprehensive Plan amendment and zoning change subject to this appeal. Exhibit 7 at ¶1, 12; *see also* Exhibit 9.

III. LEGAL ISSUES

The issues in this case are as follows:

1. Did Spokane County fail to implement and comply with the substantive and procedural requirements of the State Environmental Policy Act (SEPA), as set forth in 43.21C RCW, when it failed to properly identify, disclose, analyze, and/or mitigate known and/or possible impacts associated with the approval of 07-CPA-05 by: (a) unlawfully deferring analysis of impacts to a future, uncertain, and unidentified approval process; (b) relying upon an environmental checklist and determination of nonsignificance (DNS) that did not fully disclose, discuss, consider, or analyze known and/or probable impacts of the action; (c) failing to assess

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the impacts of the maximum potential development of the site; (d) failing to assess cumulative impacts associated with the proposal; and (e) failing to mitigate any known and/or probable environmental impacts?

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

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

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

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

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

IV. LEGAL ANALYSIS

A. STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by (Spokane County) is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of (GMA)." The Petitioner challenging the action taken bears the burden of demonstrating non-compliance with GMA. RCW 36.70A.320(2). In order to find the County's actions clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993). As illustrated in record for this matter and in the argument below, Petitioners have clearly met the burden that the County's actions are inconsistent with Washington law.

B. SPOKANE COUNTY FAILED TO IMPLEMENT AND COMPLY WITH THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS OF THE STATE ENVIRONMENTAL POLICY ACT (SEPA), AS SET FORTH IN 43.21C RCW, WHEN IT FAILED TO PROPERLY IDENTIFY, DISCLOSE, ANALYZE, AND/OR MITIGATE KNOWN AND/OR POSSIBLE IMPACTS ASSOCIATED WITH THE APPROVAL OF 07-CPA-05.

1. Spokane County unlawfully deferred analysis and mitigation of impacts to a future, uncertain, and unidentified approval process.

In exacting 07-CPA-05 and the accompanying zone change, Spokane County unlawfully deferred analysis of the impacts of 07-CPA-05 to a future, uncertain, and unidentified approval process. The SEPA checklist explicitly defers much of the analysis until a later time simply

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stating, "Non Project Action: To be determined if site specific developments are proposed for Rural Comprehensive Plan Amendments." *See, e.g.,* Exhibit 3 at 5. This was the case for all or a great portion of the sections of the checklist addressing stormwater, earth, air, water, groundwater, stormwater/runoff, plants, animals, energy and natural resources, environmental health, noise, aesthetics, light and glare, transportation, public services, and utilities. *See generally* Exhibit 3. It is simply not logical or legal to completely defer impacts analysis to some unspecified time.

SEPA environmental review is required for any local decision that is not categorically exempt, including, as here, amendments of a County comprehensive plan and zoning changes. WAC 197-11-704(b)(ii). SEPA, itself, requires the disclosure and full consideration of environmental impacts in governmental decision making. *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). The Court of Appeals in *Moss v. Bellingham* restated the long-standing rule that the purpose of SEPA is to function "as an environmental full disclosure law." 109 Wn. App. 6 (Wa. Ct. App. 2001). SEPA specifically required that the County conduct a detailed and comprehensive review, rather than take a "lackadaisical approach", as occurred here. *Eastlake Cmty. Council v. Roanoke Assocs., Inc.* 82 Wn.2d 475, 494, 513 P.2d 36 (1973); *see also Norway Hill Pres. & Prot. Ass'n v. King County*, 87 Wn.2d 267, 273, 552 P.2d 674 (1976)(SEPA requires a "detailed statement"). SEPA further requires that the County demonstrate that environmental impacts were considered in a manner sufficient to amount to prima facie "compliance with the procedural requirements of SEPA." *Sisley v. San Juan County*, 89 Wn.2d 78, 64, 569 P.2d 712 (1977).

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SEPA regulations specifically require that the County "carefully consider the range of probable impacts, including short-term and long-term effects" of a proposal. WAC 197-11-060(4)(c). Moreover, the regulations state:

> A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions. For example, adoption of a zoning ordinance will encourage or tend to cause particular types of projects or extension of sewer lines would tend to encourage development in previously unsewered areas.

WAC 197-11-060(4)(d).

While the law provide some flexibility in the level of detail necessary in the review of a nonproject action, *see e.g.* WAC 197-11-442(2), there is nothing that authorizes the County to turn a blind eye to all environmental impacts and to "punt" analysis to some later and unidentified process. Decisions from Washington courts affirm the need for a detailed analysis early in the land designation process. For example, the Supreme Court in *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993), stated that a "land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action." The Court recognized that the purpose of SEPA is "to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences." *Id.* The Court also indicated that the point of SEPA is to "not evaluate agency decisions after they are made, but rather to provide environmental information to assist with *making* those decisions." *Id.* at 666 (emphasis in the original).

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Numerous Hearings Board decisions reflect the need for a detailed SEPA analysis in the Comprehensive Plan and zoning amendment process. The Western Board has stated, "It is clear that an amendment to the Comprehensive Plan ...requires environmental review." *Superior Asphalt and Concrete v. Yakima County,* Case No. 05-1-0012, Final Decision and Order (WWGMHB, June 20, 2006).

In *Better Brinnon Coalition v. Jefferson County,* Case No. 03-2-0007, Amended Final Decision and Order (WWGMHB, Nov. 3, 2003), the Western Board stated:

> **Petitioner alleges that this SEIS is inadequate because it defers too much of the analysis of environmental impacts to the project stage when actual development proposals will be presented, and because it fails to address particular environmental concerns.** The County directs our attention to WAC 197-11-442 which provides that the County shall have "more flexibility in preparing EISs on nonproject proposals". However, the flexibility afforded the County is not unlimited. All environmental documents prepared under SEPA require consideration of environmental impacts, with attention to impacts that are likely, not merely speculative. WAC 197-11-060 (4).
>
> ...
>
> We note with the County's hearing examiner that the County essentially chose to defer all environmental review until the permitting stage. ... This is a pattern that the hearing examiner notes leads to a "dangerous incrementalism" whereby the environmental issues are never really addressed. *Ibid.* This is neither proper phasing nor a proper use of flexibility in setting the detail of analysis. **The County must evaluate the environmental impacts that are probable as a result of the change proposed. Those impacts should be measured in terms of the maximum potential development of the property under the changed land use designation.** *See Ullock v. Bremerton,* 17 Wn. App. 573, 575, 565 P.2d 1179 (1977). By waiting until each permit application is presented, the County would be unable to assess the cumulative impacts of the increased development in any meaningful way and would thwart the aim of providing future permit applicants with certainty about what is allowed in the Brinnon Rural Village Center and WaWa Point SRT overlay

In *Hood Canal v. Jefferson County,* Case No. 03-2-0006, Final Decision and Order (WWGMHB, Aug. 15. 2003), the Western Board struck down a similar effort of Jefferson

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County to defer evaluation of environmental impacts because the proposed action was a nonproject comprehensive plan action, stating:

> The County argues that the review that was conducted at this stage was appropriate because the County has flexibility in preparing an EIS and a general discussion of the impacts of alternate proposals is proper because the comprehensive plan affected a land use designation. WAC 197-11-442(1) and (4). However, **this regulation does not excuse the County from an analysis and evaluation of environmental impacts of alternatives; it just means that the impacts and alternatives may be discussed "in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal.**" WAC 197-11-442(2).

