STATE OF WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD
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SEP 22 2014
OGDEN MURPHY WALLACE PLLC

September 19, 2014

Misty Blair
1007 S Adam St
Tacoma WA 98405

Douglas Hamar
PO Box 1104
Monroe WA 98272

Chad McCammon
21624 Calhoun Rd
Monroe WA 98272

J. Zachary Lell
Ogden Murphy Wallace PLLC
901 Fifth Avenue Suite 3500
Seattle WA 98164-2008

Re: Blair, et al. v. City of Monroe, GMHB Case No. 14-3-0006c

Dear Parties,

The Board sincerely appreciates your feedback and the opportunity to correct our August 26, 2014, Final Decision and Order (FDO).

Pursuant to WAC 242-03-830(4), the Board will issue a corrected order addressing the following typographical errors and/or clerical mistakes:

Errors Identified by Petitioners:

- FDO at 7 – While Brandi Blair was present at the July 17, 2014 Hearing on the Merits, Misty Blair appeared on behalf of the Blair/Anderson Petitioners. We request the record be corrected to accurately reflect this fact.
  Corrected.

- FDO at 10 – Footnotes 45 & 48, were actually references to the Hamar/McCammon Prehearing Brief not the Blair Petitioners' Prehearing Brief. The page numbers appear to be accurate.
  Corrected – now footnotes 48 & 51.

- FDO at 10 – Footnotes 49 & 50, should reference at 16-17 not 16-7.
  Corrected – now footnotes 52 & 53.

- FDO at 11 – Footnote 52, should reference to the Hamar/McCammon Prehearing Brief not the Blair Petitioners' Prehearing Brief. The page numbers appear to be accurate.
  Corrected – now footnote 55

- FDO at 12 – Footnotes 54, 56, 57 & 58, were actually references to the Hamar/McCammon Prehearing Brief not the Blair Petitioners' Prehearing Brief. The page numbers appear to be accurate.
  Corrected – now footnotes 57, 59, 60, & 61.

- FDO at 16 – Footnote 71 should reference to the Hamar/McCammon Prehearing Brief not the Blair Petitioners' Prehearing Brief. The page numbers appear to be accurate.
  Corrected – now footnote 74.

For future reference, some confusion was caused by the lack of signature on the Hamar/McCammon brief and a footer that merely read "Prehearing Briefs." The prehearing brief was accompanied by an appropriate Certificate of Service, and the Board recognizes that Petitioners are *pro se* (representing themselves without assistance from an attorney).

Errors Identified by the Respondent:

- Page 11 – There is an anomalous reference to "EMR". What is this intended to mean in the context of the Board's decision?
  This is an acronym for "East Monroe Rezone" as introduced on page 10, line 4.

- Page 12 – The reference to "465,000 cubic yards" is not contained on the cited page of the Blair/Anderson brief, and the figure itself is erroneous.
  The figure is from the Hamar/McCammon brief but a scrivener's error placed the comma incorrectly. Corrected to read "46,500." Footnote 59 (now 62) is corrected to include "See also HEARING EXAMINER DECISION – REVISED AFTER RECONSIDERATION, RE: AP2012-01, *Anderson v. Monroe* (August 8, 2012) at 17."

- Page 20 – The reference to Kristin Eick as the SEPA Responsible Official is erroneous and should be replaced with Melissa Sartorius.
  Omitted. There should be no name in the RCW quote.

Errors Identified by the Board:

- The Board took official notice of the Hearing Examiner's Decision in the original 2012 FPEIS appeal and the appendices to the 2013 FEIS, but these facts were omitted from the Preliminary Matters section of the FDO. The omission is corrected.

- Footnotes 38, 39, and 41 are added, which changed footnote numberings as noted above. In addition, the date is corrected in footnote 52 (now 55).

- Footnote formatting is corrected for consistency throughout.

- Footnote 90 (now 93) cites to a letter attached to the Hamar/McCammon Prehearing Brief as tab A-22h. The letter should be cited as Ex. 22 using the City's Index. The letter is also referenced in Exhibit 54, Hearing Examiner's Findings of Fact, Conclusions of Law, Decision and Order, Case 13-APHE-0001, SEPA Appeal of the FEIS for the East Monroe Comprehensive Plan Amendment and Rezone (December 16, 2013) at 3 as Appellants' Exhibit L3: Department of Ecology Letter dated September 13, 2013. The citation is corrected.

Sincerely,

Cheryl Pflug,
Presiding Officer

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

BRANDI BLAIR, MATTHEW BLAIR, BRETT BLAIR, JAMES BLAIR, LOWELL ANDERSON, DOUGLAS HAMAR, AND CHAD MCCAMMON, Petitioners, v. CITY OF MONROE, Respondent.	**CASE No. 14-3-0006c** **ORDER NUNC PRO TUNC CORRECTING SCRIVENER'S ERRORS IN FINAL DECISION AND ORDER**

SYNOPSIS

Petitioners alleged the City's rezone of 43 acres within the UGA from Limited Open Space to General Commercial was noncompliant with the Growth Management Act (GMA), inconsistent with the Snohomish County Countywide Planning Policy (CPP), inconsistent with the City of Monroe's Comprehensive Plan (MCP), and noncompliant with SEPA guidelines. The Board found the City's SEPA review failed to comply with RCW 43.21C. 030(c) and that the Ordinances substantially interfere with GMA Planning Goal 10. The Board entered a determination of invalidity and the Ordinances were remanded to the City.

I. BACKGROUND

The challenged action is the City of Monroe's adoption of Ordinance No. 022/2013, amending Comprehensive Plan text for the 2015 Comprehensive Plan Update and Land Use Mapping Designations necessary to accommodate Ordinance 024/2013, and Ordinance No. 024/2013, rezoning 43 acres within the UGA from Limited Open Space (LOS) to General Commercial (GC).

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The 42.8-acre East Monroe area (the Property) at issue in this case is made up of five parcels under the single ownership of the Heritage Baptist Fellowship and located on the City of Monroe's eastern boundary adjacent to, and immediately north of, SR 2.[1] Located within the drainage basin and floodplain of the Skykomish River,[2] the 11-acre portion of the Property under consideration for development[3] is bounded by the slough of an oxbow (fed by and designated a Type I stream) and the river, which connect via a series of box culverts under the highway.[4] The Property also encompasses three wetlands, comprising approximately 8.2 acres, nearly all of which is a Category II wetland bordering the slough/stream.[5] The slough/stream lies within shoreline jurisdiction and is designated as Urban Conservancy (UC) under the City's Shoreline Master Program.[6] A Native Growth Protection Easement (NGPE) is associated with the area covered by the slough/stream and associated wetlands.[7] To the north and west of the slough/stream lie steep slopes atop which perch many single-family residences.[8]

Located within the City's Urban Growth Area, the Property is currently undeveloped.[9] Most of the Property was annexed into the City of Monroe in 1970 at the pre-existing RS-9600 designation (less than 5 residences/ acre)[10] for the stated purpose of protecting "the scenic gateway" to the City,[11] with the remaining easternmost two parcels annexed in 1984 for the stated purpose of "squaring off city boundaries" and zoned as agricultural.[12] The Growth Management Act was subsequently enacted in 1990. Since 1994, the Property has

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[1] Respondent's Prehearing Brief at 3; Ex. 54: SEPA Appeal of the FEIS for the East Monroe Comprehensive Plan Amendment and Rezone, File No. 13-APHE-0001 at 1.
[2] Respondent's Prehearing Brief at 3; Ex. 32: FEIS (September 26, 2013) at 4.
[3] Ex. 49: FEIS Ex. M3 at 88, Figure 3: Estimated Developable Area.
[4] Respondent's Prehearing Brief at 3; Ex. 32; FEIS (September 26, 2013) at 4, 17.
[5] Respondent's Prehearing Brief at 3; Ex. 32: FEIS (September 26, 2013) at 38.
[6] Respondent's Prehearing Brief at 3-4; Ex. 32: FEIS (September 26, 2013) at 52.
[7] Respondent's Prehearing Brief at 4; Ex. 3: Rezone Application, Appendix H.
[8] Ex. 49: SEPA Appeal Public Hearing, Exhibit M3: Cover Photo.
[9] Ex. 49: SEPA Appeal Public Hearing, Exhibit M3: Cover Photo.
[10] Respondent's Prehearing Brief at 3; Ex. 68: Monroe Planning Commission Review of Comp Plan Amendment and Rezone.
[11] Ex. 84: 2013 Comprehensive Plan/East Monroe Amendments, final reading track changes version, Ex. A, *Land Use Element* at 13.
[12] Monroe Comprehensive Plan 2005-2025 at LU12; Respondent's Prehearing Brief at 3, Ex. 68: Monroe Planning Commission Review of Comp Plan Amendment and Rezone.

