

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 Vince Panesko, Eugene Butler and Futurewise,

Case No. 08-2-0007c

4 Petitioners,

COMPLIANCE ORDER

5
6 v.

7 Lewis County,

8
9 Respondent.

10 And

11
12 The City of Napavine, Virgil Fox, City of Toledo
13 and Cowlitz Indian Tribal Housing ,

14 Intervenor.

15
16
17 **I. BACKGROUND**

18 In the Board's August 15, 2008 Final Decision and Order (FDO), the Board found:

- 19
20 1. Lewis County's failure to include the population allocation for the Birchfield Fully
21 Contained Community (FCC) within the land use element of the plan was a violation
22 of RCW 36.70A.070(1);
- 23 2. Information contained in Table 4.1 of the Comprehensive Plan's Land Use Element
24 did not accurately reflect modifications to urban and rural lands acreage facilitated by
25 the challenged actions, and therefore did not comply with RCW 36.70A.070;
- 26 3. The Napavine UGA inappropriately applied a market factor to existing units of
27 housing rather than those needed to accommodate projected growth thereby
28 overstating the amount of land needed to accommodate year 2025 needs in violation
29 of RCW 36.70A.110(2);
- 30 4. The change in designation of rural lands to include these lands in the expanded
31 Toledo UGA was not accompanied by a showing that the new designation and
32 mapping of those lands did not substantially interfere with Goal 8 of the GMA. Thus,

1 inclusion of those lands by Lewis County failed to comply with the GMA
2 requirements to designate and conserve agricultural lands of long-term commercial
3 significance in violation of RCW 36.70A.060(1) and 36.70A.170; and
4 5. Until invalidity has been removed from the affected land, it was premature for Lewis
5 County to consider the Curtis Rail Yard for inclusion within a LAMIRD.
6

7 The County was given until February 19, 2009 to address these areas of non-compliance.
8 On April 24, 2009, the Board issued an Order of Continuing Non-Compliance noting that,
9 although the County was moving diligently towards compliance, it had not taken any of the
10 necessary actions to achieve compliance.
11

12 This matter comes now before the Board following submittal of Lewis County's (County)
13 Compliance Report which describes the actions taken by the County in response to the
14 Board's August 15, 2008 FDO.
15

16 An objection to a finding of compliance was filed by Petitioner Vince Panesko.
17

18 A compliance hearing was held at the Board's office in Olympia, Washington on July 7,
19 2009. Board members Nina Carter and James McNamara¹ attended in person; Board
20 member William Roehl attended by phone. Petitioner Vince Panesko appeared pro se.
21 Futurewise was represented by Robert Beattey. Lewis County was represented by Glenn
22 Carter. Intervenor City of Napavine was represented by Andy Lane. Intervenor CITH was
23 represented by Ed Goodman; and Intervenor Virgil Fox, who was present, was represented
24 by Philip Kasin.
25
26

27 As a preliminary matter, the City of Napavine moved to strike Panesko's Attachment No.1,
28 an aerial photograph of the Napavine area. Napavine notes that this exhibit is not in the
29 record and Panesko failed to move to supplement the record. Because Panesko failed to
30 move to supplement the record with this proposed exhibit, Napavine's motion to strike is
31
32

¹ Board member McNamara is the Presiding Officer in this matter.
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Western Washington Growth Management Hearings Board
319 7th Avenue SE, Suite 103
PO Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

1 granted. However, as stated at the compliance hearing, Attachment No.1 will be allowed for
2 illustrative purposes to show the relationship of Napavine to the nearby road system (I-5 and
3 Highway 508) and to provide locational context.

4 5 **II. BURDEN OF PROOF**

6 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
7 of time to adopt legislation to achieve compliance. RCW 36.70A.300(3)(b). After the period
8 for compliance has expired, the board is required to hold a hearing to determine whether the
9 local jurisdiction has achieved compliance. RCW 36.70A.330(1) and (2). For purposes of
10 board review of the comprehensive plans and development regulations adopted by local
11 governments in response to a non-compliance finding, the presumption of validity applies
12 and the burden is on the challenger to establish that the new adoption is clearly erroneous.
13 RCW 36.70A.320(1), (2) and (3).

