

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 VINCE PANESKO, et al.,

4
5 Petitioners,

6 v.

7
8 LEWIS COUNTY,

9
10 Respondent,

Case No. 00-2-0031c

**ORDER RESCINDING
INVALIDITY AS TO
CARDINAL MID UGA SITE**

11
12 EUGENE BUTLER, et al.,

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14 Petitioners,

15 v.

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17 LEWIS COUNTY,

18
19 Respondent.

Case No. 99-2-0027c

**ORDER RESCINDING
INVALIDITY AS TO
CARDINAL MID UGA SITE**

20
21 THIS Matter comes before the Board upon the County's motion to rescind invalidity as to the
22 newly-designated major industrial development ("MID") urban growth area ("UGA") for a
23 float glass manufacturing facility in Lewis County. Motion of Lewis County to Rescind
24 Invalidation on Cardinal MID, February 28, 2005. This motion arises out of the Board's orders
25 imposing invalidity as to the designation of certain rural lands in Lewis County in the above-
26 entitled cases. Order Finding Noncompliance and Imposing Invalidation, February 13, 2004;
27 Order on Reconsideration of Extent of Invalidation, May 21, 2004.
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30 Opposition to the County's motion was filed by Petitioners Knutsen, Smith, Mudge, Gore,
31 Yanisch, Hayden, Vinatieri, Zieske, Butler, Burriss, Smethers, Richard Roth, Susan Roth,
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1 Boardman, and Evaline Community Association (collectively “the Butler Petitioners”);
2 Petitioner Panesko; and Intervenor Olympia and Vicinity Building and Construction Trades
3 Council and Affiliated Unions (“OBCT” hereafter).
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5 This matter is closely related to another case, *OBCT v. Lewis County*, WWGMHB Case No.
6 04-2-0041c, in which the petitioners challenge the County’s adoption of a comprehensive
7 plan amendment and development regulations creating the float glass company MID UGA.
8 The float glass company, Cardinal FG Company (“Cardinal” hereafter), is an intervenor in
9 the motion to rescind invalidity and in *OBCT v. Lewis County*, WWGMHB Case No.
10 04-2-0041c. OBCT, a petitioner in the *OBCT v. Lewis County* case, is also an intervenor in
11 this motion.
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14 **I. SYNOPSIS OF DECISION**

15 In this order, we rescind invalidity as to the designation of rural lands that were given a new
16 designation as the Cardinal Major Industrial Development Urban Growth Area in Resolution
17 No. 04-322. The Board has imposed invalidity on the designation (and mapping) of many
18 rural lands in Lewis County because the County has failed to adequately designate and
19 conserve agricultural lands as required by the Growth Management Act, Ch. 36.70A RCW
20 (the “GMA”). Order Finding Noncompliance and Imposing Invalidity, February 13, 2004;
21 Order on Reconsideration of Extent of Invalidity, May 21, 2004. The lands that are subject
22 to the invalidity finding, including the lands at issue here, are lands that meet two major
23 criteria for designation as agricultural resource lands: (1) they contain prime soils; and (2)
24 they are currently, or show evidence of having recently been, devoted to agriculture. The
25 Board imposed invalidity as to the rural designation of those lands to preserve those lands
26 for consideration for agricultural designation. *Ibid.*
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30 The County is working to achieve compliance with respect to its designation of agricultural
31 lands. However, in the meantime, it has processed a request for a major industrial
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1 development (“MID”) urban growth area (“UGA”) for a Cardinal float glass facility. By
2 Resolution 04-322, the County approved a new designation for the Cardinal float glass
3 facility as an MID UGA on September 23, 2004.
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6 In deciding to rescind the invalidity finding as to the designation of the lands on which the
7 MID UGA is sited, the Board is also preparing to issue its decision regarding the compliance
8 of the MID UGA designation with the GMA in the companion case of *OBCT v. Lewis County*,
9 WWGMHB Case No. 04-2-0041c. In the Board’s view, the two cases are inextricably linked.
10 In the *OBCT v. Lewis County* decision, the Board finds that the primary requirements for
11 designation of an MID UGA designation pursuant to RCW 36.70A.365 have been met as to
12 the Cardinal MID UGA. This decision has a major impact on the question of whether to
13 rescind invalidity as to the lands now designated as an MID UGA because the new
14 designation meets all but one of the substantive requirements for such a major industrial
15 development designation change. In addition, the Thurston County Superior Court has
16 upheld the County’s issuance of a project-level permit for the Cardinal float glass facility.
17 The Board therefore finds that there is a high likelihood that the statutory “more intense” use
18 of a major industrial development will occur on the lands in question such that the lands do
19 not have long-term commercial significance for agricultural production pursuant to RCW
20 36.70A.030 (2).
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24 The Board also accepts the County’s commitment and evidence finding that the MID UGA
25 will not affect the designation and protection of the adjacent lands as agricultural resource
26 lands. The buffering, environmental protection, and mitigation of impacts on adjacent lands
27 create a self-contained UGA that will not impede agricultural activity on the adjacent lands.
28 In addition, the evidence shows that the Cardinal industrial activity may co-exist side-by-side
29 with ongoing agriculture because it does so in other locations around the country.
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1 Because the lands do not now have long-term commercial significance for agricultural
2 production, and because the MID UGA will not adversely impact the designation and
3 protection of lands adjacent to it as agricultural resource lands, the Board finds that the
4 designation of the Cardinal MID UGA site no longer substantially interferes with the goals of
5 the GMA. Therefore, the Board rescinds its finding of invalidity as to the Cardinal MID UGA
6 site designation. The designation of all other lands in the county subject to the invalidity
7 finding in the Board's February 13, 2004, Order Finding Noncompliance and Imposing
8 Invalidation, as modified by the Board's May 21, 2004, Order on Reconsideration of Extent of
9 Invalidation shall continue to be subject to the invalidity finding.
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12 II. PROCEDURAL HISTORY