In *Seaview Coast Conservation Coalition v. Pacific County*, Case No. 96-2-0010, Final Decision and Order (WWGMHB, Oct. 22, 1996), the Western Board struck down an action similar to this case, stating:

> The record also reflected that the County did not address issues concerning access, utilities, fill for septic sewage systems nor the cumulative impact that those necessary residential aspects would impose on the area covered by the amendment. ... **The record reflected that the County's response to the environmental issues was to ignore them totally, disregard them as being unsubstantiated or acknowledge their existence but postpone any analysis until a later unspecified time.** ...WAC 197-11-060(4)(c)(d) requires that environmental consideration of a non-project nature include a "range of probable impacts".

Moreover, Washington's State Environmental Policy Act Handbook provides that the review of comprehensive plan amendment should include consideration of the future development allowed by that action, stating:

> If the nonproject action is a comprehensive plan or similar proposal that will govern future project development, the probable impacts need to be considered of the future development that would be allowed. For example, environmental analysis of a zone designation should analyze the likely impacts of the development allowed within that zone. The more specific the analysis at this point, the less environmental review needed when a project permit application is submitted.

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Washington Department of Ecology, State Environmental Policy Act Handbook (1998) at 66 (hereinafter referred to as the "SEPA Handbook").[1]

The SEPA Handbook further states, in regards to actions such as this governed by the Growth Management Act, "It is not possible to meet the goals or requirements of GMA or to make informed planning decisions without giving appropriate consideration to environmental factors. The GMA nonproject actions such as the adoption of policies, plans, and regulations form the basis for subsequent "on the ground" project decisions that directly affect our environment." SEPA Handbook at 75. The guidance in the SEPA Handbook could not be any clearer to this situation:

> Q: Is environmental review necessary for a jurisdiction that is updating an existing comprehensive plan to satisfy GMA?
>
> A: Yes, updating an existing comprehensive plan is an action that requires environmental review under SEPA. The type of environmental review required will vary depending on whether an EIS was prepared for the existing plan, how recently the EIS was prepared, and how extensive the revisions will be. As a general rule, the environmental review should address any probable significant adverse impacts that will result from the revised plan that were not analyzed when the existing plan was adopted.

SEPA Handbook at 131. No prior EIS or SEPA document covers the actions subject to this appeal.

Here, the County made no effort to analyze the probable impacts of the comprehensive plan amendment. Instead, the checklist and DNS deferred virtually all analysis of impacts to some future, unidentified time by simply characterizing this as a "non-project action." *See* Exhibit 3. While SEPA does not require the County to evaluate a laundry list of unrelated

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[1] Available at http://www.ecy.wa.gov/pubs/98114.pdf.

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environmental considerations, it does require that the County evaluate probable significant environmental impacts. WAC 197-11-402 (1). The record is clear that the County made no effort to look the impacts of the comprehensive plan amendment as required by SEPA. Not only is this reflected in the actual SEPA documents, but in other portions of the record. For example, in the Staff Report to the Hearing Examiner, County staff stated, "Future development of the site will require specific review of probably environmental impacts at the time that detailed development plans are submitted to Spokane County." Exhibit 10 at 4. This approach is simply inconsistent with SEPA.

Moreover, the County's inadequate SEPA documents will almost ensure that no environmental review of the impacts of 07-CPA-5 will ever occur. As described above, development on the property subject to 07-CPA-5 has already occurred. There is no evidence that any additional development proposals, permits, or review will be required for the use of this site or that any additional SEPA review would ever The owner of this site has all required permits and even an occupancy permit. The record indicates that County staff informed Counsel for Appellants that they were unaware of any additional approvals or SEPA review required for use of this site. *See* Eichstaedt Declaration at ¶ 3-6, included as attachment to Exhibit 5. Nothing in the record refutes this. To the contrary, no additional development proposals or SEPA analysis will ever be required for the proposed restaurant use at this site.

The County cannot rely upon future SEPA processes and development review when it is unlikely that these will not occur. Moreover, the County cannot ignore the realities of what is on the ground and the impacts associated with it by pretending that we are dealing with a bare piece of ground. Accordingly, this Board must find the County out of compliance with SEPA.

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2. Spokane County relied upon an environmental checklist and determination of nonsignificance (DNS) that did not fully disclose, discuss, consider, analyze, or mitigate known and/or probable impacts of the action.

As stated above, SEPA requires the disclosure and full consideration of environmental impacts in governmental decision making. *Polygon Corporation*, 90 Wn.2d at 61. In short, SEPA regulations and procedures are designed to evaluate project impacts and prevent environmental harm, not simply rubber stamp a project. Unfortunately, the primary document relied upon by the County staff, the SEPA checklist, did not disclose or discuss areas of impact associated with the proposal. The purpose of the SEPA checklist: "is to provide the information to . . . the agency, identify impacts . . . and to help the agency decide whether an EIS is required." WAC 197-11-960. The County did not discuss or disclose several significant issues on the checklist, which in turn, were not considered or evaluated in the DNS. The record indicates that "[n]eighboring property owners" expressed concern regarding "increased traffic, traffic safety impacts, increased noise from proposed outside entertainment, headlights shining into homes from parking a lot on site, potential pollution of area wells from on-site sewage disposal." Exhibit 9 at ¶34; *see also* Exhibit 5 (including the Membrey, Kunz, Henderson, and Shelley Affidavits includes as attachments thereto); Exhibit 11. None of these impacts were analyzed or mitigated in the DNS or checklist.

