

1 Because we find that the issues in this case are not discrete from one another
2 and that an order dismissing any one issue might have unintended
3 consequences for the remaining issues, the Board will reserve ruling on the
4 motions to dismiss until the entire case has been heard. However, to the
5 extent that the issues subject to the motions to dismiss raise the legal question
6 whether RCW 36.70A.110(4) prohibits the provision of urban services from
7 one urban growth area ("UGA") to another, we find that it does not.
8

9
10 We also find that the motions for judgment are not ripe. Those claims are
11 based, at least in part, on the failure of the County to request that the Board's
12 prior order of invalidity be lifted as to the designation of lands on which the
13 Cardinal major industrial development urban growth area ("MID-UGA") has
14 been designated. Since the County could seek a rescission or modification of
15 the invalidity finding applicable to the designation of the subject lands before
16 the hearing on the merits, an order on those issues at this time would be
17 premature.
18

19
20 Therefore, by this order the Board denies the motions to dismiss and the
21 motions for judgment brought by all parties. This is not a final order, however;
22 all of these issues will be before the Board at the hearing on the merits.
23
24

25 **MOTIONS REGARDING ISSUES 1, 2 AND 3**

26 Issue No.1. Whether Lewis County failed to comply with RCW
27 36.70A.300 and .302 when it made Resolution No. 04-322 "effective
28 immediately upon adoption" because Resolution No. 04-322 and the
29 comprehensive plan designation on the subject site are subject to an
30 invalidity order issued by this Board.

31
32 evidence that these issues require more consideration than is available on the abbreviated
schedule applicable to motions.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Issue No 2. Whether Lewis County failed to comply with RCW 36.70A.300 and .302 when it made Ordinance No. 1179H “take effect immediately upon adoption” because Ordinance No. 1179H and the zoning regulations for the subject site are subject to an invalidity order issued by this Board.

Issue No 3. Whether Lewis County failed to comply with RCW 36.70A.300 and -302 when in adopting Resolution No. 04-322 and Ordinance No. 1179H, it failed to provide that the Master Plan application could not vest or be approved until and unless this Board lifted invalidity on the comprehensive plan designation and zoning on the subject site.

Issue Nos. 1, 2 and 3 are closely related to Issue No. 26, on which no party has moved for either dismissal or judgment:

Issue No. 26: Whether the change in zoning from RDD 1-10 to an industrial UGA implemented by the Lewis County CP and DR amendments on September 23, 2004 violate the February 13, 2004 WWGMHB Order in Case Nos. 00-2-0031c and 99-2-0027c which imposed invalidity on RDD lands (especially land such as Cardinal’s which was removed from an ARL designation to accommodate industrial development), and is noncompliant with RCW 36.70A.060, RCW 36.70A.170 and RCW 36.70A.302(1).

OBCT asks this Board to rule that, as a matter of law, Resolution 4-322 and Ordinance No. 1179H fail to comply with RCW 36.70A.300 and 36.70A.302 because they provide that the comprehensive plan designation will become “effective immediately upon adoption.” OBCT’s Motion on Issues 1 and 2 at 6.

Cardinal asks this Board to dismiss Issue No. 3 because the Board has no authority to determine vesting issues. Cardinal FG Company’s Motion to Dismiss at 7.

OBCT argues that the designation change adopted by the County applies to lands whose designation is currently subject to an invalidity finding by this

1 Board. OBCT's Motion on Issues 1 and 2 at 4.² Cardinal and the County³ do
2 not dispute that the comprehensive plan designation and map of the land that
3 has been designated for a MID-UGA is subject to the Board's invalidity finding
4 in *Butler v. Lewis County*, No. 99-2-0027c and *Panesko v. Lewis County*, No.
5 00-2-0031c; they respond that the issues are too complex to dispose of Issues
6 1 and 2 on motions. Cardinal FG Company's Response to OBCT's Motion on
7 Issues 1 and 2 at 2. However, at the same time, Cardinal asks the Board to
8 dismiss Issue 3 on the grounds that the Board cannot determine vesting rights
9 and that is the only question posed by Issue 3. Cardinal FG Company's
10 Motion to Dismiss at 7.
11
12