14
15
16 In order to find Lewis County's action clearly erroneous, the Board must be "left with the firm
17 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
18 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

19
20 Within the framework of state goals and requirements, the boards must grant deference to
21 local governments in how they plan for growth:

22
23 In recognition of the broad range of discretion that may be exercised by counties
24 and cities in how they plan for growth, consistent with the requirements and goals
25 of this chapter, the legislature intends for the boards to grant deference to the
26 counties and cities in how they plan for growth, consistent with the requirements
27 and goals of this chapter. Local comprehensive plans and development
28 regulations require counties and cities to balance priorities and options for action
29 in full consideration of local circumstances. The legislature finds that while this
30 chapter requires local planning to take place within a framework of state goals
31 and requirements, the ultimate burden and responsibility for planning,
32 harmonizing the planning goals of this chapter, and implementing a county's or
city's future rests with that community. RCW 36.70A.3201 (in part).

In sum, during compliance proceedings the burden remains on the Petitioner to overcome
the presumption of validity and demonstrate that any action taken by the County is clearly

1 erroneous in light of the goals and requirements of Ch. 36.70A RCW (the Growth
2 Management Act). RCW 36.70A.320(2). Where not clearly erroneous and thus within the
3 framework of state goals and requirements, the planning choices of the local government
4 must be granted deference.
5

6 III. ISSUE PRESENTED

7 Has Lewis County cured the areas of non-compliance with the GMA identified in the Board's
8 August 15, 2008 FDO?
9

10 IV. DISCUSSION

11 The Board's FDO directed the County to bring its Comprehensive Plan into compliance with
12 the GMA with regard to the Birchfield FCC, Table 4.1, the Napavine UGA, the Toledo UGA
13 and the Curtis Rail Yard. The Board will discuss each of those matters, the County's
14 compliance efforts, and Petitioner's objections, in turn.
15

16 A. Birchfield FCC

17 The Board held that the County's failure to include the population allocation for the Birchfield
18 FCC within the Land Use Element of the County's Comprehensive Plan violated the GMA.²
19 Specifically, the Board concluded:³
20

21 Because these numbers reflect the estimates for future population growth the
22 failure to include the population allocation amendment within the land use
23 element of the plan is a violation of RCW 36.70A.070(1). This is an error which
24 the County can easily remedy.
25

26 In response to the Board's conclusion, the County amended its Comprehensive Plan to
27 include text expressly stating that the Birchfield FCC had been allocated 6300 inhabitants.⁴
28

29 Panesko objects to a finding of compliance with regard to the Birchfield FCC on the grounds
30 there is language in the County Comprehensive Plan calling for termination of the Birchfield
31

32

² FDO, at 8-9.

³ Id. at 9.

⁴ IR 180 – Resolution 09-117; IR 175 – Amended Text of Comprehensive Plan.

1 FCC if it has not been approved within five years of the adoption of the Comprehensive
2 Plan; the Comprehensive Plan was adopted in 1999.⁵ Panesko urges that the section of
3 the Land Use Element describing the Birchfield FCC should have been deleted from the
4 Plan, not simply amended, and the County's action results in an inconsistency.⁶
5

6 The Board is not persuaded by Panesko's argument for two reasons. First, the language
7 regarding the termination of the Birchfield FCC is not newly adopted language. Any claims
8 of internal inconsistency based on the language at issue, as it relates to the population
9 allocation to Birchfield, could have been raised in the Petition for Review, but was not. The
10 sole issue raised by Panesko in his PFR regarding the Birchfield FCC alleged that Lewis
11 County's failure to document the reallocation of urban population to the Birchfield FCC
12 violated the GMA. Nothing related to inconsistency based on a five year termination of the
13 FCC was asserted by Panesko.
14

