

FILED

DEC 24 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No. 30728-0

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

KITTITAS COUNTY, a political subdivision of the state of Washington,
Respondent,

v.

KITTITAS COUNTY CONSERVATION COALITION and
FUTUREWISE,
Appellants,

and

ELLISON THORP PROPERTY, LLC and ELLISON THORP
PROPERTY II, LLC,
Respondents,

and

GROWTH MANAGEMENT HEARINGS BOARD,
Respondent.

**REPLY BRIEF OF APPELLANTS KITTITAS COUNTY
CONSERVATION COALITION & FUTUREWISE**

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TABLE OF CONTENTS

<u>Topic</u>	<u>Page Number</u>
Table of Authorities	ii
I. Introduction	1
II. Standard of Review	1
III. Argument	4
A. The Board had subject matter jurisdiction over both the comprehensive plan amendments and rezones and the amendments violated the GMA and were inconsistent with the Comprehensive Plan. (Assignment of Error 1 and Issue 1)	4
1. The Board had jurisdiction over the comprehensive plan amendments in Amendments 10-12 and 10-13.	4
2. The Board had jurisdiction over the comprehensive plan amendment and Highway Commercial rezones in Amendment 10-13 because the rezones in this case are not authorized by a comprehensive plan.	4
B. The Board correctly concluded that Kittitas County Comprehensive Plan Amendment 10-12 violated RCWs 36.70A.070, 36.70A.070(5)(d)(iii), 36.70A.170(1)(a), and 43.21C.030. (Assignment of Error 2 and Issue 2)	15
1. The Thorp Type III LAMIRD violates RCW 36.70A.070(5)(d)(iii) and the Comprehensive Plan.	15
2. The Thorp Type III LAMIRD uses are not “isolated” as RCW 36.70A.070(5)(d)(iii) requires.	20
3. Amendment 10-12 is not consistent with the Kittitas County Comprehensive Plan and RCW 36.70A.070.	21
4. Expanding the Type III LAMIRD into the Agricultural Overlay violated the GMA.	21
C. The Board was correct that the Commercial Comprehensive Plan amendment and the Highway Commercial rezones in Amendment 10-13 were inconsistent with the GMA and the Comprehensive Plan. (Assignment of Error 3 and Issue 3)	22
D. The County violated SEPA and the SEPA determination in this case was properly appealed to the Board. (Assignment of Error 4 and Issue 4)	22
E. The superior court’s decision not to remand the orders and determinations of invalidity to the Board violated the Administrative Procedure Act, ch. 34.05 RCW. (Assignment of Error 5 & Issue 5)	24

TABLE OF AUTHORITIES

<u>Authority</u>	<u>Page Number</u>
Cases	
<i>Amunrud v. Board of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006)	2
<i>BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Bd.</i> , 165 Wn. App. 677, 269 P.3d 300 (2011).....	9, 11
<i>BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Bd.</i> , 173 Wn.2d 1036, 277 P.3d 669 (2012).....	9
<i>Brinnon Group v. Jefferson County</i> , 159 Wn. App. 446, 245 P.3d 789 (2011).....	12
<i>City of Burien v. Central Puget Sound Growth Management Hearings Bd.</i> , 113 Wn. App. 375, 53 P.3d 1028 (2002).....	11
<i>Clallam County v. Dry Creek Coalition</i> , 161 Wn. App. 366, 255 P.3d 709 (2011).....	2
<i>Coffey v. City of Walla Walla</i> , 145 Wn. App. 435, 187 P.3d 272 (2008)...	5
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	3
<i>Davis v. Dep't of Labor & Indus.</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980) ..	4
<i>Department of Labor and Industries v. Gongyin</i> , 154 Wn.2d 38, 109 P.3d 816 (2005).....	8
<i>Diaz v. State</i> , 175 Wn.2d 457, 285 P.3d 873 (2012).....	13

<u>Authority</u>	<u>Page Number</u>
<i>Feil v. Eastern Washington Growth Management Hearings Bd.</i> , 172 Wn.2d 367, 259 P.3d 227 (2011).....	5, 9
<i>Gold Star Resorts, Inc. v. Futurewise</i> , 167 Wn.2d 723, 222 P.3d 791 (2009).....	17
<i>Kittitas County v. Eastern Washington Growth Management Hearings Bd.</i> , 172 Wn.2d 144, 256 P.3d 1193 (2011)	12
<i>Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board</i> , 148 Wn.2d 1017, 64 P.3d 649 (2003).....	4
<i>Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.</i> 113 Wn. App. 615, 53 P.3d 1011 (2002).....	4
<i>Sleasman v. City of Lacey</i> , 159 Wn.2d 639, 151 P.3d 990 (2007)	14
<i>Southwest Washington Chapter, Nat. Elec. Contractors Ass'n v. Pierce County</i> , 100 Wn.2d 109, 667 P.2d 1092 (1983)	2
<i>Stafne v. Snohomish County</i> , 174 Wn.2d 24, 271 P.3d 868 (2012).....	7
<i>State v. Jones</i> , 172 Wn.2d 236, 257 P.3d 616 (2011).....	2
<i>State v. Wood</i> , 89 Wn.2d 97, 569 P.2d 1148 (1977).....	2
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	5
<i>Woods v. Kittitas County</i> , 162 Wn.2d 597, 174 P.3d 25 (2007).....	5, 9