13 We find that all three issues should be held over to the hearing on the merits
14 because they are complex and related to each other and the other issues in
15 this case (notably Issue No. 26), making them inappropriate for disposition on
16 motions. We also find that these issues are not ripe because they rest, at
17 least in part, on the County's failure to request that the Board lift its invalidity
18 finding as to the designation of the lands which have been re-designated as
19 the Cardinal MID-UGA in the comprehensive plan amendment challenged
20 here. Since the County still has the opportunity to request that the Board lift
21 invalidity as to the designation of those lands prior to the hearing on the merits
22 in this case, we find these issues are not ripe.
23
24

25
26 However, the challenges based on the invalidity finding raises the thorny
27 question of the impact of the Board's continuing invalidity finding in the *Butler*
28
29
30

31 ² The Battin Petitioners (Richard Battin, Eugene Butler, Pat Harader, Keith Ikerd and Gabriel Morris,
32 join in the OBCT argument on this point. Response of Battin, et al to Motions at 3.

³ The County joins in the Cardinal motions. Lewis County's Joinder of Cardinal FG Company
Response to OBCT's Motion on Issues 1 and 2.

1 v. *Lewis County*, No. 99-2-0027c and *Panesko v. Lewis County*, No. 00-2-
2 0031c cases on the designation of lands which are the subject of the County's
3 enactments in this case.

4
5 The Board's invalidity finding (as pertinent to this case) in the *Butler v. Lewis*
6 *County*, No. 99-2-0027c and *Panesko v. Lewis County*, No. 00-2-0031c cases
7 applied to the County's failure to designate agricultural resource lands in its
8 comprehensive plan in accordance with the Growth Management Act ("GMA").
9 See the February 13, 2004 Order Finding Noncompliance and Imposing
10 Invalidity, *Butler v. Lewis County*, No. 99-2-0027c and *Panesko v. Lewis*
11 *County*, No. 00-2-0031c. The Board found that the designation of agricultural
12 resource lands in the comprehensive plan was not only non-compliant and
13 invalid, but that the designation of many of the County lands as rural was
14 invalid as well because those lands should be available for consideration for
15 designation as agricultural resource lands when the County adopts its GMA-
16 compliant designation criteria. *Id.* In that order we stated:

17
18
19 After three different orders of this Board – in June of 2000, March of
20 2001, and July of 2002 – the County's approach is essentially
21 unchanged and the amount of prime farmland designated for
22 conservation is far less than the demonstrated characteristics of
23 farmland in Lewis County warrant. It is apparent from its own policies
24 that Lewis County will designate only "minimal" amounts of agricultural
25 resource lands for conservation under the GMA. LCC 17.30.020(2).
26 This stance has put much of the farmland in Lewis County at risk for
27 development inconsistent with conservation of agricultural lands, and
28 that risk continues today, nearly four years after the Board's first
29 decision directed to the issue.

30 Order Finding Noncompliance and Imposing Invalidity, *Butler v. Lewis County*,
31 No. 99-2-0027c and *Panesko v. Lewis County*, No. 00-2-0031c. (February 13,
32 2004)

1 The lands that the County has designated for the Cardinal MID-UGA in the
2 challenged enactments here are among those invalidly designated rural lands.

3
4 The County has requested, and been granted, an extension of the compliance
5 period in the *Butler* and *Panesko* cases to undertake criteria development and
6 mapping of designations of agricultural resource lands. Order Extending
7 Compliance Period and Setting New Schedule for Briefing and Hearing, *Butler*
8 *v. Lewis County*, No. 99-2-0027c and *Panesko v. Lewis County*, No. 00-2-
9 0031c, (August 30, 2004). This order extended the original compliance date to
10 March 24, 2005, with a compliance hearing scheduled for May 24, 2005.
11
12

13
14 As a consequence, the compliance hearing in the *Butler* and *Panesko* cases
15 will not occur until after the hearing on the merits in this case (April 12, 2005).