15
16 Nor was this issue addressed in the briefing for the Hearing on the Merits or in oral
17 argument at the HOM. Petitioner cannot raise this alleged internal inconsistency for the first
18 time at this stage of the proceedings.
19

20 Second, it is far from clear that the Birchfield FCC has expired under the terms of the
21 County Comprehensive Plan. As Intervenor Fox points out, LCC 17.40.040 provides that
22 master planned communities, such as the Birchfield FCC, permanently vest upon the filing
23 of a complete master plan.⁷ Fox points out that a master plan application for the Birchfield
24 FCC was submitted on April 20, 2000 and deemed complete on May 19, 2000.
25

26
27 As noted supra, the Board's FDO required the County to include the population allocation
28 for the Birchfield FCC within its Comprehensive Plan. With the adoption of Resolution 09-
29 1117 the County has done what the Board requested and has achieved compliance with the
30
31

32

⁵ Panesko Objection, at 2.

⁶ Id.

⁷ Intervenor Fox's Response, at 6-7.

1 GMA's requirement to have a forecast of population estimates within the Land Use Element
2 of its Comprehensive Plan.

3
4 **Conclusion:** Lewis County has cured the area of non-compliance identified in Conclusion
5 of Law D of the August 18, 2008 FDO by amending its Comprehensive Plan to include text
6 expressly stating that the Birchfield UGA had been allocated 6300 inhabitants.
7

8 B. Table 4.1

9 In response to a Board finding that information contained in Table 4.1 of the Land Use
10 Element did not accurately reflect modifications to urban and rural lands acreage facilitated
11 by the challenged actions, and therefore did not comply with RCW 36.70A.070, the County
12 elected to delete this table. The County noted that there have been numerous changes in
13 UGA boundaries over the past five years and it lacks the resources to devote to keeping
14 Table 4.1 current.⁸
15

16
17 Petitioner Panekso objects on the basis that the County ignored the Board's order to amend
18 Table 4.1.⁹ However, in the August 2008 FDO the Board stated that Table 4.1 was *not*
19 *required* to be included in the County's Comprehensive Plan, but once included its
20 information should be accurate at the time of adoption.¹⁰ Therefore, the deletion of this
21 table does not result in a non-compliant action.
22

23 Panesko further argues the table served as a "valuable summary" and such a summary of
24 land uses is required by RCW 36.70A.070(1) which requires a "proposed general
25 distribution" of land to be presented in the land use element.¹¹ As the Board noted in the
26 FDO, Table 4.1 is not required by the GMA and Panesko's argument that RCW
27 36.70A.070(1) requires it essentially amounts to a belated reconsideration of the Board's
28 August 2008 holding. As Panesko himself notes, this table is a *summary* of land uses
29
30

31
32 ⁸ County Response, at 4.

⁹ Panesko's Objection, at 3.

¹⁰ FDO, at 10.

¹¹ Panesko Objection, at 3.

1 within Lewis County, with the source information for Table 4.1 maintained by the County
2 with text and maps contained in its Comprehensive Plan. The removal of Table 4.1 does
3 not delete from the County's Comprehensive Plan all of the information it is based on. With
4 the deletion of Table 4.1, the County has cured the area of non-compliance as noted in the
5 August 2008 FDO.
6

7 **Conclusion:** RCW 36.70A.070(1) requires a land use element designating the proposed
8 general distribution and general location and extent of the uses of land. This information
9 need not be presented in tabular form, however, the information does need to be, and is,
10 available in the form of maps and text in the County's Comprehensive Plan. The County
11 was free to delete Table 4.1 from its Comprehensive Plan and in so doing cured the area of
12 non-compliance with the GMA identified in the Board's August 2008 FDO.
13

14 C. Napavine UGA

15 In the FDO, the Board found that the Napavine UGA inappropriately applied a market factor
16 to existing units of housing rather than to only those needed to accommodate projected
17 growth. The result was an overstatement of the amount of land needed to accommodate
18 year 2025 needs in violation of RCW 36.70A.110(2).¹² In addition, the Board found the 50%
19 market factor utilized was not sufficiently justified.¹³
20
21