13 These cases have a long and complex history. The first petition for review in *Butler v. Lewis*
14 *County* was filed on August 2, 1999. It was consolidated with a variety of other petitions for
15 review into the consolidated case WWGMHB Case No. 99-2-0027c. On March 31, 2000,
16 the first petition for review was filed in *Panesko v. Lewis County*. This petition, too, was
17 consolidated with other petitions into a consolidated case number (WWGMHB Case No. 00-
18 2-0031c) heard on a parallel track with the *Butler* case. On June 30, 2000, the Final
19 Decision and Order was issued in both cases. That Final Decision and Order found, among
20 other things, that the designation of agricultural resource lands and the development
21 regulations necessary to protect those lands were non-compliant with Ch. 36.70A RCW (the
22 "GMA").
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26 Subsequently, a compliance hearing was held and a Compliance Order was issued in both
27 cases on March 5, 2001. This Compliance Order found, in addition to other findings, that
28 the County was in continuing noncompliance with respect to its designation of agricultural
29 resource lands and protection of those lands from incompatible uses.
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1 On July 10, 2002, another Compliance Order was issued in both cases. This order
2 continued the Board's finding that the designation of agricultural resource lands was
3 noncompliant with the GMA and imposed invalidity on certain development regulations
4 based on a finding that the allowable non-resource uses in resource lands substantially
5 interfere with the goals of the GMA.
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8 As a result of these orders, the County developed a new set of designation criteria for its
9 agricultural resource lands and modified many of its development regulations pertaining to
10 allowable uses in resource lands. These designation criteria were based on the perceived
11 needs of the agricultural industry in Lewis County rather than on the characteristics of the
12 land. Order Finding Non Compliance and Imposing Invalidity, February 13, 2004,
13 Supplemental Findings of Fact and Conclusions of Law Regarding the Invalidity of
14 Agricultural Resource Lands Designation Definitions, Maps and Criteria, No. 2. As a result,
15 of the 117,000 acres of upland land being farmed in the county, less than 14,000 acres
16 were designated for conservation and protection as agricultural resource lands. *Ibid*, No. 1.
17 Based on the County's history of noncompliance and the lands at risk for incompatible
18 development, this Board imposed invalidity on the designation and mapping of agricultural
19 lands. *Ibid*, No. 8. Upon motion of the Petitioners to that case, the Board clarified the
20 nature and extent of its invalidity finding in its May 21, 2004, Order on Reconsideration of
21 Extent of Invalidity, applying invalidity to the County's designation of rural lands that met two
22 fundamental criteria for designation as agricultural resource lands: presence of prime soils;
23 and evidence of current or recent history of agricultural use. The finding of invalidity
24 extends to the designation of the lands at issue here.
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28 The original date for compliance under the February 13, 2004, order was August 10, 2004.
29 That date has been extended twice at the request of the County, to allow the County to
30 address its designation criteria and development regulations in their entirety through the use
31 of a technical advisory committee and a restructured planning commission. Under the latest
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1 order, compliance is due on these issues to August 22, 2005. Order Granting County's
2 Motion for an Extension of Time for Compliance and Setting New Compliance Schedule,
3 March 21, 2005.

