

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

DANIEL SMITH, et al., VINCE PANESKO, and)	
JOHN T. MUDGE,)	No. 98-2-0011c
Petitioners,)	
)	COMPLIANCE
)	HEARING
v.)	ORDER
)	
LEWIS COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
CITY OF CHEHALIS, CITY OF NAPAVINE, and)	
PORT OF CHEHALIS,)	
)	
Intervenors.)	
_____)	

On April 12, 2000, we held a compliance hearing in Lewis County in the above-captioned case. All three board members were present. Mr. Vince Panesko argued on behalf of Petitioners. Mr. Alexander Mackie represented Lewis County. We have received no objection to the County's April 25, 2000, motion to strike Petitioner Panesko's April 21, 2000, post-hearing brief. The motion is granted.

DISCUSSION

The County did not address any of the specific requirements of the final decision and order (FDO) in this case except to say that "all of the issues in Smith were addressed by the County during the development of the comprehensive plan."

The County's argument centered on its belief that this case is moot because of the interim nature of the ordinance in question, #1159, the subsequent adoption of the comprehensive plan (CP), and the contention that a case is moot when the matter at issue is no longer of consequence and

when the Board can affect no remedy. The County further argued that the invalid portion of the ordinance and the consequent shift in burden to the County to demonstrate validity does not apply in this case because the CP supersedes the interim urban growth area (IUGA) ordinance.

Petitioner Panesko asserted that the issues in this case continue to be noncompliant and to substantially interfere with the goals of the Growth Management Act (GMA, Act). He maintained that Lewis County was required by RCW 36.70A.300(3)(b) to respond to the Board's order and that it had not responded. He further declared that the Lewis County request for mootness fails to accommodate the Board's responsibilities to conduct a hearing "with any compliance schedule established by the Board in its final order." Section .300(2).

Petitioner Panesko further noted the County claim that the Board "can affect no remedy." He responded that the Legislature did not require the Board to affect a remedy but rather to determine compliance or noncompliance. He asserted that the GMA expects new documents (like those superseding #1159) to be presented during the compliance hearing at which time the Board can revisit previous determinations of compliance and invalidity. Section .330(1).

Petitioner Panesko identified "the fundamental issue before the Board" which he declared was "has Lewis County achieved compliance?" He noted that:

"Lewis County made it publicly known that they had no intention to follow the Board's Order when the Lewis County Planning Commission voted to ignore the Board's Order for various rural densities within 2 days after the Order.

The County re-issued the same incorrect wording in the Comp Plan and in Ordinance 1159B. The County took no action to correct Order items 3 and 4."

He went on to point out that there had been no County response to the requirement for a variety of rural densities nor for clustering. He alleged that the County failed to respond to our order regarding Ordinance #1159 Section 5.2 A, B, C, to control increases in density by exceptions. He maintained that these exceptions had been replaced with clustering provisions which achieve urban densities in rural areas in the new ordinances. He argued that the change in designation of the Curtis IUGA did not address the issues in the Board's order. He also maintained that the County did not demonstrate compliance with the FDO requirement that the County must clarify

the language of Section 5.7 regarding review discretion and guidelines.

Finally, Petitioner Panesko requested that we find invalidity regarding lack of variety of rural densities and lack of clustering controls.

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CONCLUSION

From the County's assertion that "all of the issues in Smith were addressed by the County in the development of the comprehensive plan," we conclude that the response required from the County by RCW 36.70A.300 and .330 is found in portions of the CP and subsequent implementing development regulations (DRs).

Issues Previously Found Noncompliant

The County failed to address specifically any of the issues outlined in our FDO which we found noncompliant, instead, declaring that they should all be found moot. The County also asserted that all of the issues had been addressed in the CP and the successor interim ordinances to #1159. At the County's request we had, in this case, taken official notice of those successor ordinances, including #1170. We agree with the County that the issues in this case were, by and large, addressed in *Butler, et al. v. Lewis County*, #99-2-0027c (*Butler*).

Regarding requirements in our FDO, April 5, 1999, in this case (*Smith*) we find as follows:

- The County is in continued noncompliance with Issue 1 regarding variegated rural densities.
- The County is in continued noncompliance with Issue 2 regarding capping the clustering provisions for rural areas so as to preclude low-density sprawl.
- The County is in continued noncompliance with Issue 3 requiring control of increases in density on parcels by exception so as to preclude new rural small towns.

We echo our findings of invalidity in *Butler* regarding these issues and the County's responses.

We find the County in substantial interference with the goals of the Act regarding Issue 1, 2, and 3, of *Smith*.

- The County is in continued noncompliance and continued invalidity with Issue 4 regarding the Curtis area.
- The County is in compliance regarding Issue 5, (#1159, Section 5.7, Urban Growth Prohibited).