<u>Authority</u>	<u>Page Number</u>
Statutes	
Chapter 39.34 RCW	10
RCW 34.05.574	25
RCW 36.70A.070.....	22
RCW 36.70A.070(5).....	16, 17, 19, 20
RCW 36.70A.130.....	12
RCW 36.70A.280.....	23
RCW 36.70A.290.....	18
RCW 36.70B.020.....	7, 8, 10, 11
RCW 36.70C.020.....	6, 7
Other Authorities	
WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY	14, 19
Development Regulations	
KCC 15.04.210	23, 24
KCC 15A.01.030	23
KCC 15A.02.050	23
KCC 15A.04.020	23
KCC 15B.05.010.....	23, 24

Authority

Page Number

Growth Management Hearings Board Decisions

Whitaker v. Grant County, EWGMHB Case No. 99-1-0019, Second Order
of Compliance (Nov. 1, 2004) 16

I. INTRODUCTION

The Kittitas County Conservation Coalition and Futurewise (KCCC) submit this reply brief to address the arguments in the Brief of Respondent Kittitas County and the Ellison Thorp Property, LLC and Ellison Thorp Property II, LLC's Response Brief (hereinafter Ellison LLCs' Response Brief). As this Reply shows, their arguments fail.

II. STANDARD OF REVIEW

While Kittitas County correctly states that the parties appealing the Growth Management Hearings Board's (Board) decision, in this case Kittitas County and the Ellison LLCs, have "the burden of demonstrating the invalidity of the board's actions[,]" the county attempts to shift this burden on two questions.¹ The questions are whether the Brief of Appellants Kittitas County Conservation Coalition & Futurewise (hereinafter Brief of Appellants) discussed the "Commercial" Comprehensive Plan amendment and how the Highway Commercial zoning fits into that comprehensive plan designation and whether the Brief of Appellants argued the Board had jurisdiction over the SEPA determination for the rezones.² But it is the county that has the burden of demonstrating that the Board's decision on these questions is invalid. This is true even through the superior court reversed the Board, which is the

¹ Brief of Respondent Kittitas County p. 8.

² *Id.* at pp. 2 – 3.

procedural posture in this case and in *Clallam County v. Dry Creek Coalition*.³ Even through the superior court had reversed the Board, in *Clallam County* the court wrote the “burden of demonstrating the invalidity of [an] agency action is on the party asserting the invalidity,” here the County. RCW 34.05.570(1)(a); *Thurston County*, 164 Wn.2d at 341, 190 P.3d 38.”⁴

The cases the County cites for proposition that the failure of an opening brief to address an issue constitutes abandonment do not apply to the Brief of Appellants because in both of those cases the party that failed to address the issue had the burden of proof and persuasion.⁵ Here that party is not KCCC, it is Kittitas County and the Ellison LLCs. Kittitas County’s Brief of Respondent on pages 3 and 4 argues that KCCC cannot raise these issues in its reply brief. But this argument fails for three reasons. The legal reason is that in the case the county cites for this proposition, *Cowiche Canyon Conservancy v. Bosley*, it was the private

³ *Clallam County v. Dry Creek Coalition*, 161 Wn. App. 366, 378, 255 P.3d 709, 713 (2011).

⁴ *Clallam County*, 161 Wn. App. at 380, 255 P.3d at 714.

⁵ *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148, 1149 – 50 (1977) *receded from on other grounds by Southwest Washington Chapter, Nat. Elec. Contractors Ass’n v. Pierce County*, 100 Wn.2d 109, 667 P.2d 1092 (1983) *overruling recognized by Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006). In *Jones*, Jones argued to the Court of Appeals argued an issue and the court ruled against him. On appeal, Jones did not discuss the issue in his petition for review and he did not submit a supplemental brief. The state’s supplemental brief did not address the issue so court the concluded it appeared to be abandoned. *State v. Jones*, 172 Wn.2d 236, 241 – 42, 257 P.3d 616, 618 – 19 Fn.2 (2011).

plaintiffs who had the burden of proof and persuasion that failed to brief an assignment of error for a finding of fact.⁶ But again, KCCC does not have the burden here, the County and the Thorp LCCs do.

In its Brief of Appellants, KCCC argued that the Commercial comprehensive plan amendment violated the Growth Management Act (GMA) and the *Kittitas County Comprehensive Plan* for the same reasons as the Type III Limited Areas of More Intense Rural Development (LAMIRD) comprehensive plan amendment adopting the arguments in Part VI.B.⁷ Similarly, KCCC's Brief of Appellants on pages 45 and 46 argued the SEPA appeal was properly to the Board. So these issues were not abandoned.

As to the County's unfairness argument on pages 3 and 4 of its Brief of Respondent, the County must have been aware of the law giving it the burden on appeal. The County could have moved to change the briefing order with it leading off and having the rebuttal brief, KCCC would not have opposed such a motion. Having had that opportunity, the County cannot complain about KCCC's brief rebutting the county's arguments since this is the first opportunity KCCC has had to respond to the parties with the burden of proof and persuasion.

⁶ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992).