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Fax: 360-586-2253

been zoned Limited Open Space (LOS) under both the City's Comprehensive Plan and zoning code.[13] Although not currently served, the Property is within the City's water and sanitary sewer utility service areas.[14]

In July 2010, an application for amending the City's Comprehensive Plan and rezoning the Property was supported by the property owners[15] and the East Monroe Economic Development Group, LLC (EMEDG).[16] EMEDG does not own any of the Property.[17] After a two year legislative process, the City issued a Final Phased Environmental Impact Statement (FPEIS) in April 2012[18] and adopted Ordinance No. 018/2012 in July of 2012 amending its comprehensive plan to reclassify approximately 50 acres in the East Monroe area from Limited Open Space to General Commercial. It is undisputed that Petitioners participated vigorously in the 2010-2012 process. At the time Ordinance 018/2012 was enacted, Petitioner Anderson's appeal of the Final Phased Environmental Impact Statement (FSEIS) for the reclassification was pending before the City's Hearing Examiner, Mr. Anderson also brought a challenge to Ordinance 018/2012.[19] After numerous comments were received, an open record hearing was held on the FPEIS and the Monroe Hearing Examiner concluded that the FPEIS was inadequate as a matter of law[20] because the phased nature of the FPEIS put off all impact analysis until specific development proposals would be applied for in the future. Finding that the FPEIS included no environmental analysis, no consideration of alternatives to changing the zoning from LOS to GC, and no consideration of indirect or cumulative impacts, the Examiner ruled that FPEIS failed to provide the city council sufficient information to make a reasoned decision.[21]

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[13] Ex. 68: Monroe Planning Commission Review of Comp Plan Amendment and Rezone; Respondent's Prehearing Brief at 3.
[14] Respondent's Prehearing Brief at 3; Ex. 32: FEIS (September 26, 2013) at 62.
[15] Respondent's Prehearing Brief at 3.
[16] HEARING EXAMINER DECISION – REVISED AFTER RECONSIDERATION, RE: AP2012-01, *Anderson v. Monroe* (August 8, 2012) at 1, 16.
[17] HEARING EXAMINER DECISION – REVISED AFTER RECONSIDERATION, RE: AP2012-01, *Anderson v. Monroe* (August 8, 2012) at 4.
[18] Ex. 32: FEIS (September 26, 2013) at 3.
[19] *Anderson v. Monroe,* GMHB Case No. 12-3-0007.
[20] Ex. 32: FEIS (September 26, 2013) at 3.
[21] HEARING EXAMINER DECISION – REVISED AFTER RECONSIDERATION, RE: AP2012-01, *Anderson v. Monroe* (August 8, 2012) at 14-15.

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The City then repealed Ordinance 018/2012 and, at the same Council meeting, re-docketed the East Monroe area for comprehensive plan review in 2013. In addition, the City terminated its contract with the Hearing Examiner[22] and the Growth Board dismissed Anderson's challenge as moot.[23] Next, the City prepared a modified rezone proposal and a professional consultant was retained to prepare a new EIS.[24] Throughout the ensuing 2013 legislative process, the City's notices and agendas consistently list the East Monroe Development Group Comprehensive Plan Amendment and Rezone as "Continued from 2012," using reference numbers from 2011 (CPA 2011-01) and 2012 (RZ2012-01).[25]

The City's SEPA responsible official approved and issued a new non-project FEIS on September 27, 2013.[26] An administrative appeal by Petitioner Anderson and another challenging the adequacy of the FEIS followed. The Examiner denied the appeal and the appellants' request for reconsideration and the City enacted the challenged Ordinances in a December 26, 2013 Special Session of the Council.

On February 18, 2014, Brandi Blair, Matthew Blair, Brett Blair, James Blair, and Lowell Anderson filed a Petition for Review, assigned Case No. 14-3-0003. On February 25, 2014, Douglas Hamar and Chad McCammon filed a Petition for Review challenging the same actions and alleging substantially similar issues. The Petition was assigned Case No. 14-3-0004. On February 27, 2014, Brandi Blair, Matthew Blair, Brett Blair, James Blair, and Lowell Anderson filed a second Petition for Review challenging the same actions as inconsistent with the Shoreline Management Act (SMA) and the City of Monroe's Shoreline Master Plan (MSMP). The Petition was assigned Case No. 14-3-0006. Pursuant to RCW 36.70A.290(5), the Board consolidate these cases into Case No. 14-3-0006c, *Blair v. City of Monroe*.

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[22] PFR at 5-6.
[23] *Anderson v. Monroe,* Order on Dispositive Motions (December 11, 2012) at 2.
[24] Respondent's Prehearing Brief at 5; Ex. 32: FEIS (September 26, 2013) at 3.
[25] *See, e.g.*, Exs. 62, 64, 65, 69, 70, and 71: 2013 Planning Commission Agendas.
[26] Ex. 32: FEIS (September 26, 2013).

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

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

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations and amendments to them are presumed valid upon adoption.[27] This presumption creates a high threshold for challengers as the burden is on the petitioners to demonstrate that any action taken by the City is not in compliance with the GMA.[28]

The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[29] The scope of the Board's review is limited to determining whether a City has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[30] The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA.[31] The Board shall find compliance unless it determines that the City's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[32] The challenged portion is clearly erroneous if the Board has a firm and definite conviction that a mistake occurred.[33]

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth."[34] However, a city's

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[27] RCW 36.70A.320(1) provides: "[Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption."

[28] RCW 36.70A.320(2) provides: "[Except when city or county is subject to a Determination of Invalidity] the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter."

[29] RCW 36.70A.280, RCW 36.70A.302.

[30] RCW 36.70A.290(1).

[31] RCW 36.70A.320(3).

[32] RCW 36.70A.320(3).

[33] *City of Arlington v. CPSGMHB,* 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County,* 121 Wn.2d 179, 201, 849 P.2d 646 1993); *See also, Swinomish Tribe v. WWGMHB,* 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB,* 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).

[34] RCW 36.70A.3201 provides, in relevant part: "In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

actions are not boundless; their actions must be consistent with the goals and requirements of the GMA.[35]

Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate that the challenged action taken by the City is clearly erroneous in light of the goals and requirements of the GMA.

III. BOARD JURISDICTION

The Board finds the Petition for Reviews were timely filed within 60 days as required by RCW 36.70A.290(2). The Board finds the Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2)(b).[36]

The Board finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

IV. PRELIMINARY MATTERS

At the request of the Board, Petitioners filed revised issue statements on March 25, 2014. The City then filed various dispositive motions. The City's motion to dismiss the Blair Petitioners for lack of GMA standing was denied.[37] The City's motion to dismiss the Blair Petitioners' SEPA challenge for lack of SEPA standing was granted, but co-petitioners Anderson and Hamar/McCammon were found to have SEPA standing such that the City was required to respond to the SEPA challenge. Petitioners' motion to supplement the record was granted in part.[38] The Board took official Notice of the City of Monroe Municipal

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to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community."

[35] *King County v. CPSGMHB,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the goals and requirements of the GMA). *See also, Swinomish,* 161 Wn.2d at 423-24. In *Swinomish,* as to the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: "The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a 'critical review' and is a 'more intense standard of review' than the arbitrary and capricious standard." *Id.* at 435, n.8.

[36] RCW 36.70A.280(2): "A petition may be filed only by: (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested . . . ."

[37] Order on City's Dispositive Motion and Petitioners' Motion to Supplement (May 23, 2014).

[38] *Id.*

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Codes, the Monroe Shoreline Master Program, the Snohomish Countywide Planning Policy[39] pursuant to WAC 242-03-630(4),[40] the Hearing Examiner's Decision in the original 2012 FPEIS appeal,[41] and the various appendices to the 2013 FEIS.

Both in its Prehearing Brief and at the Hearing on the Merits, the City again raised the issue of standing, this time asserting that the legislative process leading to Ordinance 022/2013, the Comprehensive Plan text amendments and Land Use mapping designations, was distinct from that of Ordinance 024/2013, East Monroe rezone, and that Petitioners only have standing to challenge the rezone.[42] The Board does not find this argument persuasive or supported by the record. The Board is not persuaded that the legislative processes leading to the Comprehensive Plan text amendments necessary to support the rezone and the rezone itself were separate.