4
5 The County filed its motion to rescind invalidity as to the Cardinal MID on February 28,
6 2005, and filed its Index of the Record applicable to this motion on March 11, 2005, in
7 accordance with the Prehearing Order for the motion. Upon request of the Petitioners, the
8 Record below was supplemented with Index Nos. 2005-2017 as added by Intervenor OBCT;
9 and Index Nos. 2017-2021 as added by the Butler Petitioners. Order on Record for County
10 Motion to Lift Invalidity as to the Cardinal MID, March 23, 2005.

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13 The hearing on the motion to rescind invalidity as to the Cardinal MID was held on April 12,
14 2005, in Chehalis, Washington. Petitioners Eugene Butler, Kathleen Heikkila, and Vince
15 Panesko spoke for the Petitioners. The County was represented by Chief Civil Deputy
16 Douglas Jensen. Intervenor Cardinal FG Company was represented by attorneys John
17 Hempelmann and Andrew Lane. Intervenor OBCT did not participate in the motions
18 hearing. All three board members attended. At the motions hearing, the Board took official
19 notice of the Order of Dismissal with Prejudice issued in Thurston County Superior Court
20 Cause No. 04-2-02114-3, *OBCT v. Cardinal FG Company and Lewis County*.

21 22 23 24 **III. BURDEN OF PROOF**

25 In deciding whether to rescind its finding of invalidity as to the designation of the lands in
26 question, the Board determines whether the new legislative enactment substantially
27 interferes with the goals of the GMA. RCW 36.70A.302(1)(b). Substantial interference with
28 the goals of the GMA can only be found after the board has determined that the challenged
29 enactment is noncompliant with the requirements of the GMA. RCW 36.70A.302(1)(a).
30 Therefore, a board shall modify or rescind the determination of invalidity if it determines "that
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1 the plan or regulation, as amended or made subject to such interim controls, will no longer
2 substantially interfere with the fulfillment of the goals of this chapter.” RCW
3 36.70A.302(7)(a).
4

5
6 Because the Board has entered an invalidity finding as to the designation of rural lands in
7 Lewis County and the site of the Cardinal MID was designated as rural land, the County
8 bears the burden of proof in this motion to rescind invalidity as to the Cardinal MID:

9 A county or city subject to a determination of invalidity made under RCW 36.70A.300 or
10 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has
11 enacted in response to the determination of invalidity will no longer substantially interfere
12 with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1).
13 RCW 36.70A.320(4)

14 This Board has held that an enactment substantially interferes with the goals of the GMA
15 when it seriously threatens the local government’s future ability to adopt compliant planning
16 legislation. *Hudson v. Clallam County*, WWGMHB Case No. 96-2-0031 (Final Decision and
17 Order, April 15, 1997); see also *Vinatieri, Smethers and Knutsen v. Lewis County*,
18 WWGMHB Case No. 03-2-0020c (Compliance Order – 2005, January 7, 2005). The
19 question before the Board in this motion is whether the designation of the Cardinal property
20 as an MID UGA continues to substantially interfere with the ability of the County to adopt
21 compliant designation, mapping and development regulations protecting agricultural
22 resource lands.
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26 The County brings its motion to rescind invalidity pursuant to RCW 36.70A.302(6):

27 A county or city subject to a determination of invalidity may file a motion requesting
28 that the board clarify, modify, or rescind the order. The board shall expeditiously
29 schedule a hearing on the motion. At the hearing on the motion, the parties may
30 present information to the board to clarify the part or parts of the comprehensive plan
31 or development regulations to which the final order applies. The board shall issue
32 any supplemental order based on the information provided at the hearing not later
than thirty days after the date of the hearing.

1 and pursuant to WAC 242-02-833:

2 If a motion to clarify, modify or rescind a determination of invalidity order has been
3 filed by a county or city subject to a determination of invalidity, pursuant to RCW
4 36.70A.302, and the jurisdiction has not enacted legislation in response to the
5 board's remand order, a board shall schedule and conduct a hearing to address
6 clarifying, modifying or rescinding the determination of invalidity. The board may
7 rescind a determination of invalidity but find continuing noncompliance, in which case
8 the board may establish a compliance schedule or new compliance date.

8 However, in this case, the County has enacted a resolution amending an invalidated part of
9 the comprehensive plan, even if the amendment was not made for the purpose of
10 responding to the Board's finding of noncompliance and invalidity. We therefore find that
11 subsection (7) of RCW 36.70A.302 also applies:
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13 (a) *If a determination of invalidity has been made and the county or city has enacted*
14 *an ordinance or resolution amending the invalidated part or parts of the plan or*
15 *regulation or establishing interim controls on development affected by the order*
16 *of invalidity, after a compliance hearing, the board shall modify or rescind the*
17 *determination of invalidity if it determines under the standard in subsection (1) of*
18 *this section that the plan or regulation, as amended or made subject to such*
19 *interim controls, will no longer substantially interfere with the fulfillment of the*
20 *goals of this chapter.*

21 RCW 36.70A.302(7)(a) (emphasis added)

22 The County bears the burden of proof on this motion because it was not brought as a timely
23 motion for reconsideration but as a motion based on a new legislative enactment (i.e. the
24 new designation of the Cardinal MID UGA). RCW36.70A.320(4) places the burden on the
25 County under these circumstances.