22 In response, the County worked with the Washington Department of Community, Trade and
23 Economic Development (CTED) to revise its needs analysis methodology.¹⁴ This
24 methodology applies the market factor to new housing units, rather than to both existing and
25 new housing units. In addition, the market factor was reduced from 50% to 25%.¹⁵ The
26 County reports that the application of the revised needs analysis resulted in a reduction in
27 the size of the UGA from 612 to 404 acres.¹⁶
28
29

30
31 _____
32 ¹² FDO, at 20.

¹³ Id.

¹⁴ County Response, at 5.

¹⁵ Id., at 6.

¹⁶ Id.

1 In his objections to a finding of compliance on this matter, Panesko argues that Napavine
2 continues to overstate the land needed in the UGA.¹⁷ Panesko asserts that it is an error for
3 Lewis County to permit the expansion of the Napavine UGA when its existing UGA has not
4 been fully developed.¹⁸ Panesko specifically requested that certain “locational” parcels be
5 removed from the UGA.
6

7 In response to Panesko’s objections, the City of Napavine argues that because Panesko
8 failed to participate orally or in writing in the compliance process before the County, his
9 standing is now limited to those issues briefed by him during the original hearing process.¹⁹
10 Napavine points out that Panesko did not brief or argue the UGA locational requirements of
11 RCW 36.70A.110(1) in prior proceedings. The Board agrees with Napavine’s position and,
12 to the extent Panesko’s arguments allege that the Napavine UGA is not consistent with the
13 locational requirements of RCW 36.70A.110(1), he lacks standing.
14

15
16 As to the argument that the Napavine UGA is oversized, the Board concludes that Panesko
17 has failed to demonstrate that the needs analysis methodology used to size the present
18 UGA is flawed. Unsupported statements that “there has been no need shown” to expand
19 the UGA,²⁰ “there is no compelling need for this land”²¹, and “the need for this land is
20 questioned”,²² fail to carry Petitioner’s burden of proof that the needs analysis supporting
21 the UGA is clearly erroneous. Further, Panesko’s objections rely upon a fundamentally
22 flawed perception that the UGA may not be expanded until all existing land in the UGA is
23 fully developed. This argument runs contrary to GMA’s requirement that UGAs are intended
24 to accommodate growth for the next 20 years.²³
25
26

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28 _____
29 ¹⁷ Panesko Objection, at 3.

30 ¹⁸ Id., at 3 – 6.

31 ¹⁹ Napavine Response, at 3.

32 ²⁰ Panesko Objection, at 4.

²¹ Id.

²² Id., at 5.

²³ “(2) Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve.” RCW 36.70A.110(2).

1 **Conclusion:** The County has cured those areas of non-compliance associated with the
2 Napavine UGA identified in the August 15, 2008 FDO.

3
4 D. Toledo UGA

5 The Board found the plan to include rural lands in the expanded Toledo UGA was not
6 accompanied by a showing that such inclusion no longer substantially interfered with Goal 8
7 of the GMA. On April 21, 2008 the City Council for the City of Toledo resolved to annex the
8 parcel.²⁴ The Boundary Review Board was notified, but no request was made to invoke
9 their jurisdiction. Barring any protests to the annexation, the annexation became effective
10 pursuant to RCW 36.93.100(4).²⁵ The County takes the position that the City of Toledo's
11 action takes this property out of its jurisdiction and it is unable to act to amend its maps to
12 reflect the property as part of the County.