The Hearing on the Merits was convened at 10 a.m. on July 17, 2014, in the Monroe City Council Chambers. Present for the Board were Cheryl Pflug, presiding officer, Margaret Pageler, and Raymond Paolella. Brandi Blair and Douglas Hamar appeared on behalf of the Petitioners. Respondent City of Monroe was represented by its attorney J. Zachary Lell, accompanied by Kristin Eick. Also present were Kirk Scarboro, Keith Vander Houweh, Wayne Rodland, Bob Martin, Brett Blair, Aaron Valvas, Kathy Helgeson, Matthew Blair, Jim Blair, Lowell Anderson, Gabriel Wood, Polly Keary, and Susan Boyd of PACE Engineers. From the City of Monroe, Gene Brazel, Christina Lavelle, Nick Holland, Melissa Place, and Paul Popelka were also present. Amanda Sue Varona provided court reporting services.

The hearing provided the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties.

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[39] Order on City's Dispositive Motion and Petitioners' Motions to Supplement (May 23, 2014).

[40] WAC 242-03-630(4) reads:

> "The board or presiding officer may officially notice:
> ...(4) Counties and cities. Ordinances, resolutions, and motions enacted by cities, counties, or other municipal subdivisions of the state of Washington, including adopted plans, adopted regulations, and administrative decisions."

[41] HEARING EXAMINER DECISION – REVISED AFTER RECONSIDERATION, RE: AP2012-01, *Anderson v. Monroe* (August 8, 2012).

[42] Respondent's Prehearing Brief at 11-12.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

V. ISSUES AND DISCUSSION

Order of Discussion

While arguments overlap somewhat, the Board finds that this case hinges on four key issues and so orders its analysis as follows:

Section One: City Legislative Authority

The Board begins by noting that many of Petitioner's arguments allege that the City's action was noncompliant with GMA goals, requirements, or with the County's Planning Policy(s). We therefore begin with a discussion of the purpose and uses of, and relationship between, various hierarchical elements of the GMA. Based on this analysis, Issues 1, 2, and 7 are decided.

Section Two: Consistency Requirements

Because Petitioners allege that the City's action was inconsistent with the preamble to GMA and with the prior version of its Comprehensive Plan, the legal standard for inconsistency is reviewed. The Board then discusses legislative discretion and coordinated planning under GMA. Based on this analysis, Issues 3, 4, 8, 9, 10, 11, and 12 are decided.

Section Three: SEPA Compliance

Issues 5 and 6 turn on the adequacy of the FEIS under SEPA.

Section Four: Invalidity

Issue 13 asks whether Ordinance Nos. 022/2013 (amending the CP and land use map) and/or Ordinance No. 024/2013 (East Monroe rezone) should be declared invalid.

Issue Analysis

Section One: City Legislative Authority (Issues 1, 2, & 7)

Issue 1: Does The City of Monroe's adoption of Ordinance No. 022/2013, an ordinance modifying Comprehensive Plan text and land use map designations, and the City of Monroe's adoption of accompanying rezone Ordinance No. 024/2013, which changed the Zoning designation of 42.81 acres of floodplain in East Monroe from Limited Open Space (LOS) to General Commercial (GC), violate and

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

substantially interfere with the goals of the Growth Management Act, specifically, RCW 36.70A.020 (1), (2), (3), (5), (7), (8), (9), (10), (11), and (12), and violate the terms of RCW 36.70A.070 (1), (3), (4), (6), and (7); and, should those two ordinances therefore be invalidated?

Issue 2: Did City of Monroe Ordinance 022/2013 fail to comply with RCW 36.70A.035 and RCW 36.70A.140 by not (1) providing a broad dissemination of proposals and alternatives, (2) not considering and responding to public comments (3) and affording the appropriate and effective level of public participation for this extensive level of Comprehensive Plan Amendments?

Issue 7: Is the East Monroe Rezone (Ordinance 022/2013 & 024/2013) necessary to accommodate development as required and in accordance with OFM population predictions? Does the pre-existing LOS zoning already allow adequate development potential consistent with RCW 36.70A.115?

The GMA identifies non-hierarchical goals to be used exclusively for the purpose of *guiding* counties and cities in developing and adopting comprehensive plans and development regulations.[43] In addition to outlining the goals of comprehensive planning and development regulation, the GMA contains specific mandates. GMA guidelines are just that and ultimately require the jurisdiction to legislatively balance competing goals and priorities in developing its own local plan,[44] whereas mandates are non-negotiable. As previously noted, the GMA grants deference to local legislative authority. As the Court of Appeals recently explained:

> A comprehensive plan amendment must "conform to [the GMA]." RCW 36.70A.130(1)(d). But "the GMA is not to be liberally construed." *Woods v. Kittitas County*, 162 Wn.2d 597, 612 & n.8, 614 (*citing Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County* , 135 Wn.2d 542, 565, 958 P.2d 962 (1998)). Thus, a comprehensive plan must obey the GMA's clear mandates. *See* Thurston *County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wn.2d 329, 341-42, 190 P.3d 38 (2008). A newly adopted or amended development regulation must be "consistent with and implement the comprehensive plan." RCW 36.70A.040(3)(d), (4)(d), (5)(d); RCW 36.70A.130(1)(d); *see* WAC 365-196-805(1). But "a comprehensive plan is a 'guide' or 'blueprint' to be used when making land use decisions." *Citizens for Mount Vernon*,

[43] RCW 36.70A.020 (emphasis added).
[44] RCW 36.70A.040.

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

133 Wn.2d at 873 (*quoting Barrie v. Kitsap County*, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980)). Thus, a development regulation need not strictly adhere but must "generally conform" to the comprehensive plan. *Id.* (quoting Barrie, 93 Wn.2d at 849)."[45]

Thus, the GMA and CPs contain both general guidelines[46] and specific mandates.[47]

Goal (1) Urban Growth

Petitioners argue that development in the East Monroe Rezone (EMR) will increase demand for police, water, and sewer services beyond the services that currently "exist or can be provided in an efficient manner" as required by RCW 36.70A.020(1).[48] The City responds that the Property lies within the service area for both water and sanitary sewer service, City planning documents provide for extension of utility lines to serve the property, and police and fire stations are located within two miles.[49]

The Board finds that Petitioners have not met their burden to show that the City failed to consider RCW 36.70A.020(1).

Goal (2) Reduce Sprawl

Noting that the Property was annexed into the Monroe Urban Growth Area prior to the GMA and for the purpose of "protecting the City's scenic gateway from the east along SR 2 and to prevent the proliferation of strip commercial uses along US-2,[50] Petitioners argue that commercial development on the site will encourage sprawl into an area that is separated from other commercial development by "a mile of mountain on one side of the road and the Skykomish river on the other."[51] Respondents correctly assert that Petitioners have cited no legal authority to support their assertions. The City does have the ability to change its planning priorities and to reclassify property once designated for another

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[45] *Kittitas County v. Kittitas County Conservation Coalition,* 2013 Wn. App. LEXIS 1873 (August 13, 2013) at 5.
[46] *Id.*
[47] *e.g.,* RCW 36.70A.070.
[48] Hamar/McCammon Prehearing Brief (June 2, 2014) at 1-2.
[49] Ex. 32: FEIS (September 26, 2013) at 59-63.
[50] Monroe Comprehensive Plan, prior to amendment by Ordinance 022-2013 at 1.
[51] Hamar/McCammon Prehearing Brief (June 2, 2014) at 3-4.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

purpose.[52] The Property is located within the City's UGA and the emphasis in GMA is to reduce sprawl by locating intense development with urban growth areas.[53]

The Board finds that Petitioners have not met their burden to show that the City failed to consider RCW 36.70A.020(2).

Goal (3) Transportation

Petitioners correctly note that the Property is served only by a pull-out driveway onto SR 2, which has existing traffic safety issues. Respondents counter that the FEIS extensively analyzed the traffic impacts and that WSDOT was notified and responded without objection to the City's SEPA process. While the Board does not buy Respondent's assertion that traffic impacts arising under proposed Alternative 2 would not vary significantly in caparison to development of the site under the current LOS, the underlying problem here lies with the lack of a true no-action alternative in the EIS design – discussed at length in Section Four. Petitioners have not provided evidence that City failed to consider mitigation of traffic impacts and promotion of multimodal transportation in its balancing analysis.

The Board finds that Petitioners have not met their burden to show that the City failed to consider RCW 36.70A.020(3).

Goal (5) Economic development

Petitioners' argue that the City's vision of increasing economic growth and enriching the community[54] by locating big-box retail in the EMR is unrealistic in view of more than 150,000 sq. ft. of vacant retail space in the City's existing commercial zones.[55] The City asserts that the applicable standard does not demand definitive proof that the action will have the desired effect.[56] The Board will not defer to Petitioners' subjective belief that the City's action will not prove fruitful.

