

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

YANISCH, et al.,)	
	)	No. 02-2-0007c
Petitioners,)	
	)	AMENDED
v.	)	PREHEARING
	)	ORDER RE:
	)	ISSUES,
LEWIS COUNTY,	)	PREVIOUS
	)	COMPLIANCE
Respondent,	)	DECISIONS, AND
	)	THE COUNTY'S
	)	OCTOBER 1, 2002
	)	MOTIONS TO
	)	STRIKE

Synopsis of the Order

The number of issues in this case reached a high water mark of 112 after petitioners filed amended petitions for review (PFRs). Through the efforts of the County, petitioners, and the Board, we will hear argument on the 10 issues noted below during the November 5, 2002 Hearing on the Merits.

We have addressed the issues briefed in the petitioners' briefs of September 25, 2002, in the categories as follows:

1. Issues to be briefed by the County for the Hearing on the Merits.

Panesko #1 – Rural Character/Property Rights

Panesko #9 – Lots Less Than 5 Acres

Panesko #10 – Unlimited Lot Division

Panesko #16 – Steam Plant

Yanisch #4 and #5 – Local Airports

Yanisch #6 – Nonconforming Uses

Yanisch #7 – Single-family Residence Concurrency Exemption

Yanisch #8 and #9 – Density Increases Creating Lots No Longer
Rural In Character

2. Issues found compliant in the July 10, 2002 Compliance Order in *Mudge, et al.*, for which, after careful consideration of all substantive arguments, we reiterate our previous decision.

Panesko #2 – Wilderness Defining Rural Character

Panesko #3 – Industrial Limited Areas of More Intensive Rural
Development (LAMIRDs) designation

Panesko #4 and #5 – Public Participation

Panesko #6 – Curtis Logical Outer Boundary (LOB)

Panesko #13 – LAMIRD Clusters

Panesko #14 – Watersheds

Panesko #17 – Environmental Impact Statement (EIS) Alternatives

Panesko #18, #19, #20, #21, #22, #23, #24, #25, and #26 – Townships,
Resource Land, Variety of Rural Densities

Yanisch #2 and #3 – Tourist/Rest Stop-Freeway, A Cluster of Uses

3. Issues found noncompliant in the July 10, 2002 Compliance Order which will be addressed in a later proceeding.

Panesko #7 and #8 – Agricultural Land

Panesko #11 – Industrial Land Band (ILB) Separation

Panesko #12 – Agriculture Lands in ILBs

4. Issues raised in the briefs which were unchanged in the April 2002 County action, or which were raised for the first time in this case after the 30-day opportunity to amend PFR by right had expired and are therefore not properly before us.

Yanisch #1 – Master Plan Resort (MPR)

Yanisch #10 – Junk Yards

Panesko #15 – Kiona

Procedural History

On May 28, 2002, we received a PFR from Vince Panesko (Case #02-2-0006 *Panesko III*). On June 14, 2002, we received a PFR from Petitioners Debra Burris, et al. (Case #02-2-0007, *Burris*). Both petitions challenged Lewis County's response to our remand in Cases #01-2-0010c (*Mudge*), #00-2-0031c (*Panesko II*), #99-2-0027c (*Butler*), and #98-2-0011c (*Smith*). On July 17, 2002, we held a Prehearing Conference where we agreed that both Petitioners Panesko and Burris, et al., would file amended petitions for review by noon, August 5, 2002, delineating the original issues raised in the initial PFRs which they believed were still before us after a review of the July 10, 2002 Compliance Order in the above-noted four Lewis County cases. We later extended that date to August 30, 2002, in order to accommodate the entry of our order regarding motions for reconsideration in *Mudge*, *Panesko II*, *Butler*, and *Smith*. On July 18, 2002, we entered an Order of Consolidation, captioning the new case #02-2-0007c, *Annette H. Yanisch, et al., v. Lewis County (Yanisch)* at the request of Burris. We received amended petitions from Petitioner Panesko and Petitioners Yanisch, et al. The County moved to strike these petitions and moved for dismissal of the case on the grounds that all of the issues contained in each amended PFR have already been addressed in the Compliance Orders in *Mudge*, *Panesko II*, *Butler*, and *Smith*, or are new issues untimely raised as they were not contained in the original PFRs in *Panesko II* and *Burris*, or addressed sections of the comprehensive plan or development regulations which were not changed, and thus not subject to challenge.