⁷ KCCC's Brief of Appellants p. 40.

Neither Kittitas County nor the Thorp LLCs have assigned error to any of the Board's findings of fact.⁸ So they are verities on appeal.⁹

III. ARGUMENT

A. The Board had subject matter jurisdiction over both the comprehensive plan amendments and rezones and the amendments violated the GMA and were inconsistent with the Comprehensive Plan. (Assignment of Error 1 and Issue 1)

1. The Board had jurisdiction over the comprehensive plan amendments in Amendments 10-12 and 10-13.

There is no dispute that the Board had jurisdiction to determine whether the comprehensive plan amendments in Amendments 10-12 and 10-13 complied with the GMA and the comprehensive plan.

2. The Board had jurisdiction over the comprehensive plan amendment and Highway Commercial rezones in Amendment 10-13 because the rezones in this case are not authorized by a comprehensive plan.

i. The Board has jurisdiction over site specific rezones not authorized by a comprehensive plan.

KCCC's Brief of Appellants on pages 11 to 23 documented that the Board correctly concluded that it had subject matter jurisdiction over the Highway Commercial rezones because they did not qualify as a project permits as they were not authorized by the *Kittitas County Comprehensive*

⁸ Brief of Respondent Kittitas County pp. 2 – 4; Ellison LLCs' Response Brief pp. 2 –4.

⁹ *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279, 1282 (1980); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.* 113 Wn. App. 615, 628, 53 P.3d 1011, 1018 (2002), review denied *Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board*, 148 Wn.2d 1017, 64 P.3d 649 (2003).

Plan. The Brief of Appellants on pages 22 to 24 showed that this interpretation is consistent with the Washington State Supreme Court's *Woods v. Kittitas County*, *Wenatchee Sportsmen Association v. Chelan County*, and *Feil v. Eastern Washington Growth Management Hearings Board* decisions.¹⁰ The Brief of Appellants on page 24 showed this analysis is not inconsistent with this Court's *Coffey v. City of Walla Walla* decision.¹¹

The Brief of Respondent Kittitas County argues on pages 10 to 23 that the Board did not have jurisdiction over the Highway Commercial rezones. All of the county's arguments fail. The County and the Ellison LLCs first argue that the list of project permits in RCW 36.70B.020(4) is a nonexclusive list that includes both "site-specific rezones authorized by a comprehensive plan or subarea plan" and, apparently, site-specific rezones not authorized by a comprehensive plan. But this argument ignores the last phrase of RCW 36.70B.020(4). This phrase excludes from the definition of "project permits" "the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection." Only one type of amendment to a

¹⁰ *Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25, 33 (2007); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 179 – 80, 4 P.3d 123, 127 – 28 (2000); *Feil v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 367, 378, 259 P.3d 227, 232 (2011).

¹¹ *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 437, 187 P.3d 272, 273 (2008).

comprehensive plan or a development regulation is specifically included in RCW 36.70B.020(4), “site-specific rezones authorized by a comprehensive plan or subarea plan” If the site-specific rezone is not authorized by a comprehensive plan or subarea plan, it is not defined as a project permit by RCW 36.70B.020(4).

The Brief of Respondent Kittitas County argues on page 17 that the county’s interpretation that RCW 36.70B.020(4) is not a finite list is supported by the courts’ interpretation of RCW 36.70C.020(2)(a) as a nonexclusive list. But the courts’ have concluded that amendments to comprehensive plans and development regulations are excluded from definition of “land use decision” in RCW 36.70C.020(2)(a). As the supreme court wrote in *Stafne v. Snohomish County*:

14 On the other hand, under LUPA, the superior court is granted exclusive jurisdiction to review government actions meeting the definition of a “land use decision” under RCW 36.70C.020(2)(a). The definition includes decisions on applications for a “project permit.” In turn, a project permit is defined by RCW 36.70B.020(4), which we have recognized applies to LUPA. *Woods v. Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007). Significant to the argument in this case, the definition for a “project permit” expressly excludes the adoption or amendment of a comprehensive plan. Further, among the types of applications excluded from a “land use decision” under RCW 36.70C.020(2)(a) are applications for legislative approvals.¹²

¹² *Stafne v. Snohomish County*, 174 Wn.2d 24, 32 – 33, 271 P.3d 868, 872 (2012) footnotes omitted.

The courts' interpretation of RCW 36.70C.020(2)(a); that while it is a nonexclusive list of certain types of land use decisions other types of decisions, such as legislative approvals, are excluded; supports KCCC's Brief of Appellants argument that the definition of project permit in RCW 36.70B.020(4) contains a non-exclusive list of certain project permits, but, like RCW 36.70C.020(2)(a), excludes certain approvals such as site-specific rezones not authorized by a comprehensive plan.

The Brief of Respondent Kittitas County, on pages 17 and 18, and the Ellison LLCs' Response Brief, on page 5, argue that since the travel center cannot go forward without rezones, they are project permits under RCW 36.70B.020(4). However, since those rezones are not authorized by the *Kittitas County Comprehensive Plan* they are excluded from the definition of project permit in RCW 36.70B.020(4). Indeed, without the comprehensive plan amendment to allow a Type III LAMIRD the project cannot go forward either. Does that make the comprehensive plan amendment a project permit? No, because like the rezones in this case comprehensive plan amendments are excluded from the definition of project permit in RCW 36.70B.020(4).