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[52] Respondent's Prehearing Brief at 16-17.
[53] Respondent's Prehearing Brief at 16-17.
[54] Ex. 32: FEIS (September 26, 2013) at 24.
[55] Hamar/McCammon Prehearing Brief (June 2, 2014) at 5.
[56] Respondent's Prehearing Brief at 20.

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1111 Israel Road SW, Suite 301
P.O. Box 40953
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Phone: 360-664-9170
Fax: 360-586-2253

The Board finds that Petitioners have not met their burden to show that the City failed to consider RCW 36.70A.020(5).

Goal (7) Permits

Petitioners offer the conclusory assertion that the inaccuracies in the FEIS will result in "a long and tortuous permitting process for any future developer."[57] No evidence is offered to support their contention. The City is correct that the emphasis in Planning Goal 7 is to ensure that timely and fair processing of permits ensures predictability.[58]

The Board finds that Petitioners have not met their burden to show that the City failed to consider RCW 36.70A.020(7).

Goal (8) Natural resource industries

Petitioners allege that the Property has agricultural and natural resource potential which will be lost if the property is developed for commercial use.[59] Petitioners could be correct, but the requirement that the City balance competing GMA goals does not allow Petitioners to select any one goal as a trump card.

The Board finds that Petitioners have not met their burden to show that the City failed to consider RCW 36.70A.020(8).

Goal (10) Environment

Petitioners summarize the 2013 FEIS as describing 75% of the property as undevelopable as a result of steep slopes, a type 1 stream (the slough), wetlands and shoreline – all of which must be protected from adverse consequences by development on the remaining 25% of the parcels[60] – and note that ten of eleven acres deemed "developable" under the FEIS are situated in the center portion of the point bar of a former oxbow of the Skykomish River, with open connections to the river through culverts at both

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[57] Hamar/McCammon Prehearing Brief (June 2, 2014) at 5.
[58] RCW 36. 70A.020(7) reads "Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability."
[59] Hamar/McCammon Prehearing Brief (June 2, 2014) at 5.
[60] Hamar/McCammon Prehearing Brief (June 2, 2014) at 5; *See, e.g.* Ex. 32: 2013 FEIS Table 4, Figures 4-12.

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1111 Israel Road SW, Suite 301
P.O. Box 40953
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Phone: 360-664-9170
Fax: 360-586-2253

ends of the slough, to which at least 46,500 cubic yards of fill must be added to raise it above the flood plain.[61]

The Board also notes that in ruling the FPEIS inadequate for failing to include any analysis of the impact of extensive filling of the Project Area, the first Hearing Examiner similarly expressed significant concern regarding the reality of flooding, finding that '[t]he best available evidence is that the majority of the developable portion of the Project Area is subject to up to about eight feet of flood inundation during the 100-year flood event; the best available science is that SR 2 does not function as a levee to protect the Project Area from flood inundation (it is punctured by two, three-foot-plus culverts associated with the oxbow slough)."[62]

Respondent declares that development of the site in compliance with applicable City regulations would actually enhance the currently degraded ecological function of the property,[63] but the Board does not find evidence in the record to support a finding that the Property is currently in a degraded condition. Further, because the FEIS (see arguments in Section Four) does not evaluate a legitimate "no-action" alternative, the Board finds no basis for the City's claim that the preferred alternative would result in enhanced ecological function over the current LOS zoning. Frankly, the idea that substantially slopes above a Type I stream (currently home to endangered and listed species) while simultaneously adding tens of thousands of cubic yards of fill in order to raise the desired building site above the 100-year floodplain (which presently provides flood storage capacity) constitutes *enhancement* of ecological function does more to suggest the City did NOT seriously consider GMA's environmental protection goal.

The deferential standard of review is "neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a 'critical review' and is

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[61] Hamar/McCammon Prehearing Brief (June 2, 2014) at 6; *See also* Ex. 32: FEIS (September 26, 2013) at 9.
[62] Hamar/McCammon Prehearing Brief (June 2, 2014) at 15; See also HEARING EXAMINER DECISION – REVISED AFTER RECONSIDERATION, RE: AP2012-01, *Anderson v. Monroe* (August 8, 2012) at 17.
[63] Respondent's Prehearing Brief at 23.

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1111 Israel Road SW, Suite 301
P.O. Box 40953
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Phone: 360-664-9170
Fax: 360-586-2253

a 'more intense standard of review' than the arbitrary and capricious standard."[64] The Board is left with the clear and convincing belief that a mistake has been made.

The Board finds that that the City failed to consider RCW 36.70A.020(10).

Goal (11) Citizen participation and coordination (Issue 2)

Petitioners present a disturbing story of participation in a lengthy legislative process beginning in 2010 and culminating in the adoption of Ordinance No. 018/2012 in July 2012, a Hearing Examiner's finding that the phased EIS prepared for Ordinance 018/2012 was inadequate, the City's replacement of the Hearing Examiner,[65] a continued legislative process (per City's own documents referencing the East Monroe Development Group Comprehensive Plan Amendment and Rezone as "Continued from 2012" and using reference numbers from 2011 and 2012)[66] which the City would later characterize as a new legislative process in an attempt to defeat Petitioners' standing,[67] an FEIS issued September 2013 which Petitioners allege did not consider the Comprehensive Plan Amendment eventually enacted by the challenged Ordinance,[68] a timely appeal of the FEIS by Petitioner Anderson,[69] a timely motion for reconsideration of the FEIS,[70] denial of reconsideration of the FEIS on December 26, 2014, and adoption of the challenged ordinance *the same day in a Special Session* of the Monroe City Council. However, Petitioners also note that the City "followed the letter of the law."[71]

The City responds that it held "at least 14 public meetings . . . and an extensive SEPA review process, all of which were publicly noticed."[72] The Special Session of the Council was necessitated by the fact that a motion for reconsideration was still pending on

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[64] *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 435, 166 P.3d 1198 (2007).
[65] The 2012 FPEIS, AP2012-01 appeal was conducted before Hearing Examiner John E. Galt. The 2013 FEIS, 13-APHE-0001 appeal was conducted before Carl D. Cox.
[66] Order on Motions, Case No. 14-3-0006c at 3.
[67] Respondent Monroe's Dispositive Motion Regarding Standing (April 22, 2014) at 2-4.
[68] Blair/Anderson/Hamar/McCammon Petitioners' Response to Dispositive Motion (May 2, 2014) at 4-5, 9.
[69] Ex. 39: Anderson Appeal Application (October 18, 2014).
[70] Ex. 59: Anderson request for Reconsideration (December 16, 2013).
[71] Hamar/McCammon Prehearing Brief (June 2, 2014) at 6.
[72] Respondent's Prehearing Brief at 7-8, 24-25.

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1111 Israel Road SW, Suite 301
P.O. Box 40953
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Fax: 360-586-2253

the FEIS appeal on December 17, 2013, the original date when action on the Ordinances was scheduled.

The legal standard under RCW 36.70A.035(1) and .140, as Petitioner Hamar notes, requires the City to utilize a public participation program and to employ notice procedures reasonably calculated to provide notice to property owners and other affected individuals.

The Board finds that Petitioners have not met their burden to show that the City failed to consider RCW 36.70A.020(11).

Adequacy of Existing Development Potential (Issue 7)

As noted in the discussion of Goal (5) Economic development, the deference due the City in upholding planning actions is not superseded by the Petitioners' subjective belief that the action is unnecessary. Petitioners have provided no evidence that the City's action was not guided by a desire to spur economic development.

The Board finds that Petitioners have not alleged a violation of GMA.

Conclusion regarding legislative authority:

Per the findings above, **Issues 2 and 7 are dismissed.**

As to Issue 1, **The Board finds** only that the City failed to consider and be guided by RCW 36.70A.020(10).

Section Two: Consistency Requirements (Issues 3, 4, 8, 9, 10, 11, & 12)

Applicable Law

RCW 36.70A.070 requires that "the [comprehensive] plan shall be an internally consistent document and all elements shall be consistent with the future land use map."

RCW 36.70A.130(1)(d) reads:

> Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

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Respondent is correct in explaining that GMA consistency requirements do not demand consistency between pre- and post-amendment versions of the City's policies.[73] The Legislature has specifically granted legislative authority to amend local plans and policies.

Petitioners contend that the agricultural history and lack of "urban" development on or near the Property is determinative of its urban status, or lack thereof.[74] The Board notes that the unique history of the annexation of these parcels prior to enactment of the state's GMA has probably resulted in a designation that might not be attained were the annexations to take place today. Nevertheless, the Property's status as urban does derive from its location within a UGA.