26 **IV. ISSUE PRESENTED**

27 *Should the Board modify its orders of February 13, 2004, and May 21, 2004, to rescind the*
28 *finding of invalidity as to the designation of rural lands that were given a new designation as*
29 *the Cardinal Major Industrial Development ("MID") Urban Growth Area ("UGA") in*
30 *Resolution 04-322.*
31

1 **V. DISCUSSION**

2 A. Introduction

3 Because the invalidity finding as to the designation of rural lands in these cases was based
4 upon the County's noncompliance with the GMA requirements for the designation and
5 conservation of agricultural resource lands, there are two chief concerns in deciding this
6 motion. The first is whether the removal of the Cardinal MID UGA lands from consideration
7 for designation as agricultural resource lands substantially interferes with the GMA goals. In
8 this regard, the compliance or noncompliance of the MID UGA designation with RCW
9 36.70A.365 is a primary consideration. The second concern is whether the designation of
10 the Cardinal MID UGA will adversely impact the designation and conservation of property
11 adjacent to the Cardinal MID UGA as agricultural resource lands. Because the County has
12 not yet adopted compliant designation criteria for agricultural resource lands, this question
13 turns upon the evidence of compatibility of the Cardinal float glass facility and master plan
14 with surrounding agricultural uses.
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18 B. Positions of the Parties.

19 The County frames its motion to rescind the invalidity finding as to the designation of the
20 lands that were given the MID UGA designation with three arguments. Motion to Rescind
21 Invalidity on Cardinal MID. First, the County argues that it is required to consider the
22 Cardinal application as vested "to all approvals necessary for the development." *Ibid* at 4.
23 Thus, the County argues, "[t]he Board should acknowledge the legal mandates on the
24 County and not require the County to consider the Cardinal MID for a potential agricultural
25 resource use." *Ibid* at 5.
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27

28 Second, the County argues that there is certainty of a more intense use of the subject
29 property. Because Cardinal will use the property for a float glass facility, the County argues
30 that it cannot legitimately consider the Cardinal MID for possible designation and regulation
31 as agricultural lands. *Ibid* at 6.
32

1 Third, the County argues that the use of the Cardinal MID for float glass manufacturing will
2 not adversely impact use of adjacent lands for agricultural production. *Ibid.* At oral
3 argument, counsel for the County asserted that the designation of the MID UGA will have no
4 impact upon the use of adjacent lands for agriculture or the designation of those adjacent
5 lands as agricultural resource lands because the Cardinal MID is self-contained and has
6 been sited so that agricultural activities are unimpeded.
7

8
9 Petitioners object to a rescission of the invalidity finding as to the designation of the rural
10 lands now designated for the MID UGA on several grounds. OBCT first responds that the
11 vesting doctrine only applies to project permit applications that can be adopted without
12 changing the comprehensive plan. OBCT Opposition to Rescinding Invalidity for Cardinal
13 at 7. Since the Cardinal application required a comprehensive plan amendment, OBCT
14 argues, the project could not vest until invalidity is lifted. *Ibid* at 10. See also Petitioner
15 Panesko Brief: Lewis County Motion to Rescind Invalidity on Cardinal MID at 6-7. Petitioner
16 Panesko further argues that the comprehensive plan amendment was discretionary with the
17 County and not a matter of right so Cardinal was not guaranteed a comprehensive plan
18 amendment when it filed its application. *Ibid* at 8. The Butler Petitioners also point out that
19 the Cardinal property was zoned rural at the time of its application for a major industrial
20 development and “major industry” is not a use allowed in any rural zone. Petitioners Butler
21 et al. Response to Motion to Rescind Invalidity at 13.
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24
25 Petitioners also object to removal of the Cardinal MID UGA site from the Board’s invalidity
26 finding since the Board denied the County’s request to do so in its May 21, 2004, decision.
27 Petitioner Panesko Brief: Lewis County Motion to Rescind Invalidity on Cardinal MID at 4;
28 Petitioners Butler et al. Response to Motion to Rescind Invalidity at 16.
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31 We will address these arguments in order:
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1 C. The Vesting Argument