Applicability of Case #00-2-0001, (*WEAN III*)

Whidbey Environmental Action Network (WEAN) v. Island County

In the above referenced case, we received a PFR from WEAN challenging provisions of several ordinances adopted by Island County in response to our findings of noncompliance in an earlier Final Decision and Order, #98-2-0023c (*WEAN II*). WEAN stated at the time that it might withdraw all or part of the PFR depending on the nature of our decision after a compliance hearing regarding the County's response to our remand. This case is analogous to *Yanisch*. When we entered our compliance order in *WEAN II*, WEAN amended its petition. Island County

then moved for dismissal of the amended PFR on the grounds that the issues in the amended PFR had already been fully decided under our compliance order in the previous case. Island County emphatically complained that “WEANs’ petition for review amounts to no more than a redundant rehash of issues that have been already raised and the Board has already decided.” WEAN responded that the legal basis presented by the County in support of its motion would render the Growth Management Act’s (GMA, Act) provision of a statutory right to file a PFR after adoptions made in response to compliance orders a nullity. WEAN further claimed that anyone with standing to participate in a compliance hearing has standing to file a new PFR regarding whatever adoptions occur as a result of the compliance process. Finally, WEAN claimed that Island County was, in a round-about fashion, requesting the Board to apply the doctrines of *res judicata* and *collateral estoppel*, equitable doctrines which we have previously found we have no authority to apply.

The County responded that the Board has authority to manage with practicality its caseload and has the authority to refuse to waste everyone’s time on frivolous and redundant appeals.

As a result of these contentions, the presiding officer sent the parties a memo which stated, “...we believe we have already seen the entire record on these issues. WEAN and the County presented extensive exhibits and briefing on these issues in Case #98-2-0023c also before the hearing on the merits and before the February 9, 2002, compliance hearing. We will give WEAN one more opportunity to present new argument on these issues to ensure that we have in fact considered everything WEAN wishes to say. If we are not persuaded by WEAN’s brief that our previous findings of compliance were in error, we will issue a finding of compliance in this case with no further proceedings. If we are convinced by WEAN's new argument that our previous findings of compliance might have been an error, we will notify the County and give them ample time to respond to WEAN's new arguments and set a new schedule for the remainder of the proceedings in this case.”

While not precisely parallel to *WEAN III*, one may draw a strong comparison to this case (*Yanisch*). The dichotomy of petitioners briefing a compliance-hearing set of issues while filing a new PFR on the same range of issues has always been a difficult one to separate. Rephrasing of issues, raising of new issues, or presenting nuances of issues previously raised, make sorting out what has been addressed and what is ripe for review an extremely difficult task.

In this case, as in WEAN, we believed that we had seen the entire record on these issues and that we had addressed most, if not all of them, in the Compliance Order on *Mudge, Panesko II, Butler, and Smith*. As in WEAN, we afforded petitioners one more opportunity to present new argument on issues which they have raised in their amended PFRs, to ensure that we had, in fact, considered everything they wished to say. We stated that if we were not persuaded by petitioners' briefs that our findings in the Compliance Order failed to consider all the issues raised in the new PFRs, we would enter a finding of compliance with no further proceedings (except, of course, for any resource lands issues found noncompliant and still pending).

If we were convinced by petitioners' arguments that the recent Compliance Order failed to address any or all of the issues they raised in their PFRs, we stated we would notify the County, give it ample time to respond to petitioners' arguments, and set a new schedule for the remainder of the proceedings in this case. We stated our intent to be mindful that the Prehearing Conference agreement was that petitioners, in their amended PFRs, would delineate issues still before us after the Compliance Order, and not raise new issues.

While we were examining the briefs submitted by Petitioners Panesko and the Butler (*Yanisch*) group in an attempt to notify the County at the earliest possible time (on or about October 2, 2002) if any of the issues presented in the petitioners' briefs needed the County's response, we received two County motions to strike Panesko's brief and the Butler group's brief. These motions were received on October 1, 2002. Responses to these motions were due end of day, Friday, October 11, 2002. Pursuant to WAC 242-02-534 (Response to Motions) we were constrained from providing information to the County as to which issues, if any, it must respond to until we had received and reviewed responses to its October 1, 2002 motions. On October 9, 2002, we received Petitioner Panesko's response to the County's motion to strike. This Order, dated October 14, 2002, is entered at this time as a result of those constraints.

