BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

VINCE PANESKO et al.,	)	No. 00-2-0031c
	)	
Petitioners,	)	RECONSIDERATION
	)	ORDER
v.	)	
	)	
LEWIS COUNTY,		
	)	
	)	
Respondent	)	
	)	
and	)	
	)	
LEWIS COUNTY ECONOMIC DEVELOPMENT COUNCIL & INDUSTRIAL LANDS ADVISORY TASK FORCE,	)	
	)	
Intervenors.	)	
-_____	)	
	)	
EUGENE BUTLER, et al.,	)	No. 99-2-0027c
	)	
	)	RECONSIDERATION
Petitioners,	)	ORDER
	)	
v.	)	
LEWIS COUNTY,		
	)	
	)	
Respondent.	)	
	)	
and	)	
	)	
CITY OF CENTRALIA, et al.,	)	
	)	
Intervenors.	)	
_____	)	

DANIEL SMITH, et al., VINCE PANESKO, and)
JOHN T. MUDGE,) No. 98-2-0011c
Petitioners,)
) RECONSIDERATION
) ORDER
v.)

LEWIS COUNTY,)
)
Respondent,)
)
and)
)
CITY OF CHEHALIS, CITY OF NAPAVINE, and)
PORT OF CHEHALIS,)
)
Intervenors.)
)

On March 5, 2001, we entered a final decision and order (FDO) in #00-2-0031c (*Panesko*) and compliance orders (CO) in #99-2-0027c (*Butler*) and #98-2-0011c (*Smith*). On March 13, 2001, Intervenor Lewis County Economic Development Council and Industrial Lands Advisory Task Force (EDC) filed a motion as to all three cases for "clarification" and reconsideration. On March 15, 2001, Petitioner Panesko filed motions for reconsideration of the *Panesko* FDO and the *Butler* CO. Panesko also filed a response to the EDC motion on March 20, 2001. EDC and Lewis County each filed a response to the Panesko motions for reconsideration.

EDC asked that we reconsider the references at page 9 and page 34 to it being the "economic arm" of Lewis County. EDC pointed out that it was a separate entity from the County and received only approximately 10 % of its budget from Lewis County tax revenue.

We have been aware of the separate entity status of EDC since it was first granted intervention. There is nothing in the general observation of the March 5, 2001, order that states or implies EDC is somehow a county agency. Rather the statements are mere observations that EDC plays a significant role in the County's economic planning decisions. If EDC feels the reference to it being the "economic arm" of the County is derogatory, no such implication was made and no such inference should be drawn. We decline to revise the order to eliminate the observation.

EDC also requested that we reconsider assignment of the burden of proof in findings 2 and 3 of appendix 1 and finding 9 of appendix 2. EDC cites RCW 36.70A.320(1) and (4) which sections direct the burden of proof for all hearings. Under RCW 36.70A.320(4) when an order of invalidity has previously been entered (as here) the County has the burden to show that "the ordinance or resolution it has enacted *in response* to the determination of invalidity will no longer substantially interfere with fulfillment of the goals of the Growth Management Act" (emphasis supplied). As noted in the Order, Ordinances #1170/1170B were not adopted in response to the *Butler* or, the county asserts, even the *Smith* orders. Thus, contends EDC, Ordinances #1170/1170B are presumed valid and the burden is placed on petitioners to show substantial interference with the goals of the Act. We specifically applied the presumption to "all" ordinances at page 9 of the Order.

EDC pointed out the observation of page 9 of the Order that it and the County had accepted the burden to rescind or modify the previous determinations of invalidity. EDC now claims, contrary to its statements at the hearing on the merits (HOM), that the County "only" has the burden when the "challenged action was taken in response to a prior order of invalidity." Thus, it concludes, we improperly assigned the burden to the County on this issue.

The discussion of this issue beginning at page 9 in the March 5, 2001 Order clearly indicates our understanding that there was arguably some question as to the burden of proof for the invalidity findings. What is clear is that at the HOM the County and EDC stated that they accepted that it was the County's burden to remove invalidity as found in the *Butler* FDO. Nonetheless, at page 9 of the order, we specifically assigned the burden of showing invalidity as to any differences of the DRs from the *Butler* CP to petitioners. In all issues involving invalidity found in the March 5, 2001 order we also stated that if petitioners had the burden of proof it had been carried. We observe the County has not filed a similar motion for reconsideration on this or any other issue.