2 The County and Cardinal argue that the Cardinal application vested against any change in
3 local law that occurred after the completed application was received. They assert that this
4 prevents the November 14, 2003, completed application for an MID from being affected by
5 this Board's February 13, 2004, and May 21, 2004, orders finding invalidity. County Motion
6 to Rescind Invalidity on Cardinal MID at 3-4.
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8
9 Petitioners, on the other hand, argue that the application did not vest to a comprehensive
10 plan designation change since comprehensive plan designations are excluded from the
11 Lewis County vesting ordinance (LCC 17.05.040); are discretionary and thus not a matter of
12 right; and that state law does not provide that vesting rights are created with respect to
13 comprehensive plan amendments. OBCT Opposition to Rescinding Invalidity for Cardinal at
14 5-10. Petitioners further point out that the code provisions that allowed the County to create
15 an MID were not enacted until April of 2004, after the invalidity findings were entered and
16 after the project application was deemed complete. Petitioners Butler et al. Response to
17 Motion to Rescind Invalidity at 11.
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19
20 The question of vested rights is not one that this Board can determine. *Vines v. Jefferson*
21 *County*, WWGMHB Case No. 98-2-0018 (Order on Motions, January 21, 1999); *FOSC v.*
22 *Skagit County*, WWGMHB Case No. 95-2-0065 (Compliance Order, August 28, 1996).
23

24 Whether or not the project vested to the comprehensive plan amendment needed to create
25 an MID UGA, the Board must decide if the new designation substantially interferes with the
26 goals of the GMA. We do not opine on what difference this would make to the Cardinal
27 project. Under the GMA (RCW 36.70A.302), the Board must determine whether invalidity
28 continues to apply, but the Board itself does not determine whether any given application
29 has vested rights. However, the Board may consider the potential for project applications to
30 vest in determining to impose invalidity in the first place, because it bears on the possible
31 interference with proper planning that such applications might pose if allowed to vest during
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1 the compliance remand period. In this case, whatever the impact of the Cardinal
2 application, that impact occurred as of November of 2003, the date of the completed
3 application.
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6 The County urges that it should not be required to consider the Cardinal site for agricultural
7 resource land designation because it is legally compelled to consider the project application
8 as vested. Again, we do not have the authority to decide the legal ramifications of a
9 particular project application, nor to speculate about the consequences of a designation
10 change subsequent to approval of the Cardinal application. The question the Board must
11 decide is whether the designation change adopted by the County substantially interferes
12 with the goals of the GMA. We believe that the proper inquiry is whether the new
13 designation itself substantially interferes with the goals of the Act.
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16 *Conclusion:* The Board does not have authority to decide whether the project vested to the
17 pre-invalidity designation. However, the Board must determine whether the change in
18 designation of the Cardinal MID UGA lands continues to substantially interfere with the
19 goals of the GMA for conservation and protection of agricultural resource lands under the
20 requirements of the GMA for those purposes. The impact of an approved project is
21 discussed below in light of the GMA definitions of agricultural resource lands.
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24 D. Certainty of a "More Intense Use"

25 The County points to the criteria for "agricultural land" in RCW 36.70A.030(2) and (10) as a
26 reason why the Cardinal MID UGA lands need not be designated as "agricultural lands."
27 RCW 36.70A.030(2) provides that agricultural lands are those lands that are "primarily
28 devoted to agriculture" and of "long-term commercial significance for agricultural
29 production." "Long-term commercial significance" includes:
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1 [T]he growing capacity, productivity, and soil composition of the land for long-term
2 commercial production, in consideration with the land's proximity to population areas,
3 and the possibility of more intense uses of the land.

4 RCW 36.70A.030(10)

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6 The County emphasizes that the major industrial development that will be placed on the
7 Cardinal MID UGA is not just a "possibility" of more intense use – it is a *certainty* of such an
8 intense use. County Motion to Rescind Invalidity on Cardinal MID at 5-6. The master plan
9 for the major industrial development was approved as a project application and the Superior
10 Court has dismissed the Land Use Petition Act ("LUPA") challenge to that approval.
11 (Thurston County Superior Court Cause No. 04-3-0-2320-3, Order of Dismissal with
12 Prejudice, April 8, 2005).