The County did not address our requirement in Issue 5 to clarify the language of Section 5.7, Rural Lands, regarding review, discretion, and guidelines. As we had taken official notice of #1170 we were able to review it without guidance from the County. Ordinance #1170, in particular, Title 17 Zoning, Subgroup IV, Rural Zones, appears to have taken #1159's Section 5.2 and revised it to remove the phrase which we had found to be the kernel of noncompliance: "the uses allowed on rural lands under this ordinance, *per se*, are not considered 'urban growth' prohibited by RCW 36.70A.110." It appears that a revised and compliant version of Section 5.7, Rural Lands-Urban Growth Prohibited, now appears in every appropriate subsection of Subgroup IV, Rural Zones, as follows:

"The Administrator shall find that any project submitted for approval under this chapter is consistent with Chapter 17.150 LCC (or RCW 36.70A.070(5) (a-e)) and that appropriate conditions are imposed to assure that "urban growth" as defined in RCW 36.70A.030(17) and as prohibited outside urban growth areas by RCW 36.70A.110, does not occur as a result of the development in question, nor does the project create a need or demand for urban levels of public facilities or services."

This section, entitled "Urban Growth Prohibited" now appears in Chapter 17 Sections .45, .50, .55, .60, .65, .70, .75, .95, .100, which are, respectively:

- Small Towns-Mixed Use/Commercial,
- Small Towns-Residential,
- Small Towns-Industrial,
- Cross-Roads Commercial,
- Freeway Commercial,
- Tourists Services Areas,
- Rural Area Industrial,

- Suburban Enclaves-Shoreline Residential Areas, and
- Rural Development District.

We find that the “urban growth prohibited” sections of these subsections now comply with the Act, insofar as the uses allowed on rural lands are not automatically precluded from being considered as “urban growth” just because they occur on rural lands. To that extent, the County has complied with the requirement of Issue 5 of the FDO in *Smith*.

Resource Lands Residential Density

In our FDO, we noted that:

“...This unvariegated 1 to 5 density in all rural areas is exacerbated by the incidental additional development at a 1 to 5 density permitted on 15 percent of resource lands. Lewis County response brief at 5, Ordinance #1151. This exceptionally liberal conversion provision in Ordinance #1151, the Resource Lands Ordinance,...underscores the noncompliant nature of the uniform 1 to 5 density found in Ordinance #1159. It is clear that, if converted, the resource lands at 1 to 5 would no longer be of a lot size to accommodate resource lands of long-term commercial significance, particularly in forest lands. *See Diehl v. Mason County*, WWGMHB #95-2-0073. They would therefore become rural lands which would add to the magnitude of unvariegated density in rural lands.”

This exacerbation of the effect of unvariegated 1/5 density in rural lands was not addressed in Ordinance #1170. We therefore echo resource land density findings in *Butler* and find that provisions in Lewis County DRs allowing densities greater than 1 du per 10 acres in resource lands are noncompliant and determined to be invalid and in substantial interference with Goals 2 (reduce sprawl), Goal 8 (natural resource industries), and Goal 9 (open space).

Issues Previously Found Invalid

Issue: Curtis IUGA

In this case we entered an order of invalidity as to the Curtis area IUGA designation. That determination was appealed to Superior Court but no action was taken subsequent to the filing of the appeal. Lewis County has never requested that we review the invalidity determination for rescission or modification.

Lewis County contended that upon its adoption of its CP, including final UGAs, and the change of designation of the Curtis area from an IUGA to limited area of more intense rural development (LAMIRD), the invalidity determination was extinguished as a matter of law. Lewis County asserted that since Ordinance #1159 (the ordinance upon which invalidity was fixed) was amended by Ordinance #1159A, contemporaneously with adoption of the CP resolution, and then amended again in Ordinance #1159B on July 27, 1999, and then amended again in Ordinance #1170 adopted February 14, 2000, and then amended again (apparently) in adoption of “final DRs” April 16, 2000, that the determination of invalidity no longer applies. Lewis County cites a ruling in a Whatcom County Superior Court appeal of our decision in *Wells v. Whatcom County*, #97-2-0030c. Recognizing that the Whatcom County Superior Court ruling does not apply outside Whatcom County, Lewis County has attempted to fashion an *estoppel* argument based upon our status as a party in that action. Petitioners contended that the invalidity determination remains.

In analyzing this question we review RCW 36.70A.302. It is that section which sets forth the authority and standards upon which a Growth Management Hearings Board (GMHB) imposes and rescinds or modifies a determination of invalidity. Initially, we note that under section .302, the only effect of a determination of invalidity is to postpone vesting of a “development permit application not vested under State or local law before receipt of the board’s order by the county...” Even from that limited impact there are the exceptions under .302 (3)(b). There are, however, no other impacts to anyone for any reason from a determination of invalidity than for non-vested permit applications received after a local government’s receipt of notice of the determination of invalidity.