The Ellison LLCs' Response Brief on page 19 argues that the "authorized by the comprehensive plan" language is left over from the initial adoption of the GMA to merely distinguish the GMA from the

Planning Enabling Act. The only authority cited for this proposition is “RCW 36.70B.550,” a section that does not exist. Further, RCW 36.70B.020(4) specifically qualifies site-specific rezones that meet the definition of “project permits” as those “authorized by a comprehensive plan or subarea plan” As the Brief of Appellants explained on pages 13 to 16, this qualification ensures that rezones that may be or may not be consistent with the comprehensive plan can be reviewed to determine consistency with the plan. Finally, when interpreting statutes the courts are to give “effect to all that the legislature has said”¹³ Wishing away part of RCW 36.70B.020(4) as the Thorp LLC’s do violates this rule.

The Brief of Respondent Kittitas County argues on pages 18 to 23 and 26 to 27 that the case law supports the County’s interpretation. It does not. The Kittitas County’s argument starts to unravel right away, conceding on page 19 of the brief that the Washington State Supreme Court in the *Feil* decision analyzed whether the challenged rezone was authorized by the comprehensive plan. But the county says that really did not matter since the Board did not have jurisdiction because it was a site specific rezone, not because it was authorized by the comprehensive plan.

¹³ *Department of Labor and Industries v. Gongyin*, 154 Wn.2d 38, 44 – 45, 109 P.3d 816, 819 (2005).

But that was not what the supreme court concluded, rather the rezone was a project permit because it was authorized by the comprehensive plan.¹⁴

The Brief of Respondent Kittitas County on page 20 states that the *BD Lawson Partners* decision “held that all site specific rezones are not subject to Hearings Board jurisdiction.” This is not true. Rezones were not at issue in *BD Lawson Partners* case, rather it was a “MPD permit” which the court wrote was “like a conditional use permit.”¹⁵

On pages 22 and 23, the Brief of Respondent Kittitas County attempts to argue that *Woods v. Kittitas County* supports its argument. It does not. As KCCC’s Brief of Appellants quoted on page 14, the Washington State Supreme Court in *Woods v. Kittitas County* wrote that “[a] site-specific rezone authorized by a comprehensive plan is treated as a project permit subject to the provisions of chapter 36.70B RCW. RCW 36.70B.020(4).”¹⁶

On page 26 the Brief of Respondent Kittitas County concedes that the Washington State Supreme Court in the *Wenatchee Sportsmen* decision analyzed whether the rezone was authorized by a comprehensive

¹⁴ *Feil v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 367, 379 – 80, 259 P.3d 227, 232 – 33 (2011).

¹⁵ *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Bd.*, 165 Wn. App. 677, 686, 269 P.3d 300, 305 (2011) review denied *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Bd.*, 173 Wn.2d 1036, 277 P.3d 669 (2012).

¹⁶ *Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25, 33 (2007).

plan looking to a staff report which concluded that the proposed rezone “would be consistent with the comprehensive plan.” But Kittitas County cannot produce any finding or conclusion from its Planning Staff, the Planning Commission, or the Board of County Commissioners in the record stating that the Highway Commercial rezones in this case are consistent with the comprehensive plan.¹⁷

On pages 26 and 27 the Brief of Respondent Kittitas County sets up the flimsiest of straw men and proceeds to knock them down. The Ellison LLCs’ Response Brief piles on page 19 footnote 9. But the County and the Ellison LLCs can only knock them down by misstating KCCC’s position. KCCC’s Brief of Appellant did not argue that only those permits or licenses listed in RCW 36.70B.020(4) qualify as project permits. Instead the brief only argued that for a site specific rezone to qualify as a project permit it must be authorized by a comprehensive plan or subarea plan.¹⁸ So this Court need not overrule *City of Burien* where the court of appeals concluded that the Board lacked the authority to decide questions related to the negotiation and approval of an interlocal agreement authorized by chapter 39.34 RCW but the Board did have the authority to review the comprehensive plan and zoning amendments adopted to

¹⁷ Neither can the Ellison LLCs. Ellison LLCs’ Response Brief p. 20.

¹⁸ KCCC’s Brief of Appellants pp. 11 – 24.

implement the agreement for compliance with the GMA.¹⁹ Nor is KCCC's argument inconsistent with *BD Lawson Partners* which did not address rezones, but instead addressed a "MPD permit."²⁰

The Ellison LLCs' Response Brief asserts on page 16 that to find jurisdiction over the rezones in Amendment 10-13 the Court must liberally construe the GMA. That is not the case, to find jurisdiction for the Board in this appeal, the Court only needs to give effect the definition of project permit in RCW 36.70B.020(4).

ii. The Highway Commercial Rezones are not authorized by the comprehensive plan.

On pages 16 to 21, KCCC's Brief of Appellants demonstrated that the Highway Commercial rezones in Amendment 10-13 were not authorized by the *Kittitas County Comprehensive Plan* or a subarea plan because they violated comprehensive plan provisions related to limited areas of more intense development (LAMIRDs). Apparently recognizing that the Highway Commercial rezones cannot be shown to comply with these provisions, the Brief of Respondent Kittitas County, on pages 24 through 26, argues that the rezones are consistent with the "Commercial" designation. This argument fails.

