

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

YANISCH, et al.,

Petitioners,

v.

LEWIS COUNTY,

Respondent.

No. 02-2-0007c

FINAL DECISION
AND ORDER

SYNOPSIS OF THE ORDER

In this order, we find Lewis County in compliance with the Growth Management Act (GMA, Act) except for the following.

1. Area maps for the Centralia Steam Plant.
2. Public notification of application hearings for general aviation facilities.
3. Preclusion of subdivision in the rural area to densities higher than
1 dwelling unit per 5 acres.
4. Clarification that Chapter 17.102.040 applies to rural area
farm properties.
5. Clarification of the comprehensive plan language on rural character.

PROCEDURAL HISTORY

The procedural history is appended to the Order as Appendix I.

COUNTY CORRECTIONS

At oral argument, the County agreed to make the following corrections which arose through inadvertence rather than due to County policy:

1. Amend LCC 17.100.015 to permit division of property only once pursuant to this provision.
2. Provide that the family member units under Ch. 17.102 LCC are available only for farm families.
3. Amend Ch. 17.102 LCC to provide that accessory dwelling units must be a part of or attached to the primary dwelling.
4. Indicate on the map that the Steam Plant ILB is proposed rather than existing.
5. Re-map the Steam Plant ILB to correctly reflect its location.

PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW

Comprehensive plans and development regulations, and amendments thereto are presumed valid upon adoption. RCW 36.70A.320.

The burden is on petitioners to demonstrate that the actions taken by Lewis County are not in compliance with the requirements of the Growth Management Act (GMA, Act). RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we “shall find compliance unless [we] determine that the action by [Lewis County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” In order to find the County’s action clearly erroneous, we must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

ISSUES

Argument and Conclusions

Issue 1 – Rural Character Defined as Self-Rule (*Panesko* #1)

Petitioner Panesko challenged the County’s definition of rural character in the Lewis County comprehensive plan on the basis that it contains language which allows for “self-rule”. Brief of Panesko, pp. 1-2. Petitioner pointed to Exhibit 1, which defines rural character, in part, as including:

Lewis County rural character includes private property rights and the responsibility to use and maintain property in a reasonable manner. Problems are solved on a local basis by locals directly impacted by the situation.

And:

Lewis County Rural character includes independent, self-reliant people guided by common sense, not political correctness of governmental intrusion.

Lewis County Comprehensive Plan, Land Use Element, Approved Plan: June 1, 1999, with changes approved as of 4/4/02, 4-33-4-34.

Petitioner also pointed to the Rural Area Goal which emphasizes “self-rule”:

Allow residents in remote parts of the County to live as they choose as long [sic] they do not infringe upon the rights of neighboring property owners or cause environmental degradation.

Lewis County Comprehensive Plan, Land Use Element, Approved Plan June 1, 1999, with changes approved as of 4/4/02, p. 4-60.

Petitioner Panesko argued that including private property rights in the individuals' responsibility to determine reasonable use of the property as part of the definition of rural character is noncompliant with the GMA goals and definition of rural character.

The County responded that the issue of rural character had been previously argued before the Board and Mr. Panesko's challenge amounted to a re-argument on a matter already lost. We ruled that this specific issue had not been raised in the compliance hearings in the four previous Lewis County cases (*Mudge*).

Petitioner Panesko maintained that the comprehensive plan amendments introduced personal feelings into the definition of rural character. He claimed that as personal feelings vary considerably, interpretations of the comprehensive plan and the development regulations will vary considerably.

The County responded that the reference to property rights was not clearly erroneous under the record in this case and maintained that the challenged language makes it clear that citizens' property rights are to be respected by government and that those rights must be exercised responsibly. The County maintained that this complied with specific GMA goals.

Mr. Panesko contended that an example of how such comprehensive plan language may be used to violate the GMA requirements can be found in the notification requirements for a change in use of an industrial development site. He argued that the County only requires notification of property owners within a 1,000 feet of the industrial site, which fails to comply with the requirements of the Act. Brief of Panesko, p. 2.