That being true, Lewis County’s observation that its CP and DRs are presumed valid under RCW 36.70A.320 (1) is absolutely correct, but is not particularly relevant to the issue at hand. In determining how a determination of invalidity may be rescinded or modified we turn to the plain

statutory language and review the 1997 amendments contained in Chapter 429, Laws 1997, particularly sections 14 and 16. The amendments to those sections are now codified as RCW 36.70A.302.

Prior to the adoption of the 1997 amendments, RCW 36.70A.300 (3)(b) stated that any determination of invalidity shall:

“(b) Subject any development application that would otherwise vest after the date of the board’s order to the local ordinance or resolution that *both is enacted and in response* to the order of remand *and* determined by the board pursuant to RCW 36.70A.330 to comply with the requirements of this chapter.” (emphasis supplied)

That section was stricken in its entirety and a new section (16) was added to the language now codified as RCW 36.70A.302, specifically (3) and (5). As noted above, (3)(a) directs that where a permit application is not vested at the time the local government receives the order determining invalidity the application “vests to the local ordinance or resolution *that is determined by the board* not to substantially interfere with the fulfillment of the goals of this chapter.”

Additionally, RCW 36.70A.302 (5) provides that:

“A county or city subject to a determination of invalidity may adopt interim controls and other measures to be in effect until it adopts a *comprehensive plan and development regulations that comply with the requirements of this chapter*. A development permit application *may vest* under an interim control or measure *upon determination by the board* that the interim controls and other measures do not substantially interfere with the fulfillment of the goals of this chapter. (emphasis supplied)

Finally, (7)(a) provides that:

“If a determination of invalidity has been made and the County or City has enacted an ordinance or resolution *amending* the invalidated part or parts of the plan or *regulation* or establishing interim controls on development affected by the order of invalidity, *after a compliance hearing*, the board shall modify or rescind the determination of invalidity if it determines under the standard in subsection (1) of this section that the plan or regulation, as *amended* or made subject to such interim controls, will no longer substantially interfere with the fulfillment of the goals of this chapter. (emphasis supplied)

The statutory scheme, especially in light of the 1997 amendments, is clear. Once a determination of invalidity has been made a local government may adopt a “local ordinance or resolution” under (3)(a) or “interim controls and other measures” under (5). In either event the option chosen does not remove the determination of invalidity until a GMHB finds that the measure no longer substantially interferes with the fulfillment of the goals of the GMA.

The language in RCW 36.70A.302 (5) allows the adoption of interim controls to be in effect until a local government “adopts a comprehensive plan and development regulations *that comply* with the requirements of this chapter.” (emphasis supplied)

If there are any ambiguities as to whether a determination of invalidity can be rescinded or modified without an express finding by a GMHB, the requirement that an adopted CP or DR must comply with the Act, as opposed to being presumptively valid, resolves that ambiguity.

We specifically hold that any determination of invalidity remains in effect until such time as a local government asks for and receives a finding from a GMHB that the new action no longer substantially interferes with the goals of the Act. In this case, Lewis County amended the IUGA ordinance (#1159) both at the time of adoption of its CP by Ordinance #1159A and less than 60 days thereafter, with Ordinance #1159B. In the recent case of *Butler v. Lewis County* #99-2-0027c, we held that the redesignation of the Curtis area as a LAMIRD did not comply with the Act and substantially interfered with the goals of the GMA.

Lewis County’s “*estoppel*” argument also fails on two grounds. Initially, the ruling by the Whatcom County Superior Court related to the language contained in the Act prior to the 1997 amendments and was directed towards, as we understand it, the phrase “in response to.” That phrase is no longer part of the statute which is under consideration in this case.

Secondly, the *estoppel* argument fails because a GMHB is prohibited from being a party to any appeal and being an advocate for one side or the other under *Kaiser Aluminum v. Labor and Industries* 121 Wn.2d 776 (1993) (*Kaiser*). In that case, the Supreme Court specifically held that the Board of Industrial Insurance Appeals (analogous to a GMHB) did not have any authority to participate in an appeal from one of its quasi-judicial orders. Rather, the court held that the

Department of Labor and Industries (analogous to CTED) was the only agency with legislative authorization to participate in appeals.

In the Whatcom County case, AAG Marjorie T. Smitch directed a letter to the court, dated August 13, 1998, informing the court and parties that she was the AAG assigned to represent the three GMHBs, who are quasi-judicial bodies and under the authority of *Kaiser* would not be appearing in court to advocate any particular position involving the case. A brief explaining the role of the GMHB under the GMA was filed on July 30, 1998, but no participation by AAG Smitch occurred either at the Superior Court or the Court of Appeals level. Rather, AAG Alan Copsey, assigned to represent CTED, was the advocate for that “front-line” agency.

