

FILED

OCT 26 2012

COURT OF APPEALS
OF THE 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, LCC and ELLISON THORP
PROPERTY II, LCC,
Respondents,

and

GROWTH MANAGEMENT HEARINGS BOARD,
Respondent.

**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	iii
I. Introduction.....	1
II. Procedural Posture.....	2
III. Assignments of Error, Issues, and Short Answers	2
IV. Facts.....	4
V. Standard of Review	7
VI. Argument	10
A. The Board had subject matter jurisdiction over both the comprehensive plan amendments and rezones at issue in this case and those amendments violated the GMA and were inconsistent with the Kittitas County Comprehensive. (Assignment of Error 1 and Issue 1).....	10
1. The Board had subject matter jurisdiction over the comprehensive plan amendments in Amendments 10-12 and 10-13.	10
2. The Board had subject matter jurisdiction over the comprehensive plan amendment and Highway Commercial rezones in Amendment 10-13 because the Highway Commercial rezones in this case are not a site-specific rezones authorized by a comprehensive plan.	11
B. The Board correctly concluded that Kittitas County Comprehensive Plan Amendment 10-12, which expanded the Type III LAMIRD from 12 acres to over 52 acres for the purpose of developing a truck stop, restaurant, hotel, and RV park, 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).....	24
1. The Thorp Type III LAMIRD is not the intensification of development on lots containing isolated nonresidential uses, the new development of isolated cottage industries, the new development of isolated small-scale businesses, the expansion of small-scale businesses, or a new small-scale business on a site previously occupied by an existing business as authorized by RCW 36.70A.070(5)(d)(iii) and the Kittitas County Comprehensive Plan.....	25
2. The Thorp Type III LAMIRD is not “isolated” as RCW 36.70A.070(5)(d)(iii) requires.....	31
3. Amendment 10-12 is not consistent with the Kittitas County Comprehensive Plan and RCW 36.70A.070.	32
4. Expanding the Type III LAMIRD into the Agricultural Overlay violated the GMA.	39

<u>Topic</u>	<u>Page Number</u>
C. The Board correctly concluded that the Comprehensive Plan amendment and the Highway Commercial rezones in Amendment 10-13 violated the GMA and were inconsistent with the County Comprehensive Plan. (Assignment of Error 3 and Issue 3).....	40
D. The County violated SEPA and the SEPA determination in this case was properly appealed (Assignment of Error 4 and Issue 4)	41
E. The superior court’s decision not to remand the orders and determinations of invalidity to the Board for action consistent with the superior court’s order violated the Washington State Administrative Procedure Act. (Assignment of Error 5 and Issue 5)	46
VII. Conclusion.....	49

TABLE OF AUTHORITIES

<u>Authority</u>	<u>Page Number</u>
Cases	
<i>Boehm v. City of Vancouver</i> , 111 Wn. App. 711, 47 P.3d 137, (2002)	42
<i>Callecod v. Wash. State Patrol</i> , 132 Wn.2d 1004, 939 P.2d 215 (1997).....	9
<i>Callecod v. Washington State Patrol</i> , 84 Wn. App. 663, 929 P.2d 510 (1997)	9
<i>Coffey v. City of Walla Walla</i> , 145 Wn. App. 435, 187 P.3d 272 (2008)	24
<i>Department of Labor and Industries v. Gongyin</i> , 154 Wn.2d 38, 109 P.3d 816 (2005)	11
<i>Feil v. Eastern Washington Growth Management Hearings Bd.</i> , 172 Wn.2d 367, 259 P.3d 227 (2011).....	23
<i>Gold Star Resorts, Inc. v. Futurewise</i> , 167 Wn.2d 723, 222 P.3d 791 (2009)	1
<i>King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 138 Wn.2d 161, 979 P.2d 374 (1999).....	9
<i>Kittitas County v. Eastern Washington Growth Management Hearings Bd.</i> , 172 Wn.2d 144, 256 P.3d 1193 (2011)	7, 8, 9, 11
<i>Manke Lumber Co., Inc. v. Diehl</i> , 137 Wn.2d 1018, 984 P.2d 1033 (1999)	47
<i>Manke Lumber Co., Inc. v. Diehl</i> , 91 Wn. App. 793, 959 P.2d 1173 (1998).....	47
<i>Quadrant Corp. v. State Growth Management Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	46
<i>Spokane County v. Eastern Washington Growth Management Hearings Bd.</i> , 160 Wn. App. 274, 250 P.3d 1050 (2011).....	10

<u>Authority</u>	<u>Page Number</u>
<i>Thurston County v. Cooper Point Ass'n.</i> , 148 Wn.2d 1, 57 P.3d 1156 (2002).....	8, 9
<i>Thurston County v. Western Washington Growth Management Hearings Bd.</i> , 164 Wn.2d 329, 190 P.3d 38 (2008).....	9, 10
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000)	22
<i>Weyerhaeuser v. Pierce County</i> , 124 Wn.2d 26, 873 P.2d 498 (1994)	16
<i>Whidbey Envtl. Action Network ("WEAN") v. Island County</i> , 122 Wn. App. 156, 93 P.3d 885 (2004)	9
<i>Woods v. Kittitas County</i> , 162 Wn.2d 597, 174 P.3d 25 (2007)	14, 16, 21, 22
 Statutes	
Chapter 34.05 RCW	46
Chapter 36.70A RCW	1
Chapter 36.70B RCW.....	14, 16
Chapter 36.70C RCW	14, 16
RCW 34.05.570	8
RCW 34.05.574	4, 46, 47, 48
RCW 36.70A.030	12, 20, 21
RCW 36.70A.040	12, 16, 39
RCW 36.70A.070	32, 39
RCW 36.70A.070(5)	passim
RCW 36.70A.130	16, 25

<u>Authority</u>	<u>Page Number</u>
RCW 36.70A.280	12, 21
RCW 36.70A.302	48
RCW 36.70B.020	12, 13, 14, 15
RCW 36.70B.040	14, 15, 16

Regulations

WAC 197-11-960	44
----------------------	----

Development Regulations

Chapter 17.44 KCC	15, 18, 19, 20
KCC 15.04.210	45
KCC 15B.05.010	45
KCC 17.44.020	19, 21

Growth Management Hearings Board Decisions

<i>Kittitas County Conservation, et al. v. Kittitas County</i> , EWGMHB Case No. 07-1-0015, Final Decision and Order (March 21, 2008)	7
<i>Moe v. Kittitas County</i> , EWGMHB Case No. 08-1-0010, Final Decision and Order (Aug. 26, 2008).....	12
<i>Whitaker v. Grant County</i> , EWGMHB Case No. 99-1-0019, Second Order of Compliance (Nov. 1, 2004).....	26, 28, 31, 35

I. INTRODUCTION

In the *Gold Star Resorts, Inc.* decision, the Washington State Supreme Court concluded that:

¶ 5 LAMIRDs are not intended for continued use as a planning device, rather, they are “intended to be a one-time recognition of existing areas and uses and not intended to be used continuously to meet needs (real or perceived) for additional commercial and industrial lands.” *People for a Liveable Comty. v. Jefferson County*, No. 03–2–0009c (Growth Mgmt. Hr’gs Bd. Final Dec. and Order Aug. 22, 2003). (In general, planning in rural zones must “protect the rural character of the area” and “contain[] or otherwise control[] rural development.” RCW 36.70A.070(5)(c), (i)).¹

In this case Kittitas County did exactly the opposite of the supreme court’s command. The county attempted to use a Type III limited area of more intense rural development (LAMIRD) to meet a perceived need for more commercial land. This violated the Growth Management Act (GMA), chapter 36.70A RCW, and was inconsistent with the *Kittitas County Comprehensive Plan*.

This brief will first outline the key facts, assign errors to the superior court order, identify the standard of review, and show that the Growth Management Hearings Board (Board) had jurisdiction over both the comprehensive plan amendments and rezones at issue in this case. The brief will then show that the Board correctly interpreted and applied the GMA, the Washington State Environmental Policy Act (SEPA), and Kittitas County’s

¹ *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 727 – 28, 222 P.3d 791, 793 (2009).

Comprehensive Plan. This brief will also document that the Board's orders are supported by substantial evidence. So the Kittitas County Conservation Coalition and Futurewise (the KCCC Appellants) respectfully request that this Court uphold the Board's orders.

II. PROCEDURAL POSTURE

The KCCC Appellants were petitioners before the Board and prevailed on the merits.² Kittitas County was the respondent before the Board. Ellison Thorp Property, LCC and Ellison Thorp Property II, LCC (Ellison LCCs) were intervenors before the Board.

Kittitas County and the Ellison LCCs appealed the Board's orders to Kittitas County Superior Court where they prevailed.³ The KCCC Appellants filed this appeal to the Court of Appeals.

III. ASSIGNMENTS OF ERROR, ISSUES, AND SHORT ANSWERS

Assignment of Error 1: The Board correctly concluded that it had subject matter jurisdiction over the comprehensive plan amendments and rezones and the superior court's conclusion to the contrary was an erroneous interpretation of the law and not supported by substantial evidence.

² Administrative Record (AR) 582 *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 10 of 13. Hereinafter SEPA FDO; AR 602, *Kittitas County Conservation and Futurewise v. Kittitas County*, GMHBEWR Case No. 11-1-0001, Final Decision and Order (Partial) Thorp LAMIRD III Expansion and Thorp Travel Center Land Use Map Change and Rezone (July 12, 2011), at 16 of 18. Hereinafter Comp Plan and Rezone FDO.

³ Clerk's Papers (CP) 223 – 24, *Kittitas County v. Kittitas County Conservation et al.*, Kittitas County Superior Court Case No. 11-2-00344-5 Final Order pp. 2 – 3 of 4 (Feb. 27, 2012).

Issue 1: Did the Board correctly conclude it had jurisdiction over the comprehensive plan amendments and rezones? Yes.

Assignment of Error 2: The Board correctly concluded that Kittitas County Comprehensive Plan Amendment 10-12 violated the GMA and the *Kittitas County Comprehensive Plan* and the superior court's conclusion to the contrary was an erroneous interpretation of the law and not supported by substantial evidence.

Issue 2: Did the Board correctly conclude that Kittitas County Comprehensive Plan Amendment 10-12 violated the GMA and the County Comprehensive Plan and was the Board's conclusion supported by substantial evidence? Yes.

Assignment of Error 3: The Board correctly concluded that the Comprehensive Plan amendment and the Highway Commercial Rezones in Amendment 10-13 violated the GMA and were inconsistent with the *Kittitas County Comprehensive Plan* and the superior court's conclusion to the contrary was an erroneous interpretation of the law and not supported by substantial evidence.

Issue 3: Did the Board correctly conclude that Comprehensive Plan Amendment and rezones in Amendment 10-13 violated the GMA and were inconsistent with the *Kittitas County Comprehensive Plan* and was the Board's conclusion supported by substantial evidence? Yes.

Assignment of Error 4: The Board correctly concluded that the County violated the Washington State Environmental Policy Act (SEPA), chapter 43.21C, the SEPA determination was properly appealed to the Board, and the superior court's conclusion to the contrary was an erroneous interpretation of the law and not supported by substantial evidence.

Issue 4: Did the Board correctly conclude that County violated SEPA for Amendments 10-12 and 10-13, was the Board's conclusion supported by substantial evidence, and was the SEPA determination properly appealed to the Board? Yes.

Assignment of Error 5: The superior court erred in dissolving the determinations of invalidity rather than remanding the Board's orders back to the Board for a decision consistent with the Court's Final Order as required by RCW 34.05.574(1).

Issue 5: Did the superior court's decision not to remand the orders and determinations of invalidity to the Board for action consistent with the superior court's order violate the Washington State Administrative Procedure Act, chapter 34.05 RCW? Yes.