16 OBCT draws our attention to RCW 36.70A.302(7)(a):

17 If a determination of invalidity has been made and the county or city has
18 enacted an ordinance or resolution amending the invalidated part or
19 parts of the plan or regulation or establishing interim controls on
20 development affected by the order of invalidity, **after a compliance**
21 **hearing**, the board shall modify or rescind the determination of
22 invalidity if it determines under the standard in subsection (1) of this
23 section that the plan or regulation, as amended or made subject to such
24 interim controls, will no longer substantially interfere with the fulfillment
25 of the goals of this chapter.
26 (emphasis added)

27 In light of the timelines for a compliance hearing in the *Butler* and *Panesko*
28 cases, the language in this provision stating that the Board shall determine
29 whether to lift invalidity “after a compliance hearing” poses a procedural
30 problem in this case.
31
32

1 Further, while we have held that it is not within our authority to determine
2 whether or not the Cardinal application has vested⁴, it is our obligation to
3 determine whether the comprehensive plan amendment that changes the
4 designation of the subject property is valid. Under RCW 36.70A.302(7)(a), if
5 the board has entered an order of invalidity as to a part of the comprehensive
6 plan and the county then amends the part of the comprehensive plan to which
7 the invalidity order applies, the board must determine whether invalidity should
8 be lifted on the grounds that that the portion of the comprehensive plan that
9 was invalid before no longer substantially interferes with fulfillment of the goals
10 of the GMA. *Id.* Because the invalidity finding in the *Butler* and *Panesko*
11 cases applies to the prior land use designation for the Cardinal property in the
12 County's comprehensive plan, the new designation of that property amends
13 "the invalidated part or parts of the plan." RCW 36.70A.302(7)(a). Therefore,
14 RCW 36.70A.302(7)(a) is triggered by the challenged amendment to this
15 designation change and invalidity is not lifted until the Board rescinds or
16 modifies its prior finding. *Id.* Moreover, because of the prior invalidity finding,
17 the County has the burden of showing that the new designation, which makes
18 the Cardinal property an MID-UGA, no longer substantially interferes with the
19 goals of the GMA as found in the Board's February 13, 2004 and May 21,
20 2004 orders in *Butler v. Lewis County*, No. 99-2-0027c and *Panesko v. Lewis*
21 *County*, No. 00-2-0031c. RCW 36.70A.320(4). At the same time, the burden
22 is on the Petitioners to show that the new designation and development
23 regulations do not comply with RCW 36.70A.365. See RCW 36.70A.320.
24
25
26
27
28

29 Under the facts of this case, therefore, our determination of the challenges to
30 amendments to the comprehensive plan for the Cardinal MID-UGA must be
31

32 _____
⁴ See Order on Request for Reconsideration, *Roth v. Lewis County*, Case No. 04-2-0014c,
December 30, 2004.

1 made both in accordance with the criteria for creating an MID-UGA found in
2 RCW 36.70A.365 **and** in light of the Board's prior finding of invalidity with
3 respect to the designation of the subject property.
4

5 Petitioners challenge whether the Board can determine that invalidity may be
6 lifted with respect to the designation and mapping of the Cardinal property
7 without first having a compliance hearing; and the language of RCW
8 36.70A.302(7)(a) appears to support their argument. However, we do not
9 decide this issue at this point because the County still has time to cure the
10 alleged defect in its procedures. The County could move for an expedited
11 hearing to request that invalidity be lifted as to the property at issue here and
12 then (if such a motion is made promptly) a decision as to whether invalidity
13 should be lifted could be made prior to the hearing on the merits in this case.⁵
14
15
16

17 As we expressly stated in our Order on Reconsideration of Extent of Invalidity:
18 Should the County wish to offer changes or additions to its development
19 regulations and/or comprehensive plan that will prevent incompatible
20 development in the areas to which this invalidity order applies, **the**
21 **Board stands ready to consider those bases for lifting invalidity as**
22 **to some or part of the lands on an expedited basis.** RCW
23 36.70A.302(6). (emphasis added)

24 Order on Reconsideration of Extent of Invalidity, *Butler v. Lewis County*, No.
25 99-2-0027c and *Panesko v. Lewis County*, No. 00-2-0031c, May 21, 2004.