Argument and Rulings Re: Issues Briefed

Panesko Issues (Appendices 1 through 26, Panesko Brief, September 25, 2002)

Appendix 1 – Rural Character/Property Rights

Mr. Panesko challenged the County's definition of rural character for including private property rights and the individual's responsibility to determine reasonable use of the property as part of the definition. Petitioner Panesko claimed that inclusion of these factors is noncompliant with the definition of rural character in GMA Section .030(14).

The County responded that the issue of rural character was a principal one before the Board and that the matter was previously briefed and argued by Mr. Panesko. The County contended that Mr. Panesko "may not now pick out a few words or phrases he omitted from prior proceedings and re-argue the matter already lost."

This specific issue was not raised in the compliance hearings on the four old cases, nor was it addressed in the Compliance Order. It is not to be found in the *Mudge* case's *Butler* brief, pages 39-45, or in the *Panesko* brief, pages 9-11, pages referenced in our Compliance Order when we ruled that definition of rural character was compliant. The County must brief this issue for the Hearing on the Merits.

Appendix 2 - Use of Wilderness to Define the Rural Visual Landscape

In our Compliance Order, in *Mudge, et al.*, we held that the County had complied in its determination of rural character and visual compatibility. Mr. Panesko challenges two illustrative statements in the comprehensive plan rural areas sub element regarding visual landscape where the County references "wholly undeveloped wilderness areas," and "national parks wilderness areas." We reiterate our previous ruling regarding visual compatibility. The County need not brief this issue.

Appendix 3 – Industrial LAMIRD Designation Areas

Petitioner Panesko pointed out what he claimed to be errors in the wording of the comprehensive plan regarding the Curtis Rail Yard and the Ed Carlson (Toledo Field) Airport. He further claimed that the County was noncompliant in designating 93 acres of the airport as rural area industrial. We note that the runway takes up most of the 93-acre area. (Exhibit for Attachment 2, Toledo Airport, Compliance Order, July 10, 2002, *Mudge*, Official Zoning Map, Rural Area Industrial (RAI)) We previously found the Toledo Airport in compliance as well as the Curtis Rail Yard and the Centralia Steam Plant Industrial Land Bank. We reiterate our previous

findings. The County need not brief this issue.

Appendices 4 and 5 – Public Participation

We have previously ruled that the public participation process used by the County is compliant. The concerns raised by Petitioner Panesko relate to notification of nearby property owners. They in no way alter the requirements under the GMA for notification when amendments to the GMA-adopted plan or regulations are made. We reiterate our previous findings. The County need not brief this issue.

Appendix 6 – Expansion Beyond the Curtis Logical Boundary

Petitioner Panesko argues as he did in the prior compliance hearings that the Curtis Industrial Park is noncompliant because its 160 acres is greater than what he claims is the 1993 footprint of 70 acres. We previously found the LOB for Curtis (see page 17 of our Compliance Order) compliant. We reiterate our previous finding. The County need not brief this issue.

Appendix 7 – Undesignated Agricultural Land at Curtis

In our Compliance Order in *Mudge*, we found that petitioners sustained their burden of showing that the County has not complied with the GMA in its designations of agricultural resource land. In our Order we called upon the County to complete its duty to designate appropriate agricultural lands under the Department of Community Trade and Economic Development guidelines and GMA requirements. The County will address this requirement in a later proceeding. Compliance is due 180 days from the date of our Order on the Motions for Reconsideration regarding our July 10, 2002, Compliance Order. The County need not brief this issue at this time. The same applies to **Appendix 8 – Incorrect Agricultural Land Criteria.**

Appendix 9 – Creation of Lots Less Than 5 Acres

Petitioner Panesko challenged language in Lewis County Code (LCC) Section 17.100.015 (General Guidelines for Rural Development District) which allow lots 7.5 acres or greater to be divided into two lots. Petitioner Panesko maintained that lots less than 5 acres in size are not rural and therefore that this provision does not comply with Section .070C(iii). The County responded that the Board had made a finding of compliance regarding rural character based on lot size and that this was a rehash of a single piece of the overall plan.