The County's SEPA documents failed to disclose and analysis a wide variety of known and probable impacts associated with development at the subject property:

- The checklist and DNS did not disclose the inadequacy of the existing septic system and impacts to groundwater.

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- As discussed above, the checklist and DNS did not disclose that the site in question was already built. The DNS did not disclose this fact or disclose how or when additional review and mitigation of impacts would occur.
- The checklist and DNS failed to address and mitigate for traffic and parking impacts.
- The checklist and DNS failed to address and mitigate impacts to the community, including noise and other screening issues.

As discussed below, the record clearly indicates that the SEPA documents supporting the County's decision are inadequate warranting a finding by this Board that the County acted in a manner inconsistent with SEPA.

a. Impacts to Groundwater

The SEPA documents fail to recognize impacts to groundwater associated with the proposal. *See* Exhibits 3, 4. Despite the fact that the record indicates that this area is classified as "a Critical Aquifer Recharge Area that is rated as having High susceptibility", the SEPA documents lack any analysis of how the action would impact either the aquifer or neighboring drinking water sources. *See* Exhibit 12 at 6, *generally see* Exhibits 3,4. No discussion is presented of the adequacy of the septic system, of stormwater impacts, of the presence of wells in the vicinity of the area (*see* Exhibit 5, Henderson and Kunz affidavits), or for impacts/mitigation related to grease/oil/food waste disposal associated with use of the site.

First, it is clear that actions on this site authorized by the challenged amendment and rezone are inconsistent with the County's own Critical Areas Ordinance. The Critical Areas Ordinance requires nonresidential development outside of the urban growth area that produce more than 90 gallons per day to utilized an enhanced wastewater disposal system, such as: (a) treatment utilizing sealed lagoons; (b) treatment using holding tanks with transport of and disposal at a site licensed for disposal of the particular sewage effluent; (c) treatment in

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compliance with a valid surface water discharge permit obtained from the Washington State Department of Ecology; or (d) connection to an existing public or private collection/treatment facility when allowed pursuant to the County sewer concurrency requirements. Spokane County Code 11.20.075(c)(§L-3)[2], *see also* Exhibit 12 at 6.

Unfortunately, the site fails to comply with these requirements and the SEPA documents fail to discuss the inadequacy of the existing sewage system, its noncompliance with the County's Critical Areas Ordinance, or the probable impacts. As recognized by the Spokane County Hearing Examiner:

> The wastewater performance standards set forth in the CARA provisions of the County Critical Areas Ordinance would require an enhanced treatment disposal system for the uses in the remodeled building and proposed expansion, if such uses would generate approximately 378 gallons per day (i.e., 4.2-acre site times 90 gpd) or more of wastewater, and such generation exceeds the volume of wastewater generated by lawful uses of the site prior to the remodeling and proposed expansion.

Exhibit 7 at ¶132. The Hearing Examiner also found:

> If water flow is used as the basis for determining the volume of wastewater per day generated by the business on the site as remodeled, both the maximum and average daily flows of wastewater from the remodeled business would exceed 90 gallons per day per acre, and appear to be 20% higher than the wastewater flows generated by the previous business. In such case, the water flow for the remodeled business, which are projected to average 450 god, cannot exceed the wastewater flow generate by the previous business without providing treatment at least equal to one of the enhanced treatment systems described in paragraphs 11.20.075.C, item 2.a. of L-3, of the Critical Areas Ordinance.

Id. at ¶137.

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[2] Available at http://ordlink.com/codes/spokaneco/_DATA/TITLE11/Chapter_11_20_CRITICAL_AREAS/11_20_075_Critical_aquifer_rec.html.

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Stan Miller, the former Water Quality Management Program Manager for Spokane County, reviewed the Critical Areas issues surrounding 07-CPA-05. Exhibit 13. Mr. Miller concluded:

> I have examined this proposal and find it inconsistent with the intent of the 1979 Spokane Aquifer Water Quality Management Plan and its implementing actions the Spokane Aquifer Overlay Zone (adopted by the Spokane County BoCC in 1983) and the more recent provisions of Section 11.20.075 Critical Aquifer Recharge Areas of the Spokane County Critical Areas Ordinance.

Exhibit 13 at 1. Mr. Miller found numerous potential risks and problems associated with use of this site as a restaurant, including the need for enhanced septic treatment, as required by the Critical Areas Ordinance:

> At 450 gallons per day a full five acre (5 acres x 90 gal/acre/day) site would be needed to avoid the provisions of paragraph 11.20.075.C(2.a) of L3 in the Critical Areas Ordinance. Any of the treatment options described there would easily handle the increased waste strength of the restaurant land use. In any case a detailed evaluation of the impact of the higher waste strength associated with restaurant use should be conducted (See Chapter 246-272A-0230 (2)(e)(i & ii). The primary focus of this evaluation would be determining the impact of restaurant waste on the expected life of the system used to treat the waste.
>
> ...
>
> Based on the above discussion it is clear that 1) state and local aquifer protection policy recognized from the first set of protection recommendations that on-site sanitary waste disposal posed a risk to the aquifer, 2) the policies further recognize that for a variety of reasons, non-residential waste disposal poses an even higher risk and 3) septic tank elimination was considered the most effective way of lowering the risk of contamination of the aquifer. Both Spokane County through the Critical Areas Ordinance and the State of Washington Department of Health through Chapter 246-272 WAC, recognize the need for giving special consideration to system treatment capability before allowing on-site disposal of non-residential wastewater. This was not done as part of this application.

Exhibit 13 at 2-3.

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Mr. Miller also found that the stormwater injection well on the site is out of compliance with applicable regulations:

> One final note on the proposal relates to the comment in Finding 129 that the proposal "is grandfathered without new drainage requirements." The site as developed now contains at least one stormwater injection well. As the direct injection of stormwater in Spokane County was prohibited by county ordinance in December of 1980, this dry well could never have been legal on this site as it was first developed in 1984, at least 3 years after it was prohibited.

Exhibit 13 at 3.

Other documents in the record indicate concern regarding groundwater. The County Engineer recognized the potential for stormwater related impacts. In a January 26, 2006 letter regarding this site, he stated, "Treatment of stormwater runoff shall be provided for directly connected pollution generating impervious surfaces including traveled ways and parking areas that are designated as high susceptibility or detain to an area of high susceptibility." *See* Exhibit 14 at 3. Unfortunately, none of these impacts are disclosed, discussed, or mitigated for in the SEPA documents. *See* Exhibits 3,4. The County simply cannot omit or defer analysis of the impacts to groundwater and the Critical Areas Ordinance.

b. Noise Impacts

Obviously, a comprehensive plan amendment allowing a restaurant with music in a rural area will present noise impacts. However, no analysis of these impacts is presented anywhere in the SEPA documents. *See* Exhibits 3,4.