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14
15 OBCT responded that there is no certainty that the MID project will proceed (OBCT
16 Opposition to Rescinding Invalidity for Cardinal at 10), but this response was submitted
17 before the Thurston County Superior Court dismissed the LUPA petition. Likewise, the
18 Butler Petitioners assert that the determination of the likelihood of a more intense use of the
19 property "should be made after the issuance of decisions" in the Thurston County Superior
20 Court case and in the case of *OBCT v. Lewis County, WWGMHB Case No. 04-2-0041c*.
21 Petitioner Butler et al. Response to Motion to Rescind Invalidity at 16. Now that the
22 Superior Court has dismissed the LUPA appeal, the likelihood of a more intense use on the
23 property is high.
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26 Petitioner Panesko argues that the more intense use claim must be denied because the
27 Cardinal MID UGA converts agricultural lands to industrial uses in violation of the Board's
28 March 5, 2001, order. Petitioner Panesko Brief: Lewis County Motion to Rescind Invalidity
29 on Cardinal MID at 8-10. However, Petitioner Panesko misread the Board's March 5, 2001,
30 Compliance Order in these cases. It did not invalidate the designation of lands; it
31 invalidated certain uses allowed on resource lands. The question here is not whether to
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1 allow industrial *uses* in agricultural lands but whether the change in the *designation* of those
2 lands as a special purpose UGA for major industrial development would substantially
3 interfere with the goals of the GMA.
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5 Petitioners argue strenuously that the Cardinal site contains prime agricultural soils that
6 should not be converted to industrial use. While we agree that the protection and
7 conservation of agricultural lands is a major aim of the GMA, it is not the only goal of the
8 Act. In addition to conservation and protection of resource lands, one of the legislative
9 objectives in adopting the GMA was to encourage economic development:
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11 Encourage economic development throughout the state that is consistent with
12 adopted comprehensive plans, promote economic opportunity for all citizens of this
13 state, especially for unemployed and for disadvantaged persons, promote the
14 retention and expansion of existing businesses and recruitment of new businesses,
15 recognize regional differences impacting economic development opportunities, and
16 encourage growth in areas experiencing insufficient economic growth, all within the
17 capacities of the state's natural resources, public services, and public facilities.

18 RCW 36.70A.020(5) (Goal 5 of the GMA)

19 One way for addressing economic development was specifically approved with the adoption
20 of RCW 36.70A.365. That provision of the Act allows the creation of a special purpose
21 urban growth area for major industrial development outside an existing UGA. The
22 legislative findings pertaining to the subsequently adopted industrial land bank provisions of
23 RCW 36.70A.367 illustrate the legislature's intention to facilitate major industrial
24 development outside urban growth areas. Findings – Purpose – 1996 c 167 (RCW
25 36.70A.367):
26

27 In 1995 the legislature addressed the demand for siting of major industrial facilities by
28 passage of Engrossed Senate Bill No. 5019, implementing a process for siting such
29 activities outside urban growth areas. The legislature recognizes that the 1995 act
30 requires consideration of numerous factors necessary to ensure that the community
31 can reasonably accommodate a major industrial development outside an urban
32 growth area.

1 While RCW 36.70A.365 places a number of conditions on approval of such an MID UGA,
2 none of them preclude siting the special-purpose urban growth area on resource lands.
3 Priority must be given to applications for sites adjacent to or in close proximity to an urban
4 growth area (RCW 36.70A.365(2)(h)), but the “developable land” sites considered must also
5 meet the *bona fide* requirements for locating the major industrial development.
6

7
8 In this case, the County’s determination to locate the MID UGA on lands that meet the test
9 for consideration of designation as agricultural resource lands resulted from the unique
10 siting requirements of the Cardinal float glass facility. See *OBCT v. Lewis County*,
11 WWGMHB Case No. 040-2-0041c (Final Decision and Order). Those requirements
12 included proximity to rail and highway, parcel size, and, most significantly, water table. The
13 need for a 35-foot deep basement in which to house the furnace for glass production means
14 that the float glass facility must be located on a parcel at least 35 feet above the water table.
15 These requirements led Cardinal to the lands at issue and Cardinal points out that no one
16 has brought forward any other parcel of land that meets the *bona fide* requirements for the
17 float glass facility.
18

19
20 Petitioners argue, and the Board agrees, that most uses other than agriculture are more
21 intense uses of the land. The definition of “long-term commercial significance” cannot,
22 therefore, be read to allow *any* more intense use of the land to constitute a rationale for
23 removing agricultural lands from conservation and protection as resource lands. However,
24 the major industrial development urban growth area is specifically allowed by the GMA and,
25 by the terms of RCW 36.70A.365, contains its own conditions for approval. An MID UGA is
26 not just any “more intense” use; it is a statutorily created and limited “more intense” use.
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30 It is clear that the lands in question contain prime soils and have a history of agricultural
31 use. This makes them strong candidates for designation as agricultural resource lands.
32 However, the high likelihood of a more intense permitted use under the specific facts of this