IV. FACTS

As part of Kittitas County's 2010 comprehensive plan update, Kittitas County approved two "Map Amendments," Amendments 10-12 and

10-13.⁴ Amendment 10-12 expanded a Type III, or Type 3, limited area of more intense rural development (LAMIRD) “for the purpose of developing the Thorp Travel Center consisting of a truck stop, restaurant and hotel and RV park[.]”⁵ Amendment 10-13 changed the comprehensive plan “land use map from Rural to Commercial” and rezoned the area from “Agricultural 20 [and Limited Commercial] to Commercial Highway for the purpose of developing the Thorp Travel Center consisting of a truck stop, restaurant and hotel and RV park[.]”⁶ The expanded LAMIRD also is within Kittitas County’s Agricultural Study Overlay Zone.⁷

These amendments are located on the southwest corner of the “Thorp Highway” interchange with I-90.⁸ The amendments are adjacent to the Puget Sound Energy (PSE) office, utility building, and storage area.⁹ They are also across I-90 from two retail commercial uses.¹⁰ Most of the land the Type III LAMIRD was expanded into is currently being farmed.¹¹

⁴ AR 208 – 09, 211, Kittitas County Comprehensive Plan Ordinance No. 2010-014 pp. 8 – 9, p. 11.

⁵ AR 201, Kittitas County Comprehensive Plan Ordinance No. 2010-014 p. 11.

⁶ AR 201, Kittitas County Comprehensive Plan Ordinance No. 2010-014 p. 11; AR 320, Kittitas County Comprehensive Plan Ordinance No. 2010-014 p. 120.

⁷ AR 505, Kittitas County Figure 14 BOCC Approved Agricultural Study Overlay Zone Thorp Study Area (Dec. 2009).

⁸ AR 547, Aerial Photograph.

⁹ AR 509 – 11, Kittitas County 2010 Comprehensive Plan Map and Text Amendments Docket 10-12 p. *1.

¹⁰ AR 547, Aerial Photograph; AR 377, Futurewise comment letter to the Kittitas County Board of Commissioners p. 33 (Oct. 29, 2010).

¹¹ AR 547, Aerial Photograph.

Ordinance No. 2010-014 refers to the LAMIRD as increasing from 12 to 30.5 acres, but that is an error.¹² The Ellison LCCs requested a 36.5 acre LAMIRD, including only part of Tax Parcel Number 18-17-14010-0011, shown as 010-0011 on the parcel map, and none of Tax Parcel Number 18-17-14010-0011, shown as 010-0013 parcel map.¹³ The county actually included all of 010-0011 and 010-0013 in the LAMIRD designation, resulting in a total LAMIRD of over 52 acres.¹⁴

The LAMIRD was approved to permit the Thorp Travel Center, which will consist of a truck fueling area, truck and car parking, and a gas station and drive thru covering approximately nine acres, a restaurant covering approximately two acres, a hotel covering approximately five acres, an RV Park covering approximately four acres, two future support services buildings which with parking covering 3.5 acres, and approximately six acres for a well and septic system including a reserve area for the septic system to serve all of this development.¹⁵ This totals 29.5 acres of parking, buildings, and infrastructure, not including the existing Puget Sound Energy building and parking and storage areas. The seven proposed buildings will have a

¹² AR 201, Kittitas County Comprehensive Plan Ordinance No. 2010-014 p. 11.

¹³ AR 519, Docket 10-13 Thorp Travel Center Rezone RZ-10-0001 – Application p. *2; AR 520, Map from the Legal Description; AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009), attached as Exhibit 3 to this brief.

¹⁴ AR 519, Docket 10-13 Thorp Travel Center Rezone RZ-10-0001 – Application p*2; AR 334, “7. Narrative Project Description.”

¹⁵ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

projected 54,000 square feet including a 50 unit hotel.¹⁶ The Puget Sound Energy building, parking, and utility yard occupies another five plus acres.¹⁷ So the existing and currently planned development will total 34.5 acres.¹⁸

In 2008, the Board concluded that Kittitas County's Highway Commercial Zone violated the Growth Management Act (GMA).¹⁹ The Washington State Supreme Court affirmed the Board's orders, with the exception of the Board's ruling on the airport zoning.²⁰ The supreme court did not reach each of the zoning provisions the Board found to violate the GMA, directing Kittitas County to redo its comprehensive plan for the rural area.²¹ The Board will review the revised comprehensive plan and any revised zones after the County completes its work.²²

V. STANDARD OF REVIEW

In Kittitas County v. Eastern Washington Growth Management Hearings Bd., the Supreme Court of Washington State succinctly stated the standard of review for appeals of Board decisions:

¶ 14 Courts apply the standards of the Administrative Procedure Act [APA], chapter 34.05 RCW, and look directly

¹⁶ AR 499 – 504, IMPLAN model projections enclosed with the Letter from the Economic Development Group of Kittitas County to Kittitas County Board of Commissioners.

¹⁷ AR 334, “7. Narrative Project Description.”

¹⁸ *Id.*

¹⁹ *Kittitas County Conservation, et al. v. Kittitas County*, Eastern Washington Growth Management Hearings Board (EWGMHB) Case No. 07-1-0015, Final Decision and Order (March 21, 2008), at 37.

²⁰ *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 181, 256 P.3d 1193, 1211 (2011).

²¹ *Kittitas County*, 172 Wn.2d at 166 –67, 256 P.3d at 1204.

²² *Id.*

to the record before the board. *Lewis County*, 157 Wn.2d at 497, 139 P.3d 1096; *Quadrant Corp.*, 154 Wn.2d at 233, 110 P.3d 1132. Specifically, courts review errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) *de novo*. *Thurston County*, 164 Wn.2d at 341, 190 P.3d 38. Courts review challenges under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence by determining whether there is “ ‘a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.’ ” *Id.* (internal quotation marks omitted) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)). Finally, courts review challenges that an order is arbitrary and capricious under RCW 34.05.570(3)(i) by determining whether the order represents “ ‘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, 959 P.2d 1091 (internal quotation marks omitted) (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)).²³

“Under the judicial review provision of the APA, the ‘burden of demonstrating the invalidity of [the Board’s decision] is on the party asserting the invalidity.’ ”²⁴ In this case that is Kittitas County and the Ellison LCCs. The KCCC Appellants may argue and the appellate court may sustain the Board’s order on any ground supported by the record even if the Board did not consider it.²⁵

²³ *Kittitas County*, 172 Wn.2d at 155, 256 P.3d at 1198.

²⁴ *Thurston County v. Cooper Point Ass’n.*, 148 Wn.2d 1, 7 – 8, 57 P.3d 1156, 1159 – 60 (2002) citing RCW 34.05.570(1)(a).

²⁵ *Whidbey Envtl. Action Network (“WEAN”) v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885, 891 (2004).

“Substantial weight is accorded to a board’s interpretation of the GMA, but the court is not bound by the board’s interpretations.”²⁶ In interpreting the GMA, the courts do not give deference to local government interpretations of the law.²⁷ On mixed questions of law and fact, the court determines the law independently, and then applies it to the facts as found by the Board.²⁸ The reviewing court does not weigh the evidence or substitute its view of the facts for that of the Board.²⁹

In considering this appeal, it is important to note that appeals by citizens and citizen groups are the mechanism that the Governor and Legislature adopted to enforce the GMA.³⁰ Unlike some laws, such as Washington’s Shoreline Management Act, there is no state agency that reviews and approves or disapproves GMA comprehensive plans and development regulations. The responsibility to appeal noncompliant comprehensive plans and development regulations to the Board is that of citizens and groups such as the KCCC Appellants.

²⁶ *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008).

²⁷ *Kittitas County*, 172 Wn.2d at 156, 256 P.3d at 1199.

²⁸ *Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 8, 57 P.3d 1156, 1160 (2002).

²⁹ *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676, 929 P.2d 510, 516 n.9 (1997) *review denied* *Callecod v. Wash. State Patrol*, 132 Wn.2d 1004, 939 P.2d 215 (1997).

³⁰ *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 175 – 77, 979 P.2d 374, 380 – 82 (1999).

VI. ARGUMENT

- A. The Board had subject matter jurisdiction over both the comprehensive plan amendments and rezones at issue in this case and those amendments violated the GMA and were inconsistent with the Kittitas County Comprehensive. (Assignment of Error 1 and Issue 1)**
- 1. The Board had subject matter jurisdiction over the comprehensive plan amendments in Amendments 10-12 and 10-13.**

Following *Spokane County v. Eastern Washington Growth Management Hearings Board*, the Board correctly concluded it had jurisdiction to determine whether Kittitas County's comprehensive plan amendments in Amendments 10-12 and 10-13 complied with the GMA.³¹ As the Washington State Supreme Court has concluded, "[i]f a county amends a comprehensive plan, the amendment must comply with the GMA and may be challenged within 60 days of publication of the amendment adoption notice."³² Amendments 10-12 and 10-13, the comprehensive plan amendments in this case, amended the Kittitas County Comprehensive Plan's Land Use Map³³ and the KCCC Appellants appealed within 60 days of the filing of the notice of adoption. So the Board had subject matter jurisdiction over the comprehensive plan amendments in this case.

³¹ AR 591, Comp Plan and Rezone FDO at 5 of 18 citing *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 160 Wn. App. 274, 282, 250 P.3d 1050, 1053 (2011).

³² *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38, 46 (2008).

³³ AR 319 – 20, Kittitas County Comprehensive Plan Ordinance No. 2010-014 pp. 119 – 20.

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

Also following the *Spokane County* and *Woods v. Kittitas County* decisions, the Board correctly concluded that it had subject matter jurisdiction over the rezones.³⁴ The Board correctly determined that the Highway Commercial rezones are not “a site-specific rezone authorized by a comprehensive plan” and therefore the Board had jurisdiction to review the rezones.³⁵

The Washington State Supreme Court has held that:

The primary goal of statutory interpretation is to ascertain and give effect to the legislature’s intent and purpose. *Am. Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004); *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question. *Campbell & Gwinn*, 146 Wn.2d at 11, 43 P.3d 4.³⁶

The courts “read the legislation as a whole and interpret provisions in context. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002).”³⁷

³⁴ AR 591, Comp Plan and Rezone FDO at 5 of 18.

³⁵ *Id.*

³⁶ *Department of Labor and Industries v. Gongyin*, 154 Wn.2d 38, 44 – 45, 109 P.3d 816, 819 (2005).

³⁷ *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 185, 256 P.3d 1193, 1212 (2011), Justice Chambers concurring in part and dissenting in part.

RCW 36.70A.280(1) provides in relevant part that the Growth Management Hearings Board “shall hear and determine only those petitions alleging ... that, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.” Kittitas County plans under RCW 36.70A.040.³⁸

RCW 36.70A.030(7) defines development regulations as:

(7) “Development regulations” or “regulation” means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

RCW 36.70B.020(4) defines a project permit, emphasis added, as:

(4) “Project permit” or “project permit application” means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions,

³⁸ *Moe v. Kittitas County*, EWGMHB Case No. 08-1-0010, Final Decision and Order (Aug. 26, 2008), at 18.

binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.

Reading these three sections together we see that the Board has jurisdiction over amendments to development regulations, including zoning ordinances. However, if the site-specific rezone is “authorized by a comprehensive plan or subarea plan,” then the Board does not have jurisdiction over the rezone. The last phrase of RCW 36.70B.020(4) 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 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 legislature limited the definition of project permits to site-specific rezones authorized by a comprehensive plan or subarea plan for a very important policy reason. The Growth Management Act, in RCW 36.70A.130(1)(d), provides in relevant part that “[a]ny amendment of or

revision to development regulations shall be consistent with and implement the comprehensive plan.” Neither the Local Government Permitting Act, chapter 36.70B RCW, or the Land Use Petition Act (LUPA, chapter 36.70C RCW) include this requirement. To ensure that rezones comply with the comprehensive plan, the legislature only defined rezones authorized by the comprehensive plan as project permits in RCW 36.70B.020(4). This can be seen in the supreme court’s *Woods v. Kittitas County* decision.