Further, inconsistency does not arise from inapplicable policies or regulations,[75] and generally does not arise where identified goals and policies are merely of a "framework policy nature or other general implementation guidance nature" unless a "clear conflict" prevents them from working together.[76]

> Issue 3: Are the adopted Comprehensive Plan amendment Ordinance No. 022/2013 and accompanying rezone Ordinance No. 024/2013 inconsistent with the stated goals and policies of the City of Monroe's Comprehensive Plan, including but not limited to, the Vision Statement, the Land Use Element (LUP-1.1, 1.2, 5.3, 5.4, and 10.2; LUG-4, 5, and 9), the Natural Environment Element (NEG 1.1, 1.2, 1.3, 3.1, 4.1, 6.1, 6.2 and 6.3; NEP 1.1, 1.3, 1.4, 2.1, 2.2, 2.3,3.1, and 6.4; NEA 2.1, 3.8, and 4.1), the Economic Development Element (as it now reads in Ordinance No. 022/2013, and within that ordinance, ED-G1, 2, 3, and 5; EDP6), the Transportation Element (TG1, 2,and 4; TP1.2, and 1.3), and the City's Shoreline Master Program (with regard to its purpose, policies and regulations), and are these inconsistencies in violation of RCW 36.70A.070 (preamble), and section (6)?

Here, RCW 36.70A.070 (preamble), and RCW 36.70A.210 (countywide planning policies) are general guidelines.

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[73] Respondent's Prehearing Brief at 27.
[74] Hamar/McCammon Prehearing Brief (June 2, 2014) at 7.
[75] *CARE v. King County*, FDO, GMHB Case No. 13-3-0003 (August 21, 2013) at 10.
[76] *CARE v. King County*, FDO, GMHB Case No. 13-3-0003 (August 21, 2013) at 10; *Bridgeport v. City of Lakewood,* FDO, GMHB Case No. 04-3-0003 (July 24, 2004) at 18.

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The Board finds that Petitioners have not carried their burden to show inconsistency with the preamble to the GMA. Issue 3 is **dismissed**.

Issue 4: Are the adopted Comprehensive Plan amendment Ordinance No. 022/2013 and accompanying rezone Ordinance No. 024/2013 inconsistent with the growth management guidance of Snohomish County's Countywide Planning Policies (CCP), the Snohomish County Comprehensive Plan, Snohomish County Tomorrow, the 2012 Snohomish County Buildable Lands Report, and the stated regional goals and policies expressed in Puget Sound Regional Council's VISION 2040 in violation of RCW 36.7A.100, RCW 36.70A.110, RCW 36.70A.210, and WAC 365-195-915?

RCW 36.70A.110 applies by its terms to the designation of urban growth areas and is inapplicable where, as in the instant case, the land is already located within the UGA. WAC 365-195-915 pertains to the use of best available science in developing policies and development regulations *for* critical areas, as to distinct from development *within* critical areas.

The Board finds that RCW 36.7A.100 and WAC 365-195-915 are, by their terms, not applicable in the instant case. Issue 4 is **dismissed**.

Issue 8: Are the City of Monroe's Ordinance Nos. 022/2013 and 024/2013 regarding the East Monroe Rezone inconsistent with and noncompliant to RCW 36.70A.177?

RCW 36.70A.177 is a permissive statute, employing the words "may" and "should," describing innovative zoning techniques that that can be employed. It does not impose mandates or requirements on the Property at issue in this case.

The Board finds that RCW 36.70A.177 is inapplicable to the Property at issue in this case. Issue 8 is **dismissed**.

Issue 9: Did the City of Monroe Ordinances 022/2013 and 024/2013 fail to comply with RCW 36.70A.040(3) & RCW 36.70A.130(1)(d) because they are internally inconsistent with the City's Comprehensive Plan, FEMA floodplain management obligations and other governing documents?

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Olympia, WA 98504-0953
Phone: 360-664-9170
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Issue 10: Are the City of Monroe Ordinances 022/2013 and 024/2013 inconsistent with MMC 14.01.020 & 14.01.030 and in violation of RCW 36.70A.110 because they do not consider Best Available Science in accordance with RCW 36.70A.172?

Petitioners confuse the siting of commercial development with the designation of urban growth areas, which is the subject of RCW 36.70A.110, and then cite to the statement of purpose and general contents sections of the Municipal Code in support of their proposition that the challenged actions fail to use Best Available Science for designating or protecting critical areas as required by 36.70A.172. Petitioners do not provide any evidence that the Ordinances themselves violate the general policy frameworks of the cited code provisions.

The Board finds that Petitioners cannot carry their burden to show that cited statutes apply to the property in question, let alone conflict with the MMC policy framework statements. Issue 10 is **dismissed**.

Issue 11: Are the City of Monroe Ordinances 022/2013 and 024/2013 inconsistent with RCW 36.70A.110(3) because they designate urban growth in the form of General Commercial uses in an area that is not adequately served by public facilities and services, and the City has not acknowledged the lack of mitigation available to remedy these insufficiencies?

Petitioners assert the lack of water or sewer service to the Property makes its designation for commercial use non-compliant with RCW 36.70A.110(3). The City responds that water and sewer service will be extended to the property at the developer's expense as a condition of any more intensive development.

Petitioners confuse the siting of commercial development with the designation of urban growth areas, which is the subject of RCW 36.70A.110.

The Board finds Petitioners cannot show that the cited statute applies to the City's action. Legal Issue 11 is **dismissed**.

Issue 12. Are Ordinances 022/2013 and 024/2013 inconsistent and non-compliant to the *City of Monroe's Shoreline Master Program (MSMP)* and the *Shoreline Management Act (SMA)*, specifically *MSMP* Chapter 1 sections A, B, C, D.3, and E; Chapter 2 sections B.4, C, and D; Chapter 3 sections B, D, E, F, H, L; Chapter 4

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sections A, B, and D; Chapter 5 sections B, H, and I; Chapter 6 section F; Chapter 7 sections B, C, D.3, D.4, E.1, G, and H; Appendix B? If so, are Ordinances 022/2013 and 024/2013 non-compliant with RCW 36.70A.172, RCW 36.70A.130(1)(d), RCW 36.70A.100, RCW 36.70A.060 & RCW 90.58?

Petitioners cite to a host of Shoreline Master Program provisions prohibiting structural flood control works that result in increased commercial development within the undeveloped 100-year floodplain; prohibiting intensive development of shoreline areas identified as hazardous or sensitive; and the like. The City responds that these protections are inapplicable because (a) the proposed development pad is not within the 100-year floodplain and (b) development is not proposed within the shoreline jurisdiction.

The Board notes the City used the un-adopted 2007 FIRM maps, which placed the East Monroe property within the 100-year floodplain, as the basis for its environmental impact analysis. However, the City has not adopted the 2007 FIRM but rather uses the 1999 FIRM maps which place the Property in the 500-year floodplain for purposes of implementing its Shoreline Master Program. The shoreline boundaries on the Property are those areas 200 feet from the OHWM, not the 100-year floodplain.[77] Thus Shoreline Master Program protections are not applicable to the proposed development on the Property.

The only activity proposed to occur on the Property within designated shorelines is cut for flood management purposes.[78] Petitioners urge this violates SMP provision giving preference to nonstructural solutions over structural flood control devices, and discouraging stream channel modification and gravel removal for flood protection.[79] The Board notes the cut/excavation is not proposed within the shoreline area or in the stream or slough channel but adjacent to it, although the Board wonders whether it is possible to achieve the amount of "cut and fill" envisioned without encroaching on these areas. Further, such cut/excavation is not "structural flood control" which would include diking, dams and levees, but is "flood management," which the SMP specifically allows in the Urban Conservancy environment. [80]

The Board finds the Petitioners have failed to carry their burden of proof to

[77] Ex. 32: FEIS (September 26, 2013) at 39; SMP, p. 9 (Chapter 1, D.3).
[78] Respondent's Brief, at 57.
[79] SMP, Ch. 3, §§ F.2.4 and F.2.5.
[80] Ex. 32: FEIS (September 26, 2013) at 32; SMP Shoreline Use Matrix.