EDC also asked for reconsideration of its oral request at the HOM to remove invalidity from the Curtis "IUGA" found in the *Smith* FDO and CO. EDC pointed out that after the *Smith* FDO the County "did not amend Ordinance #1159 in response to the *Smith* FDO and did not adopt Ordinances #1170/1170B in response to the *Smith* FDO." We have never received a written request from the County (or EDC) to remove the *Smith* invalidity. We did receive an oral request from the County and EDC during the HOM in this case.

As noted by EDC the language of RCW 36.70A.320(4) places the burden on the County to remove invalidity when it has enacted an ordinance or resolution "in response" to the determination of invalidity. According to EDC, and perhaps the County, the County has never enacted an ordinance "in response" to either the *Smith* or the *Butler* findings of invalidity. That being the case, we are at a loss to understand how the County, or EDC, could ever expect us to rule that the invalidity should be modified and/or rescinded. Since there is no "ordinance or resolution in response to the findings of invalidity," there is nothing for us upon which to base a

decision to modify and/or rescind.

If we considered the LAMIRD designation of the Curtis poleyard area to be a "response" to the invalidity finding, we have consistently found, with the burden on petitioners, that the LAMIRD designation did not comply with RCW 36.70.070(5)(d) or (e) and substantially interfered with the goals of the Act. Ordinances #1170/1170B adopted prior to the FDO in *Butler* were adopted subsequent to the FDO in *Smith*. Since the finding of invalidity in *Smith* and the subsequent adoption of comprehensive plan development regulations were adopted after the initial determination of invalidity in *Smith*, a question arises as to whether the County's self-serving statement that the ordinances were not adopted "in response" to *Smith* can be legally effective. Regardless of the resolution of that question, the fact remains that the County has never adopted any ordinance or resolution that removed the Curtis poleyard invalidity regardless of which party had the burden of proof. See also *Smith* CO July 13, 2000 discussion beginning at page 6.

EDC's motions for reconsideration are denied.

Finally, EDC observes that in the March 5, 2001 Order under the heading "compliance with previous cases" we cited *Panesko I* when the reference should have been to the *Smith* case. Clearly that observation is correct and the reference to "Panesko I" should be a reference to the July 13, 2000, CO in *Smith*.

Regarding the *Butler* CO section of the March 5, 2001 Order, Petitioner Panesko requested that we determine the "locations included in the urban industrial land bank on December 31, 1999, are

no longer available for major industrial development" under the provisions of RCW 36.70A.367 (7). We do not read that section of the Act to authorize or impose a duty on a Growth Management Hearings Board (GMHB) to make the determination requested by Panesko. The job of a GMHB is to determine compliance or noncompliance. The motion is denied.

Regarding the FDO portion of the March 5, 2001 Order, Panesko requested that we reconsider his argument that the adopted maps for critical areas in Ordinance #1170B did not adequately identify the areas and were thus noncompliant. Panesko pointed out that the maps associated with this case "have been replaced with new critical areas in the map associated with Ordinance #1176 (an issue in Case #01-2-0010c)." Because the most current maps on critical areas are an issue in the new case, we will address it in that process. We specifically did not address the issue in this case because of the timing of the adoption of Ordinance #1176. Panesko's motion for reconsideration is denied.

Panesko also requested reconsideration of our order concerning industrial land bank (ILB) changes with regard to Issue 42 as to whether the provisions of RCW 36.70A.365 were used. The County, and EDC, responded that ILBs were designated under the provisions of RCW 36.70A.367 not .365. In any event, since the provisions of Resolution 00-434 are part of the new case we will address the issues raised there and deny Panesko's motion for reconsideration.

Although not noted by any party in this case, we observe that no specific timeframe for compliance under the March 5, 2001 Order was specified. We grant Lewis County the full 180 days from the date of this order in order to achieve compliance with the Act.

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

So ORDERED this 13th day of April, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

William H. Nielsen
Board Member

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Les Eldridge
Board Member