¶ 27 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). In reviewing a proposed land use project, a local government must determine whether the proposed project is consistent “with applicable development regulation, or in the absence of applicable regulations the adopted comprehensive plan.” RCW 36.70B.030(1). While standards are explicitly provided for making the determination of whether a proposed project is consistent with the development regulations, or, in their absence, the comprehensive plan, there is no explicit requirement that the project permit be consistent with the GMA. *See* RCW 36.70B.030, .040. Instead, the land use planning choices reflected in the comprehensive plan and regulations “serve as the foundation for project review.” RCW 36.70B.030(1).³⁹

RCW 36.70B.040(1) provides in full that:

A proposed project’s consistency with a local government’s development regulations adopted under chapter 36.70A RCW, or, in the absence of applicable development regulations, the appropriate elements of the comprehensive plan adopted under chapter 36.70A RCW shall be decided by the local government during project review by consideration of:

³⁹ *Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25, 33 (2007).

- (a) The type of land use;
- (b) The level of development, such as units per acre or other measures of density;
- (c) Infrastructure, including public facilities and services needed to serve the development; and
- (d) The characteristics of the development, such as development standards.

RCW 36.70B.020(2)(a) provides that where the development regulations specify the “land uses permitted,” the regulations “shall be determinative . . .” Zones, such as the Highway Commercial Zone, Chapter 17.44 Kittitas County Code (KCC), typically specify the type of land use and the level of development allowed for at least some of the allowed uses.⁴⁰ So if the Highway Commercial rezones were project permits, RCW 36.70B.040(1) provides that it is only the development regulations that should be considered in reviewing the rezones. Since rezones by their nature change the allowed uses and allowed densities, limiting the review of challenged rezones to only those uses and densities allowed by the new zone makes sense only when those uses and densities are authorized by the comprehensive plan. That is why RCW 36.70B.020(4) limits project permits to only those rezones authorized by the comprehensive plan. If the rezone is not authorized by the

⁴⁰ AR 466 – 67, Chapter 17.44 KCC.

comprehensive plan, then the Board can look to the comprehensive plan to see whether the allowed uses and densities are consistent.

The potential harshness of RCW 36.70B.040(1) can be ameliorated because a local government can choose to, but is not required to, mandate that development permits must be consistent with the comprehensive plan.⁴¹ But chapter 36.70B RCW and LUPA, alone, do not require review of whether project permits are consistent with the comprehensive plan. Further, even though the GMA requires that counties and cities “adopt development regulations that are consistent with and implement the comprehensive plan...” and that “amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan,” the courts have recognized that “a specific zoning ordinance will prevail, even over an inconsistent comprehensive plan.”⁴² The only state law that requires this consistent is the GMA and the only the Boards have the authority to review development regulations for compliance with the comprehensive plan in all situations. That is why only rezones that are authorized by the comprehensive plans are project permits.

The Highway Commercial rezones in Amendment 10-13 were not authorized by the *Kittitas County Comprehensive Plan* or a subarea plan. There is

⁴¹ *Woods*, 162 Wn.2d at 614, 174 P.3d at 34.

⁴² RCW 36.70A.040(4)(d); RCW 36.70A.130(1)(d); *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 43, 873 P.2d 498, 507 (1994).

no current subarea plan applicable to this area. The *Kittitas County*

Comprehensive Plan includes the following provisions related to this question:

Based on the LAMIRD types established in RCW 36.70A.070(5), Kittitas County establishes three categories of LAMIRD designations. These are:

....

- Rural Employment Center – Intensification of development on lots containing isolated nonresidential uses or new development of isolated small-scale businesses that are not principally designed to serve the rural area, but do provide job opportunities for rural residents.

The following goals, policies and objectives provide guidance for designation and development within LAMIRDS generally, as well as more specific guidance for each type of LAMIRD.

GPO 8.67 Allow for designation of LAMIRDs in the rural area, consistent with the requirements of the GMA.⁴³

Kittitas County Comprehensive Plan policy GPO 8.78 includes the following standards for designating Type III LAMIRDs which the comprehensive plan refers to as Rural Employment Centers:

GPO 8.78 Designation and development standards in Rural Employment Centers:

- a) Intensification of development on lots containing isolated nonresidential uses or new development of isolated small scale businesses is permitted;

⁴³ AR 538, *Kittitas County Comprehensive Plan* p. 8-13 (Dec. 2010). The cited pages from the comprehensive plan are enclosed as Exhibit 1 to this brief.

- b) Businesses should provide job opportunities for rural residents, but do not need to be principally designed to serve local residents;
- c) Small scale employment uses should generally be appropriate in a rural community, such as (but not limited to) independent contracting services, incubator facilities, home-based industries, and services which support agriculture; and
- d) Development should conform to the rural character of the surrounding area.⁴⁴

Kittitas County amended the comprehensive plan designation of this area to be a Type III LAMIRD.⁴⁵ So the zoning applicable to this area must meet the standards in the GMA, because the comprehensive plan policies require compliance with the GMA. So to be authorized by the *Kittitas County Comprehensive Plan* a Type III LAMIRD must be authorized by a comprehensive plan and consistent with the GMA. As we will see, the Highway Commercial Zone, Chapter 17.44 Kittitas County Code (KCC), when applied to this area is not authorized by a comprehensive plan.

The *Kittitas County Comprehensive Plan* provides that Type III LAMIRDS, Rural Employment Centers, permit the “[i]ntensification of development on lots containing isolated nonresidential uses or new development of isolated small scale businesses”⁴⁶ Similar limits are also

⁴⁴ AR 539 – 40, *Kittitas County Comprehensive Plan* GPO 8.78 pp. 8-14 – 8-15 (Dec. 2010).

⁴⁵ AR 211, 319, *Kittitas County Comprehensive Plan Ordinance No. 2010-014* p. 11 & p. 119.

⁴⁶ AR 538, *Kittitas County Comprehensive Plan* p. 8-13 (Dec. 2010); AR 539 – 40, *Kittitas County Comprehensive Plan* GPO 8.78 pp. 8-14 – 8-15 (Dec. 2010).

required by the GMA in RCW 36.70A.070(5)(d)(iii). But the Highway Commercial Zone does not limit the permitted uses to the “intensification of development on lots containing isolated nonresidential uses or new development of isolated small scale businesses” as the *Kittitas County Comprehensive Plan* requires. There is no requirement that the uses must be “isolated” and multiple buildings and businesses are allowed on the same lot and on adjacent lots.⁴⁷ Other than grocery stores, there is no limit to the size of the business so it does not require that they are “small-scale.”⁴⁸ Grocery stores are limited to four thousand square feet in size, but this is not small-scale either.⁴⁹ There is no requirement in the Highway Commercial Zone that the allowed uses should generally be appropriate in a rural community as the *Kittitas County Comprehensive Plan* policies require.⁵⁰ The uses listed in policy GPO 8.78c as appropriate in Type III LAMIRDs “independent contracting services, incubator facilities, home-based industries, and services which support agriculture” are not even permitted or conditional uses in Highway Commercial Zone.⁵¹

The *Kittitas County Comprehensive Plan* requires that for Type III LAMIRDs “[d]evelopment should conform to the rural character of the

⁴⁷ AR 466 – 67, Chapter 17.44 Kittitas County Code (KCC), C-H Highway Commercial Zone. Chapter 17.44 KCC is enclosed as Exhibit 2 to this brief.

⁴⁸ AR 466 – 67, Chapter 17.44 KCC, C-H Highway Commercial Zone.

⁴⁹ AR 466, KCC Section 17.44.020(11).

⁵⁰ AR 540, *Kittitas County Comprehensive Plan* GPO 8.78c p. 8-15 (Dec. 2010).

⁵¹ *Id.*; AR 466 – 67, Chapter 17.44 KCC.

surrounding area.”⁵² The GMA in RCW 36.70A.070(5)(d)(iii) requires Type III LAMIRDs to “conform with the rural character of the area . . .” The *Kittitas County Comprehensive Plan* includes this definition of rural character taken from RCW 36.70A.030(15):

Rural character refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

In which open space, the natural landscape, and vegetation predominate over the built environment;

That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;

That provide visual landscapes that are traditionally found in rural areas and communities;

That are compatible with the use of the land by wildlife and for fish and wildlife habitat;

That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;

That generally do not require the extension of urban governmental services[;]

That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.⁵³

The Highway Commercial Zone, Chapter 17.44 KCC, does not include any requirement that development should conform to the rural character of the surrounding area for any of the elements of rural character. The zone does

⁵² AR 540, *Kittitas County Comprehensive Plan* GPO 8.78d p. 8-15 (Dec. 2010).

⁵³ AR 534, *Kittitas County Comprehensive Plan* p. 8-1 (Dec. 2010).

not include any requirements for open space, to protect the natural landscape, or to protect vegetation. The zone does not include any provisions to foster traditional rural lifestyles, except for an allowance for fruit stands.⁵⁴ There are no requirements to provide the visual landscapes traditionally found in the Thorp area. There are no requirements that development is to be compatible with the use of the area by wildlife and for fish and wildlife habitats. There are no requirements to reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. There are no requirements that the allowed development not require the extension of urban governmental services. There are no requirements for protecting natural surface water flows and ground and surface recharge. So we see that the Highway Commercial Zone does not include any requirements that development should conform to the rural character of the surrounding area.

The Highway Commercial rezones in Amendment 10-13 were not authorized by the *Kittitas County Comprehensive Plan* because the Highway Commercial zone does not come close to meeting the comprehensive plan's provisions for Type III LAMIRDs. So the Highway Commercial rezones in Amendment 10-13 are not "project permits," rather they are the kind of

⁵⁴ AR 466, KCC Section 17.44.020(8).

amendment to a development regulation over which the Board has subject matter jurisdiction.⁵⁵

The case law is consistent with this interpretation. In *Woods v. Kittitas County* the Supreme Court 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).”⁵⁶ So to be a “project permit,” the rezone must be “authorized by a comprehensive plan.” In the *Wenatchee Sportsmen Ass'n v. Chelan County* decision the Washington State Supreme Court wrote:

Stemilt argues that the rezone was a development regulation and not a project permit because Chelan County does not have a comprehensive plan. Br. of Appellants at 16-17 n. 10. Hence, the rezone was appealable to a GMHB. *Id.* In order for this view to prevail, the Local Project Review statute would have to imply the added phrase in brackets: “ ‘Project permit’ or ‘project permit application’ means any land use or environmental permit or license required from a local government for a project action, including but not limited to ... site-specific rezones authorized by a comprehensive plan or subarea plan [under RCW 36.70A (GMA)].” RCW 36.70B.020(4). Unless this court gives effect to the implied phrase, the rezone in this case is a “project permit application” because it was authorized by a comprehensive plan. But Chelan County has a pre-GMA comprehensive plan enacted in 1958. Chelan County Code § 10.12.010. The Chelan County Planning Department’s Staff Report recommending that the rezone be approved concludes that approval would be consistent with that comprehensive plan. Administrative Record (AR) 226, at 6. Thus, the rezone of

⁵⁵ RCW 36.70A.280(1)(a); RCW 36.70A.030(7); *Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25, 33 (2007).

⁵⁶ *Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25, 33 (2007). In fact, the supreme court wrote it twice, see also *Woods*, 162 Wn.2d at 612 fn.7, 174 P.3d at 32.

Stemilt's property is a site-specific rezone authorized by a comprehensive plan, but not a comprehensive plan under the GMA.⁵⁷

Interestingly, in this case the Kittitas County Staff Report for Amendment 10-13 does not say that the rezones are consistent with the comprehensive plan, indeed the Staff Report does not even reference the Type III LAMIRD Comprehensive Plan Policies in GPO 8.67 or 8.78.⁵⁸ The Staff Report for Comprehensive Plan Amendment 10-12 also does not find that the amendments are consistent with the Comprehensive Plan or reference these key policies.⁵⁹ More importantly, as we have documented above, the Highway Commercial Zone is not authorized by the *Kittitas County Comprehensive Plan* because it is not consistent with or authorized by the Type III LAMIRD policies or the GMA.

In 2011's *Feil* decision, the Supreme Court of Washington also wrote that a "'project permit application' is any land use permit required by a local government for a project action, including 'conditional uses, shoreline substantial development permits ... [or] site-specific rezones authorized by a comprehensive plan.' RCW 36.70B.020(4)."⁶⁰ So these cases are consistent

⁵⁷ *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 179 – 80, 4 P.3d 123, 127 – 28 (2000).