¹⁹ *City of Burien v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn. App. 375, 384 – 86, 53 P.3d 1028, 1033 – 34 (2002).

²⁰ *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Bd.*, 165 Wn. App. 677, 686, 269 P.3d 300, 305 (2011).

The first problem with the County’s argument is the contention that the LAMIRD policies do not apply to comprehensive plan amendment and rezones in Amendment 10-13. “Under the GMA, a comprehensive plan must be ‘an *internally consistent document* and all elements shall be consistent with the future land use map.’ RCW 36.70A.070 (emphasis added [by the court]). This requirement means that differing parts of the comprehensive plan ‘must fit together so that no one feature precludes the achievement of any other.’ WAC 365–196–500.”²¹ “The County’s ordinances and Plan must be read as a whole,”²² RCW 36.70A.130(1)(d) provides that “[a]ny amendment of or revision to a comprehensive land use plan shall conform to this chapter [36.70A RCW]. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.” So Amendment 10-13 must be consistent with all relevant comprehensive plan provisions, both the Commercial goals and GPOs, and the Rural and LAMIRD GPOs. If the Commercial goals and GPOs can override the rural GPOs, then one feature, the Commercial GPOs, precludes the achievement of another feature. The County, which “has the burden of demonstrating the

²¹ *Brinnon Group v. Jefferson County*, 159 Wn. App. 446, 476 – 77, 245 P.3d 789, 804 (2011).

²² *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 206, 256 P.3d 1193, 1223 (2011) Johnson, J. (concurring in part and dissenting in part).

invalidity of the board's actions[,]" makes no attempt to show compliance with the LAMIRD GPOs.²³

Second, the County's argument that Amendment 10-13 is consistent with the "Commercial" policies also fails. GPO 2.105 provides in full that "I-90 exits shall not be considered as new business sites unless an Interchange Zone Classification is developed."²⁴ GPO 2.105 uses the term "shall" and shall is mandatory.²⁵ The County concedes that it has not developed the "Interchange Zone Classification," but argues, without citation to the record or authority, that since the Thorp Highway and I-90 Interchange has been developed for commercial uses for decades it cannot be a new business site.²⁶ The County appears to be arguing that GPO 2.105 only prohibits new business sites on interchanges that have no businesses. But GPO 2.105 does not have a "no businesses" qualifier. GPO 2.105 prohibits considering as "new business sites" land at the "I-90 exits" regardless of whether the exits have existing business, had businesses in the past, or never had businesses.

When words in a county or city enactment are undefined, the use of a dictionary is appropriate to define their plain meaning and the courts

²³ Brief of Respondent Kittitas County p. 8, pp. 23 – 25.

²⁴ Brief of Respondent Kittitas County Exhibit F p. 2-26.

²⁵ *Diaz v. State*, 175 Wn.2d 457, 469 – 70, 285 P.3d 873, 880 (2012).

²⁶ Brief of Respondent Kittitas County p. 7 Fn. 1.

often use Webster's Third New International Dictionary.²⁷ "New" is undefined in the *Kittitas County Comprehensive Plan*. The first meaning of "new" is "having existed or having been made but a short time:"²⁸ Let's consider each parcel in the LAMIRD that is proposed for new development and their new uses. There is not now and there has never been a truck fueling operation and travel center on parcel number 010-0013 and the triangular parcel north of parcel number 010-0013 and just east of parcel number 010-0012.²⁹ So if these structures are constructed and uses undertaken they will be new businesses on new business sites. There is not now and has never has been a restaurant on parcels 010-0013 and 010-0008.³⁰ So if this building is constructed and this use undertaken it will be a new business on a new business site. There is not now a gas station and drive through, or any business, on parcel 010-0008.³¹ So if this facility is constructed and the use undertaken it will be a new business on a site that does not currently have a business. There is not now and has never has been a hotel on parcel 010-0013.³² So if this building is constructed and use undertaken it will be on a new business on a new

²⁷ *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643 – 44, 151 P.3d 990, 992 – 93 (2007).

²⁸ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY p. 1522 (2002).

²⁹ AR 547, Aerial Photograph; AR 520, Map from the Legal Description; AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009); Ellison LLCs' Response Brief p. 7.

³⁰ *Id.*

³¹ *Id.*; Ellison LLCs' Response Brief p. 21 ("the area of the former truck stop is now vacant.")

³² *Id.*

business site. There is not now and has never has been any “future support services buildings” on parcel 010-0013.³³ So if those two “support services buildings” are constructed and the uses undertaken they will be new businesses on new business sites. There is not now and has never has been a “RV Park” on parcel 010-0013.³⁴ So if those structures are constructed and the use undertaken it will be a new business on a new business site. The inclusion of new business sites in the LAMIRD, the Commercial comprehensive plan designation, and the Highway Commercial rezones can be seen by the fact that the LAMIRD on the southwest corner of the interchange increased from 12 to over 52 acres.³⁵ Because of all of these new businesses on new business sites, Amendment 10-13 is inconsistent with GPO 2.105. So neither the Commercial comprehensive plan designation nor the Highway Commercial zoning are authorized by the comprehensive plan’s Commercial GPOs.