The potential for noise has been recognized by the Spokane County Hearing Examiner, "The applicant also indicated that any musical entertainment at the site would initially be limited to a small 2-piece band located indoor, **but this could change over time."** Exhibit 7 at ¶144 (Emphasis added). Testimony was previously submitted to the Hearing Examiner regarding

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plans for the site for patio service and live music. The site will have longer evening hours and serve alcohol. *See generally Id.* These activities increase noise.

An earlier environmental checklist submitted by the owner of the site for a conditional use permit indicated "an outdoor seating area is planned on the south side of the building; ... the business would close at 7:00 p.m., and possibly 9:00 p.m. on summer evenings; **noise from customers and music would likely be generated by the outdoor seating.**" Exhibit 7 at ¶17 (Emphasis added).

Unfortunately, the County's SEPA documents did not identify such impacts nor did it discuss mitigation to address those impacts. These impacts need to be disclosed, analyzed, and mitigated.

c. Impacts Related to Screening/ Light

The challenged action will allow a use that will increase light glare into adjacent properties. In fact, the record is clear that the site does not meet screening requirements. As stated in the Hearing Examiner's Decision, "The site plan of record does not demonstrate compliance with the landscaping and screen standards." Exhibit 7 at ¶142.

Use of this site, as will be authorized by the comprehensive plan amendment, will result in a direct view of outdoor seating and parking lot to adjacent property owners. There currently is no screening or fences and there is no requirement under this proposal to do so. Moreover, outdoor seating will likely require additional lighting than what is currently at the site. The impacts and deficiencies associated with light and screening were not analyzed or mitigated in the SEPA documents.

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d. Impacts Associated with Traffic/Roads/Parking

The DNS and checklist is silent as to impacts associated with increased traffic associated with the use of this site, inadequate parking, and other road/traffic issues. *See* Exhibits 3, 4.

The existing entrance to the site is located on narrow Yale Road. The main entrance approach is hazardous particularly for exiting traffic and traffic turning onto Yale from west bound Day-Mt. Spokane. Those exiting to Day-Mt. Spokane block Yale, if any other traffic is at the stop sign or pull in front of traffic turning onto Yale. These deficiencies are well documented in the record. The County Engineer on May 5, 2005 indicated, "The existing access point on Yale Rd. does not meet standard corner clearance to the Day-Mt. Spokane arterial. The Applicant should take this opportunity at renovation to relocate the access point further north." *See* Exhibit 15. Moreover, the "County Engineering conditions of approval require the applicant to participate in a road improvement district (ROD) for the future improvement of Yale Road along the frontage of the site, including the installation of 10-12 feet of asphalt, curbing and sidewalk along the frontage of the site." Exhibit 7 at ¶149.

The road has no useable shoulders for parking lot overage and the existing parking lot does not accommodate large trucks that deliver and is insufficient to accommodate patrons. *See* Exhibit 5 at 19-21 (photos); *see also* Exhibit 5, Kunz and Henderson affidavits. This results in trucks block Yale and even Day-Mt. Spokane Roads and in illegal parking on Yale and within the right-of-way. *Id.* All this increased impact occurs in areas where the neighboring properties are single-family residences. The increased traffic and parking is deteriorating Yale Road.

Moreover, the impact of 07-CPA-5 with the other amendments adopted by the County a cumulative impact that the SEPA documents ignore. The record contains a letter from the

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Spokane Regional Transit Commission that states, "As a group of amendments, they will potentially contribute in excess of 2000 vehicle trips per day to the regional transportation system that are not already being planner for through existing comprehensive plans ... In the north portion of Spokane County, it appears the CPA's if approved, will contribute to congestion on US 395 at the North Division Wye, increase traffic on US 2 and to a lesser extent Bruce Road and Bigelow Gulch." *See* Exhibit 16 at 2. All of these impacts need to be disclosed, addressed, and mitigated through the SEPA process.

3. Spokane County failed to assess and mitigate the impacts of the maximum potential development of the site.

As discussed above, the County largely deferred analyzing impacts of the challenged action by deferring analysis until some later and unidentified process. *See, e.g.,* Exhibit 3 at 5. By deferring analysis, the County failed to comply with the requirements of SEPA that the maximum possible development of the site be assessed. The Court of Appeals in *Ullock v. Bremerton*, 17 Wn. App.573, 575, 565 P.2d 1179 (Wa. Ct. App. 1977) found, "We hold that an EIS is adequate in a nonproject zoning action where the environmental consequences are discussed in terms of the **maximum potential development** of the property under the various zoning classifications allowed." SEPA regulations specifically require that the County "carefully consider the range of probable impacts, including short-term and long-term effects" of a proposal. WAC 197-11-060(4)(c). Moreover, the regulations specifically state:

> A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions. For example, adoption of a zoning ordinance will encourage or tend to cause particular types of projects or extension of sewer lines would tend to encourage development in previously unsewered areas.

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WAC 197-11-060(4)(d).

The County's decisions must consider more than the narrow, limited environmental impact of the immediate, pending action and cannot close their eyes to the ultimate probably environmental consequences. *Cheney v. Mountlake Terrace,* 87 Wash.2d 338, 344, 552 P.2d 184 (1976). The Western Board has clearly stated, "[I]t is not appropriate to defer all environmental review to the permitting stage." *Whidbey Environmental Action Network v. Island County*, Case No. 03-2-0008, Final Decision and Order (WWGMHB, August 22, 2003). In that case, the WGMHB found:

> The impacts that must be considered for this non-project action are the impacts that are allowed by virtue of the change in designation itself. While project level impacts may properly be deferred to the permitting stage, the County must evaluate the impacts allowed under the changed designation at the time of that non-project action.

Id. Similarly, in *Hood Canal, et al. v. Jefferson County*, Case No. 03-2-0006, Compliance Order (WWGMHB, October 14, 2004), the Western Board clearly found, "The County must analyze potential significant environmental impacts of its non-project actions. The impacts must be measured in terms of the **maximum development** that might occur as a result of the non-project action."

As stated above, the County has deferred most of the analysis of impacts of the development of the subject property and the record contains no analysis or even a reference to the maximum potential development of the site. This amounts to a failure to comply with the requirements of SEPA.

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4. Spokane County failed to assess cumulative impacts associated with the proposal.