⁵⁸ AR 509 – 11, 2010 Comprehensive Plan Map and Text Amendments Docket 10-13 pp. *1 – 4.

⁵⁹ AR 337 – 41, 2010 Comprehensive Plan Map and Text Amendments Docket 10-12 pp. *1 – 4.

⁶⁰ *Feil v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 367, 378, 259 P.3d 227, 232 (2011).

with the Board's interpretation that it had jurisdiction over the rezones because they require that rezones, to be project permits, must be authorized by a comprehensive plan.

Coffey v. City of Walla Walla is not inconsistent with this analysis.⁶¹

Coffey addressed the question of whether a comprehensive plan amendment can be challenged in superior court under the Land Use Petition Act (LUPA).⁶² The ordinance challenged in *Coffey* only amended the comprehensive plan designation of the property, not the zoning.⁶³ The *Coffey* decision does include language saying that challenge a comprehensive plan amendment and a rezone adopted in the same proceeding would require both a Growth Management Hearings Board and a superior court appeal.⁶⁴ But because the case did not involve a rezone, the court did not have to analyze the question of whether the rezone was authorized by the comprehensive plan and whether it would be appealed under the LUPA to superior court even if it was not authorized by a comprehensive plan.

B. The Board correctly concluded that Kittitas County Comprehensive Plan Amendment 10-12, which expanded the Type III LAMIRD from 12 acres to over 52 acres for the purpose of developing a truck stop, restaurant, hotel, and RV park, violated RCWs 36.70A.070, 36.70A.070(5)(d)(iii),

⁶¹ *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 437, 187 P.3d 272, 273 (2008).

⁶² *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 437, 187 P.3d 272, 273 (2008).

⁶³ *Coffey*, 145 Wn. App. at 437 – 38, 187 P.3d at 273. “The City Council, however, voted in favor of the plan amendment. The ordinance adopting that decision expressly indicated that it was not changing the land’s zoning status.” *Coffey*, 145 Wn. App. at 437, 187 P.3d at 273.

⁶⁴ *Coffey*, 145 Wn. App. at 442, 187 P.3d at 275.

36.70A.170(1)(a), and 43.21C.030. (Assignment of Error 2 and Issue 2)

- 1. The Thorp Type III LAMIRD is not the intensification of development on lots containing isolated nonresidential uses, the new development of isolated cottage industries, the new development of isolated small-scale businesses, the expansion of small-scale businesses, or a new small-scale business on a site previously occupied by an existing business as authorized by RCW 36.70A.070(5)(d)(iii) and the Kittitas County Comprehensive Plan.**

Type III LAMIRDs are authorized by RCW 36.70A.070(5)(d)(iii).

That subsection provides in full that:

(iii) The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents. Rural counties may allow the expansion of small-scale businesses as long as those small-scale businesses conform with the rural character of the area as defined by the local government according to RCW 36.70A.030(15). Rural counties may also allow new small-scale businesses to utilize a site previously occupied by an existing business as long as the new small-scale business conforms to the rural character of the area as defined by the local government according to RCW 36.70A.030(15). Public services and public facilities shall be limited to those necessary to serve the isolated nonresidential use and shall be provided in a manner that does not permit low-density sprawl[.]⁶⁵

In adopting Comprehensive Plan Amendment 10-12, Kittitas County amended the comprehensive plan to expand a Type III LAMIRD on the

⁶⁵ RCW 36.70A.070(5)(d)(iii).

west side of the Thorp Interchange so the requirements of RCW 36.70A.070(5)(d)(iii) apply.⁶⁶

Type III LAMIRDs are designated based on a lot or lots, not on a logical outer boundary.⁶⁷ As the Eastern 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); *Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c (Final Decision and Order, May 7, 2001)). However, the Type III LAMIRD must meet the requirements of RCW 36.70A.070(5)(d)(iii) and is not merely the same thing as a Type I LAMIRD without the requirement of a logical outer boundary established in accordance with the built environment as of July 1990.⁶⁸

RCW 36.70A.070(5)(d)(iii) allows five types of development. The first is the “intensification of development on lots containing isolated nonresidential uses.” According to Ellison LCCs, their lots do not contain any nonresidential uses to intensify.⁶⁹ This is confirmed by the aerial photograph of the area.⁷⁰ This aerial photograph and the parcel map from the legal description show that the Puget Sound Energy facility is on a different

⁶⁶ AR 203, 319, Kittitas County Comprehensive Plan Ordinance No. 2010-014 p. 3 & Exhibit G p. 119; RCW 36.70A.130(1)(d).

⁶⁷ RCW 36.70A.070(5)(d)(iii); (iv).

⁶⁸ *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Second Order of Compliance (Nov. 1, 2004), at 5.

⁶⁹ CP 88, Ellison Thorp Property, LLC and Ellison Thorp Property II, LLC’s Opening Brief p. 4 (Dec. 14, 2011).

⁷⁰ AR 547, Aerial Photograph.

lot from the properties in the Thorp Type II LAMIRD expansion.⁷¹ Even if it was not on a different lot, the proposed commercial uses are not the intensification of the Puget Sound Energy facility.⁷² So the Thorp Type III LAMIRD expansion is not authorized under the first clause of RCW 36.70A.070(5)(d)(iii).

The second type of development is the “new development of isolated cottage industries.” The *Kittitas County Comprehensive Plan* defines a cottage industry as “a small industry in or near the operator’s home with a few employees, but with a low impact on neighbors and services.”⁷³ None of the commercial uses proposed for this site meet this definition of cottage industries.⁷⁴ They are not small or industries. The seven proposed commercial buildings will have a projected 54,000 square feet including a 50 unit hotel.⁷⁵ The proposed parking, buildings, and infrastructure, not including the existing Puget Sound Energy building and parking and storage areas covers 29.5 acres.⁷⁶ They are not in or near the operator’s home and will not have few employees. At full development, the project is estimated to

⁷¹ *Id.*; AR 520, Map from the Legal Description. The lot on which the Puget Sound Energy facility is located is labeled “010-0012.”

⁷² AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

⁷³ AR 536, *Kittitas County Comprehensive Plan* GPO 8.38 p. 196 (Dec. 2010).

⁷⁴ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

⁷⁵ *Id.*

⁷⁶ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

employ over 112 direct onsite employees in its operations.⁷⁷ So the Thorp Type III LAMIRD expansion is not authorized under the second clause of RCW 36.70A.070(5).

The third type of development authorized by RCW 36.70A.070(5)(d)(iii) is the new development of “isolated small-scale businesses.” The businesses within the Thorp Type III LAMIRD expansion are not small-scale because they will cover 29.5 acres of buildings, parking, and infrastructure, not including the existing Puget Sound Energy building and parking and storage areas.⁷⁸ The seven buildings will have a projected 54,000 square feet including a 50 unit hotel.⁷⁹ Puget Sound Energy building, parking, and utility yard occupies another five plus acres.⁸⁰ The parts of the LAMIRD planned for development in the near future total over 34.5 acres, which is not a small-scale business.

The total LAMIRD is larger still, totaling over 52 acres.⁸¹ In *Whitaker v. Grant County* the Eastern Board concluded that “36.66-acres is extensive acreage, more than would be needed for isolated small-scale businesses or

⁷⁷ AR 499 – 504, IMPLAN model projections enclosed with the Letter from the Economic Development Group of Kittitas County to Kittitas County Board of Commissioners.

⁷⁸ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

⁷⁹ AR 499 – 504, IMPLAN model projections enclosed with the Letter from the Economic Development Group of Kittitas County to Kittitas County Board of Commissioners.

⁸⁰ AR 334, “7. Narrative Project Description.”

⁸¹ AR 513, Docket 10-13 Thorp Travel Center Rezone RZ-10-0001 – Application p*2; AR 334, “7. Narrative Project Description.”

cottage industries.”⁸² And as we have seen, the over 52 acre LAMIRD has the capacity for more than seven large business, the PSE energy facilities and the six commercial businesses proposed on Shea-Carr-Jewell Ellensburg Station Conceptual Site Plan, with acreage left over.⁸³ As will be analyzed below, the Thorp Type III LAMIRD expansion and the commercial businesses within it are not isolated. So the Thorp Type III LAMIRD expansion is not authorized under the third clause of RCW 36.70A.070(5).

The fourth type of development authorized by RCW 36.70A.070(5)(d)(iii) is “the expansion of small-scale businesses as long as those small-scale businesses conform with the rural character of the area as defined by the local government according to RCW 36.70A.030(15).” As we documented above, there are currently no small-scale businesses within the LAMIRD expansion to expand. The new commercial businesses are not small-scale. They also do not conform to the rural character defined by Kittitas County. For example, Kittitas County’s definition of rural character provides in part that “open space, the natural landscape, and vegetation predominate over the built environment.”⁸⁴ Open space, the natural landscape, and vegetation will not predominate over the built environment

⁸² *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Second Order of Compliance (Nov. 1, 2004), at 14.

⁸³ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

⁸⁴ AR 534, *Kittitas County Comprehensive Plan* p. 8-1 (Dec. 2010).

on the 29.5 acres of buildings, parking, and infrastructure.⁸⁵ The seven buildings will have a projected 54,000 square feet including a 50 unit hotel.⁸⁶

The fifth type of development authorized by RCW 36.70A.070(5)(d)(iii) is new small-scale businesses using a site previously occupied by an existing business as long as the new small-scale business conforms to the rural character of the area. But as the aerial photograph of the area confirms, the expanded LAMIRD is not the site of a previous business.⁸⁷ The aerial photograph and the parcel map from the legal description show that the former gas station is on a different lot than the Thorp Type III LAMIRD expansion.⁸⁸ The former gas station was also originally included in the Thorp Type III LAMIRD before the expansion.⁸⁹ And the proposed development is not small-scale as we documented above, nor does it conform to the rural character of the area as we also documented above.

In summary, the Thorp Type III LAMIRD expansion and the commercial businesses proposed for the expansion are not authorized by RCW 36.70A.070(5)(d)(iii). The Board's conclusion that Amendment 10-12

⁸⁵ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

⁸⁶ AR 499 – 504, IMPLAN model projections enclosed with the Letter from the Economic Development Group of Kittitas County to Kittitas County Board of Commissioners.

⁸⁷ AR 547, Aerial Photograph.

⁸⁸ *Id.*; AR 520, Map from the Legal Description. The former gas station was on the lot labeled "010-008."

⁸⁹ AR 319, Kittitas County Comprehensive Plan Ordinance No. 2010-014 p. 119.

violated the GMA correctly interpreted and applied the law and is supported by substantial evidence.

2. The Thorp Type III LAMIRD is not “isolated” as RCW 36.70A.070(5)(d)(iii) requires.

Except for new small-scale businesses using a site previously occupied by a business, RCW 36.70A.070(5)(d)(iii) only allows the “intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses.” The Board correctly concluded that “[t]he Legislature’s use of the term ‘isolated’ for both cottage industry and small-scale businesses demonstrates an unambiguous intention to ensure that any commercial uses established by the mechanism of a type (d)(iii) LAMIRD be set apart from other such uses.”⁹⁰

This LAMIRD is not isolated because it is adjacent to the Puget Sound Energy (PSE) office, utility building, and storage area.⁹¹ It is also across I-90 from two retail commercial uses.⁹² The uses proposed within the expanded LAMIRD are not isolated either because they include a travel center with a truck fueling area, truck and car parking, a gas station and drive thru, a restaurant, a hotel, a RV Park, and two other commercial buildings

⁹⁰ *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Second Order of Compliance (Nov. 1, 2004), at 6. This decision is quoted more extensively in part VI.B.3 of this brief.

⁹¹ AR 337, Kittitas County 2010 Comprehensive Plan Map and Text Amendments Docket 10-12 p. *1.

⁹² AR 547, Aerial Photograph; AR 377, Futurewise comment letter to the Kittitas County Board of Commissioners p. 33 (Oct. 29, 2010).

with parking.⁹³ The Board's conclusion that Amendment 10-12 violated the GMA correctly interpreted and applied the law and is supported by substantial evidence.