Our Compliance Order in *Mudge* did not address LCC 17.100.015. We deem this a new issue and call upon the County to respond.

Appendix 10 – Unlimited Division of Lots

Petitioner Panesko alleged that a new section, LCC 17.102 (Family Member Units and Accessory Dwelling Units) allowed the accessory dwelling unit (ADU) to be sold to the family member after five years and he alleged that this creates two parcels and that the cycle could repeat itself anytime after five years. He contended that a 5-acre lot in a 1 dwelling unit per 5-acre zone could be legally subdivided into 4 lots in a 6-year period of time.

The County countered that the Board had ruled against Mr. Panesko on the overall topic of land division provisions and that “this matter was raised during compliance proceedings and Mr. Panesko should not be permitted to re-litigate the matter here (pages 14-15 of the July 10, 2002 Compliance Order)”. A reading of our Compliance Order does not show LCC 17.102 as under consideration in the compliance proceedings. It is not referred to in pages 14-15 of our Compliance Order, although those pages do reference LCC 17.42, 17.150, and 17.100. The County did not comment on LCC 17.102, or the distinction between ADUs and guesthouses or whether the prohibition against kitchens in guesthouses applied to ADUs. We deem this a new issue and call upon the County to respond to it.

Appendix 11 – Separation of Industrial Land Bank (ILB) Into Islands

Petitioner Panesko contended that the I-5/Highway 12 ILB created three separate parcels, now called an ILB, which, he contended, failed to comply with the one-location requirement for ILBs in RCW 36.70A.367.

The County responded that the ILB was the subject of the *Mudge* Compliance Order, page 20. On page 20 we noted that we had rejected the argument that there were three separate parcels constituting new ILBs. We also noted that the planning required by RCW 36.70A.367 has not yet been accomplished and the area remains in noncompliance. We called upon the County to complete the requirements of Section .367 for the I-5/US 12 ILB. This issue will be addressed in

the next compliance hearing on this case. The County need not address it at this time.

Appendix 12 – Undesignated Agricultural Land in the ILB

Petitioner Panesko once again addressed the question of agricultural lands and the I-5/US 12 ILB. The County pointed out that it is proceeding with its designation review as ordered by the Board. Any question, the County contended, as to the propriety of designation of any one property is premature. The County is correct. This issue will be addressed in the next compliance hearing. The County need not address it now.

Appendix 13 – Creation of LAMIRDs Called Clusters

On page 15 of our *Mudge* Compliance Order we stated that the key to balancing rural economic growth while retaining rural character and the limitations of rural development was to identify size, scale, and intensity of activities common to rural areas and appropriate for future rural development. We found that the County had attained compliance in this regard. These considerations included the subject of clusters. We reiterate our previous finding of compliance. The County need not address this issue.

Appendix 14 – Failure to Protect Watersheds

Petitioner Panesko claimed that the water supplies for Napavine, Toledo, and Mossyrock are insufficient to meet the needs of the three towns during the planning period (Exhibit 28, page 32 of the EIS). He alleged that the 1 to 5 zoning in the vicinity of the watersheds made the land use element noncompliant with Section .070(1). He requested that we declare rural zoning within 2 miles of the three cities noncompliant until long-term water supply or city wells is assured. The County noted that on page 5 of the *Mudge* Compliance Order, we had concluded that the Final Environmental Impact Statement complied with the GMA and that the EIS contained a reasonably thorough discussion of the significant aspects of the probable environmental consequences. We held that the County was aware of environmental risk of proposed action and reasonably considered the available alternatives. We reiterate our previous finding. The County need not brief this issue.

Appendix 15 – Improper Creation of the Town of Kiona

Petitioner Panesko noted that the amended development regulation maps included the new small

town of Kiona. He claimed that the 2.5-mile end-to-end distance along Highway 12 is mostly vacant and that the creation of a small town instead of the crossroads which Kiona has been for decades, allows the vacant land to be subject to higher densities and revised petition for review. A careful examination of Mr. Panesko's original petition dated May 28, 2002, shows no mention of Kiona in the 55 issues listed. The agreement at the July 17, 2002, Prehearing Conference was that petitioners would file amended petitions for review which delineated the issues contained in the originals that they believed were still before us after their opportunity to review the Order on Motions to Reconsider our original Compliance Order in *Mudge*. As the agreement was to reduce the number of issues, not add to them, and, as the County has pointed out, the revised petitions were past the 30-day deadline for amendments by right to the PFR, this issue is improperly before us and the County need not brief it.