Conclusion - Rural Character and Property Rights

Petitioner Panesko is correct in his belief that the language of the comprehensive plan will form the basis for subsequent land use decisions by the County. Indeed, that is the purpose of a comprehensive plan. RCW 36.70A.040. At the same time, the Legislature has indicated the importance of a county incorporating and harmonizing its own local circumstances with the Growth Management Act goals in the rural element of the county's comprehensive plan. RCW 36.70A.070(5) (a).

Lewis County has chosen to describe an approach to life as part of the Lewis County rural character.

This approach includes self-reliance, independence, and an emphasis on the importance of individual property rights.

The County itself suggested that the comprehensive plan language might form the basis for new rights in property. In defense of the County's decision to allow property owners to subdivide lots of 7.5 acres (even though this would create rural lots less than five acres in size), for example, the County argued:

The comprehensive plan language concerning property rights gives rise to the question of treating similarly situated people equally and drawing lines or boundaries that achieve that objective.

Lewis County's Response Brief, p. 9.

The County's choice to incorporate rural attitudes into rural character is of concern only if it gives rise to land use regulations that do not conform to GMA goals and requirements.

With due deference to the County's able counsel, we do not find that the reference to private property rights in the definition of rural character creates any new or different rights in property for Lewis County rural residents. Therefore, it is not clearly erroneous for the County to incorporate that language into its comprehensive plan.

However, the goal of permitting residents in remote parts of the County to live as they choose is more troubling. Comprehensive Plan, Land Use Element, Approved Plan: June 1, 1999, with changes approved as of 4/4/02, 4-60. Only two conditions modify this goal – not infringing upon the rights of neighboring property owners; and not causing environmental degradation.

From the inception of the Growth Management Act, the Legislature has voiced its concern that “uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.” RCW 36.70A.010. By its very nature, the Growth Management Act establishes goals for the use of property in this state that may not comport with the wishes of every individual landowner. Lewis County cannot exempt its rural residents from the requirements of the Act, even if doing so would reflect the wishes of those residents. The rural area goal that is to “Allow residents of remote parts of the County to live as they choose as long [sic] they do not infringe upon the rights of neighboring property owners or cause environmental degradation” is not harmonized with the GMA goals and is therefore noncompliant.

Issue 2 – Creation of Lots Less Than 5 Acres in the Rural Area (*Panesko* #9)

Petitioner Panesko challenged language in the Lewis County Code (LCC), Section 17.100.015 which allows lots of 7.5 acres or greater to be divided into two lots. He maintained that lots less than 5 acres in size are not rural and that this provision would allow lots smaller than 5 acres which under the LCC could be further subdivided. He argued that this provision puts into effect a new 3.75-acre minimum in rural areas. He maintained that this fails to comply with RCW 36.70A070(c) (iii) which precludes the inappropriate conversion of undeveloped land into sprawling low-density development in the rural area.

The County responded that the Board had made a finding of compliance regarding rural character based on lot size and that Panesko's challenge was a "rehash of a single piece of the overall plan".

We found that our Compliance Order in *Mudge* did not address LCC 17.100.015 and that this was a new issue.

The County further responded that the GMA does not prohibit lots less than 5 acres in rural areas but only that such development be consistent with the requirements to prohibit urban growth and sprawl. The County argued that a person who owned exactly 10 acres in the R1-5 Zone could divide into two 5 acre parcels, while the person who owned 9.9 acres would only have one lot. The County maintained that the provision meets the goal of the comprehensive plan of dealing fairly with property owners with similar properties.

Conclusion – Creation of Lots Less Than 5 Acres in the Rural Area

We conclude that the allowance of creation of lots less than 5 acres in the rural area fails to comply with the requirement in the Act to prevent higher densities and sprawl in the rural area and to maintain rural character. The argument that inability of a landowner to divide a lot under a 10-acre threshold somehow creates dissimilar and therefore unfair treatment, does not alter the noncompliant nature of a provision which allows lots of a size clearly not rural and contributing to sprawl in the rural area. The County must remove this noncompliance and also preclude further subdivision of lots initially subdivided to a 5-acre size.