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

RCW 36.70A.070 requires that the comprehensive plan must be internally consistent. So comprehensive plan amendments have to be consistent with the comprehensive plan. Several *Kittitas County Comprehensive Plan* policies direct the designation of Type III LAMIRDs. GPO 8.67 allows the "designation of LAMIRDs in the rural area, consistent with the requirements of the GMA."⁹⁴ So to be consistent with the comprehensive plan Amendment 10-12 must be consistent with the GMA provisions for Type III LAMIRDs.

Comprehensive plan policy GPO 8.78 includes the following standards for designating and allowing development in Type III LAMIRDs which the comprehensive plan refers to as Rural Employment Centers:

GPO 8.78 Designation and development standards in Rural Employment Centers:

- a) Intensification of development on lots containing isolated nonresidential uses or new development of isolated small scale businesses is permitted;

⁹³ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

⁹⁴ AR 538, *Kittitas County Comprehensive Plan* p. 8-13 (Dec. 2010).

- b) Businesses should provide job opportunities for rural residents, but do not need to be principally designed to serve local residents;
- c) Small scale employment uses should generally be appropriate in a rural community, such as (but not limited to) independent contracting services, incubator facilities, home-based industries, and services which support agriculture; and
- d) Development should conform to the rural character of the surrounding area.⁹⁵

Considering each of these criteria in order shows that Amendment 10-12 does not comply with the GMA or the *Kittitas County Comprehensive Plan*.

- i. **Amendment 10-12 does not comply with the GMA's and GPO 8.78a's requirements that the permitted uses must be the intensification of development on lots containing isolated nonresidential uses or the new development of isolated small scale businesses.**

GPO 8.78a provides that the “[i]ntensification of development on lots containing isolated nonresidential uses or new development of isolated small scale businesses is permitted.”⁹⁶ As was discussed in part VI.B.1, of this brief, RCW 36.70A.070(5)(d)(iii) also allows the “intensification of development on lots containing isolated nonresidential uses ...” According to Ellison LCCs, their lots do not contain any nonresidential uses to

⁹⁵ AR 539 – 40, *Kittitas County Comprehensive Plan* GPO 8.78 pp. 8-14 – 8-15 (Dec. 2010).

⁹⁶ AR 540, *Kittitas County Comprehensive Plan* GPO 8.78a p. 8-15 (Dec. 2010).

intensify.⁹⁷ As we documented above, this is confirmed by other evidence in the record.⁹⁸ So this requirement of GPO 8.78a and the GMA is not met.

The uses permitted in the LAMIRD are not isolated small-scale businesses which GPO 8.78a and RCW 36.70A.070(5)(d)(iii) also allow. The Board addressed the definition of “isolated” in a case similar this one, *Whitaker v. Grant County*. The Board wrote:

First we observe that the term “isolated” is used repeatedly to modify the type of use allowed in the type (d)(iii) LAMIRD. The terms “cottage industries” and “small-scale businesses” are both modified by the term “isolated”. There is no ambiguity about the application of the term “isolated” to both types of uses.

Second, we note that the term “isolated” is not used to modify “lots”. The lots described in the statute contain isolated uses but the lots themselves are not defined as “isolated”. We therefore conclude that the statute is referring to isolated uses rather than to isolated lots. If it were sufficient for the location to be isolated or remote as the County argues, then the term “isolated” would have been applied to “lots” rather than (or in addition) to “cottage industries” and “small-scale businesses”.

Our inquiry does not end there, however. We must still decide what it means for the uses to be isolated. Participant argues that the term “isolated” must “at least include the notion that the new (d)iii LAMIRD is discontinuous

⁹⁷ CP 88, Ellison Thorp Property, LLC and Ellison Thorp Property II, LLC’s Opening Brief p. 4 (Dec. 14, 2011).

⁹⁸ AR 547, Aerial Photograph.

from other commercial development”. Ex. 13-50 (Comment letter of Nancy Dorgan).

The dictionary indicates that the derivation of the word “isolate” comes from the Latin “insula” meaning “island.” “Isolate” is defined as “to set apart from others; place alone.” Webster’s New World Dictionary of the American Language, College Edition. An isolated use, then, must be one that is set apart from others. The Legislature’s use of the term “isolated” for both cottage industry and small-scale businesses demonstrates an unambiguous intention to ensure that any commercial uses established by the mechanism of a type (d)(iii) LAMIRD be set apart from other such uses. *Better Brinnon Coalition v. Jefferson*, WWGMHB 03-2-0007 Compliance Order (June 23, 2004).

It is also important that rural development be contained and inappropriate conversion of undeveloped land into sprawling, low-density development is reduced in the rural areas. RCW 36.70A.070(5)(c)(i) and (iii). Side-by-side LAMIRDs can hardly be said to contain and reduce sprawl and limit growth.⁹⁹

The Board in *Whitaker* found, in part, that “[t]he proposed new type (d)(iii) LAMIRD does not comply with RCW 36.70A.070(5)(d) because it connects a new area of more intense rural uses to an existing LAMIRD that allows the same kind of uses.”¹⁰⁰ The Thorp LAMIRD Extension that is the subject of amendments 10-12 and 10-13 connects a new Type III LAMIRD to an existing Type III LAMIRD that with the rezone now allows the same

⁹⁹ *Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019, Second Order of Compliance (Nov. 1, 2004), at 6.

¹⁰⁰ *Id.* at 17.

uses. Further, the preexisting LAMIRD is occupied by a Puget Sound Energy (PSE) office and utility building.¹⁰¹ The expansion is also across I-90 from two retail commercial uses.¹⁰² So we see that this Type III LAMIRD is not set apart from other such uses. So it does not meet GPO 8.78a's and the GMA's requirements that the uses must be isolated.

In addition to the offsite uses, this proposed development will include a travel center with a truck fueling area, truck and car parking, and a gas station and drive thru.¹⁰³ It will also include a restaurant, a hotel and a RV Park.¹⁰⁴ It will also have two other commercial buildings.¹⁰⁵ The commercial uses even on the site are not set apart from other such uses. The Thorp Type III LAMIRD expansion, therefore, does not comply with RCW 36.70A.070(5)(d)(iii) and GPO 8.78a.

The LAMIRD is also not limited to cottage industries and small-scale businesses as we documented above. In short, GPO 8.78a permits the “[i]ntensification of development on lots containing isolated nonresidential uses or new development of isolated small scale businesses.” As we have documented, substantial evidence shows that shows that no isolated nonresidential uses exist on the Ellison LCCs’ lots. The proposed uses are

¹⁰¹ AR 337, Kittitas County 2010 Comprehensive Plan Map and Text Amendments Docket 10-12 p. *1.

¹⁰² AR 547, Aerial Photograph; AR 337, Futurewise comment letter to the Kittitas County Board of Commissioners p. 33 (Oct. 29, 2010).

¹⁰³ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

not isolated. The proposed uses are not small-scale. So substantial evidence supports the Board's order. The Board also did not misinterpret or misapply the law.¹⁰⁶ So this court must uphold the Board's conclusion that the comprehensive plan amendments do not comply with the comprehensive plan because they do not comply with GPO 8.78a and the GMA.

ii. **Amendment 10-12 does not comply with the GPO 8.78c's direction that "small scale employment uses should generally be appropriate in a rural community."**

GPO 8.78c provides that "[s]mall scale employment uses should generally be appropriate in a rural community, such as (but not limited to) independent contracting services, incubator facilities, home-based industries, and services which support agriculture"¹⁰⁷ None of the uses proposed for this Type III LAMIRD, the travel center with a truck fueling area, truck and car parking, a gas station and drive thru, a restaurant, a hotel, an RV Park, and two commercial buildings with parking comply with this policy.¹⁰⁸ Substantial evidence supports the Board on this question and the Board did not misinterpret or misapply the law.

¹⁰⁶ *Id.*

¹⁰⁷ AR 539 – 40, *Kittitas County Comprehensive Plan* GPO 8.78 pp. 8-14 – 8-15 (Dec. 2010).

¹⁰⁸ AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

iii. Amendment 10-12 does not comply with the GPO 8.78d's requirement that "[d]evelopment should conform to the rural character of the surrounding area."

GPO 8.78c requires that "[d]evelopment should conform to the rural character of the surrounding area."¹⁰⁹ Rural character is defined in the *Kittitas County Comprehensive Plan* and is included in part VI.A.2 of this brief.

The definition lists among other things, providing "visual landscapes that are traditionally found in rural areas and communities."¹¹⁰ The photographs in the record show that a LAMIRD that may have up to 52 acres of buildings, parking lots, and infrastructure is not part of the traditional rural character of this part of Kittitas County which consists largely of fields and open space and a few buildings.¹¹¹

Other elements of rural character are not met as well. For example, open space, the natural landscape, and vegetation will not predominate over the built environment in the travel center with its a truck fueling area, truck and car parking, gas station and drive thru, restaurant, hotel, RV Park, and two commercial buildings with parking.¹¹² In short, substantial evidence supports the Board's order and the Board did not misinterpret or misapply the law.

¹⁰⁹ AR 540, *Kittitas County Comprehensive Plan* GPO 8.78 p. 8-15 (Dec. 2010).

¹¹⁰ AR 534, *Kittitas County Comprehensive Plan* p. 8-1 (Dec. 2010).

¹¹¹ AR 419 – 420, photos of the vicinity of the proposed Thorp LAMIRD expansion.

¹¹² AR 534, *Kittitas County Comprehensive Plan* p. 8-1 (Dec. 2010); AR 331, Shea, Carr, Jewell Ellensburg Station Conceptual Site Plan (Oct. 2009).

iv. In summary, Amendment 10-12 does not comply with the Comprehensive plan and the GMA.

GPO 8.67 allows the “designation of LAMIRDs in the rural area, consistent with the requirements of the GMA.”¹¹³ GPO 8.78 requires, by the use of the conjunction “and,” that all of its four standards must be met for a Type III LAMIRD.¹¹⁴ As we have shown, three of the four provisions are not met. The bottom line is that Amendment 10-12 does not comply with the *Kittitas County Comprehensive Plan* or the GMA. Substantial evidence supports the Board’s decision. The Board did not misinterpret or apply the law. We respectfully request that the Board’s orders be upheld.

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

The Type III LAMIRD was expanded into the Agricultural Overlay. As part of the original LAMIRD designations, Kittitas County committed itself to evaluating whether some of the lands in the Thorp area should have been designated as agricultural lands of long-term commercial significance and this work was on this 2010 comprehensive plan docket along with the Thorp Type III LAMIRD expansion, although the former work was not done.¹¹⁵ This study should have been conducted before the expansion was

¹¹³ AR 538, *Kittitas County Comprehensive Plan* p. 8-13 (Dec. 2010).

¹¹⁴ AR 539 – 40, *Kittitas County Comprehensive Plan* GPO 8.78 pp. 8-14 – 8-15 (Dec. 2010).

¹¹⁵ AR 337 – 400, 2010 Comprehensive Plan Map and Text Amendments Docket 10-02; AR 506 – 08, Agriculture Study Overlay Zone.

approved. The Board was correct in finding that this failure violated the GMA as RCW 36.70A.070 requires internal consistency.

The county has also not amended the Agriculture Study Overlay Zone and so the use limitations in that zone continued to apply to the expanded Type III LAMIRD.¹¹⁶ These use limitations prohibit the commercial uses proposed for the LAMIRD.¹¹⁷ This also creates inconsistent zoning in violation of RCW 36.70A.070 which requires an internally consistent comprehensive plan and RCW 36.70A.040(4)(d) which requires the county to adopt “development regulations that are consistent with and implement the comprehensive plan” Again, substantial evidence supports the Board’s decision and the Board did not misinterpret or misapply the law.

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

As we have shown in Part VI.B of this brief, the Thorp Type III LAMIRD expansion and “Commercial” Comprehensive Plan Amendment violate the GMA and the *Kittitas County Comprehensive Plan*. Part VI.A.2 of this brief also documents that the Highway Commercial zone violates the GMA and the

¹¹⁶ AR 504, Figure 14 BOCC Approved Agriculture Study Overlay Zone Thorp Study Area (Dec. 2009).

¹¹⁷ AR 506 – 08, Agriculture Study Overlay Zone.