B. The Board correctly concluded that Kittitas County Comprehensive Plan Amendment 10-12 violated RCWs 36.70A.070, 36.70A.070(5)(d)(iii), 36.70A.170(1)(a), and 43.21C.030. (Assignment of Error 2 and Issue 2)

1. The Thorp Type III LAMIRD violates RCW 36.70A.070(5)(d)(iii) and the Comprehensive Plan.

³³ *Id.*

³⁴ *Id.*

³⁵ AR 13, Kittitas County Comprehensive Plan Ordinance No. 2010-014 p. 8; AR 519, Docket 10-13 Thorp Travel Center Rezone RZ-10-0001 – Application p*2; AR 334, “7. Narrative Project Description.” Please see KCCC Brief of Appellants p. 6 for an explanation of the 52 acre estimate.

The Ellison LLCs' Response Brief on pages 22 to 25 argues that the expanded LAMIRD complies with the GMA because the LAMIRD is within the logical outer boundary required by RCW 36.70A.070(5)(d)(iv). But Type III LAMIRDs are designated based on a lot or lots, not on the logical outer boundary requirements of RCW 36.70A.070(5)(d)(iv).³⁶ As the Board concluded: "Type III LAMIRDs do allow new development on "lots" rather than requiring the County to determine Logical Outer Boundaries for the LAMIRD as is provided for Type I LAMIRDs based on the pre-existing built environment as of July 1990. (RCW 36.70A.070(5)(d)(iv)"³⁷ The *Kittitas County Comprehensive Plan* in GPO 8.68 a) also provides that logical outer boundaries only apply to Type I LAMIRDs.³⁸ If the logical outer boundary requirements did apply, only the Puget Sound Energy facility could be included in the LAMIRD as it is the only built environment in the southwest quadrant of the Thorp Highway and I-90 Interchange.³⁹ As the Ellison LLCs' Response Brief concedes "the area of the former truck stop is now vacant" and the rest of the property is a hayfield and has one house.⁴⁰

³⁶ RCW 36.70A.070(5)(d)(iii).

³⁷ *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Second Order of Compliance (Nov. 1, 2004), at 5.

³⁸ AR 538, *Kittitas County Comprehensive Plan* p. 8-13 (Dec. 2010).

³⁹ AR 547, Aerial Photograph; Ellison LLCs' Response Brief p. 7 & p. 21.

⁴⁰ Ellison LLCs' Response Brief p. 7 & p. 21.

Contrary to the Ellison LLCs' Response Brief's assertion on page 25, the Type III LAMIRD is not consistent with the *Gold Star Resorts, Inc.* decision. The analysis of existing uses and logical outer boundaries in *Gold Star Resorts* was for criteria for Type I LAMIRDs authorized by RCW 36.70A.070(5)(d)(i), not the Type III LAMIRDs authorized by RCW 36.70A.070(5)(d)(iii) which are at issue here.⁴¹

The Ellison LLCs' Response Brief on pages 25 to 26 argues that the proposed LAMIRD is small-scale because it will only occupy 13 percent of the LAMIRD, citing to KCCC's brief in the Superior Court.⁴² The Ellison LLC's Response Brief misquotes the KCCC brief, arriving at the 13 percent figure by adding the 54,000 square feet of proposed buildings and the 3.5 acres occupied by the two support buildings and their parking. Unfortunately, this calculation omits the fueling areas and parking for the other buildings and uses. The actual figures are a truck fueling area, truck and car parking, and a gas station and drive thru covering approximately nine acres, a restaurant and parking lot covering approximately two acres, a hotel and parking lot covering approximately five acres, an RV Park covering approximately four acres, two future support services buildings which with parking lots covering 3.5 acres, and

⁴¹ *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 727, 222 P.3d 791, 793 (2009).

⁴² CP 130 lines 4 to 15, *Kittitas County Conservation Coalition et al. Reply Brief*, Kittitas County Superior Court Case No. 11-2-00344-5 p. 5.

approximately six acres for a well and septic system including a reserve area for the septic system to serve all of this development.⁴³ This totals 29.5 acres of parking, buildings, and infrastructure. The Puget Sound Energy building, parking, and utility yard occupies another five plus acres.⁴⁴ So the existing and currently planned development will total 34.5 acres. As near as can be derived from the record, the total LAMIRD is over 52 acres and so about 66 percent of it will be development with potentially more development to come.⁴⁵

The Ellison LLCs' Response Brief on page 22, without citing any authority, faults the Board for looking to what it refers to as the proposed use after the rezone to determine if the LAMIRD would be small-scale or isolated. The Board properly looked to the Ellensburg Station Conceptual Site Plan and other materials in the record before the County.⁴⁶ RCW 36.70A.290(4) requires that "[t]he board shall base its decision on the record developed by the ... county"

In response to the arguments in KCCC's Brief of Appellants that the uses allowed in the LAMIRD are not isolated small-scale businesses, the Ellison LLCs' Response Brief on pages 28 and 29 criticizes KCCC's

⁴³ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

⁴⁴ AR 334, "7. Narrative Project Description."