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demonstrate inconsistency with the Shoreline Master Program or non-compliance with the Shoreline Management Act. Legal Issue 12 is **dismissed.**

Conclusions regarding consistency:

Petitioners have failed to carry their burden of demonstrating GMA noncompliance in Legal Issues 3, 4, 8, 9, 10, 11, and 12. These issues are **dismissed.**

Section Three: SEPA Compliance (Issues 5 & 6)

Issue 5: Did the City of Monroe's SEPA review and FEIS prepared for the East Monroe Comprehensive Plan Amendment and Rezone fail to comply with RCW 43.21C.030(c)(i), (ii), (iii) and RCW 43.21C-.030(d)? Furthermore, did the City of Monroe fail to comply with SEPA where the FEIS prepared for the project:(1) did not consider reasonable alternatives, (2) did not utilize best available science, (3) lacks informed traffic projections and traffic impact mitigation, (4) lacks accurate flood history of the property and achievable floodplain habitat mitigation, (5) lacks informed noise level estimates and noise impact mitigation?

Issue 6: Did the Environmental Impact Statement relied upon by the City of Monroe for adoption of Comprehensive Plan amendment Ordinance No. 022/2013 and accompanying rezone Ordinance No.024/2013 violate SEPA rules, including but not limited to, WAC 197-11-792 (c)(ii) and (iii), and WAC 197-11-060 (4)(c),(d)and(e) by not adequately considering the long range and cumulative impact of allowing commercial expansion into a hitherto exclusively agricultural area?

Applicable Law

SEPA RCW 43.21C.030 requires:

> (c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:
> (i) the environmental impact of the proposed action;
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
> (iii) alternatives to the proposed action;
> (d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
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authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes. . . .

WAC 197-11-060 Content of environmental review.

(4) Impacts.

(a) SEPA's procedural provisions require the consideration of "environmental" impacts (see definition of "environment" in WAC 197-11-740 and of "impacts" in WAC 197-11-752), with attention to impacts that are likely, not merely speculative. (See definition of "probable" in WAC 197-11-782 and 197-11-080 on incomplete or unavailable information.)

(b) In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction, including local or state boundaries (see WAC 197-11-330(3) also).

(c) Agencies shall carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer.

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

WAC 197-11-400 Purpose of EIS

(2) An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures that would avoid or minimize adverse impacts or enhance environmental quality.

WAC 197-11-440 EIS Contents

(5) **Alternatives including the proposed action.**

. . .

(c) This section of the EIS shall:

(i) Describe the objective(s), proponent(s), and principal features of reasonable alternatives. Include the proposed action, including mitigation measures that are part of the proposal. . . .

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(v) Devote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action.

Petitioners raise a number of objections to the FEIS: lack of appropriate alternatives and inadequate assessment of impacts including noise, traffic, environmental and habitat values, and flood and landslide hazards.

The City responds that the EIS was prepared by a qualified consultant and approved by the hearing examiner after an appropriate public process. The City argues the impacts of the various alternatives and possible mitigations set forth provided the City Council with adequate information for informed decision-making under the rule of reason. The State Environmental Policy Act (SEPA) requires all government agencies to consider the environmental effects of a proposed action, together with alternatives to the proposed action.[81] The Supreme Court has referred to SEPA as an environmental full disclosure law. SEPA requires agencies to identify, analyze, disclose, and consider mitigation of impacts on both the natural and built environments resulting from a proposed action. The disclosure of environmental impact information to the county decision-makers and to the public promotes the policy of fully informed decision-making by government bodies and better opportunities for meaningful public participation.[82]

Thus, when a county or city amends its CP or changes zoning, a detailed and comprehensive SEPA environmental review is required.[83] SEPA is to function "as an environmental full disclosure law,"[84] and the City must demonstrate environmental impacts were considered in a manner sufficient to show "compliance with the procedural requirements of SEPA."[85] Although the City decision is afforded substantial weight,[86] environmental documents prepared under SEPA require the consideration of

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[81] RCW 43.21C.030(2).
[82] RCW 43.21C.030; RCW 36.70A.035; *Norway Hill Preservation & Protection Assn. v. King County,* 87 Wn.2d 267 (1976).
[83] WAC 197-11-704(b)(ii).
[84] *Moss v. Bellingham*, 109 Wn. App. 6, 16, 31 P.3d 703, (2001).
[85] *Sisley v. San Juan County*, 89 Wn.2d 78, 64, 569 P.2d 712 (1977).
[86] RCW 43.21C.090.

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"environmental" impacts with attention to impacts that are likely, not merely speculative,[87] and "shall carefully consider the range of probable impacts, including short-term and long-term effects."[88]

In *King County v. Washington State Boundary Review Board for King County,* the Supreme Court recognized the purpose of SEPA is "to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences,"[89] and the SEPA is to provide agencies environmental information *prior to making decisions, not after they are made.*[90]

Chapter 197-11 WAC divides actions into two categories: project and nonproject. Amendment of a comprehensive plan and adoption of zoning for the area involved in such an amendment is a nonproject action. WAC 197-11-774. The EIS requirements for a nonproject action require that the EIS "shall discuss impacts and alternatives in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal." WAC 197-11-442(2) "Alternatives should be emphasized. . . . Alternatives including the proposed action should be analyzed at a roughly comparable level of detail, sufficient to evaluate their comparative merits. . . ." *Id.*

An EIS for a <u>project</u> action may be limited to "actions which could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." WAC 197-11-440(5). By contrast, for a <u>nonproject</u> action the discussion of alternatives may be limited to "a general discussion of the impacts of alternative proposals for . . . land use or shoreline designations. . . ." WAC 197-11-442(4). In either case, "[t]he range of alternatives considered in an EIS must be sufficient to permit a reasoned choice." *SWAP v. Okanogan County*, 66 Wn. App. 439, 444, 832 P.2d 503 (1992). For the FEIS to be adequate, the City must consider alternative designations for the Property and/or alternative locations within the City for additional GC development. *Citizens*

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[87] WAC 197-11-060(4)(a).
[88] WAC 197-11-060(4)(c).
[89] *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). *See also, Lasilla v. Wenatchee,* 89 Wn.2d 804 (1978).
[90] *Id.*

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Alliance v City of Auburn, 126 Wn.2d 356, 365, 894 P.2d 1300 (1995).

The FEIS for the Property failed to consider meaningful alternatives to redesignation of the Property from LOS to GC because it failed to properly formulate the "no-action" alternative and assessed the impacts of the chosen alternatives in relation to each other rather than in relation to existing conditions.

The three alternatives chosen all promote intense development.[91] Alternative 1 contemplates a church, fitness center, childcare facility, 550-car parking lot and other uses. Alternative 2 plans for a high-volume discount store, with associated strip-mall retail establishments and 660-car parking lot. Alternative 3 contemplates a rezone to Mixed Use Commercial allowing potential residential, professional office, medical clinic, restaurant, and other retail and commercial uses, with 680-car parking lot.

The assumption that commercial development is the goal, and therefore alternatives for more intensive development should shape the analysis, is inappropriate for a nonproject policy action. The LOS designation allows commercial or more intensive use only as a conditional use, while "[a]t a minimum level, one dwelling unit per five acres is currently allowed."[92] By formulating a "no-action" alternative under conditional use provisions rather than permitted uses, the FEIS avoided a true analysis of the environmental impacts of the GC designation.

The Department of Ecology stated that the Draft EIS did not accurately portray environmental impacts because the City failed to use the existing, undeveloped site condition as the baseline for environmental review:

> Because the existing undeveloped site condition is not used as the baseline for alternatives comparison, it gives the impression that the DEIS is not a balanced, objective analysis of the alternatives or potential impacts. To avoid the possible impression of being pre-decisional and to accurately portray potential impacts, the existing undeveloped condition needs to be used as the baseline for alternative comparisons in the final environmental impact statement (FEIS). There is no discernible difference in the developed footprint in the conceptual drawings for the three proposed alternatives, only in the intensity of development within that footprint. All of the alternatives are

[91] Ex. 32: FEIS (September 26, 2013) at 17-18.
[92] Ex. 32: FEIS (September 26, 2013) at 9.

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a significant change from the existing site conditions and it is unclear how the proposed no action alternative accurately reflects existing conditions and use of the property." [93]

The City did not follow Ecology's recommendation to more accurately portray environmental impacts in the FEIS by adding a true no-action alternative as the baseline using existing, undeveloped site conditions.

Thus, for example, all three of the FEIS alternatives include activity within the shoreline environment on the Property to create developable area by using the area within the Urban Conservancy designation for provision of compensatory flood storage, i.e., excavating and removing soils along the slough.[94] The FEIS simply fails to provide alternatives that inform City Council members of the range of environmental impacts of their action.