Kittitas County Comprehensive Plan. So again the Court must uphold on the Board's order on that conclusion.¹¹⁸

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)

As the Washington State Court of Appeals has written:

“SEPA is a legislative pronouncement of our state’s environmental policy.” Anderson, 86 Wn. App. at 300, 936 P.2d 432. It requires local governments to fully consider the environmental and ecological effects of major actions. See RCW 43.21C.030; *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 813, 576 P.2d 54 (1978).

Before processing a permit application for a private land use project, SEPA requires local governments to make a threshold determination of whether the project is a “major action[] significantly affecting the quality of the environment[.]” RCW 43.21C.030(2)(c); *see also* WAC 197-11-330.¹²¹ A major action significantly affects the environment “whenever more than a moderate effect on the quality of the environment is a reasonable probability.” *Norway*, 87 Wn.2d at 278, 552 P.2d 674.

The “lead agency” (here, the City) uses an environmental checklist to review a project’s “proposed activities, alternatives, and impacts ... in accordance with SEPA’s goals and policies.” WAC 197-11-060. The responsible official then renders a “determination of significance” (DS) or a “determination of nonsignificance” (DNS). A DS requires intensified environmental review through preparation of an environmental impact statement (EIS). WAC 197-11-360. Conversely, a DNS means that no EIS will be required. WAC 197-11-340.

....

¹¹⁸ AR 599 – 602, Comp Plan and Rezone FDO at 13 – 16 of 18.

We review a threshold determination that an EIS is not required under the “clearly erroneous” standard. *Norway*, 87 Wn.2d at 275, 552 P.2d 674. When applying this standard, we do more than merely determine whether substantial evidence supports the decision; we are also required to consider the public policy and environmental values of SEPA. *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977).

For the MDNS to survive judicial scrutiny, the City must demonstrate that it actually considered relevant environmental factors^{FN2} before reaching that decision.^{FN3} Moreover, the record must demonstrate that the City adequately considered the environmental factors “in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA.” *Lassila*, 89 Wn.2d at 814, 576 P.2d 54; *see also Anderson*, 86 Wn. App. at 302, 936 P.2d 432. Further, the decision to issue a MDNS must be based on information sufficient to evaluate the proposal’s environmental impact. *Anderson*, 86 Wn. App. at 302, 936 P.2d 432; WAC 197-11-335. We accord substantial weight to an agency’s decision to issue a MDNS and not require an EIS.^{FN4}

FN1. WAC 197-11-330 specifies the criteria and procedures for determining whether a proposal is likely to have a significant adverse impact. For example, the lead agency’s “responsible official” must take into account that the proposal may have a significant adverse impact in one location but not in another; that several marginal impacts when considered together may result in a significant adverse impact; and that for some proposals, it may be impossible to forecast environmental impacts with precision. WAC 197-11-330(3). A threshold determination must not balance whether the beneficial aspects of a proposal outweigh its adverse impacts. WAC 197-11-330(5).

FN2. WAC 197-11-444 lists relevant environmental elements.

FN3. RCW 43.21C.030(2)(c); *Lassila*, 89 Wn.2d at 813, 576 P.2d 54; *Juanita Bay Valley Cmty. Ass’n v. City of Kirkland*, 9 Wn.

App. 59, 73, 510 P.2d 1140, *review denied sub nom.*, *State v. Silverthorn*, 83 Wn.2d 1001 (1973).

FN4. RCW 43.21C.090; *Anderson*, 86 Wn. App. at 302, 936 P.2d 432; *Indian Trail Prop. Owner's Ass'n v. City of Spokane*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994).¹¹⁹

Applying the *Boehm* decision to this appeal, the Board concluded that Kittitas County violated SEPA for two reasons. First, the Board concluded that “there is no evidence the County ever made a Threshold Determination for Map Amendment 10-13.”¹²⁰ Substantial evidence supports the Board’s conclusion. The County’s Final Determination of Nonsignificance has a description of proposal that reads “2010 Kittitas County Annual Comprehensive Plan and Development Code Amendments.”¹²¹ The proponent is “Kittitas County.”¹²² The location of the proposal is “[e]lements of the proposal are countywide.”¹²³ There is no indication of privately initiated rezones or zoning map amendments of any kind in the Determination of Nonsignificance (DNS), only amendments to the comprehensive plan and development code.¹²⁴

The Board also did not misinterpret or misapply the law. As we have seen above, *Boehm* requires that “the record must demonstrate that the [County] adequately considered the environmental factors ‘in a manner

¹¹⁹ *Boehm v. City of Vancouver*, 111 Wn. App. 711, 717 – 19, 47 P.3d 137, 141 – 42 (2002).

¹²⁰ AR 581, SEPA FDO at 9 of 13.

¹²¹ AR 465, Kittitas County Final Determination of Nonsignificance (November 2, 2010).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

sufficient to be prima facie compliance with the procedural dictates of SEPA.”¹²⁵ Here, nothing in the record shows the county undertook SEPA review of the rezone in Amendment 10-13.

The second problem with the SEPA review was that was inadequate.

As the Board wrote:

With respect to Map Amendment 10-12, the SEPA Environmental Checklist is devoid of any facts or information relating to environmental effects for the 2010 Kittitas County Annual Comprehensive Plan and Development Code Amendments. Instead of providing information about environmental effects, the environmental checklist merely contains the entry "N/A" for all of the various environmental elements. Moreover, the Supplemental Sheet For Nonproject Actions contains mere conclusory statements that there are not likely to be significant environmental impacts from the proposed comprehensive plan amendments, without providing any actual information about environmental effects. As noted *supra*, SEPA review is required to ensure decision-makers have all the pertinent information needed to make informed decisions, and also so an informed public has an opportunity to meaningfully participate in the [Comprehensive Plan Amendment] CPA process.¹²⁶

Again, the record supports the Board’s conclusion. Both project and nonproject actions must complete part “B. Environmental Elements.”¹²⁷ But every answer in Part B is “N/A.”¹²⁸ The Board is also correct in its

¹²⁵ *Boehm*, 111 Wn. App. at 718, 47 P.3d at 142.

¹²⁶ AR 581, SEPA FDO at 9 of 13.

¹²⁷ WAC 197-11-960.

¹²⁸ AR 383 – 89, Kittitas County SEPA Checklist Non-project action: 2010 Kittitas County Annual Comprehensive Plan Amendments & Development Code amendments pp. *3 – 8.

characterization of part “D. Supplemental Sheet for Nonproject Actions.”¹²⁹

The Board is also correct that Kittitas County did not adopt its earlier environmental impact statements by reference.¹³⁰ Substantial evidence supports the Board’s conclusion. The Board was correct on the law too. As *Boehm* makes clear, “the record must demonstrate that the [County] adequately considered the environmental factors ‘in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA.’”¹³¹ Here, the record does not show that the County adequately considered the environmental factors.

The appeal was also properly before the Board. Kittitas County does not provide for an administrative appeal for SEPA determinations for amendments to the comprehensive plan and development regulations.

Kittitas County Code (KCC) 15.04.210(2) provides in relevant part that “[a] final threshold determination and/or final EIS issued in conjunction with the adoption of and/or amendment(s) to the Kittitas County Comprehensive Plan or Development Regulations may be appealed pursuant to Title 15B of this code.” KCC 15B.05.010 provides 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

¹²⁹ Id. at AR 390 – 91, pp. *9 – 10.

¹³⁰ AR 581 – 82, SEPA FDO at 9 – 10 of 13.

¹³¹ *Boehm*, 111 Wn. App. at 718, 47 P.3d at 142.

EIS) issued pursuant to Chapter 15.04 of this code, may be appealed through the growth management hearings board, superior court, and/or other applicable federal or state law.” As we have seen, this case involves two comprehensive plan amendments and two amendments to the development regulations. Kittitas County does not provide an administrative appeal for SEPA decisions for comprehensive plan and development regulation amendments.¹³² So there were no County administrative remedies to exhaust and the KCCC Appellants properly brought the appeal to the Board.

So we see that the Board was correct on the SEPA issues. We also see that proper appeal was to the Board. So the Court must uphold the Board’s FDO on the SEPA issues.¹³³

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

After reversing the Board’s orders, the Kittitas County Superior Court essentially found compliance and dissolved the Board’s determinations of invalidity.¹³⁴ This was done over the objection of the KCCC Appellants.¹³⁵

¹³² KCC 15B.05.010.

¹³³ AR 559 – 72, SEPA FDO at 1 – 13 of 13.

¹³⁴ CP 224, *Kittitas County v. Kittitas County Conservation et al.*, Kittitas County Superior Court Case No. 11-2-00344-5 Final Order p. 3 of 4 (Feb. 27, 2012).

¹³⁵ *Kittitas County v. Kittitas County Conservation and Futurewise et al.* Court of Appeals No. 30728-0, Kittitas County Cause No. 11-2-00344-5 Verbatim Report of Proceedings pp. 37 – 38 (Feb. 3, 2012 and Feb. 27, 2012).

The Washington State “Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of challenges to board actions.”¹³⁶ RCW 34.05.574(1) provides in relevant part that:

In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.”

No party argued that a remand was impracticable or would cause unnecessary delay.¹³⁷ The superior court did not find or conclude that a remand was impracticable or would cause unnecessary delay.¹³⁸ Nothing in the record indicates that a remand was impracticable or would cause unnecessary delay.

In *Manke Lumber Co., Inc. v. Diehl*, the Washington State Court of Appeals concluded that while a court has the authority to reverse the Board, it lacks the authority to find compliance citing to RCW 34.05.574(1).¹³⁹ In *Manke Lumber Co., Inc. v. Diehl*, the courts error was ameliorated because the superior court “properly remanded to the Board for further proceedings

¹³⁶ *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132, 1137 (2005).

¹³⁷ *Kittitas County v. Kittitas County Conservation and Futurewise et al.* Court of Appeals No. 30728-0, Kittitas County Cause No. 11-2-00344-5 Verbatim Report of Proceedings pp. 34 – 38 (Feb. 3, 2012 and Feb. 27, 2012).

¹³⁸ *Id.* at 37 – 38; CP 222 – 24, *Kittitas County v. Kittitas County Conservation et al.*, Kittitas County Superior Court Case No. 11-2-00344-5 Final Order pp. 1 – 3 of 4 (Feb. 27, 2012).

¹³⁹ *Manke Lumber Co., Inc. v. Diehl*, 91 Wn. App. 793, 809 – 10, 959 P.2d 1173, 1182 (1998), review denied *Manke Lumber Co., Inc. v. Diehl*, 137 Wn.2d 1018, 984 P.2d 1033 (1999).

consistent with its opinion.”¹⁴⁰ The Court of Appeals also concluded that there was no prejudice since the Court of Appeals reviews the Board’s order directly, not the superior court decision.¹⁴¹

Here the court both essentially found compliance and actually dissolved the Board’s determinations of invalidity.¹⁴² There was no remand to the Board.¹⁴³ A determination of invalidity prevents new development applications for major developments from vesting during the time that the determination of invalidity is in effect.¹⁴⁴ The KCCC Appellants have been and continue to be prejudiced by the superior court’s order dissolving the determinations of invalidity because major developments could vest during the appeal period. So the KCCC Appellants may prevail, but end up with large commercial developments on the farmland anyway. So the superior court order essentially finding compliance, dissolving the determinations of invalidity, and failing to remand to the Board violated RCW 34.05.574(1). The KCCC Appellants respectfully request that the superior court order be reversed and the determinations of invalidity be reinstated.

¹⁴⁰ *Id.* at 810, 959 P.2d at 1182.

¹⁴¹ *Id.*

¹⁴² CP 224, *Kittitas County v. Kittitas County Conservation et al.*, Kittitas County Superior Court Case No. 11-2-00344-5 Final Order p. 3 of 4 (Feb. 27, 2012).

¹⁴³ *Id.* at CP 222 – 25, pp. 1 – 4 of 4.

¹⁴⁴ RCW 36.70A.302(3)(a).