26 Therefore, on motion by the County, the Board could consider whether
27 invalidity no longer applies to just that portion of the invalidly designated lands
28 that are the subject of (and/or impacted by) the Cardinal MID-UGA.
29
30

31 _____
32 ⁵ A board determination of a request to lift invalidity is due in 45 days if brought pursuant to
RCW 36.70A.302(6).

1 If the County brings an expedited motion to lift invalidity with respect to the
2 Cardinal property and adjacent lands, the Board would be able to go directly to
3 the merits of the change in designation as it impacts designation of agricultural
4 lands in Lewis County, and then to the merits of the challenge to the creation
5 of an MID-UGA under RCW 36.70A.365. If the County does not bring such a
6 motion, the Board will first have to determine whether the procedural
7 requirements of the GMA regarding the rescission or modification of invalidity
8 findings have been met. We reserve ruling on that procedural question until
9 the hearing on the merits, since the posture of the case may change before
10 then.
11
12

13 **MOTIONS REGARDING ISSUES 18 AND 23**

14
15 Issue 18: Whether amendments to the Lewis County Comprehensive
16 Plan and the Development Regulations which allow urban
17 governmental services to be extended outside of UGAs to a Major
18 Industrial Development are consistent with the Lewis County
19 Comprehensive Plan Land Use Element, page 4-28(f), which states,
20 "The County plan prohibits the extension of the urban services defined
21 below, outside of the urban growth area, except where already in
22 existence, or where necessary and available to resolve existing or
23 imminent health hazards," and, therefore, noncompliant with RCW
24 36.70A.070, RCW 36.70A.120, and RCW 36.70A.130(1)(b)?

25 Issue 23: Whether amendments to the Lewis County Comprehensive
26 Plan and Lewis County Code (LCC 17.21.070) that allow extension of
27 water and wastewater facilities to cross non-urban areas are
28 inconsistent with Lewis County Code 17.150.030(3)(k) and, are
29 therefore, noncompliant with RCW 36.70A.070, RCW 36.70A.120, and
30 RCW 36.70A.130(1)(b)?

31 These issues challenge the consistency of the amendments to the County's
32 comprehensive plan and development regulations with the County's existing
comprehensive plan and development regulations. Challenges to consistency
are not typically appropriate for disposition on motions. These challenges do

1 not raise purely legal questions and they may implicate many parts of the
2 record below. For that reason, we deny the motions to dismiss these issues at
3 this time.
4

5 **MOTIONS REGARDING ISSUES 19-22**

6
7 Issue No. 19: Whether the provisions in the amendments to the Lewis
8 County Comprehensive Plan and the amendments to Lewis County
9 Code, specifically LCC 17.21.030 and LCC 17.21.070, fail to comply
10 with RCW 36.70A.110(4) for failure to contain urban governmental
11 services within the boundaries of existing urban growth areas (UGAs),
12 and for allowing extension of water and wastewater facilities to cross
13 non-urban areas?

14 Issue No. 20: Whether the amendments to the Lewis County
15 Comprehensive Plan and Development Regulations are noncompliant
16 with RCW 36.70A.110(4) by providing for urban governmental services
17 to a Major Industrial Development UGA?

18 Issue No. 21: Whether the revision to the Land Use Map is non-
19 compliant with RCW 36.70A.110(4)?

20 Issue No. 22: Whether amendments to the Lewis County
21 Comprehensive Plan and Lewis County Code (LCC 17.21.030) are
22 noncompliant with RCW 37.70A.365 for allowing urban governmental
23 services from outside service providers, including municipalities, and
24 special purpose districts, which were authorized by the Legislature for
25 Master Planned Resorts in RCW 36.70A.360 but which were not
26 authorized by the Legislature for Major Industrial Developments in RCW
27 36.70A.365?