The SEPA documents fail to address any cumulative impacts of the eight rural amendments collectively or of the total 2007 amendments (15 total). Exhibits 3, 4, *see also* Exhibit 17 (description of other amendments). The County has a duty under SEPA to take a look at what the cumulative impacts of its proposals are. *Cheney v. City of Mountlake Terrace*, 87 Wash.2d 338, 344, 552 P.2d 184 (1976) ("Implicit in [SEPA] is the requirement that the decision makers consider more than what might be the narrow, limited environmental impact of the immediate, pending action. The agency cannot close its eyes to the ultimate probable environmental consequences of its current action."). Specifically, WAC 197-11-330(3) requires that the County "take into account" whether "several marginal impacts when considered together may result in a significant adverse impact." This simply did not occur.

Moreover, the SEPA Handbook clearly provides that the County should evaluate cumulative impacts of development through the comprehensive plan amendment process:

> SEPA requires agencies to address cumulative impacts. This can be difficult if each project is evaluated individually in isolation from other related proposals. With comprehensive planning under GMA, cities and counties are able to look at the "big picture," evaluate cumulative impacts of development, and determine appropriate mitigation measures to apply to individual, future proposals. Agencies also have a responsibility to look at cumulative impacts within project EISs. The EIS should look at how the impacts of the proposal will contribute towards the total impact of development in the region over time.

SEPA Handbook at 131-32.

Evidence exists in the record that there is likely to be cumulative impacts. For example, in comments from the Spokane Regional Transportation Council (SRTC), the agency indicated, "Cumulative impacts of CPA's and other land use decision are only now being understood for

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their overall impacts to the regional transportation system. Collectively they may have a long range impact, depending on Capital Facilities Plans being developed by local jurisdictions, Spokane County, and Washington State Department of Transportation." *See* Exhibit 16 at 3.

Here, despite purporting to provide environmental analysis and disclosure for eight comprehensive plan amendments, which were considered and adopted by the County in one resolution (Exhibit 1), there is no discussion of the cumulative impacts of the project. The cumulative impacts of the County's comprehensive plan amendments needs to be disclosed, analyzed, and mitigated.

C. SPOKANE COUNTY FAILED TO IMPLEMENT AND COMPLY WITH THE GROWTH MANAGEMENT ACT, 36.70A RCW, WHEN IT APPROVED 07-CPA-05 BY CREATING A 4.2 ACRES LIMITED AREA OF MORE INTENSE RURAL DEVELOPMENT (LAMIRD).

While the GMA does allow commercial, urban-type designations outside of the UGA, Spokane County failed to comply with the requirements for adopting such a land use designation. In 1997, the GMA was amended to allow counties to permit limited areas of more intensive rural development (LAMIRD).[3] The Legislature required counties to "adopt measures to minimize and contain the existing areas or uses of more intensive rural development" so that "[l]ands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl." Laws of 1997, ch. 429, § 7; RCW 36.70A.070(5)(d)(iv). The GMA is clear that LAMIRDs must be mapped and restricted to their existing use, so as to "minimize and contain" more intensive development:

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[3] Spokane County's Comprehensive Plan refers to LAMIRDs as LDAC. *See* http://www.spokanecounty.org/BP/Documents/CompPlan/Chapter3.pdf.

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SPOKANE, WA 99201
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(iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services *756 in a manner that does not permit low-density sprawl;

(v) For purposes of (d) of this subsection, an existing area or existing use is one that was in existence:

(A) On July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter

RCW 36.70A.070(5)(d)(iv), (v)

Spokane County failed to comply with these GMA provisions by: (1) extending the commercial development boundary beyond boundary of existing use; (2) allowing new uses within a LAMIRD; and (3) creating an irregular LAMIRD boundary.

1. Spokane County extended commercial development beyond the boundary of the existing area and use.

Spokane County violated the GMA by adopting a LAMIRD that extended beyond the boundaries of existing use. GMA is clear that LAMIRDs must be mapped and restricted to their existing use, so as to minimize and contain more intensive development The rationale is that LAMIRDs are not tools for encouraging development or creating opportunities for growth, and their densities must be confined to the clearly identifiable area of more intense development existing as of July 1990.

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Here, the record, including the County's own Staff Report indicates that the subject parcel is 4.46 acres with only about ¼ of the site currently developed as commercial (1 acre). Exhibit 12 at 1; *see also* Exhibit 11 at 12-13 (aerial images of site illustrating current build-out). The designation of the 4.46 acres as LAMIRD would allow expansion of commercial business by more than 3 acres onto undeveloped property in a residential areas outside of the UGA..

Both the Courts and Hearings Boards have rejected similar efforts. The Court of Appeals in *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn.App. 378, 391, 166 P.3d 748 (Wa. Ct. App. 2007) reviewed aerial photographs showing swaths of apparently undeveloped land within the LAMIRD boundaries concluded, "The photograph strikingly illustrates that LAMIRD boundaries are not restricted to areas already developed as of 1990, do not 'minimize and contain' the areas of intensive development, and seemingly take little account of physical boundaries." *Id.* The Gold Star Court supported the Western Board's remand to the County for review of its LAMIRDs, in particular, to adopt logical outer boundaries based on pre-1990 development.

This Board in *Wilma v. Stevens* County, Case No. 06-1-0009c, Order on Compliance (EWGMHB, May 22, 2008) found a LAMIRD out of compliance with the GMA in a similar circumstance, stating, "[I]t appears the County went well beyond using physical boundaries in an attempt to include additional undeveloped land. ... [The] LAMIRD does not comply with the RCW 36.70A.070(5)(d)(iv) standards for defining the logical outer boundary because it included undeveloped platted/subdivided lands as part of the existing 'built environment' of a LAMIRD so as not to minimize and contain the more intensive development"

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Here, the County in adopting 07-CPA-05 extended the LAMIRD beyond the boundary of the existing commercial use allowing an increase in commercial development in a residential area outside of the UGA. This is inconsistent with the GMA and the County must be found out of compliance.

2. The LAMIRD allowed a new use in the rural area.

The County also violated the GMA by allowing a new use with the existing rural area. Fundamental to the establishment of a LAMIRD is the requirement that it be based upon "existing areas and uses" as established by the built environment. RCW 36.70A.070(5)(d)(i)(C) provides, "Any development or redevelopment in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas." For the purposes of establishing LAMIRDs, "an existing area or existing use is one that was in existence ... [o]n July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter." RCW 36.70A.070(5)(d)(v).