Appendix 16 – Two Steam Plant Designations

Petitioner Panesko challenged the designation of rural area industrial and industrial land bank for the same location. He complained that the RAI designation and the ILB designation have different requirements and claimed that the County cannot demonstrate compliance until it decides which designation actually applies.

On page 20 of our Order, we determined that “the County has also removed the industrial reserve area adjacent to the Centralia Steam Plant ILB. The action is in compliance with the GMA.” Our finding did not reference RAI. Therefore, this is a new challenge. The County must brief the issue.

Appendix 17 – Use of Invalid Alternatives in the EIS Is Invalid

Petitioner Panesko claimed that the use of alternatives in the EIS fail to comply with the requirement to consider valid alternatives and by failing to provide decision makers with choices based on “comparative environmental impacts.” We found the County EIS compliant in the Compliance Order. We reiterate our previous finding. The County need not brief this issue.

Appendix 18 – Analysis of T15N: Five Partial Townships

Petitioner Panesko concluded from aerial photos and maps that the County has erred in designating timber land for rural development with the zoning of 1 to 20, 1 to 10, and 1 to 5.

Petitioner Panesko claimed that this land should have been designated forest resource lands as it has, he claimed, an existing and obvious pattern of land use as timber land. He assigned the same error to section of the T15N area containing the Centralia Steam Plant and raises questions over the assignment of some of the area as mineral resource land. The County contended that Mr. Panesko is again challenging zoning patterns that were at the heart of the compliance proceedings and in which the Board ruled for the County.

In Mr. Panesko's May 21, 2002 Brief for the Mudge proceedings, on page 9, he made the same arguments regarding protecting rural character. He said, "an analysis of aerial photos and parcel sizes clearly demonstrates that the three zoning densities (1 to 10, 1 to 20, and 1 to 5) would destroy most of the existing rural character in Lewis County. The rural character of large parcels of undeveloped 40, 80, and 160 acres would be destroyed by a zoning of 1 to 5."

In our decision we said that "ultimately the decision as to what are appropriate rural sizes and uses including their scale and location is a function of the Board of County Commissioners (BOCC) as long as the goals and requirements of the Act are met. The BOCC is free to adopt the very minimum restrictions and designations that comply with the Act. After our review of the record in this case (*Mudge*) and the argument and contentions of petitioners, we find the County has complied in its determination of a variety of rural densities, the establishment of rural character, and visual compatibility." We reiterate our previous findings. The County need not brief this issue.

Appendix 19 – T14N, R3W

Mr. Panesko made the same charges for this area as for the previous Appendix 18. We reach the same conclusion and reiterate our previous findings. The County need not brief this issue.

Appendix 20 – Analysis of T14N, R2W, Northwest ¼ and Northeast ¼

Mr. Panesko made the same charges as in Appendix 18 for this area near the Centralia UGA. We reach the same conclusion as in Appendix 18 and reiterate our previous findings. The County need not brief this issue.

Appendix 21 – Rural Zoning Applied to 1300 Block of Timber Land in Township T14N, R2W, Southwest ¼

Mr. Panesko made the same arguments as in Appendix 18 regarding this area near the Chehalis UGA. We reach the same conclusion as in Appendix 18 and reiterate our previous findings of compliance. The County need not brief this issue.

Appendix 22 – T14N, R2W, Southeast ¼

Mr. Panesko made the same arguments regarding undeveloped timber land that he made in Appendix 18. We reach the same conclusion and reiterate our previous finding of compliance for the area east of Chehalis. The County need not brief this issue.

Appendix 23 – T14N, R1W

Mr. Panesko claimed that land designations in this area are “reasonably consistent with traditional patterns of land use except for haphazard designations of FRL and MRL in the land uses open pit coal mines and 2,090 acres of undeveloped forest land designated without consideration for patterns of land use.” We reiterate our previous findings that the variety of rural densities, the establishment of rural character, and visual compatibility have been determined by the County and are compliant. The County need not brief this issue.