⁴⁵ AR 519, Docket 10-13 Thorp Travel Center Rezone RZ-10-0001 – Application p*2; AR 334, "7. Narrative Project Description."

⁴⁶ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

reliance on *Whitaker v. Grant County* arguing that just because a LAMIRD was not isolated or small-scale in Grant County does not mean it is not isolated or small-scale in Kittitas County. But the Ellison LLCs have the burden here. They need to provide authority or evidence that the Board misinterpreted the law or that the decision was not supported by substantial evidence. They provide none. But the Court does not need to rely on that, a comparison with the pre-amendment LAMIRD shows the expanded LAMIRD is not small-scale. The first meaning of “small” is “slight in circumference [especially] as compared with length or with another similar thing”⁴⁷ The Puget Sound Energy facility is five plus acres.⁴⁸ The original Type III LAMIRD was 12 acres.⁴⁹ Compared to either of these Kittitas County examples, the current 52 acre LAMIRD is not small-scale.⁵⁰ The truck fueling area, truck and car parking, gas station, and drive thru alone total approximately nine acres, nearly twice the size of the Puget Sound Energy facility.⁵¹ And as we will see in the next section the uses proposed for the LAMIRD are not isolated as RCW 36.70A.070(5)(d)(iii) requires.

⁴⁷ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY p. 2149 (2002).

⁴⁸ AR 334, “7. Narrative Project Description.”

⁴⁹ AR 13, Kittitas County Comprehensive Plan Ordinance No. 2010-014 p. 8.

⁵⁰ AR 519, Docket 10-13 Thorp Travel Center Rezone RZ-10-0001 – Application p*2; AR 334, “7. Narrative Project Description.”

⁵¹ AR 334, “7. Narrative Project Description;” AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

The Ellison LLCs' Response Brief on page 22 also argues that Board's conclusion that the development is not small-scale is not supported by the record. However, as the Court can see from the prior analysis in this section, Board's order is supported by substantial evidence.

2. The Thorp Type III LAMIRD uses are not "isolated" as RCW 36.70A.070(5)(d)(iii) requires.

The Ellison LLCs' Response Brief on pages 26 and 27 argues that since the LAMIRD was expanded and not a new LAMIRD, the LAMIRD is isolated. But RCW 36.70A.070(5)(d)(iii) does not require the LAMIRD to be isolated, rather as KCCC's Brief of Appellants argued on pages 33 to 36, Type III LAMIRDS allow the "new development of isolated cottage industries and isolated small-scale businesses"⁵² RCW 36.70A.070(5)(d)(iii) requires the cottage industries and the small-scale businesses to be isolated, not the LAMIRD. The Ellison LLC's Response Brief, on pages 26 – 27, also argues that the LAMIRD was not expanded to allow the development of Thorp Travel Center. But the Kittitas County Ordinance that approved Amendment No. 10-12, the LAMIRD expansion, provides that the expansion was "for the purpose of developing the Thorp Travel Center consisting of a truck stop, restaurant, and hotel and RV Park."⁵³ So the Board did not err in finding that the uses were not isolated.

⁵² Emphasis added.

⁵³ AR 13, Kittitas County Ordinance Number 2010-014 p. 8.

3. Amendment 10-12 is not consistent with the Kittitas County Comprehensive Plan and RCW 36.70A.070.

Next, the Ellison LLCs' Response Brief on page 29 argues, without any citation to the record or authority, that the LAMIRD expansion area is not rural and so the LAMIRD development does not need to conform to the county's definition of rural character. But the land added to the LAMIRD is about 40 acres with a house and a hay field.⁵⁴ Photographs of the vicinity show the area consists largely of fields, open space, and a few buildings.⁵⁵ The area is rural. The *Kittitas County Comprehensive Plan* in GPO 8.78 d) provides that for Type III LAMIRDs "[d]evelopment should conform to the rural character of the surrounding area."⁵⁶ The GMA also requires that Type III must protect rural character, which includes this Type III LAMIRD.⁵⁷

4. Expanding the Type III LAMIRD into the Agricultural Overlay violated the GMA.

The Ellison LLC's Response Brief on pages 27 and 28 argues, without citation to the record or authority, that all the "Agricultural Overlay" did was identify property that would be studied for an agricultural designation at some undefined future date. But as KCCC's

⁵⁴ AR 201, Kittitas County Comprehensive Plan Ordinance No. 2010-014 p. 11; AR 519, Docket 10-13 Thorp Travel Center Rezone RZ-10-0001 – Application p*2; AR 334, "7. Narrative Project Description;" Ellison LLCs' Response Brief p. 7 & p. 21.

⁵⁵ AR 419 – 420, photos of the vicinity of the proposed Thorp LAMIRD expansion.

⁵⁶ AR 539 – 40, *Kittitas County Comprehensive Plan* GPO 8.78 pp. 8-14 – 8-15 (2010).

⁵⁷ RCW 36.70A.070(5)(c); (d)(iii).