Issue 3 – Unlimited Division of Lots (*Panesko* #10)

Petitioner Panesko alleged that a new section, LLC 17.102 – Family Member Units (FMU), and Accessory Dwelling Units (ADUs), allowed the additional dwelling unit to be sold to the family member after five years creating two new parcels. He claimed that the cycle could repeat itself after another five years.

The County responded that we had ruled against Mr. Panesko on the general topic of land division provisions and that Mr. Panesko “should not be permitted to relitigate the matter here”.

We concluded that the Compliance Order in *Mudge* did not show LCC 17.102 under consideration in the compliance proceedings. We concluded that this was a new issue that must be briefed in these proceedings.

Petitioner Panesko expressed his concern regarding FMUs and ADUs, alleging that LCC 17.102.040 allows the ADU to be sold to a family member after five years. His concern was that parcels less than 5 acres in size could be created under a separate ownership.

The County responded that these types of developments are in the rural area and outside limited areas of more intensive development (LAMIRDs). The County pointed out that this section applies to farm families and the majority of farm families lots are in the 1-20 and 1-10 zones. The County maintained that the property can either be divided as permitted in the underlying zones which would preclude additional units, or owners could petition for a cluster subdivision. The County claimed that the cluster subdivision limitations including the requirement for properties to be 40 acres and larger, would further preclude the creation of lots less than 5 acres as Petitioner Panesko envisioned.

Conclusion – Unlimited Division of Lots

The County’s response brief references family farm units. The County’s response brief refers to ADUs and FMUs in the context of family farm history in Lewis County, yet the word “farm” appears nowhere in Chapter 17.102. It is clear from the County’s response brief that this section was intended to refer to family farms outside of designated agricultural resource lands and inside rural districts. That distinction is not clear within the section’s language.

Given this disparity between the County's purpose and the language of the ordinance, we find this section noncompliant and remand it to the County for correction.

The County must also ensure that this section precludes unlimited subdivision of lots, particularly in to lots less than 5 acres. The County must ensure that the stated intent of retaining rural non-resource-land farms in farming is not undermined by provisions in the chapter which allow subdivision in to lot sizes too small for farming.

Issue 4 – Two Steam Plant Designations (*Panesko* #16)

Petitioner Panesko maintained that the rural area industrial designation (RAI) around the Centralia Steam Plant was superimposed on the industrial land bank (ILB) designation for the steam plant and that the industrial land bank and the rural area industrial have different requirements. He charged that GMA compliance is impossible to determine until Lewis County decides which designation applies.

The County responded that the RAI is defined as an area around the operations portion of the facility and that the ILB appropriate location process has not been completed. The County maintained that no ILB now exists in the area until that process is completed. The County acknowledged that the mapping was incorrect as provided, and pledged to provide adequate mapping.

Conclusion – Two Steam Plant Designations

We conclude that the designation of the area as RAI while the ILB process is being completed, complies with the Act. We require the County to honor its pledge for map correction. Petitioner has failed to demonstrate clear error by the County under this record.

Issue 5 – Permitting Public Airports (*Yanisch* #4 and 5)

Petitioners Yanisch claimed that the provisions of LCC 17.100.020, 17.42.040, and 17.155.030(6) fail to comply with the Act because the provisions authorize creation of a new Type 1 LAMIRD and because no process has been enacted to permit siting of essential public facilities. They further claimed that this

constitutes substantial interference with the fulfillment of the goals of the Act. Petitioners argued that general aviation airports should not be sited under the rural element of the comprehensive plan, but must be specifically addressed under RCW 36.70A.200(1). They further maintained that there were no special siting criteria or provisions for discouraging of incompatible uses adjacent to such airports. They maintained that noise was not a consideration under Chapter 17.115.030(6). They further maintained that new airport general aviation facilities would be either Type 2 or Type 3 LAMIRDs and therefore could not be sited under the rural element of the Act, but only under RCW 36.70A.200.