Here, the record indicates that this site was used for agricultural products sale (a "fruit and vegetable stand") since 1984. Exhibit 7 at ¶83. Efforts to open a restaurant did not begin until 2004 when the current owners purchased the property. Exhibit 7 at ¶1, 12; *see also* Exhibit 9. While a agricultural stand may be an existing use, the post-1990 restaurant is not an existing use and therefore cannot be allowed within the LAMIRD. This is inconsistent with the GMA and the County must be found out of compliance.

3. Spokane County created irregular LAMIRD boundaries.

Spokane County also violated the requirements of the GMA requiring that LAMIRDs have logical boundaries. RCW 36.70A.070 (5)(d)(iv)(D) states, "A county shall adopt measures

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to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection ... The county shall establish the logical outer boundary of an area of more intensive rural development."

Here, the record is clear that the boundaries for the LAMIRD are irregular and do not represent the type of logical boundaries intended by the Legislature. As indicated in the County's own staff report, the addition of this property would create a peculiar north extension to LAMIRD designated properties (LDAC) stating, "If approved the Limited Development Area Commercial would be extended to the north side of Day Mt. Spokane Road and to property which is not fronting or adjacent to Limited Development Areas with actual frontage on Highway 2." Exhibit 12 at 8., *see also* Exhibit 12 at 9 (map depicting current land use designations and subject property). Clearly, a property "not fronting or adjacent" to the existing LAMIRD parcels do not represent a "logical boundary," but appears to be a willy-nilly application of the LAMIRD designation. This is inconsistent with the GMA and the County must be found out of compliance.

D. SPOKANE COUNTY FAILED TO IMPLEMENT AND COMPLY WITH THE COUNTY COMPREHENSIVE PLAN AND COUNTY ORDINANCES WHEN IT APPROVED 07-CPA-05 BY CREATING A 4.2 ACRES AREA DESIGNATED AS LIMITED DEVELOPMENT AREA – COMMERCIAL (LDAC).

As discussed in the Order Denying Motions to Dismiss, the GMA specifically provides that County actions, such as the amendment at issue here, must be consistent with and implement its comprehensive plan and other planning documents. Unfortunately, in enacting the Comprehensive Plan amendment and rezone, Spokane County ignored its own Comprehensive

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Plan requirements governing the designation of a Limited Development Area (Commercial)(LDAC).[4]

The criteria for the proposed designation of a LDAC can be found in policy RL.5.2 of the Comprehensive Plan:[5]

RL.5.2 The intensification and infill of commercial or non-resource-related industrial areas shall be allowed in rural areas consistent with the following guidelines:

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

The record indicates the adoption of 07-CPA-05 was inconsistent with these requirements. For example, the Staff Report, prepared by County planning staff, specifically finds that this proposal is inconsistent with the Comprehensive Plan, stating:

> The Limited Development Area Industrial-Commercial was designated south of Day Mt Spokane Road and adjacent to both side of Highway 2 based on existing land uses, zones, comprehensive planning policies and the public process that resulted in the adoption of the original GMA County Comprehensive Plan in November of 200I. If approved the Limited Development Area Commercial would be extended to the north side of Day Mt. Spokane Road and to property which is not fronting or adjacent to Limited Development Areas with actual frontage on Highway 2.

Exhibit 12 at 8. As discussed below, the challenged action is not consistent with the Comprehensive Plan for the reason stated in the staff report, as well as the reasons stated below.

[4] The County's designation of a LDAC is equivalent to a LAMIRD.
[5] Available at http://www.spokanecounty.org/BP/Documents/CompPlan/Chapter3.pdf.

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1. Spokane County allowed expanded commercial development in a rural area without a demonstrated need.

The County's Comprehensive Plan, Goal RL.5a states that commercial uses may occur "in rural areas that serve the needs of rural residents." However, the record contains no demonstrated need for a restaurant in this rural area. Nothing in the staff report indicates that this rural area is undeserved by the services that would be provided by a restaurant outside of the UGA.

To the contrary, the record indicates that there are ample restaurants (including those that serve alcohol), convenient stores, and grocery stores within an easily accessible distance from this site. Exhibit 18. Travel time to the "Y" is approximately 7 minutes and 12 minutes to Francis, both major commercial areas. *Id.* Both of these areas are business and retail centers. No evidence exists that local residents are underserved or that there is a need for additional commercial development in the area.

2. The LDAC will alter the character of the neighborhood.

The County's Comprehensive Plan, RL.5.2(b), provides that, in designating a LDAC, "[t]he character of neighborhoods and communities is maintained." However, the development of this site as a commercial restaurant, as opposed to the previous use of an agricultural stand, would significantly impact and alter the character of the residential neighborhood in a number of ways. These impacts include the increased noise, traffic, and other factors that significantly alter the rural and residential nature of this community. These impacts are specifically discussed in detail above in the SEPA section.

Obviously, a comprehensive plan amendment allowing a restaurant with music in a rural area will present noise impacts altering the character of the residential community. McGlade's

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proposes extended hours serving alcohol with outdoor seating and music. Documents in the record indicate the increase in noise resulting for this action. For example, a document submitted by the owner of the site for the conditional use permit indicated "an outdoor seating area is planned on the south side of the building; ... the business would close at 7:00 p.m., and possibly 9:00 p.m. on summer evenings; noise from customers and music would likely be generated by the outdoor seating." Exhibit 7 at ¶17.

This comprehensive plan will allow a use that will increase light glare into adjacent properties. As discussed above, use of this site authorized by 07-CPA-05 will result in a direct view of outdoor seating and parking lot to adjacent property owners.

Use of this site will also increase traffic and adversely impact Yale Road. The existing entrance to the site is located on narrow Yale Road. The main entrance approach is hazardous particularly for exiting traffic and traffic turning onto Yale from west bound Day-Mt. Spokane. Those exiting to Day-Mt. Spokane block Yale, if any other traffic is at the stop sign or pull in front of traffic turning onto Yale. The road has no useable shoulders for parking lot overage and the existing parking lot does not accommodate large trucks that deliver and is insufficient to accommodate patrons. This results in trucks blocking Yale and even Day-Mt. Spokane Roads and in illegal parking on Yale and within the right-of-way. All this increased impact occurs in community/neighborhood where the neighboring properties are single-family residences

Obviously, these impacts would significantly interfere with the rural nature of the area and the surrounding homes. This is inconsistent with the requirements of the County's Comprehensive Plan.

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3. The LDAC lacks logical boundaries.