Brief of Appellants documented on pages 39 and 40, the County had the evaluation on the 2010 docket and failed to complete it. Further, the Agriculture Study Overlay Zone still applies to the expanded Type III LAMIRD and the Overlay Zones' use limitations prohibit the commercial uses proposed for the LAMIRD.⁵⁸ This creates inconsistent zoning in violation of RCW 36.70A.070 and RCW 36.70A.040(4)(d)'s requirement that the county shall adopt "development regulations that are consistent with and implement the comprehensive plan"

C. The Board was correct that the Commercial Comprehensive Plan amendment and the Highway Commercial rezones in Amendment 10-13 were inconsistent with the GMA and the Comprehensive Plan. (Assignment of Error 3 and Issue 3)

As we have shown above, the Thorp Type III LAMIRD expansion and "Commercial" Comprehensive Plan Amendments violate the GMA and the *Kittitas County Comprehensive Plan*. As this brief also documents the Highway Commercial zone violates the GMA and the *Kittitas County Comprehensive Plan*. So this Court must uphold on the Board's order.⁵⁹

D. The County violated SEPA and the SEPA determination in this case was properly appealed to the Board. (Assignment of Error 4 and Issue 4)

Kittitas County and the Ellison LLCs are correct that the Board has jurisdiction over the Washington State Environmental Policy Act (SEPA)

⁵⁸ AR 504, Figure 14 BOCC Approved Agriculture Study Overlay Zone Thorp Study Area (Dec. 2009); AR 506 – 08, Agriculture Study Overlay Zone.

⁵⁹ AR 599 – 602, Comp Plan and Rezone FDO at 13 – 16 of 18.

appeals for comprehensive plan amendments and rezones over which the Board has jurisdiction.⁶⁰ No party disputes that the Board had jurisdiction over the comprehensive plan amendments in Amendments 10-12 and 10-13. Further, KCCC's Brief of Appellants and this brief show that the Board had jurisdiction over the Highway Commercial rezones in Amendment 10-13. So the Board had jurisdiction over the SEPA review for both the comprehensive plan and development regulation amendments in Amendments 10-12 and 10-13.

Ellison LLCs' Response Brief on pages 31 and 32 argues that KCCC failed to exhaust its administrative remedies relying on KCC 15A.04.020. But KCC 15A.04.020 applies to land use permits which excludes the legislative approvals at issue here.⁶¹ As KCCC's Brief of Appellants on pages 45 and 46 documented, KCC 15B.05.010 and KCC 15.04.210(2) when read together provide that "[t]he final adoption of and/or amendments to the *Kittitas County Comprehensive Plan* or development regulations, combined with any administrative environmental determinations (e.g., final threshold determination or final EIS) issued pursuant to Chapter 15.04 of this code, may be appealed

⁶⁰ Brief of Respondent Kittitas County p. 28; Ellison LLCs' Response Brief p. 31; RCW 36.70A.280(1)(a).

⁶¹ KCC 15A.01.030; KCC 15A.02.050(1). The Kittitas County Code was last accessed on Dec. 18, 2012 at <http://www.co.kittitas.wa.us/boc/countycode/default.asp>

through the growth management hearings board”⁶² Kittitas County does not provide an administrative appeal for SEPA decisions for comprehensive plan and development regulation amendments.⁶³ Since, this case involves two comprehensive plan amendments and two amendments to the development regulations the appeal to the Board was proper. That one of the parties to this appeal may also have filed a Land Use Petition Act (LUPA) appeal is irrelevant and the Ellison LLCs’ Response Brief identifies no authority for the proposition that the LUPA appeal precludes this appeal.

Neither Kittitas County nor the Ellison LLCs argue that the County complied with SEPA for either the comprehensive plan amendments or the rezones. They have the burden in this appeal, so this Court must uphold the Board’s FDO on the SEPA issues.⁶⁴

E. The superior court’s decision not to remand the orders and determinations of invalidity to the Board violated the Administrative Procedure Act, chapter 34.05 RCW. (Assignment of Error 5 and Issue 5)

The Brief of Respondent Kittitas County argues on page 30 that the Kittitas County Superior Court’s failure to comply with RCW

⁶² The quote is from KCC 15.04.210(2).

⁶³ KCC 15B.05.010.

⁶⁴ AR 559 – 72, *Kittitas County Conservation and Futurewise v. Kittitas County*, GMHBEWR Case No. 11-1-0001, Corrected Final Decision and Order (Partial) [SEPA – RCW Chap. 43.21C Non-Compliance, Remand and Invalidity] (June 13, 2011), at 1 – 13 of 13.

34.05.574(1) was harmless error because there is no authority for the proposition that the Board would reinstate invalidity. The Ellison LLCs' Response Brief argues that on remand the Board would have had a LAMIRD boundary found to be complaint and rezones over which it had no jurisdiction so why remand. But these arguments assume that there were no other grounds for the Board to find that the comprehensive plan amendments violated the GMA, such as the lack of consistency with the Agriculture Overlay Zone.⁶⁵ The County and the Thorp LLCs have the burden, they have not met it by assuming that the Board had no other viable course of action.

Respectfully submitted this 20th day of December 2012.



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⁶⁵ AR 506 – 08, Agriculture Study Overlay Zone.

CERTIFICATE OF SERVICE

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on December 20, 2012, I caused the original and true and correct copies of the following document to be served on the persons listed below in the manner shown: **Reply Brief of Appellants Kittitas County Conservation Coalition & Futurewise.**

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Dated this 20th day of December 2012.



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