The County responded that its language authorizes creation of new facilities outside urban areas because of space needs and uses typically incompatible with urban densities. The County argued that provisions concerning existing, more-intensive uses are not applicable. Further, the County claimed that it has a process to permit siting of essential public facilities under RCW 36.70A.200 and that where the permitting process for such siting occurs within the LCC is incidental.

Conclusion – Permitting Public Airports

General aviation airports, including those referenced in LCC 17.115.030m are clearly essential public facilities. RCW 36.70A.200 calls for siting process for such. LCC 17.115.030(6) outlines detailed special conditions designed to preclude location near incompatible uses, provide for safety, and otherwise comply with Federal Aviations Agency and the Washington State Department of Transportation guidelines. Petitioners have failed to show that provisions for siting general aviation airports, which are essential public facilities, are clearly erroneous because they appear in the special use permits section rather than elsewhere in the comprehensive plan or LCC. We find the County’s provisions for siting general aviation airports to be compliant. The only exception to this is the notification provisions contained within the LCC. Notification to residents within a 1,000 feet from any point on a proposed landing area is not compatible with the requirement in RCW 36.70.547 for public consideration and comment. The County must make clear how public consideration and comment may be ensured in the process outlined in its code for siting aviation airports.

Issue 6 – Nonconforming Uses (*Yanisch* #6)

In *Mudge* during 2001, we ruled that changing from one nonconforming use to another in the rural area was noncompliant and invalid. Owing to a scrivener’s error, we did not cite the section of the code

pertaining to nonconforming uses, but cited another instead. In the County's response, it did not change the language of the section on nonconforming use in response of our finding of noncompliance and invalidity.

It made many other changes to the rural section in response to our earlier remand.

In the 2002 *Mudge* Compliance Order, we found the rural area sections of the code in compliance but again did not reference nonconforming use. Petitioners pointed out our scrivener's error in this case. They claimed that it would be an injustice for us not to address the question which we had originally found noncompliant and invalid even though the County's reason for failing to respond may have been our incorrect cite of the code section. At the Hearing on the Merits, we ruled that we would hear the question. Post-hearing briefs were received from the County and petitioners.

The County pointed out that our March 5, 2001 Final Decision and Order in *Mudge* contained no specific findings as to why nonconforming use sections give rise to a nonconformity with the GMA, nor any factual finding or justification whatsoever for the conclusion that the provision would lead to a substantial interference with the community's ability to achieve the goals of the GMA. Our July 10, 2002 Compliance Order in *Mudge* specifically addressed rural lands and the issues of variety of densities, rural character, and visual compatibility. The County maintained that it presented the Board with comprehensive plan amendments and development regulations that took a "holistic view of the rural lands, rural characters, and needs of rural communities". As a result, the County pointed out that we found compliance with rural densities, establishment of rural character, and visual compatibility.

The County maintained that our language specifically addressed concerns about controls on uses in rural areas. At page 15 of the July 10, 2002 Compliance Order, we said, "the previous determination of invalidity as to the lack of a variety of rural densities and the virtually unlimited uses allowed in the rural zone is rescinded."

Our conclusion, at page 18 stated: "we rescind any determinations of invalidity as they apply to the newly adopted LAMIRDs and rural development district uses."

The County noted that change of use provisions under the nonconforming use chapters, Chapters 17.155 and 17.160 LCC, were "rural development district uses". The County pointed out that our conclusion in specific findings that "Lewis County has adopted appropriate size and scale limitations in the rural areas. In finding #19 (LAMIRDs) we said: logical outer boundaries (LOBs) and allowable uses comply with the Act". The County also noted our oft-referenced contention that a key concern in a compliance proceeding hearing is "compliance with the GMA whether or not the actions strictly involves strict adherence to the provisions of the order determining noncompliance". The County further noted that our Order on Reconsideration stated that the "potential conflict between LCC Section 17.155.040 and

17.42.040 are appropriately resolved in a subsequent hearing on the merits”. The County claimed that its sections regarding change of one nonconforming use to another and expansion of an existing nonconforming commercial and industrial use contain strong limitations. It argued that there was no conflict between sections of the LCC regarding nonconforming use because the challenged sections permit both expansion and conversion of nonconforming uses under the constraints and limitations previously noted.