VII. CONCLUSION

As we have seen, the Board had jurisdiction over the two comprehensive plan amendments in Amendments 10-12 and 10-13 and the rezones in Amendment 10-13 because the amendments to the development regulations were not authorized by the *Kittitas County Comprehensive Plan*. Substantial evidence supports the Board's Final Decisions and Orders finding the comprehensive plan amendments and rezones violated the GMA, SEPA, and the *Kittitas County Comprehensive Plan*. The Board also correctly interpreted and applied the law. We respectfully request that the Court uphold the Board's two orders.

Respectfully submitted this 24th day of October 2012.



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CERTIFICATE OF SERVICE

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on October 24, 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: **Brief of Appellants Kittitas**

County Conservation Coalition and Futurewise.

Ms. Renee S. Townsley,
Clerk/Administrator
Court of Appeals of the State of
Washington Division II
500 North Cedar Street
Spokane, Washington 99201-1905
Original and Copy

Mr. Neil Caulkins
Kittitas County Prosecuting Attorney's
Office
205 W. 5th Ave., Rm 213
Ellensburg, WA 98926-3129
Attorney for Kittitas County

<input type="checkbox"/>	By United States Mail postage prepaid	<input checked="" type="checkbox"/>	By United States Mail postage prepaid
<input checked="" type="checkbox"/>	By Legal Messenger or Hand Delivery to the Offices of the Court of Appeals of the State of Washington Division I	<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid	<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input type="checkbox"/>	By E-Mail:	<input checked="" type="checkbox"/>	By E-Mail: neil.caulkins@co.kittitas.wa.us

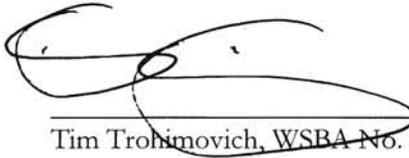
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<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
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<input checked="" type="checkbox"/>	By United States Mail postage prepaid
<input type="checkbox"/>	By Legal Messenger or Hand Delivery
<input type="checkbox"/>	By Federal Express or Overnight Mail prepaid
<input checked="" type="checkbox"/>	By E-Mail: LALSeaEF@atg.wa.gov

Dated this 24th day of October 2012.



Tim Trohimovich, WSBA No. 22367

Kittitas County
Comprehensive Plan

December 2010

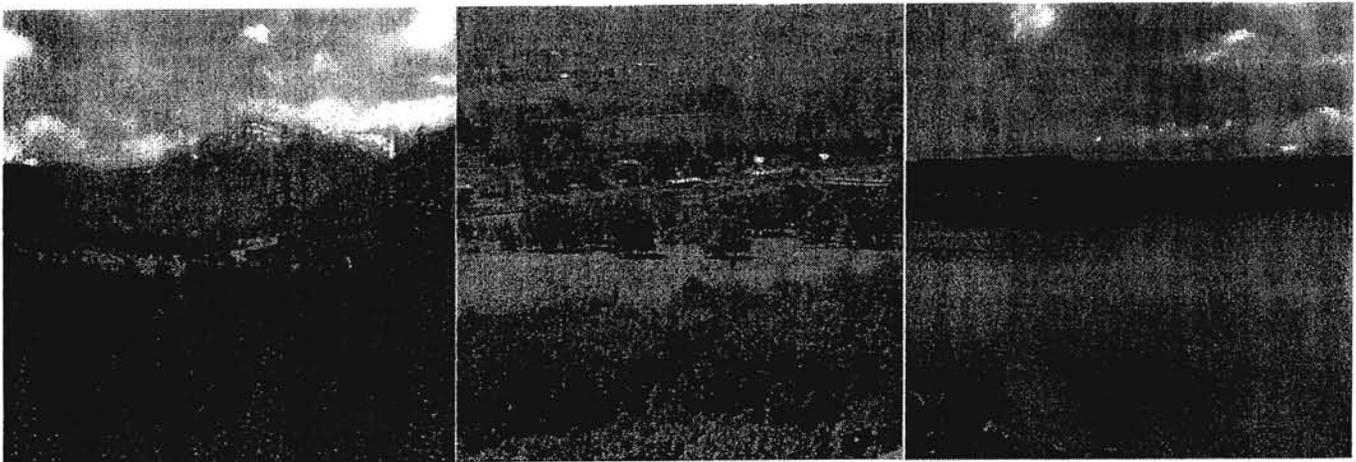
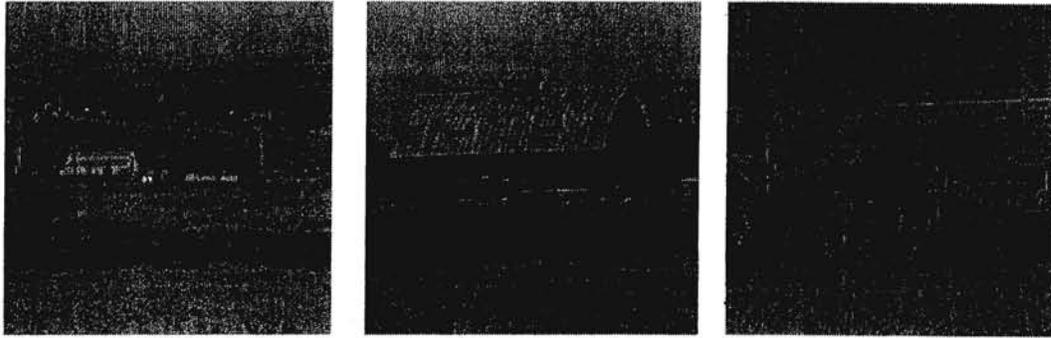


Exhibit 1





Chapter 8. Rural Lands

8.1. Introduction

Kittitas County's rural land use designation consists of a balance of differing natural features, landscape types and land uses. Rural land uses consist of both dispersed and clustered residential developments, farms, ranches, wooded lots, and small scale commercial and industrial uses that serve rural residents as their primary customer. Rural landscapes encompass the full range of natural features including wide open agriculture and range land, forested expanses, rolling meadows, ridge lines and valley walls, distant vistas, streams and rivers, shorelines and other sensitive areas. The State of Washington defines rural character, rural development and rural governmental services in the Revised Code of Washington (RCW) 36.70A.030 (15), (16), and (17) as follows:

"Rural Character refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

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

"Rural development refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, including clustered residential

development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.”

“Rural governmental services or rural services include those public services and public facilities historically and typically delivered at an intensity usually found in rural areas, and may include domestic water systems, fire and police protection services, transportation and public transit services, and other public utilities associated with rural development and normally not associated with urban areas. Rural services do not include storm or sanitary sewers, except as otherwise authorized by RCW 36.70A.110(4).”

8.2. Identification of Rural Lands

8.2.1. General Uses

The Rural Lands exhibit a vibrant and viable landscape where a diversity of land uses and housing densities are compatible with rural character. Many sizes and shapes can be found in the Rural lands, its topography and access variations allow for small to large acreage, economic activities, residential subdivisions, farming, logging, and mining. This rich mix of uses allows the variety of lifestyle choice, which makes up the fabric of rural community life. Some choose a private, more independent lifestyle, or space for small farm activities and children’s 4-H projects. Others choose the more compact arrangement found in clustering, with its accompanying open space and close neighbors. The most common uses in rural lands are agriculture and logging, which have been basic industries historically and remain important in terms of employment, income and tax base. Kittitas County will strive to encourage and support these resource-based activities in whatever areas and zones they occur.

8.2.2. Description of Rural Lands

Kittitas County lies within the Upper Yakima River watershed near the geographic center of Washington State. Lands range from coniferous forestlands of the mountains and foothills in the north and west to arid rangeland to the south and east. Mountains and high hills ring an extensive irrigated area known as the Kittitas Valley where most of the County’s residents live. The County Seat and Central Washington University reside on the valley floor in the city of Ellensburg. Other incorporated areas throughout Kittitas County include: Cle Elum, South Cle Elum, Roslyn, and Kittitas. These areas have adopted designated Urban Growth Areas (UGA’s). A rural lands designated “Limited Area of More Intensive Rural Development” (LAMIRD) has been assigned to Snoqualmie Pass, Easton, Ronald, Thorp, and Vantage. Other un-incorporated communities presumably designated as rural areas include: Liberty, Thrall, Lauderdale, Sunlight Waters, Fairview, Denmark, Badger Pocket, Elk Heights, Teanaway, Reecer Creek, and Sky Meadows, as well as others.

8.5.4. Other Business Uses

The economy of our rural community has traditionally been based on natural resource activities and Kittitas County encourages and supports their continuation in Rural Lands. Policies on the continuation of these resource uses are found in Section 8.5 (C) of the Comprehensive Plan. Rural Areas are not just rustic places; they are vital, thriving communities with working landscapes and working peoples. Economically viable farming and logging may occur with or beyond the state designated areas (LLTCS) but more and more it is necessary to supplement income from outside sources in order to support natural resource operations. Other businesses and economic growth can be realized without sacrificing our rural character.

The value of agricultural and forest products can be increased by having them processed locally, instead of shipping the products and thus economic benefits elsewhere. Direct marketing of local products, such as through farmers' markets, roadside stands, and "U-pick" operations also increases value.

Our many scenic and recreation areas provide economic opportunities through tourism and recreation. These recreational and tourist uses, including the commercial facilities, which serve them, are important sources of income and employment.

Some commercial and industrial uses are appropriate in rural areas and are permitted through the Growth Management Act. Home-based occupations are growing in popularity and provide workers with flexible hours, an alternative to commuting, and an answer to childcare concerns. Computers and advancements in communication open new opportunities for home-based businesses.

GPO 8.38 Cottage and home occupations should be encouraged. Cottage industries are considered a small industry in or near the operator's home with a few employees, but with a low impact on neighbors and services.

GPO 8.39 Kittitas County recognizes home occupations and cottage industries as valuable additions to the economic health of the community. In addition, where distances from other employment warrants, limited-dispersed rural business activities (LD-RBA's) of low impact and with necessary infrastructure will be encouraged on a case by case basis as long as these sustain or are compatible with the rural character of the area in which they operate.

GPO 8.40 Limited-dispersed rural business activities (LD-RBA's), not necessarily resource-based, including but not limited to: information, legal, office and health services, arts and crafts, clothing, small manufacture and repair, may be located as an overlay zone in all rural areas.

GPO 8.41 Provisions should be made for roadside stands, farmers' markets, "U-pick," and customer share cropping operations.

GPO 8.42 The development of resource based industries and processing should be encouraged.

located in Rural Lands are protected by Kittitas County Code 17A - Critical Areas, and the Kittitas County Shoreline Master Program, as well as the Flood Damage Prevention Ordinance - KCC 17.08. Policies to address ground water are located in Section 2.2(F) and water rights are discussed in Section 2.2(B) of this plan.

Habitat and scenic areas are a benefit to the County. However, as pointed out by the Land Use Study Commission in its 1996 Annual Report, "If voters are not willing to bear the cost of additional open space and habitat protection, it is unclear how effective the GMA will be in increasing the amount of open space, recreational, and habitat opportunities." Kittitas County residents must make the difficult decision on how much they are willing to pay in taxes to obtain these benefits.

GPO 8.62 Habitat and scenic areas are public benefits which must be provided and financed by the public at large, not at the expense of individual landowners and homeowners.

GPO 8.63 Any policies or actions concerning critical areas shall not be in conflict with Section 2.2(B), Private Property and Water Rights.

GPO 8.64 Kittitas County may accept by bequest lands for habitat and scenic areas.

GPO 8.65 If Kittitas County chooses to acquire additional lands for habitat and scenic areas, it may consider a variety of methods of financing, including grants of state or federal funds, or other instruments.

GPO 8.66A The County should recognize the abundance of habitat, scenic areas and views on publicly-owned lands when assessing the need for additional such lands. Efforts to connect habitat and open space on private lands to habitat and open space on public lands shall be encouraged.

GPO 8.66B Efforts to retain access to public lands shall be encouraged.

8.5.8. Limited Areas of More Intensive Rural Development

Many counties, including Kittitas County, contain historical rural settlements that pre-date the Growth Management Act (GMA) and that are characterized by higher density development and economic activity than the surrounding rural area. These areas may provide rural community identity, residential neighborhoods and goods and services, or provide rural employment opportunities. The LAMIRD designation is an optional tool provided by the GMA that is intended to recognize these pre-existing development patterns; provide for limited infill, development or redevelopment; and allow for necessary public services to serve the LAMIRD.