While the no action alternative neglects an accurate picture of existing conditions, the FEIS alternatives also fail to assess the maximum development under GC designation. Alternative 2 presents development occurring on 11 acres although the GC designation applies to 43 acres. The Ordinance rezoned 43 acres of land but the FEIS only analyzed environmental impacts of development on 11 acres of land. **SEPA requires adequate analysis of reasonably foreseeable direct, indirect, and cumulative impacts.**[95]

The Ordinance did not condition the rezone to limit commercial development to only a portion of the property, and the FEIS must properly assess the maximum development possible under the GC designation. "Commercial developments that would logically locate along an arterial highway are usually land extensive and would want to maximize use of the available non-NGPA-restricted portions of the site."[96]

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[93] Ex. 22, DOE comment letter from Paul Anderson to Melissa Sartorius, Monroe SEPA responsible official (September 13, 2013) at 1; See also Ex. 54: Hearing Examiner's Findings of Fact, Conclusions of Law, Decision and Order, Case 13-APHE-0001, SEPA Appeal of the FEIS for the East Monroe Comprehensive Plan Amendment and Rezone (December 16, 2013) at 3 (cited as Appellants' Exhibit L3: Department of Ecology Letter dated September 13, 2013).

[94] Ex. 55: HEARING EXAMINER DECISION, FOF 39, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 14-15.

[95] WAC 197-11-792.

[96] HEARING EXAMINER DECISION – REVISED AFTER RECONSIDERATION, RE: AP2012-01, *Anderson v. Monroe* (August 8, 2012) at 17.

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1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Without a properly-framed set of alternatives, the City's nonproject environmental review simply fails to provide decision makers with the information to make an informed choice about the land use designation for the East Monroe Property. While the Board accords substantial weight to the City's determination of the adequacy of environmental review, the Board here is left with a definite and firm conviction that a mistake has been made. The FEIS is clearly inadequate because it failed to consider a reasonable range of alternatives and failed to analyze environmental impacts on the entire 43-acre rezone. Ordinance No. 022/2013 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The FEIS must be remanded to the City for action to comply with RCW 43.21C.030(c). The Board briefly addresses the specific flaws alleged by Petitioners.

Traffic. Currently "a pullout driveway provides access to the Property from SR-2."[97] The FEIS Hearing Examiner decision concludes that "the traffic impacts for Alternatives 1, 2, and 3 do not vary significantly."[98] While the traffic counts and timing generated by the different alternatives certainly would vary, virtually any development of the Property creates the necessity for an access road and SR-2 intersection improvements. Petitioners have not met their burden of proving inadequacy of the FEIS on this issue.

Noise. Petitioners raise a dispute of fact about the noise likely to be generated from rooftop air conditioners for the big-box store contemplated in Alternative 2. The Board finds this matter to be a technical dispute which the FEIS analyzed, reaching a different but reasonable conclusion based on expert analysis in the record. Petitioners have not met their burden of proving inadequacy of the FEIS on this issue.

Ecological Value. The FEIS describes the Property as having low to moderate ecological value which will be enhanced by development under Alternative 2.[99] "[L]ow to moderate quality habitat exists on the Property, with the stream/slough, wetlands, adjacent

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[97] Ex. 55: HEARING EXAMINER DECISION, FOF 10, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 6.

[98] Ex. 55: HEARING EXAMINER DECISION, FOF 49, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 17.

[99] Respondent's Brief, at 23, 31.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

upland forested area, and steep slopes, describing the area as having moderate potential to provide quality wildlife habitat."[100] The FEIS discusses implications of the presence of federally listed threatened and endangered species on the Property, including requirements for specific habitat protections.[101] The FEIS then concludes that since Property build-out under any of the three alternatives will only be on the limited buildable platform, there will be little habitat loss.[102] Given the assumption of cut and fill under any scenario, this conclusion lacks credibility.

Petitioners point out the presence of a Type 1 stream and slough supporting listed and endangered species, Type II and III wetlands, and critical shoreline areas including both Urban Conservancy and Native Growth Protected Areas (NGPA). The oxbow slough provides high-value off-channel habitat with a 7-acre high-functioning (Category II) wetland all within the 100-year floodplain of the Skykomish River, a high functioning salmon-bearing shoreline of the state. The Board concurs with Petitioners that the FEIS has failed to recognize and assess the impacts to ecological functions of waterways and wetlands by not providing a "no action" alternative based in the existing conditions.

Flood and Landslide Hazard. The Board notes the dispute in the record concerning the appropriate FEMA map to be used. The Board agrees with the 2012 hearing examiner that "in the context of an EIS, the reality of flooding is more important than which regulatory requirements may apply."[103] In the present case, the Property is undeniably subject to frequent flood inundation. Any intensification of development will require offsetting action to increase flood storage capacity, i.e., cutting into the slough.

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[100] Ex. 55: HEARING EXAMINER DECISION, FOF 30, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 12.
[101] Ex. 55: FOF 31, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 12.
[102] Ex. 55: FOF 13, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 12.
[103] HEARING EXAMINER DECISION – REVISED AFTER RECONSIDERATION, RE: AP2012-01, *Anderson v. Monroe* (August 8, 2012) at 9.

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Thus, all the FEIS alternatives include provisions for onsite compensatory flood storage, created by excavation of soils immediately adjacent to the stream,[104] which lies at the toe of the steep slopes to the north. "[T]he USDA classifies the northern portion of the site and adjoining properties to the north (orange highlight) as severe [erosion] hazard area."[105]

> The biggest impact to topography and soils is the amount of cut and fill required to meet regulatory requirements associated with grading in the flood plain, including compensatory flood storage. For each of the Alternatives, considerable cut and fill is required to avoid flooding impacts by raising the site above the 100-year floodplain elevation of approximately 67 feet, as designated in the preliminary FEMA Flood Insurance Rate Maps (FIRMs) dated 2007.
> ****
> For the speculative development scenarios put forth herein, compensatory flood storage is provided within the floodplain, shoreline jurisdiction, wetland and stream buffer, and Native Growth Protection Area (NGPA) ... as a means of maximizing developable area of the site. If and when the area develops, the excavation as proposed would likely occur south of the slough, in critical area buffers, and outside of both stream and wetland boundaries. The excavation, fill and grading of the site would provide for flood storage and would help ensure that flood water levels will not exceed the flood water elevations on the north bank of the slough.[106]

Undeniably, the hydrology of the Property will be altered by the fill and impervious surface associated with development. The Critical Areas Study and Habitat Conservation Report for the East Monroe Rezone states: "Increased impervious surfaces on-site may increase the volume of water within the slough and associated wetland."[107]

> The discussion in the "Surface Water" section notes that each of the three alternatives has potential to impact the on-site stream and, essentially, the greater the size of any development footprint on the Property, the greater the potential resulting impact.... Current LOS zoning permits maximum lot

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[104] Ex. 55: FOF 25, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 10-11.
[105] Ex. 32: FEIS at 26.
[106] Ex. 32: FEIS at 29.
[107] Ex. 32: FEIS: Appendix D: Wetland Resources, Inc., *Critical Areas Study and Habitat Conservation Plan* (July 18, 2013) at 20.

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Fax: 360-586-2253

coverage of 30%, whereas GC zoning permits 100% lot coverage and Alternative 3 is exempt from lot coverage requirements.[108]

This is the context within which the landslide hazard impacts of the GC designation must be assessed. How are the water flows likely to change and what might be the action at the toe of the steep slopes on the far side of the slough from the development? The FEIS notes the signs of soil instability on these slopes but simply concludes that because no construction or other work is planned on the slopes, there is no impact: "any work within the NGPA must be approved by the City and adhere to the City's critical area guidelines, and [] flood hazard management work is permitted within the 200-foot boundary of the ordinary high water mark of the stream/slough."[109] Similarly, the SEPA Responsible Official for the City, Melissa Sartorius, AICP, noted that the developable area is quite a distance from the steep slopes; she apparently failed to grasp how the changed hydrology of the stream/ slough resulting from development could increase the vulnerability at the toe of the slope.[110]

The technical assessment of landslide risk in the FEIS acknowledges "[t]he existing drainage channel at the toe of the slope may also be influencing slope stability by eroding the toe of the slope," but relies on "slow moving flow in the channel" to project no "potential for further movement of the channel toward the toe of the slope . . . provided the flow velocities in the channel do not change." [111] Given the nature of the development proposed in the various alternatives, the added impervious surfaces, the extreme erosion hazard characteristics of the slopes, and the reconfiguration of the floor of the channel, the Board does not find the technical assessment persuasive. Particularly disconcerting is the fact that many Monroe citizens reside at the top of these erosion- and landslide-prone slopes.

The Board concurs with Petitioners that the FEIS fails to provide decision makers with information on which to base their action concerning flood and landslide hazards.