Petitioners argued that Chapter 17.155.040 and 17.42.040 allow change from one nonconforming use to another and that this allows perpetuation of uses contrary to those allowed in the use district. They claimed that this creates an inconsistent zoning pattern. They noted that although the County pointed to some building size limitations on expansion, there are no limitations on activities outside of buildings.

Conclusion – Nonconforming Uses

We have ruled many times that jurisdictions must comply with the Growth Management Act in their responses to our remands, whether or not those responses specifically address provisions of our remand order. Our rulings in *Mudge* were made with that principle in mind. We reiterate our previous findings that uses allowed in the rural area are compliant. Changes in nonconforming uses are compliant so long as the overall nature and intensity of the activity remains the same. We find that petitioners have failed to show that the County’s code sections regarding nonconforming use are clearly erroneous in allowing limited expansion or change of nonconforming uses. We find that petitioners have failed to demonstrate clear error on the part of the County when we contrast the provisions of LCC, 17.42.040 with 17.155.040.

Issue 7 – Single Family Residence Concurrency Exemption (*Yanisch* #7)

Petitioners contended the exemption of single-family residential use on existing lots of record from concurrency requirements was noncompliant and should be found invalid. The County maintained that the provisions at issue were not materially changed in April 2002 and therefore the petition was untimely. The County claimed that even if the Board does review the section, the amendment only clarified a language distinction between “adequate facilities”, the development standard under Chapter 58.17 RCW, and more specific development constraints associated with transportation concerns “concurrency” in RCW 36.70A.070(6)(b). Petitioners pointed out that in *Panesko* (one of the *Mudge*

cases), they had raised the issue, “does the exemption of single family residential use on existing lots of record from concurrency requirements fail to comply with the Act?” Petitioners claimed that we did not decide this issue in *Panesko*. They maintain that creation of 10 and 20-acre zones then changed the circumstances in connection with application of provisions for such an exemption. Petitioners claimed that there are large numbers of 5-acre lots in Lewis County in the 10 and 20-acre zones and no provision for aggregation.

Conclusion – Single Family Residence Concurring Exemption

We find that the County’s action in changing “concurrency” to “adequate facilities” was a clarification amendment intended to eliminate confusion in the minds of citizens regarding of requirement for “adequate facilities” as defined in Chapter 58.17 RCW and “concurrency” as used in the Act. These are two very different concepts. The language in these chapters on exemptions was not altered in 2002 and therefore not before us. This language change was made in LCC 17.130 and nine other LCC chapters. Petitioners have failed to show clear error on the part of the County in adopting this amendment. The question of aggregation of undersized lots in newly created zones was not addressed in this amendment. The County noted in argument that it does have aggregation requirements for some lots of record. Every rural county in the state has faced the problem of existing lots of record being undersized for newly adopted zones with a variety of rural densities. Consideration of this question is not properly before us here.

Issue 8 – Density Increases Creating Lots No Longer Rural In Character (*Yanisch* #8 and 9)

Petitioners alleged the provisions of LCC 17.100, 17.102.040, and .050, allowing density bonuses, fail to comply with RCW 36.70A.070(5)(c) requiring protection of rural character and with RCW 36.70A.070(5)(d), prohibiting creation of new Type i LAMIRDs. They charged that this failure to comply substantially interferes with the goals of the Act.

The County responded that LCC 17.100.120 is the provision which authorizes the density bonus and that provision was adopted as part of Ordinance 1170 B and was not amended in the 2002 proceedings. As such, the County contended, the petition in regard to that section was untimely and should be dismissed. As to the Chapter 17.102 provisions, the County noted their purpose was to protect family farm operation.

The County claimed the impact of bonus uses would be isolated and limited.