The County's Comprehensive Plan, Policy RL.5.2(a) provides that the area subject to a LDAC must be "contained by logical boundaries" to limit commercial development in rural areas. This amendment fails to comply with this requirement in both an internal and external method.

First, as indicated in the County's own staff report, the addition of this property would create a peculiar north extension to the existing LDAC properties:

> The Limited Development Area Industrial-Commercial was designated south of Day Mt Spokane Road and adjacent to both side of Highway 2 based on existing land uses, zones, comprehensive planning policies and the public process that resulted in the adoption of the original GMA County Comprehensive Plan in November of 200I. **If approved the Limited Development Area Commercial would be extended to the north side of Day Mt. Spokane Road and to property which is not fronting or adjacent to Limited Development Areas with actual frontage on Highway 2.**

Exhibit 12 at 8., *see also* Exhibit 12 at 9 (map depicting current land use designations and subject property). Clearly, a property "not fronting or adjacent" to the existing LDAC parcels do not represent a "logical boundary," but appears to be a willy-nilly application of the LDAC designation.

Second, the boundary is internally inconsistent with this requirement. According to the Staff Report, this parcel is 4.46 acres with only about ¼ of the site developed (1 acre). Exhibit 12 at 1; *see also* Exhibit 11 at 12-13 (aerial images of site illustrating current build-out). The designation of the 4.46 acres as LDAC would allow expansion of commercial business by more than 3 acres in a residential area outside of the UGA.. Nothing in the redesignation of this property to LDAC would prohibit complete commercial build-out on the entire 4.6 acre site.

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Accordingly, the County's action fails to comply with the requirement that the boundaries of a LDAC be logical.

E. SPOKANE COUNTY FAILED TO IMPLEMENT AND COMPLY WITH THE GOALS OF THE GROWTH MANAGEMENT ACT, 36.70A RCW, BY ALLOWING DEVELOPMENT WITHIN DESIGNATED RURAL AREAS.

By failing to comply with the requirements of the GMA (LAMIRD) and its own Comprehensive Plan (LDAC) for designation of urban development outside of the UGA, the County has failed to comply with and implement the goals of the GMA. The Legislative Findings governing the GMA explain, "[t]hat uncoordinated and unplanned growth, together with a lack of common goals expressing the public interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety and high quality of life enjoyed by the residents of this state." RCW 36.70A.010. A key element of the GMA's strategy is RCW 36.70A.110(1), which specifically states that the comprehensive plans adopted by the counties must "designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." This requirement has been described by the Washington Supreme Court as "[o]ne of the central requirements of the GMA." *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wash.2d 224, 232, 110 P.3d 1132 (2005).

The intent of RCW 36.70A.110(1) was to confine urban growth to these areas and not allow it to overrun surrounding undeveloped areas. This, in turn, helps to achieve the specified GMA Goals contained in RCW 36.70A.020, including the first two stated goals which encourage development in urban areas and reduce sprawl, by which the Act seeks to prohibits "the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW

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36.70A.020(1),(2). This intent was recognized by the Washington Court of Appeals in the *Quadrant* case:

> The Legislature created the Growth Management Act (GMA) to control urban sprawl and ensure that "citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning." ... The GMA requires that counties adopt a comprehensive growth management plan which, among other things, designates Urban Growth Areas (UGAs). UGAs are regions within which urban growth is encouraged and outside of which growth can occur only if it is not urban in nature. ... The GMA's goals include reducing sprawl, encouraging development in areas already characterized by urban development, preserving open spaces and the environment, and encouraging availability of affordable housing.
>
> The GMA forbids growth that is "urban in nature" outside of the areas designated as UGAs. "[G]rowth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands" is not allowed in areas designated as rural.

Quadrant Corp. v. State Growth Management Hearings Bd., 119 Wash.App. 562, 567-68, 81 P.3d 918 (Wa. Ct. App. 2003). Similarly, this Board in *Loon Lake Property Owners v. Stevens County* stated, "The Growth Management Act, RCW 36.70A.110(1) requires urban growth to be prohibited outside ... UGAs." Case No. 01-1-0002c, Amended Final Decision and Order (EWGMHB, October 26, 2001).

The Central Board in *Association of Rural Residents v. Kitsap County,* Case No. 93-3-0010 , Final Decision and Order (CPSGMHB, June 3, 1994) recognized that the prohibition against urban development outside of the UGA was a mandatory GMA requirement and not merely an aspirational goal stating.

Besides the clear statutory mandate prohibiting urban development in rural areas in RCW 36.70A.110(1), it is a central policy of the GMA to encourage urban development within UGAs,

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to reduce sprawl, and to ensure that public facilities and services exist for development. RCW 36.70A.020(1), (2), (12). The County's action of allowing urban development outside the UGA frustrates these fundamental goals. RCW 36.70A.020 states:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

While the GMA provides some limited exception for urban development outside of the UGA (LAMIRDs), the County, as discussed above, failed to comply with these requirements and in turn failed to implement and comply with the goals of the GMA that prohibits urban development and sprawl outside of the UGA. Accordingly, the County must be found out of compliance with the goals of the GMA.

F. SPOKANE COUNTY FAILED TO IMPLEMENT AND COMPLY WITH REQUIREMENTS REGARDING CRITICAL AREA PROTECTION OF THE GROWTH MANAGEMENT ACT, 36.70A RCW, THE COUNTY COMPREHENSIVE PLAN, AND COUNTY ORDINANCES, INCLUDING THE COUNTY'S CRITICAL AREA ORDINANCE, WHEN IT APPROVED 07-CPA-05 WITHOUT PROPERLY IDENTIFYING, DISCLOSING, ANALYZING, AND/OR MITIGATING KNOWN AND/OR POSSIBLE IMPACTS TO A DESIGNATED CRITICAL AQUIFER RECHARGE AREA

The County failed to comply with and implement the GMA, its Comprehensive Plan, and its Critical Areas Ordinance by failing to protect "critical areas" and otherwise failing to adequate consider environmental issues as required by the GMA and its planning documents. The record is clear that the property impacted by the County's action is classified as "a Critical Aquifer Recharge Area that is rated as having High susceptibility." Exhibit 12 at 6. However, the County's action fails to ensure protection of this critical area. No discussion or evaluation is presented of the adequacy of the septic system, of stormwater impacts, of the presence of wells

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in the vicinity of the area (*see* Exhibit 5, Henderson and Kunz affidavits), or for impacts/mitigation related to grease/oil/food waste disposal.