To be consistent with the requirements of the GMA, designated LAMIRDS must have clearly identifiable and logical outer boundaries delineated predominately by the built environment and/or physical boundaries, such as bodies of water, streets and highways, and land forms and contours. Although new development and redevelopment is allowed, development cannot extend

beyond the established boundary and contribute to a new pattern of low density sprawl. Public facilities and services provided to LAMIRDs must not permit low density sprawl.

Based on the LAMIRD types established in RCW 36.70A.070(5), Kittitas County establishes three categories of LAMIRD designations. These are:

- **Rural Activity Center** – Rural development consisting of infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.
- **Rural Recreational Center** – Intensification of development on lots containing, or new development of, small-scale recreational or tourist uses that rely on a rural location and setting, but do not include new residential development.
- **Rural Employment Center** – Intensification of development on lots containing isolated nonresidential uses or new development of isolated small-scale businesses that are not principally designed to serve the rural area, but do provide job opportunities for rural residents.

The following goals, policies and objectives provide guidance for designation and development within LAMIRDS generally, as well as more specific guidance for each type of LAMIRD.

GPO 8.67 Allow for designation of LAMIRDs in the rural area, consistent with the requirements of the GMA.

GPO 8.68 Consider the following factors in designating a LAMIRD and establishing boundaries:

- a) Existing development pattern, potential for redevelopment and infill, and for Type 1 LAMIRDs the ability to establish a logical outer boundary;
- b) Rural character of the potential LAMIRD and surrounding area;
- c) Existing and potential mix of uses, densities and intensities and potential impacts to the surrounding area;
- d) Presence/location of infrastructure and other “man-made” facilities;
- e) Distance from other LAMIRD, UGA, designated resource land or other special land use designation. If in close proximity, consider the potential for sprawl, and/or land use conflicts;
- f) Feasibility, cost and need for public services;
- g) Significant natural constraints or features to be preserved; and
- h) Public input and comment.

GPO 8.69 Once boundaries are established, geographic expansion is not permitted unless needed based on one or more of the following criteria:

- a) to correct for mapping errors, or
- b) to correct for other informational errors, or

- c) when otherwise consistent with the requirements of GMA.

GPO 8.70 Allow inclusion of undeveloped land in LAMIRDs for limited infill, development or redevelopment when consistent with rural provisions of the Growth Management Act.

GPO 8.71 Require that development or redevelopment harmonize with the rural character of the surrounding areas.

GPO 8.72 Recognize that public services, including police and fire protection, emergency medical response, roads and general utilities, will continue to be provided at a rural level of service. Public services and facilities should not be provided in a manner that allows low-density sprawl.

GPO 8.73 Development densities, intensities or uses that require urban level of services should not be allowed.

GPO 8.74 Continue to protect the long-term viability of designated forest, mineral and agricultural resource lands. The LAMIRD designation will not be applied to designated resource lands. Development within the LAMIRD designation and adjacent to designated resource lands will minimize potential conflicts and not lead to potential conversion of farm and forest land to non-resource uses.

GPO 8.75 Strip commercial development along state and county roads should not be permitted in any LAMIRD.

GPO 8.76 Designation and development standards in Rural Activity Centers:

- a) For the purpose of establishing the outer boundary, existing development is considered to be any commercial, industrial, residential or mixed-used development in existence on July 1, 1990.
- b) The scale and type of new development and redevelopment should be primarily to serve local residents and secondarily to support the traveling public.

GPO 8.77 Designation and development standards in Rural Recreation Centers:

- a) Intensification of development or new development of small scale recreational or tourist uses that rely on a rural setting is permitted;
- b) Proposed uses may serve the surrounding rural population and the traveling public;
- c) The location of the facility may not adversely impact natural resource production in the surrounding vicinity;
- d) The proposed use should be consistent with the surrounding rural character, avoids impact adjoining rural uses, and does not lead to low-density sprawl; and
- e) New residential development is not permitted.

GPO 8.78 Designation and development standards in Rural Employment Centers:

Rural Lands

- a) Intensification of development on lots containing isolated nonresidential uses or new development of isolated small scale businesses is permitted;
- b) Businesses should provide job opportunities for rural residents, but do not need to be principally designed to serve local residents;
- c) Small scale employment uses should generally be appropriate in a rural community, such as (but not limited to) independent contracting services, incubator facilities, home-based industries, and services which support agriculture; and
- d) Development should conform to the rural character of the surrounding area.

Chapter 17.44
C-H HIGHWAY COMMERCIAL ZONE

Sections

- 17.44.010 Purpose and intent.
- 17.44.020 Uses permitted.
- 17.44.030 Conditional uses.
- 17.44.040 Minimum lot size.
- 17.44.050 Setback requirements.
- 17.44.055 Setback requirements- Zones Adjacent to Commercial Forest Zone.
- 17.44.060 Building height.
- 17.44.070 Off-street parking.
- 17.44.080 Access.

17.44.010 Purpose and intent.

It is the purpose and intent of the highway commercial zone to provide for motorist- tourist dependent businesses having little interdependence and requiring convenient access to passing traffic: (Ord. 83-Z-2 (part), 1983)

17.44.020 Uses permitted.

In any highway commercial zone, only the following uses are permitted:

1. Motels;
2. Restaurants, cafes;
3. Commercial recreation establishments;
4. Retail sales of souvenirs, gifts, novelties, curios, and handicraft products;
5. Offices whose activities are directly related to tourism and recreation;
6. Public and commercial museums and art galleries;
7. Gas service stations including truck stop operations, with minor repair work permitted only;
8. Fruit stands;
9. Cocktail lounges;
10. Public transportation, deadhead stations;
11. Grocery stores, not to exceed four thousand (4,000) square feet gross area;
12. Any use not listed which is nearly identical to a permitted use, as judged by the administrative official, may be permitted. In such cases, all adjacent property owners shall be given official notification for an opportunity to appeal such decisions within ten working days pursuant to Title 15A of this code, Project permit application process. (Ord. 2007-22, 2007; Ord. 96-19 (part), 1996; Ord. 83-Z-2 (part), 1983)

17.44.030 Conditional uses.

Conditional uses are as follows:

1. Public utilities;
2. Public transportation, passenger terminals;
3. Recreation vehicle parks. (Ord. 83-Z-2 (part), 1983)

17.44.040 Minimum lot size.

It is the intent of this chapter that each business be situated on a site of sufficient size to provide all off-street parking, loading and necessary driveways. (Ord. 83-Z-2 (part), 1983)

17.44.050 Setback requirements.

EXHIBIT 2

1. **Front Setback.** There shall be a minimum front yard depth of fifteen feet. Off-street parking and maneuvering area shall not be considered as front yard;
2. **Side Setback.** Ten feet;
3. **Rear Setback.** Ten feet. (Ord. 2007-22, 2007; Ord. 83-Z-2 (part), 1983)

17.44.055 Setback requirements – Zones Adjacent to Commercial Forest Zone

Properties bordering or adjacent to the Commercial Forest zone are subject to a 200' setback from the Commercial Forest Zone. (KCC 17.57.050(1)). For properties where such setback isn't feasible, development shall comply with Kittitas County Code 17.57.050(2). (Ord. 2007-22, 2007)

17.44.060 Building height.

The maximum height of any structure shall be two and one-half stories or thirty-five feet, whichever is less. (Ord. 83-Z-2 (part), 1983)

17.44.070 Off-street parking.

Off-street parking and loading shall be provided as required in Chapter 17.64.1 (Ord. 83- Z-2 (part), 1983)

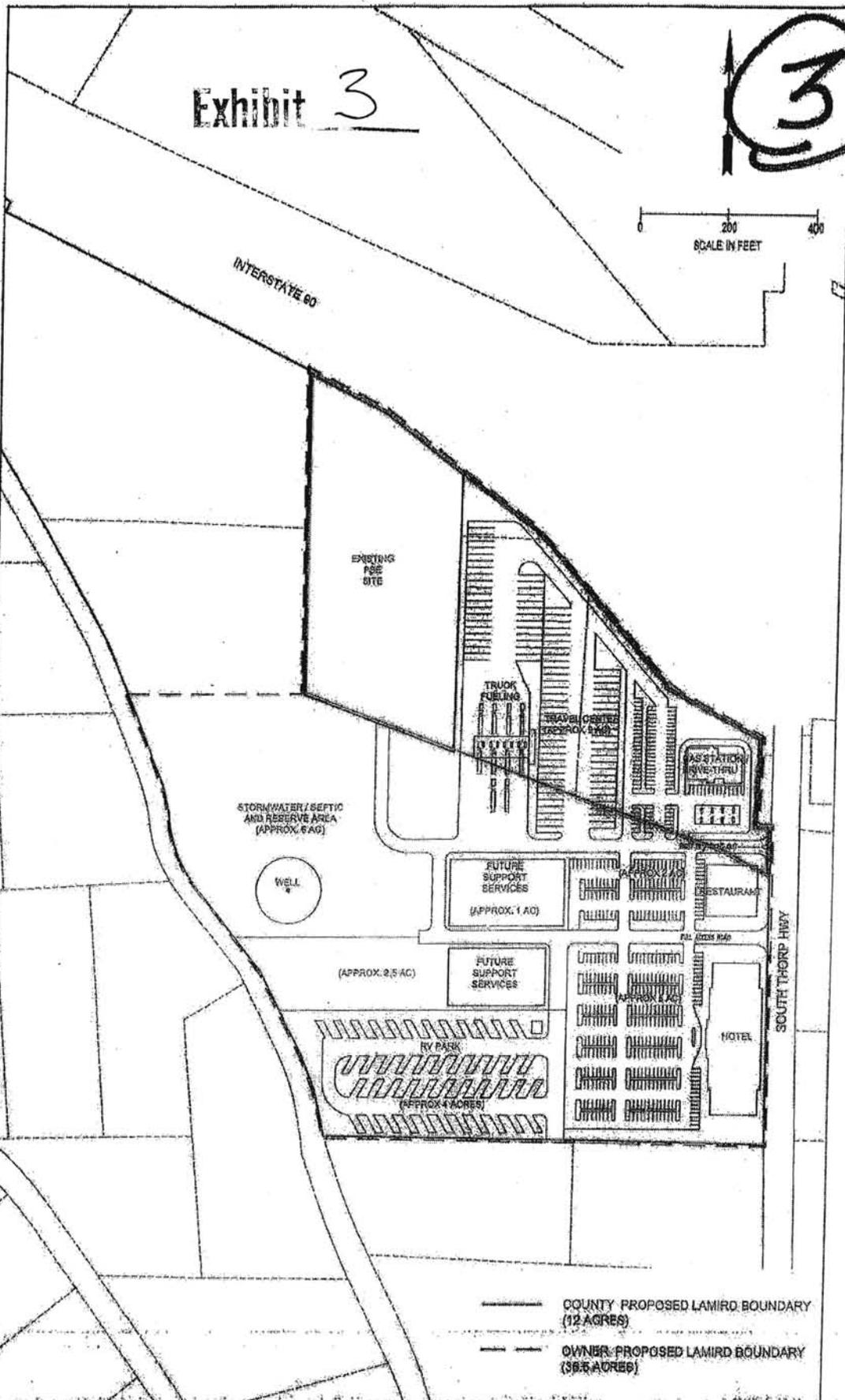
17.44.080 Access.

All lots in this district shall abut a public street, or shall have such other access as deemed suitable by the board. (Ord. 83-Z-2 (part), 1983)

Exhibit 3

3

0 200 400
SCALE IN FEET



— COUNTY PROPOSED LAMIRO BOUNDARY (12 ACRES)
 - - - OWNER PROPOSED LAMIRO BOUNDARY (36.6 ACRES)

	SCALE: 1"=200'	ELLENSBURG STATION CONCEPTUAL SITE PLAN	EXHIBIT No. 3
	DATE: 001, 2008		SHEET No. 1