As noted in *Kaiser*, naming of the board as a party does not change the prohibition against participation in an appeal. The Supreme Court noted that a private party “should not have the power to grant authority to agencies which the agencies’ enabling statutes do not provide.”

ORDER

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We echo *Butler* regarding the issues set forth in both cases as follows:

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In order to comply with the GMA Lewis County must, within the timeframes from the date of the *Butler* FDO (June 30, 2000):

1. Limit the type and amount of clustering allowed in rural areas to encourage growth into urban areas and discourage new urban or low-density sprawl in rural areas within 60 days (*Butler* FDO #4).
2. Discourage with appropriate CP policies and DRs new low-density sprawling growth in rural areas within 150 days (*Butler* FDO #5).
3. Reduce the significant amount of low-density sprawl allowed in the rural area within 180 days (*Butler* FDO #14).

4. Remove all LAMIRD designations within 30 days. If any new LAMIRD designations are to be allowed, begin with a thorough analysis in the CP as to the existing areas and uses as of July 1, 1993. (*Butler* FDO #15).
5. If new LAMIRD designations are to be made, establish a logical outer boundary which contains and limits the intensive rural development as required by the GMA. (*Butler* FDO #16).
6. Establish a variety of rural densities that are consistent with the rural character of Lewis County within 180 days. (*Butler* FDO #17).
7. Remove provisions allowing density greater than 1 du per 10 acres in designated resource lands.
8. Any findings of noncompliance and/or invalidity in previous sections of the FDO are incorporated by reference. (*Butler* FDO #30).

We further echo *Butler* in its invalidity section, Appendix II, Findings of Fact and Conclusions of Law pursuant to RCW 36.70A.302(1)(b), as follows:

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FINDINGS OF FACT

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1. Ordinance #1159A was adopted June 1, 1999, as an emergency ordinance. It amended Ordinance #1159 which had been subject to a finding of noncompliance in *Smith*.
2. Petitions challenging the CP and Ordinance #1159A were filed on August 2, 3, 6, and 10, 1999.
3. Ordinance #1159B, amending Ordinance #1159A, was adopted on July 27, 1999, as a partial set of interim implementing DRs for the CP.

4. The CP and DR failed to confine and contain any of the rural area designations, to allow a variety of rural densities, or to maintain Lewis County's rural character. They also failed to maintain a traditional rural visual landscape with uses that were compatible with wildlife and for fish and wildlife habitat and that reduced inappropriate conversion of undeveloped land into sprawling low-density development.
5. The use of unlimited clustering exacerbated what few land-originated restrictions were imposed on rural development by allowing those restrictions to be circumvented. Full clustering allowances would allow urban growth in rural areas.
6. In *Smith* the majority of the acreage in the Curtis pole yard designation was found to be subject to a determination of invalidity. Lewis County has never requested that the determination be rescinded or altered.
7. Designation of the Curtis 357-acre location as a LAMIRD under RCW 36.70A.070(5)(d) is expressly prohibited by .070(5)(e). The Curtis pole yard location does not comply with the requirements of RCW 36.70A.365.
8. The Curtis pole yard designation does not comply with the requirements of RCW 36.70A.070(5)(d) because there is no establishment of uses and areas existing on July 1, 1993, and no restrictions or policies contained in either the CP or Ordinance #1159B constraining the outer boundary of the LAMIRD to uses and areas in existence prior to July 1, 1993.
9. The designation of the entire 357-acre Curtis pole yard property as a LAMIRD substantially interferes with the goals of the Act, specifically Goals 1 and 2.
10. There is a prior finding of invalidity as to a portion of the Curtis pole yard property that was not removed by its designation as a LAMIRD in the new CP.
11. Chapter 4 of rural sections of Ordinance #1159B for all rural areas, including LAMIRDs, substantially interferes with Goals 1, 2, 8, 10, and 12. The shoreline designations

additionally substantially interfere with Goal 14 (Shoreline Management Act).

12. Provisions in Lewis County DRs that allow RL densities more intensive than 1 du per 10 acres and provisions that allow an opt out by the landowner from the ARL designation substantially interfere with Goal 8 of the Act.
13. Any finding which is more correctly a conclusion of law shall be so deemed.

CONCLUSIONS OF LAW

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1. The rural element of the CP (Chapter 4) is determined to be invalid.
2. The rural sections of Ordinance #1159B are determined to be invalid.
3. The Curtis LAMIRD designation is determined to be invalid.
4. Provisions in Lewis County DRs that allow densities greater than 1 du per 10 acres in resource lands are determined to be invalid.

These Findings of Fact and Conclusions of Law are adopted pursuant to RCW 36.70A.302 (1)(b).

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 13th day of July, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

Nan A. Henriksen
Board Member

William H. Nielsen
Board Member