Petitioners maintained that density bonus provisions are among the factors which allow creation of lots less than 5 acres in size. Petitioners claimed that all three sections allow increases in density and create densities in the “non-rural” range.

Conclusion

We reiterate our findings in Issue 2 (*Panesko* #9) and Issue 3 (*Panesko* #10) of this Order regarding creation of lots less than 5 acres in the rural area and call upon the County to preclude such creation. We find that petitioners have failed to show that the density bonus is clearly erroneous. The density bonus provisions referenced by petitioners and the County as Chapter 17.100.120. LCC Section .120 refers to density bonuses for cultural and historic sites. As petitioners do not appear to be challenging cultural sites and as LCC Section .100 has been previously found compliant we decline to address this section of the chapter. Regarding Sections LCC 17.102.040 and .050, we will address compliance as the County responds to our remand in accordance with our conclusions in *Panesko* #9 and #10. We do not find that the clustering provisions rise to the level of clear error.

FINDINGS OF FACT

1. The amendments to the comprehensive plan, page 4-33, state “Lewis County rural character includes private property rights and the responsibility to use and maintain property in a reasonable manner”, but also state that residents in remote areas may live as they choose.
2. Nowhere in the comprehensive plan section pertaining to rural area development is there a reference to “fundamental fairness” as it applies to allowance of subdivision for lots less than 5 acres in size.
3. Rural Area Policy R 1.2 states, “rural development should be encouraged to occur at a density of not more than one dwelling per 5 acres.”
4. Chapter 17.100.015 allows lots of 7.5 acres or greater to be divided into two lots each of which would be less than 5 acres.

5. We have consistently found that densities greater than 1 unit per 5 acres are not rural densities.
6. Chapter 17.102 is titled “Accessory Dwelling Units and Family Member Units”. The word “farm” appears nowhere in that section.
7. The County’s response brief claimed that Chapter 17.102 was intended to regulate family farms outside of designated agricultural resource lands and inside rural districts.
8. This section allows subdivision of some lots to densities higher than 1 unit per 5 acres.
9. The County acknowledged that the mapping for the Centralia Steam Plant area was incorrect.
10. The industrial land bank process within the Centralia Steam Plant rural area industrial (RAI) designation is not yet complete.
11. The comprehensive plan designates airports as essential public facilities at page 4-27 and 4-42.
12. A regional airport would be processed through a GMA comprehensive plan amendment process.
13. A general aviation airport is processed through a special use permit process, LCC 17.115.030(6) and (5).
14. Notification of special use permit application hearing for a public aviation facility is provided to residents within 1,000 feet from any point on proposed air craft landing area.
15. In our July 10, 2002 Compliance Order at page 15, we said, “the previous determination of invalidity as to the lack of a variety of rural densities and the virtually unlimited uses allowed in the rural zone is rescinded.”
16. In that Compliance Order, our findings concluded Lewis County has adopted appropriate size and scale limitations in the rural areas. We further concluded that within LAMIRDs,

allowable uses comply with the Act.

17. LCC 17.42.030 and .040 limit uses in size and location.

18. LCC 17.115.030(9) limits expansion of an existing nonconforming commercial and industrial use to 10,000 square feet or less.

19. LCC 17.155.040 requires a change of a nonconforming use to another nonconforming use within an existing structure or facility must meet the conditions of no increased utility or offsite impact.

20. LCC 17.030 originally read, in its purpose section: “concurrency is the provision of adequate public facilities and services in a timely fashion.” It now reads, “Lewis County requires a determination of adequate facilities for all projects.”

21. LCC 17.130.010 and numerous other sections exempt development of a single-family residence on an existing lot of record from the “adequate public facilities” provision. That exemption was unchanged in the 2002 proceedings under challenge in this case.

22. Petitioners declared they had submitted written materials to the Citizen’s Advisory Committee, Planning Commission, and the Board of County Commissioners. Amended PFR, August 30, 2002.

(Took out the previous #17 RE: equitable doctrines)

CONCLUSIONS OF LAW

1. The property rights section of the comprehensive plan, as written, does not allow exemptions for rural landowners regarding subdivision of property in to lots smaller than 1 unit per 5 acres.