Appendix 24 – Analysis of T13N

Mr. Panesko made the same arguments as he made in Appendix 18 regarding this forested area. We reiterate our findings in the *Mudge* Compliance Order, page 15. The County need not brief this issue.

Appendix 25 – Analysis of T12 North

Mr. Panesko offered the same challenges as in Appendix 18 for this area near Winlock, Mary’s Corner, Jackson Highway, Mayfield Dam, Mossyrock Dam, Riffe Lake, Randall, and the Cowlitz River. We reiterate our previous findings. The County need not brief this issue.

Appendix 26 – Analysis of T11N

Mr. Panesko offered the same argument that he did in Appendix 18 regarding this area which includes the area west of Vader, the Toledo UGA, and the Cowlitz River. We reiterate our

previous finding. The County need not brief this issue.

**Response to Briefing on the Issues Delineated in the *Yanisch* Brief
(Also referred to as the *Butler* or *Burris* Group)**

The *Yanisch* petitioners' brief pointed out that they have reduced the number of issues from 42 in the amended PFR to 10, which they have briefed. We will discuss each of the 10 in turn.

Issue 1

Do the Master Plan Resort (MPR) provisions of the comprehensive plan (CP) at pages 4-18 authorizing such resorts to be located outside of a setting of significant natural amenities fail to comply with RCW 36.70A.360?

In its October 2, 2002 Motion to Strike the County contended that our September 5, 2002 Order precluded petitioners from raising new issues. The agreement at the Prehearing Conference was that petitioners would assess after a review of our Order on Motions to Reconsider which of the issues in their original PFR in *Yanisch* were still at issue. This issue was not included in the original PFR, but was included in the amended PFR which we received August 30, 2002, more than 30 days after the June 13, 2002 original PFR and therefore beyond the 30-day time period in which petitioners as a matter of right may raise new issues in an amended PFR (WAC 242-02-260 (1)).

Petitioners pointed out that this Board did not respond to this issue, timely raised in the *Mudge* cases, either in our Compliance Order or in our Order on Motions to Reconsider in *Mudge*. In the *Yanisch* petitioners brief, page 9, they claim that the Board has a duty to enter findings and conclusions on all issues raised by the parties (RCW 34.05.461(3)).

We conclude that as petitioners failed to include this issue in their initial PFR, they may not now raise it for consideration.

Issue 2

Do the LCC sections allowing Tourist/Rest Stops-Freeway and allowing new development of LAMIRDS fail to comply with Section 36.70A.070(d)(i) and (ii) of the GMA?

Issue 3

Does such a failure to comply constitute substantial interference with the fulfillment of the goals of the Act?

In Issues 2 and 3, petitioners challenged the provisions of Section LCC 17.42 as they pertain to the uses allowed in Tourist/Rest Stops-Freeway-a cluster of uses, and the relationship of these uses to the LAMIRD's zoning summary and the Freeway Commercial designation. The County responded that we held in *Mudge* that the County had satisfied the burden of demonstrating that substantial interference with the fulfillment of the goals of the Act regarding boundaries of LAMIRDs, uses allowed in LAMIRDs, and whether those uses were truly rural and consistent with rural character, had been met. In our Compliance Order in *Mudge* on page 20, we said, "petitioners made general claims of oversizing and excessive allowable uses, but ultimately did not meet their burden of showing that the adoption of Chapter 17.42 fails to comply with the Act." We reiterate our previous findings. The County need not brief these issues.

Issue 4 and 5

Do the provisions of LCC 17.100, 17.42.040, and 17.155.030(6) (permitting public airports) fail to comply with the Act because the provision authorizes the creation of a new Type 1 LAMIRD and because no process has been enacted to permit siting of essential public facilities? Does this alleged failure to comply substantially interfere with the fulfillment of the goals of the Act?

Our Compliance Order addressed the Ed Carlson Memorial Field noncompliance and determination of invalidity. It did not address the question of siting of new local airports and new regional airports. The County must respond to this issue, and whether, under **Issue 5**, substantial interference ensues.