The GMA clearly requires protection of critical areas. *Miotke v. Spokane County,* Case No. 05-1-0007 ,Final Decision and Order (EWGMHB, February 14, 2006). A fundamental axiom of growth management is that critical areas[6] and resource lands should be excluded from urban development, such as the designation that occurred to the subject property in this case. "'[T]he land speaks first.' Only after a county's agricultural, forestry and mineral resource lands have been identified and actions taken to conserve them, and its critical areas, including aquifers, are identified and protected, is it then possible and appropriate to determine where, on the remaining land, urban growth should be directed pursuant to RCW 36.70A.110." *Friends of Skagit County v. Skagit County*, Case No. 95-2-0075, Final Decision and Order (WWGMHB, Jan. 22, 1996); *see also Yakima Tribes v. Yakima County*, Case No. 940100021, Final Decision and Order (EWGMHB Mar. 10, 1995)("It may be noted that critical area designations as well as resource land designations are an important first step in the planning process. They provide the sideboards for further comprehensive plan development by pointing out either where development should not occur or where, at the least, there are significant developmental concerns.").[7] The GMA also establishes a broad goal of protecting "the environment and enhance[ing] the state's high quality of life, including air and water quality, and the availability of water. RCW 36.70A.020 (10).

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[6] "'Critical areas' include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas." RCW 36.70A.030(5).

[7] *Also see* the planning sequence required by RCW 36.70A.040 (3), (4), (5).

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The GMA's goals and requirements are reflected in the County's own Comprehensive Plan that provides that "land use decisions in Spokane County shall protect critical areas." (Goal NE.2) and that "[b]est available science will be used in the ... protection of critical areas" (Goal NE.12). In regards to aquifer recharge areas, such as the property subject to this appeal, the Comprehensive Plan states, "Prevent degradation of groundwater quality" and "Protect groundwater quality from development impacts" (Goals NE.17a-17b). These goals are incorporated into the specific Comprehensive Plan policies, which state, "Evaluate proposed land use changes for both positive and negative impacts on groundwater quality, especially in moderate and highly susceptible critical aquifer recharge areas" (Policy NE.17.4) and, "Require development that would have a significant negative impact on the quality of an aquifer to provide measurable and attainable mitigation for the impact" (Policy NE.17.5).

Moreover, in areas designated as highly susceptible such as the property in this appeal, the Comprehensive Plan provides for a higher level of protection, stating, "In moderate and highly susceptible critical aquifer recharge areas, no variances, deviations or exceptions to the groundwater protection regulations shall be allowed except with alternative mitigation measures that provides protection of groundwater equal to or better than the stated regulations" (Policy NE.20.1).

In addition, the County's own Critical Areas Ordinance requires nonresidential development outside of the UGA that produce more than 90 gallons per day to utilized an enhanced wastewater disposal system, such as: (a) treatment utilizing sealed lagoons; (b) treatment using holding tanks with transport of and disposal at a site licensed for disposal of the particular sewage effluent; (c) treatment in compliance with a valid surface water discharge

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permit obtained from the Washington State Department of Ecology; or (d) connection to an existing public or private collection/treatment facility when allowed pursuant to the County sewer concurrency requirements. Spokane County Code 11.20.075(c)(§L-3).

Evidence in the record indicates that the County failed to protect critical areas as required by the GMA, its Comprehensive Plan, and by its Critical Areas Ordinance. Stan Miller, the former Water Quality Management Program Manager for Spokane County, reviewed the proposal for 07-CPA-5 and concluded:

> I have examined this proposal and find it inconsistent with the intent of the 1979 Spokane Aquifer Water Quality Management Plan and its implementing actions the Spokane Aquifer Overlay Zone (adopted by the Spokane County BoCC in 1983) and the more recent provisions of Section 11.20.075 Critical Aquifer Recharge Areas of the Spokane County Critical Areas Ordinance.

Exhibit 13 at 1. Mr. Miller finds numerous potential risks and problems associated with use of this site as restaurant, as currently designed, including the need for enhanced septic treatment. *Id.*

Other documents in the record indicate concern regarding groundwater. The County Engineer recognized the potential for stormwater related impacts. In a January 26, 2006 letter regarding this site, he stated, "Treatment of stormwater runoff shall be provided for directly connected pollution generating impervious surfaces including traveled ways and parking areas that are designated as high susceptibility or detain to an area of high susceptibility." *See* Exhibit 14 at 3.

Evidence in the record points to critical area impacts associated with the County's action. Moreover, the County failed to evaluate or develop mitigation measures to address these impacts. As such, the record lacks evidence that the County will comply with the requirements of the GMA, its own Comprehensive Plan's goals and policies, and its own Critical Areas

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Ordinance in regards to the protection of the Critical Aquifer Recharge Area. Accordingly, the County must be found out of compliance.

V. DECLARATION OF INVALIDITY

Petitioners assert that the Board should go beyond ruling that 07-CPA-5 and the accompanying rezone are not in compliance with GMA, and take the extraordinary step of declaring it invalid. RCW 36.70A.302(1) states the requirements for a determination of invalidity. The touchstone is a finding by the Board that "the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1)(b).

Here, 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. RCW 36.70A.020. The County failed to follow the requirements of the GMA and its own planning documents in authorizing urban development outside of the UGA. An order of invalidity will ensure that further development of the subject property will not occur and that the rural, residential nature of the community will be preserved, as intended by the requirements of the GMA and the County's own Comprehensive Plan. Accordingly, Petitioners request that this Board declare 07-CPA-05 invalid.

VI. RELIEF SOUGHT

Petitioners request the following relief:

1. An order declaring Spokane County out of compliance with the Growth Management Act, SEPA, its own planning documents, and other applicable legal requirements.

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2. An order requiring that 07-CPA-5 and the accompanying rezone be remanded back to Spokane County for action consistent with the Board's rulings and be directed to take appropriate steps to ensure that GMA, SEPA, and other legal requirements are met in regards to the subject parcel.

3. An order from the Board finding that 07-CPA-5 and the accompanying rezone substantially interferes with the fulfillment of the goals of the Growth Management Act and declaring the resolution invalid pursuant to RCW 36.70A.302.

4. Award any other remedy the Board deems appropriate and fair under the circumstances and as allowed by law.

VI. CONCLUSION

For the reasons set forth above, Petitioners respectfully request an order finding that the County's approval of 07-CPA-5 and the accompanying rezone was inconsistent with the GMA and SEPA.

DATED this 3rd of July, 2008.

Respectfully submitted,

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