1 case makes the long-term commercial significance of those lands for agricultural production
2 minimal. Further, because of the unique requirements of the Cardinal float glass plant, only
3 one site in Lewis County has been shown to meet Cardinal's legitimate needs for location.
4 No matter how significant we believe the aim of conserving agricultural lands to be, we fail
5 to discern a legislative intent to require a local jurisdiction to reject the only qualified site in
6 the county for the creation of an urban growth area for this major industrial development
7 solely because the lands on that site could be designated agricultural resource lands. The
8 choice to designate them for another use does not, itself, substantially interfere with the
9 goals of the GMA so long as the change in designation does not affect the designation and
10 protection of adjacent agricultural lands.
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12
13 *Conclusion:* There is a high likelihood that the lands in question will be subjected to a more
14 intense use as a major industrial development. As a result, these lands need not be
15 conserved for consideration as designated agricultural resource lands.
16

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18 E. Lack of an adverse impact use of the MID UGA on adjacent lands for agricultural
19 production

20 The provisions of RCW 36.70A.365(2) include requirements for buffers, environmental
21 protection, and mitigation of adverse impacts on resource lands. The uncontroverted
22 evidence shows that the Cardinal MID will be self-contained and buffered so that agricultural
23 activity may occur unimpaired at its very edges. Cardinal has offered evidence of
24 agricultural activity co-existing side-by-side with its manufacturing activities in other parts of
25 the United States. Ex. 210. The Hearings Examiner found the Cardinal facility would not
26 affect the continued use of agriculture on adjacent lands. Hearing Examiner Master Plan
27 Findings, Conclusions and Recommendations, In Re: Cardinal FG Company Float Glass
28 Manufacturing Plant, Hearing No. 04-2-001, September 8, 2004, Finding #44 (Attachment 3
29 to the Motion of Lewis County to Rescind Invalidity on Cardinal MID). At the hearing on this
30 motion, the County unequivocally represented that the designation of the MID UGA will
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1 have no impact upon the potential designation of the adjacent lands as agricultural resource
2 lands.

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4 Petitioners argue that the County has still failed to adopt compliant designation criteria and
5 development regulations to protect agricultural resource lands from incompatible uses.

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7 Therefore, they urge the Board should not lift invalidity on the Cardinal lands. Petitioners
8 Butler et al. Response to Motion to Rescind Invalidity at 17; Petitioner Panesko Brief: Lewis
9 County Motion to Rescind Invalidity on Cardinal MID at 13-14. They argue that the Board
10 has already declined to exempt the Cardinal MID UGA site from its invalidity order and that
11 the Board should not consider this request in the absence of the County completing its work
12 on agricultural lands overall. However, the County has amended a part of the
13 comprehensive plan in Resolution 04-322, and RCW 36.70A.302(7)(a) provides that the
14 board shall modify or rescind the determination of invalidity if it finds that the plan as
15 amended will no longer substantially interfere with the goals of the Act. That is the inquiry
16 here.
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19 OBCT also argues that there is a risk of further industrial development on adjacent lands
20 under option to Sovran that has not been addressed in the development regulations
21 adopted for the Cardinal MID UGA. OBCT Opposition to Rescinding Invalidity for Cardinal
22 at 11-12. However, OBCT has not shown that the rescission of invalidity here will in any
23 way further the change in designation or use of adjacent lands; indeed, all the evidence
24 before the Board demonstrates that agricultural uses can continue unimpeded on lands
25 adjacent to the Cardinal float glass facility.
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29 While it would be preferable to have the County's designation criteria before us to ensure
30 that the presence of the MID UGA will not affect the designation of adjacent lands, that work
31 is not yet finished. Reply of Lewis County on Motion to Rescind Invalidity on Cardinal MID,
32 Attachment 7. We share the Petitioners' concerns about the impact of this MID UGA on

1 adjacent lands, particularly given the history of noncompliant designation and protection of
2 agricultural lands. However, we accept the County's commitment that the MID UGA will
3 have no effect on the designation and protection of adjacent lands for agriculture as binding
4 and consistent with the evidence.
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7 *Conclusion:* The County has met its burden of showing that the MID UGA does not
8 substantially interfere with the GMA goals for conservation and protection of agricultural
9 resource lands.