13
14
15 Petitioner Panesko vigorously objects and characterizes the action by the County and City
16 as egregious for which sanctions should be sought.²⁶

17
18 It is unfortunate that the Cowlitz Indian Tribal Housing (CITH) property was annexed in the
19 midst of a proceeding to consider its designation as agricultural land of long term
20 commercial significance. Nevertheless, the Board finds nothing egregious in the County's
21 conduct. As the County notes, it unsuccessfully solicited requests for landowners and other
22 agencies to invoke the jurisdiction of the Boundary Review Board.²⁷ The Board has no
23 jurisdiction in the realm of municipal annexations.²⁸ Further, now that the CITH property has
24 been annexed by the City of Toledo, the issue of whether this property should be included
25 as part of the UGA is moot.
26
27
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31 ²⁴ IR No. 189 – Toledo Resolution to Annex.

32 ²⁵ IR Nos. 190-91 – Certification of Boundary Review Board.

²⁶ Panesko's Objection, at 7.

²⁷ County Response, at 7.

²⁸ See, RCW 36.70A.280.

1 **Conclusion:** The City of Toledo having annexed the CITH property, the land is no longer
2 subject to the County's jurisdiction. The County having no ability to consider or alter the
3 designation of this property as agricultural land of long term commercial significance, it need
4 not take any further action in that regard.
5

6 E. Curtis Pole Yard

7 As noted above the Board found that until invalidity has been removed from the affected
8 land, it was premature to consider the Curtis Rail Yard for inclusion within a LAMIRD. The
9 Board set a compliance date of February 19, 2009 which was subsequently extended to
10 April 20, 2009.²⁹ On that date, the County took action to comply with the FDO by rescinding
11 the expansion of the Curtis Pole Yard LAMIRD, restoring the property to its zoning
12 immediately before the challenged action.³⁰
13
14

15 In response, Petitioner Panesko contends this action, coming seven months after the FDO,
16 "demonstrates the lack of responsiveness of Lewis County toward orders written by the
17 Board. Seven months is an excessive amount of time to rescind an amendment".³¹
18

19 The Board would agree that seven months does appear to be excessive when the end
20 result is rescission of the offending amendment. However, Lewis County did specifically
21 request additional time to come into compliance in order to have its Planning Commission
22 and County Commissioners consider this issue along with the other compliance matters.³²
23

24 While the request was made after the time for compliance had elapsed, necessitating a
25 compliance hearing, the Board granted the County additional time to achieve compliance
26 and the County met the new deadline.
27
28
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31 ²⁹ See, Order of Continuing Noncompliance, 4/24/09, at 4.

32 ³⁰ See, IR 179-80 – Ordinance No. 1205 and Resolution No. 09-117 – Rescission of Curtis LAMIRD expansion
and return of LAMIRD to pre-existing designation.

³¹ Panesko's Objection, at 8.

³² Lewis County's Motion for Compliance Deadline Extension, filed February 23, 2009.

1 Panesko offers no other objection to a finding of compliance with regard to the Curtis
2 LAMIRD, and the Board finds that the County, by its actions, has achieved compliance in
3 this regard.
4

5 **Conclusion:** By rescinding the expansion of the Curtis LAMIRD and restoring the property
6 to its zoning immediately before the challenged action the County has removed the Board's
7 basis for a finding of non-compliance as found in the FDO.
8

9
10 **V. ORDER**

11 Based on the forgoing, the Board determines that the County has now fully addressed the
12 areas of non-compliance identified in the Board's August 15, 2008 FDO or, as in the case of
13 the Toledo UGA, compliance has been rendered moot. Therefore Case No. 08-2-0007c is
14 CLOSED.

15 Entered this 27th day of July, 2009.
16

17
18
19 _____
James McNamara, Board Member

20
21 _____
William Roehl, Board

22
23 _____
Nina Carter, Board Member
24

25 Pursuant to RCW 36.70A.300 this is a final order of the Board.
26

27 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
28 of mailing of this Order to file a petition for reconsideration. The original and three
29 copies of a motion for reconsideration, together with any argument in support
30 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
31 original and three copies of the motion for reconsideration directly to the Board, with
32 a copy to all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing

1 of a motion for reconsideration is not a prerequisite for filing a petition for judicial
2 review.

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

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