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[108] Ex. 55: HEARING EXAMINER DECISION, FOF 26, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 11.
[109] Ex. 55: HEARING EXAMINER DECISION, FOF 22, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 10.
[110] Ex. 55: HEARING EXAMINER DECISION, FOF 74, *Anderson and Rogers v. City of Monroe*, Case No. 13-APHE-0001 (December 16, 2013) at 22.
[111] Ex. 32: FEIS (September 26, 2013) Appendix C, Letter from GeoEngineers to Heritage Baptist Fellowship (June 16, 2013).

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Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Agriculture. Petitioners contend the FEIS fails to consider the cumulative impacts on agriculture in the river valley east of Monroe if the Property is allowed to develop at urban densities. The Board agrees with the City that the Property is a part of the urban growth area, incorporated into the City of Monroe. The preservation of agricultural resource lands east of Monroe is primarily the responsibility of Snohomish County. The Petitioners have failed to carry their burden of proof on this issue, and Legal Issue 6 is dismissed.

Conclusion Concerning Legal Issues 5 and 6

The Board finds that the FEIS fails to provide decision makers with information on which to base their action by failing to consider appropriate alternatives. In particular, without an alternative based on existing conditions, the FEIS failed to assess impacts on environmental values and flood/landslide hazards.

The Board finds Petitioners have carried their burden of demonstrating the City's environmental review failed to comply with RCW 43.21C.030(c). The Ordinances and the FEIS are remanded to the City to take action to comply with SEPA as set forth in this order.

Petitioners failed to carry their burden with respect to Legal Issue 6. Legal Issue 6 is dismissed.

Section Four: Invalidity (Issue 13)

Issue 13: Would the continued validity of Ordinance 022/2013 and 024/2013 substantially interfere with the fulfillment of the goals of GMA and SMA? If so, should the Board issue a determination of invalidity under RCW 36.70A.302?

Applicable law

RCW 36.70A.302, the GMA's invalidity provision, provides in part:

1. A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
   (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
   (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter, and

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
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(c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

A determination of invalidity is based on a finding that continued validity of a City's action "would substantially interfere with the fulfillment" of a GMA Goal. Petitioners here cite to GMA Goals 1 (Urban growth), 2 (Reduce sprawl), 8 (Natural resource industries), 10 (Environment) and 11 (Citizen participation and coordination). The Board has previously concluded that Petitioners have not carried their burden in demonstrating that the challenged Ordinance will frustrate GMA goals 1, 2, 3, 5, 7, 8, 11, and 12. *See* Legal Issue 1.

The Board therefore looks solely to GMA Planning Goal 10 in RCW 36.70A.020 which requires environmental protection:

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

SEPA is an environmental full disclosure law that requires cities to identify and analyze the environmental effects of proposed actions in order to achieve good land use decision making by involving and informing both the public and decision-makers about the environmental consequences of the proposed actions. The Board has determined that the City of Monroe failed to comply with SEPA and has remanded this matter to the City to achieve SEPA compliance under RCW 36.70A.300.

Non-compliance with SEPA does not automatically equate to frustration of the GMA goal for protection of the environment.[112] In this decision, however, the rezoned property is largely within critical areas and/or shorelines, and development of this property without an environmental review that properly informs the decision makers of the impact and

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[112] Compare, *Kittitas County Conservation v. Kittitas County*, Case No. 11-1-0001, Corrected Final Decision and Order (Partial) (June 13, 2011), at 11-12, *aff'd Kittitas County v. Kittitas County Conservation Coalition,* 176 Wn.App. 38, 308 P.3d 745 (2013), finding GMA and SEPA planning procedures would be rendered ineffectual and moot if project vesting were to occur despite non-compliant environmental review, with *Davidson Serles & Associates v. City of Kirkland*, Case No. 09-3-0007c, Final Decision and Order (October 4, 2009), at 20, *aff'd Davidson Serles & Assoc. v. Central Puget Sound Growth Management Hearings Board*,159 Wn.App 148, 244 P.3d 1003 (2010), "While the [SEPA] deficiency is serious, the Board is not persuaded that the GMA goal will be thwarted absent a ruling of invalidity."

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Fax: 360-586-2253

mitigations of the intensity of development allowed by the proposed zoning would render moot and thwart protection of the environment. Pursuant to RCW 36.70A.302(2) **the Board enters the following findings**:

1. The Property contains critical areas regulated under RCW 36.70A.172, and a portion of the Property is within the Shoreline Management Act jurisdiction.
2. The oxbow slough of the Skykomish River is habitat for endangered or threatened species of fish.
3. Extensive wetlands in the property include 7 acres of Category II wetlands, which are relatively high-functioning.
4. The stream entering the property is a Type I stream, the highest stream classification.
5. Steep slopes greater than 40% and approximately 100-120 feet high border the property on the outer bank of the oxbow slough. These slopes have a history of landslides in the recent past.[113]
6. The property is flood prone, with a history of recent inundation.
7. The Ordinances rezone the property from a very low development intensity (LOS) to a very high intensity (GC) without an environmental review that properly informs decision-makers of the impacts of the action. The Board has determined the SEPA review of the Ordinances is inadequate.
8. Development under the GC zoning will have impacts on a stream, wetlands, and salmon habitat that have not been adequately analyzed and mitigated.
9. Development under the GC zoning will increase risks of landslide and flood hazard – risks that have not been adequately analyzed and mitigated.
10. The City's adoption of GC zoning based on inadequate environmental review thwarts the GMA goal to protect the environment.

[113] HEARING EXAMINER DECISION – REVISED AFTER RECONSIDERATION, RE: AP2012-01, *Anderson v. Monroe* (August 8, 2012), FOF 11, at 8: The slope "is also potentially unstable because of rapid stream incision or stream bank erosion associated with the slough located near the base of the slope."

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The Board concludes the continued validity of Ordinance No. 022/2013, Section 3, and related attachments including Exhibit G, and Ordinance No. 024/2013 would substantially interfere with the fulfillment of GMA Planning Goal 10. The Board remands the Ordinances to the City, establishes a compliance schedule, and enters a determination of invalidity.

VII. ORDER

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

1. Petitioners have failed to meet their burden of proof as to Legal Issues 2, 3, 4, 6, 7, 8, 9, 10, 11, and 12. These issues are dismissed.
2. The City failed to comply with RCW 43.21C.030(c), and the Final Environmental Impact Statement for Ordinance Nos. 022-2013 and 024/2013 is inadequate because it failed to consider a reasonable range of alternatives and failed to adequately analyze environmental impacts on the entire 43-acre rezone.
3. The City's adoption of the Ordinances was not guided by and substantially interferes with the fulfillment of GMA Planning Goal 10.
4. A determination of invalidity is entered for Ordinance No. 022/2013, Section 3, and related attachments including Exhibit G, and Ordinance No. 024/2013.

The Board sets the following schedule for the City's compliance.[114]

[114] Pursuant to WAC 242-03-910, the County may file a motion requesting an expedited compliance hearing if it has taken action to comply with all or part of the Board's order prior to expiration of the time set for compliance.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
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Phone: 360-664-9170
Fax: 360-586-2253

Item	Date Due
Compliance Due	February 23, 2015
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	March 9, 2015
Objections to Finding of Compliance	March 23, 2015
Response to Objections	April 2, 2015
Compliance Hearing (Telephonic) Call 1-800-704-9804 and use pin 4472777#	**April 9, 2015** **10:00 a.m.**

SO ORDERED this 19th day of September, 2014.

Cheryl Pflug, Board Member

Margaret Pageler, Board Member

Raymond Paolella, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[115]

[115] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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1111 Israel Road SW, Suite 301
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Fax: 360-586-2253

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION

Case No. 14-3-0006c
Blair-Anderson, Douglas Hamar, and Chad McCammon v. City of Monroe

DECLARATION OF SERVICE

I, LYNN TRUONG, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Office Assistant to the Growth Management Hearings Board. On the date indicated below a copy of the ORDER NUNC PRO TUNC CORRECTING SCRIVENER'S ERRORS IN FINAL DECISION AND ORDER in the above-entitled case was sent to the following through the United States postal mail service:

Misty Blair
1007 S Adam St
Tacoma WA 98405

J. Zachary Lell
Ogden Murphey Wallace PLLC
901 Fifth Avenue Suite 3500
Seattle WA 98164-2008

Douglas Hamar
PO Box 1104
Monroe WA 98272

Chad McCammon
21624 Calhoun Rd
Monroe WA 98272

DATED this 19th day of September, 2014.

Lynn Truong, Office Assistant

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253