10 11 **VI. FINDINGS OF FACT**

- 12 1. Lewis County is a county located west of the crest of the Cascade Mountains that is
13 required to plan pursuant to RCW 36.70A.040.
- 14 2. This motion to rescind invalidity as to the Cardinal MID UGA was brought by the
15 County in response to the Board's finding in both of the above-entitled cases that the
16 designation of the lands now constituting the MID UGA site substantially interferes with
17 the goals of the GMA. That finding was imposed in two previous orders of the Board –
18 the February 13, 2005, Order Finding Non Compliance and Imposing Invalidity and the
19 May 21, 2004, Order on Reconsideration of Extent of Invalidity.
- 20 3. The Petitioners participated in person or in writing in the legislative adoption
21 proceedings in Lewis County with respect to the issues raised in the petitions for
22 review.
- 23 4. Intervenors OBCT and Cardinal FG Company have interests in the subject-matter of
24 this motion that they wish to protect through participation in this motion. Both have
25 been granted Intervenor status.
- 26 5. Lewis County Resolution 04-322 amends the County comprehensive plan to create a
27 major industrial development ("MID") urban growth area ("UGA") on lands whose
28 designation was found to be invalid in the February 13, 2005, Order Finding Non
29 Compliance and Imposing Invalidity and the May 21, 2004, Order on Reconsideration
30 of Extent of Invalidity.
- 31 6. Cardinal filed its application for a major industrial development on November 14, 2003,
32 and the County considered it complete on that date.

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- 7. The master plan for the Cardinal major industrial development was approved as a project application and the Superior Court has dismissed the Land Use Petition Act (“LUPA”) challenge to that approval. (Thurston County Superior Court Cause No. 04-3-0-2320-3, Order of Dismissal with Prejudice, April 8, 2005).
- 8. The Cardinal MID UGA lands contain prime soils and have a history of agricultural use.
- 9. The unique siting requirements of the Cardinal float glass facility include proximity to rail and highway, parcel size, and, most significantly, water table. The need for a 35- foot deep basement in which to house the furnace for glass production means that the float glass facility must be located on a parcel at least 35 feet above the water table.
- 10. These requirements led Cardinal to the lands at issue and only one site in Lewis County has been shown to meet Cardinal’s legitimate needs for location.
- 11. The high likelihood of a more intense permitted use under the specific facts of this case makes the long-term commercial significance of those lands for agricultural production minimal.
- 12. The uncontroverted evidence shows that the Cardinal MID will be self-contained and buffered so that agricultural activity may occur unimpeded at its very edges.
- 13. Cardinal has offered evidence of agricultural activity co-existing side-by-side with its manufacturing activities in other parts of the United States. Ex. 210.
- 14. The Hearings Examiner found the Cardinal facility would not affect the continued use of agriculture on adjacent lands. Hearing Examiner Master Plan Findings, Conclusions and Recommendations, In Re: Cardinal FG Company Float Glass Manufacturing Plant, Hearing No. 04-2-001, September 8, 2004, Finding #44 (Attachment 3 to the Motion of Lewis County to Rescind Invalidity on Cardinal MID).
- 15. At the hearing on this motion, the County unequivocally represented that the designation of the MID UGA will have no impact upon the potential designation of the adjacent lands as agricultural resource lands.

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VII. CONCLUSIONS OF LAW

- A. This Board has jurisdiction over the parties and the subject matter of this motion.
- B. The Petitioners have standing to object to the County's Motion To Rescind Invalidity on the Cardinal MID.
- C. The Intervenors have a sufficient interest in the subject matter of this motion to participate in this motion.
- D. Resolution 04-322 amends the Lewis County comprehensive plan to change the designation of lands owned by Cardinal FG Company from a rural designation to a major industrial urban growth area designation.
- E. The lands designated as the Cardinal MID UGA do not have long-term commercial significance for agricultural production and are no longer required to be considered for designation as agricultural resource lands.
- F. The designation of lands adjacent to the Cardinal MID UGA as agricultural resource lands and the County's obligation to adopt development regulations to protect those lands will not be affected by the Cardinal MID UGA.
- G. The designation of the Cardinal MID lands no longer substantially interferes with the goals of the GMA.

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VIII. ORDER

Based on the foregoing, the finding of invalidity imposed by the Order Finding Noncompliance and Imposing Invalidity, February 13, 2004; and the Order on Reconsideration of Extent of Invalidity, May 21, 2004, as to the designation of the lands designated in Resolution 04-322 as the Cardinal Major Industrial Development Urban Growth Area is hereby **RESCINDED**. The finding of invalidity as to the designation of all other lands upon which the finding was imposed by the two referenced orders shall remain in full force and effect.

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This is a final decision for purposes of appeal pursuant to RCW 36.70A.300(5). For purposes of a motion for reconsideration, pursuant to WAC 242-02-832 such motion must be brought within ten days of service of this decision.

Entered this 12th day of May 2005.

Margery Hite, Board Member

Holly Gadbow, Board Member

Gayle Rothrock, Board Member