28 As stated above, these issues are interwoven with other issues and therefore,
29 the Board declines to grant the motion to dismiss them at this time. However,
30 the underlying legal question in these issues was addressed by the Board in
31 the Order on Motions in the companion case of *Heikkila v. Winlock*,
32 WWGMHB Case No. 04-2-0020c, December 14, 2004. Petitioner Panesko
argues here as he did there that city water services cannot be used to provide

1 needed utilities to the Cardinal MID-UGA because they are urban services,
2 provision of which would violate the RCW 36.70A.110(4) prohibition against
3 providing urban services in the rural areas. Petitioner Motion to Deny Cardinal
4 Motion to Dismiss at 4-5. The Board reiterates its analysis in *Heikkila* that
5 RCW 36.70A.110(4) does not prohibit the provision of urban services from one
6 UGA to another. RCW 36.70A.110(4) states:
7

8
9 In general, cities are the units of local government most appropriate to
10 provide urban governmental services. In general, it is not appropriate
11 that urban governmental services be extended to or expanded in rural
12 areas except in those limited circumstances shown to be necessary to
13 protect basic public health and safety and the environment and when
14 such services are financially supportable at rural densities and do not
15 permit urban development.

16 This language is addressed to the issue of providing urban service levels in
17 rural areas. However, the Cardinal MID-UGA, if it is found valid, would not be
18 a "rural area"; it would constitute an urban growth area:

19 Final approval of an application for a major industrial development shall
20 be considered an adopted amendment to the comprehensive plan
21 adopted pursuant to RCW 36.70A.070 designating the major industrial
22 development site on the land use map as an urban growth area.
23 RCW 36.70A.365(3)(in pertinent part).

24 The prohibition in RCW 36.70A.110(4) does not apply to urban services in
25 urban growth areas. Urban growth areas by definition are allowed to have
26 urban levels of growth and should have the urban services to support that
27 growth. See RCW 36.70A.030(17), (18), and (19). The plain language of
28 RCW 36.70A.110(4) prohibits urban level services in rural areas. If water lines
29 just traverse the rural areas and do not serve them, water service from UGA to
30 UGA will not violate RCW 36.70A.110(4).
31
32

1 Since this is not the only question involved in the resolution of Issue Nos.19-
2 22, the Board does not dismiss those issues at this point. However, this is the
3 Board's decision with regard to the legal question of the meaning of RCW
4 36.70A.110(4) as to urban services provided from one UGA to another.
5

6 **MOTION REGARDING ISSUE 9**

7
8 Issue No. 9. Whether Resolution No. 04-322, Ordinance No.1179H and
9 Resolution No. 04-323 fail to comply with RCW 36.70A.365(2)(a) and
10 local implementing policies and regulations in that there is no evidence
11 of water rights and/or there is no binding agreement for providing water
12 supply or waste water disposal.

13 Cardinal's motion with respect to Issue 9 is addressed to Resolution 04-323.
14 Resolution 04-323 approves the Cardinal FG Major Industrial Development
15 Master Plan and the Findings, Conclusions and Conditions of the Lewis
16 County Hearing Examiner. Cardinal argues that the Master Plan is a project-
17 level permit rather than a comprehensive plan, development regulation or
18 amendment of either. Cardinal FG Company's Motion to Dismiss at 7-8.
19 Therefore, Cardinal argues, the Board lacks jurisdiction over Resolution 04-
20 323 and, to the extent that Issue No. 9 challenges that enactment, it should be
21 dismissed. *Id.*
22

23
24 In the related case of *Roth v. Lewis County*, WWGMHB Case No. 04-2-0014c,
25 this Board found that the consideration of the master site plan for major
26 industrial developments was a project-level determination and not subject to
27 the Board's jurisdiction. Amended Order on Motions to Dismiss, (December
28 21, 2004). We incorporate that reasoning here, as well.
29

30
31 To the extent that Resolution 04-323 approves the master site plan for the
32 Cardinal MID-UGA, then, it is not subject to the Board's jurisdiction. However,

1 Resolution 04-323 also incorporates the hearing examiner's findings with
2 respect to the Cardinal application. Those Findings, Conclusions and
3 Recommendations are lengthy and include findings that may be argued to
4 apply to the major industrial development comprehensive plan designation
5 change and development regulations as well as to the master plan. Petitioner
6 Motion To Deny Cardinal Motion to Dismiss at 19.
7