2. Provisions in the Lewis County Code allowing subdivision of rural properties into lot densities greater than 1 unit per 5 acres are noncompliant.

3. The development of an industrial land bank which incorporates a rural area industrial designation complies with the Act.
4. Lewis County complies with the requirement of the Act to include a plan, scheme, or design for general aviation airports.
5. The plan for siting of general aviation airports complies with the Act except with regard to the requirement for public notification of application for such a project.
6. Restrictions on the intensity of changes from one nonconforming use to the other comply with the Act.
7. The change from the term “concurrency” to the term “adequate facilities” in Section 17.130.010 complies with the Act.
8. The same change in other sections of the LCC also comply with the Act.
9. Under this record, we conclude that petitioners have demonstrated standing and that we have jurisdiction to hear their petition for review.
RCW 36.70A.280(2).

ORDER

To bring the challenged land use policies and regulations into compliance with the GMA, the County must within 180 days of the date of this Order:

1. Preclude the subdivision of lots in the rural area to densities higher than 1 unit per 5 acres.
2. Ensure notification of applications for general aviation facilities to members of the public living beyond 1,000 feet of the facility.
3. Clarify that the section on accessory dwelling units and FMUs applies to farmlands in rural areas.

4. Provide accurate maps for the rural area industrial designation in the Centralia Steam Plant area.

5. Clarify that the language in the comprehensive plan section on rural character, page 4-60, regarding residents in remote areas, does not allow them to ignore fulfillment of the goals of the Act and adherence to the development regulations which implement those goals, and thus, harmonize this comprehensive plan section with GMA goals.

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 11th day of December, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

Nan A. Henriksen
Board Member

I concur in the results.

Margery Hite
Board Member

APPENDIX I. PROCEDURAL HISTORY

On November 5, 2002 a Hearing on the Merits of this case was held at Ferryman's Inn, Centralia, Washington. Present for the Board were Les Eldridge, Margery Hite, and Nan Henriksen. Alexander Mackie and Mike McCormick represented Lewis County. Eugene Butler and Vince Panesko presented argument for petitioners.

The number of issues in this case reached a high water mark of 112 after petitioners filed amended petitions for review (PFRs). We heard argument on ten issues, noted below, during the November 5, 2002 Hearing on the Merits.

We 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 have reiterated 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 Bank (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

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*). (Collectively, *Mudge*) 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. The Order, dated October 14, 2002, was entered at that 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 RCW 36.70A.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. We required the County to 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 RCW36.70A.070(c)(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 deemed this a new issue and called 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 deemed this a new issue and called 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 RCW 36.70A.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 RCW 36.70A.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. We required the County to 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 RCW 36.70A.070(d)(i) and (ii)?

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 reiterated 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. We required the County to respond to this issue, and to the issue of 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, RCW 36.70A.070(5)(b) requiring provision for permitted uses, RCW 36.70A.070(5)(c) requiring protection of rural character, and RCW 36.70A.070(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*, we 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 initially agreed with the County because the petitioners framed their comments on the incorrect cite in such a way as to lead us to assume they had made the scrivener's error.

Having later reexamined the Compliance Order and the subsequent Order on Reconsideration, it is clear that it was our error. We inadvertently listed the issues in the Amended Prehearing Order in the

category of issues to be briefed by the County. The County's response brief noted that in the text of the Order, we had said that the County need not brief the issue. In its reply brief, the *Yanisch* Group claimed failure to hear the issue would be a manifest injustice. At the Hearing on the Merits, we allowed petitioners to argue the issue. We then allowed 14 days for a post hearing brief from the County to respond to the argument and seven more days for a reply brief from petitioners.

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 called upon the County to respond to this issue and we heard 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 RCW 36.70A.070(5)(c) of the Act requiring protection of rural character and RCW 36.70A(5)(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 required 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 was briefed by the County.

Issue 10

Does LCC 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 LCC 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.