Issue 6

Do the provisions of LCC 17.100.020, .155.020, .155.040, and .42.040 allowing expansion of nonconforming uses and changes from one nonconforming use to another fail to comply with RCW 36.70A requiring internal consistency, Section .070(5)(b) requiring provision for permitted uses, RCW 36.70A.070(5)(c) requiring protection of rural character, and Section (5)(d)(iv)

requiring minimization and containment of existing uses and do these failures substantially interfere with the fulfillment of Goals 1, 2, and 12 of the Act?

For this issue, petitioners pointed out that in the original Hearing on the Merits for *Panesko*, petitioners cited an incorrect code section (LCC 17.160.030 rather than Section .155.040). Petitioners noted that we failed to catch the error, as did the parties, and carried it through to our Final Decision and Order in which we also cited Section .160. Petitioners maintained that the County did not change the rule with respect to nonconformity contained in LCC 17.155.040. Petitioners claimed our intent was to find an ordinance authorizing changes in nonconforming uses to be noncompliant and invalid. As a result of the clerical error we later did not make a determination as to whether we should rescind or modify the order of invalidity. Petitioners now ask us to make a ruling in this matter. The County's Motion to Strike simply states the fact that the precise language of the nonconforming use provisions was not changed in April 2002. The County maintained that the language may not therefore, be challenged under this petition. We agree with the County.

Issue 7

Do sections of the LCC exempting establishment of single-family residences from compliance with concurrency requirements fail to comply with the Act?

Petitioners maintained that this issue was raised in *Panesko* as follows under

Issue 30:

“Does the exemption of single-family residential use on existing lots of record from concurrency requirements as set forth in LCC 17.130.010, 17.45.040, .070, (sic) 17.50.070, 17.55.050, 17.60.070, 17.65.060, 17.70.090, 17.95.070, and/or 17.100.090 fail to comply with RCW 36.70A.070(3)(d) (sic) and or RCW 36.70A.020(12) and/or substantially interfere with RCW 36.70A.020(12)?”

Petitioners continued that “despite the duty of the Hearings Board to include a statement of findings and conclusions, and the reason and basis therefore, on all the material issues of fact presented on the record in *Panesko*, the Board did not decide this issue.” Petitioners maintained that they timely raised the issue and that we did not act. In response, the County, in its Motion to Strike, merely cited the issue but did not argue it. We call upon the County to respond to this

issue and we will hear argument at the Hearing on the Merits.

Issue 8

Do the provisions of LCC 17.100, 17.102, .040 and .050, allowing density bonuses, fail to comply with Section .070(5)(c) of the Act requiring protection of rural character and Section (d) prohibiting creation of new Type (i) LAMIRDs?

Petitioners argued that these provisions permit increases in residential densities beyond the limits otherwise established and that with or without the density transfer feature, allows creation of lots that are no longer rural in character. They further assert that the family member and accessory dwelling unit section is objectionable because it allows substantial increases in densities on parcels of land. As we have deemed in a similar issue, *Panesko* #9, as a new issue, we will require briefing from the County in response on this issue also.

Issue 9

Is the effect of Issue 8 to create substantial interference with the fulfillment of the goals of the Act?

This issue should also be briefed by the County.

Issue 10

Does Section 17.145.090, exempting junk yards, salvage yards and recyclers from compliance, siting and permitting regulations on rural development and resource lands, thus providing a blanket allowance, fail to comply with RCW 36.70A.070(5)(d) permitting intensive development of only existing uses, and with RCW 36.70A.070(5)(c)(v) requiring protection against conflict with the use of resource lands and does this constitute a substantial interference with the fulfillment of Goals 1, 2, 8, 10, and 12?

Petitioners pointed out another scrivener's error in our Final Decision and Order in *Panesko*, where they maintained we cited Section 17.45.090 instead of Section 17.145.090. Petitioners noted that finding #36 of our noncompliance findings carried forward the clerical error. They noted while we did not make a finding with respect to junk yards in the Compliance Order, we

did suggest the issue would be properly resolved by PFR. (*See* Order on Reconsideration)

The County pointed out that the original PFR did not even mention the junk yard issue. It first appeared in the August 30, 2002 Amended PFR. Further language was not changed in April 2002.

As petitioners did not raise this issue in their initial PFR nor within their 30 day-window of opportunity to amend by right, we will not consider it now.

So ORDERED this 14th day of October, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

Nan A. Henriksen
Board Member