8
9 Of all the issues before the Board, only Issue No. 9 challenges Resolution 04-
10 323; Issue No. 9 relates to the findings the resolution contains concerning
11 water and wastewater services. Since we are unable to discern without the
12 entire case before us whether Resolution 04-323 does in fact contain
13 enactments relating to the comprehensive plan designation and development
14 regulations that are subject to the Board's jurisdiction, we decline to dismiss
15 Issue No. 9 as to Resolution 04-323 at this time. However, we note the
16 difficult burden Petitioners shoulder in attempting to establish that Resolution
17 04-323 is part of the comprehensive plan and development regulation
18 amendments.
19
20
21

22 PAGE LIMITATION

23 The Prehearing Order inadvertently fails to contain a page limitation for briefs
24 submitted in this case. **Briefs in this case may not exceed 35 pages.** No
25 brief may be filed that is longer than 35 pages unless prior permission has
26 been obtained from the presiding officer to file an over-length brief.
27 Arguments from the motions briefs submitted by the January 24th deadline
28 may be referenced in the hearing briefs to avoid unnecessary duplication.
29
30
31
32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

This is not a final order. All of the issues set out in the Amended Prehearing Order will be before the Board in the Hearing on the Merits, April 12, 2005.

Entered this 8th day of February 2005.

Margery Hite, Board Member

Holly Gadbow, Board Member

Gayle Rothrock, Board Member

1 Gadbaw, concurring:

2 I concur with the reasoning and decision of the majority in this case. In
3 addition, I think it is appropriate to advise the County of the areas of my
4 concern regarding the invalidity finding currently in place. The County has the
5 burden to show that the amendment to the designation of the Cardinal lands in
6 the comprehensive plan no longer substantially interferes with the goals of the
7 GMA in conserving and protecting agricultural resource lands. I wish to be
8 clear about what I think that showing entails.
9

10
11
12 The existing invalidity finding (from the *Butler* and *Panesko* cases referenced
13 in this decision) is based on the need to have lands which are being farmed or
14 show evidence of having recently been farmed available for consideration for
15 designation as agricultural resource lands when the County adopts GMA-
16 compliant designation criteria. Therefore, in order for the Board to lift invalidity
17 as to the lands which have been newly designated as the Cardinal MID-UGA,
18 the County would need to address two major concerns;
19

20
21 First, the County should address whether the MID-UGA property itself should
22 be designated as agricultural resource land. The applicability of the GMA
23 definitions of “agricultural land” and “long-term commercial significance” would
24 be of particular interest in this regard. RCW 36.70A.030(2) and (10).
25

26
27 Second, the County should address the impact of the new designation of the
28 Cardinal MID-UGA on adjacent lands whose designation is also subject to the
29 Board’s invalidity finding. Of concern would be whether or not the new
30 designation of a MID-UGA will prevent those adjacent lands from being
31 considered for designation as agricultural lands or if the new UGA would
32 adversely affect the ability of the County to protect the adjacent lands for

1 agricultural uses. In this regard, the adoption of any criteria for agricultural
2 designation that makes proximity to a UGA an eliminating factor would also be
3 significant.

4
5 I understand that the County is just beginning the process for establishing its
6 criteria for designating agricultural lands and that an inclusive public process is
7 critical to the designation of agricultural resource lands. I am also well aware
8 of the contentiousness that has surrounded the designation of agricultural
9 lands as well as the designation of the Cardinal MID-UGA. The conservation
10 of agricultural lands, early and continuous public process, and encouragement
11 of economic development are all important goals of the Growth Management
12 Act (GMA). Lewis County and its citizens face the continuing challenge of
13 expeditiously making these goals work together in a manner that complies with
14 the GMA. It is difficult for a county to manage all these tasks together, but it is
15 important to be sure that the accomplishment of one goal does not impair the
16 County's ability to accomplish any of the others.
17
18
19
20
21
22

23 Holly Gadbow, Board Member
24
25
26
27
28
29
30
31
32