

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 OBCT, et al.,

4
5 Petitioners,

6 v.

CASE NO. 04-2-0041c

7
8 LEWIS COUNTY,

9 Respondent,

**FINAL DECISION AND
ORDER**

10
11 And

12
13 CARDINAL FG COMPANY,

14 Intervenor.

15
16 **I. SYNOPSIS OF DECISION**

17 In this case, we are asked to determine whether the County’s approval of a major industrial
18 development (“MID”) urban growth area (“UGA”) for a float glass manufacturing facility
19 complies with the Growth Management Act, Ch. 36.70A RCW (the “GMA”). With the
20 exception of the challenges to the adequacy of arterial road service to the MID, we find that
21 the County’s legislative enactments adopting the MID UGA designation and its
22 implementing development regulations are compliant with the requirements of the GMA.
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25 In reviewing the arguments and record in this case, we are persuaded that this is precisely
26 the kind of situation that the Legislature intended to address when it enacted RCW
27 36.70A.365. The unique siting requirements for the industrial use proposed here mean that
28 the facility could not be located within existing urban growth areas in Lewis County. Without
29 the ability to create an MID UGA on this site, the industry would likely have to be located
30 outside of Lewis County. Under these circumstances, the statute provides a mechanism
31 where a contained and buffered UGA may be located in such a way that any impacts on the
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1 surrounding community are minimized. Our inquiry here is whether the statutory
2 requirements for this purpose have been met and we find, in large part, that they have been.

3
4 Petitioners raise several challenges to the County's compliance with RCW 36.70A.365. We
5 find that water and sewer service have been adequately "provided for" at the planning level.
6 The range of alternatives available to the industry, Cardinal FG Company ("Cardinal"), is
7 underwritten by the commitment of the City of Winlock to provide water service as needed.
8 Cardinal also has agreed to pay for the extension of water service by Winlock. Further,
9 because the project permits are conditioned upon actual service being present, the industry
10 will not be able to occupy its facility until those conditions are met.
11

12
13 On the other hand, we find that the infrastructure requirements for road service to the MID
14 have not been met. The County's own plan and regulations require arterial level service to
15 the industrial site and the Hearing Examiner recommended that improvement to arterial
16 design standards be required. The failure to do this creates an inconsistency in County
17 planning policies and insufficient infrastructure needed because of the MID.
18

19
20 Petitioners also challenge the sufficiency of the County's development regulations to ensure
21 urban growth will not occur in adjacent *nonurban* areas. In this regard, a major concern is
22 that the provision of urban levels of service to the MID UGA will create pressure to extend
23 those services and densities outside the MID UGA. The County's development regulations
24 for the MID UGA expressly prohibit such an extension of urban services. Petitioners have
25 failed to meet their burden of proof on this challenge.
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27
28 The statute also requires that an inventory of developable land be prepared so that the
29 County may determine whether "land suitable to site the major industrial development" is
30 available in existing urban growth areas. RCW 36.70A.365(2)(h). We find that the *bona*
31 *fide* operational requirements of the industry determine what land is suitable and therefore
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1 must be included in the inventory. Given the unique siting requirements of the float glass
2 factory, the inventory of sites considered here meets the requirements of the GMA. We also
3 find that the public was involved in suggesting potential sites and commenting on the sites
4 under consideration.
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6
7 Petitioners have mounted a vigorous challenge to the County's decision to adopt an MID
8 UGA. Their public-spirited involvement has been evident in every aspect of this process.
9 However, we must remember that the decision to approve the MID UGA ultimately lies with
10 the County Commissioners. That decision was based on a thorough review of the statutory
11 criteria and an active program of public participation. With the one exception we have
12 described, we find their decision is compliant with the GMA requirements.
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14 II. PROCEDURAL HISTORY

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16 This case arises against a complicated backdrop of related legal challenges. The
17 designation of the land which is the subject of this MID UGA designation was subjected to
18 an invalidity finding in *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c and
19 *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c. Order Finding NonCompliance
20 and Imposing Invalidity, February 13, 2004. The code provisions adopted by the County for
21 processing applications for a major industrial development pursuant to RCW 36.70A.365
22 were found noncompliant with the GMA in *Roth v. Lewis County*, WWGMHB Case No.
23 04-2-0014c. Final Decision and Order, December 10, 2004.
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25
26 However, the Board rescinded invalidity as to the Cardinal MID site upon motion of the
27 County in the *Butler* and *Panesko* cases upon finding that the subject lands do not have
28 long-term commercial significance for agricultural production and that the new designation
29 will not interfere with agricultural activity on adjacent lands. Order Rescinding Invalidity,
30 May 12, 2005. In *Roth*, the Board also decided to consider whether this MID UGA adoption
31 met the requirements of the GMA under the particular facts of this case, where it had been
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1 approved before the Board found the process noncompliant. *Roth v. Lewis County*,
2 WWGMHB Case No. 04-2-0014c. Final Decision and Order, December 10, 2004.

3
4 Petitioners challenge Ordinance 1179H, Resolution 3-322 and Resolution 3-323.
5 Resolution 04-322 amends the Lewis County comprehensive plan to create a major
6 industrial development (“MID”) urban growth area (“UGA”) for the Cardinal FG Company
7 float glass facility. Resolution 04-323 approves the Cardinal FG Major Industrial
8 Development Master Plan. Ordinance 1179H adopts development regulations to implement
9 MID UGA. All three of these enactments were adopted on September 23, 2004, and
10 published September 29, 2004.
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12

13 This case is a consolidation of four petitions for review filed with the Board. The first petition
14 was filed by Petitioner Panesko on November 22, 2004, and was originally assigned
15 WWGMHB Case No. 04-2-0027. Petitioner Heikkila filed her petition for review on
16 November 24, 2004, and it was assigned WWGMHB Case No. 04-2-0039. Petitioners
17 Battin, Butler, Harader, Ikerd, and Morris (collectively, the “Battin Petitioners”) filed their
18 petition for review on November 24, 2004, and it was assigned WWGMHB Case No.
19 04-2-0040. Olympia and Vicinity Building and Construction Trades Council and Affiliated
20 Unions (“OBCT”) also filed a petition for review on November 24, 2004, which was assigned
21 WWGMHB Case No. 04-2-0041. Cardinal was granted leave to intervene and these
22 petitions were consolidated into WWGMHB Case No. 04-2-0041c on December 2, 2004.
23 Order Consolidating Case.
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27 Cardinal, OBCT, and Petitioner Panesko filed substantive motions prior to the Hearing on
28 the Merits. Cardinal FG Company’s Motion to Dismiss, January 13, 2005; OBCT’s Motion
29 on Issues 1 and 2, January 13, 2005; Dispositive Motion for Ruling on Issue 22, January 7,
30 2004. The Board declined to decide the issues on motions and held them over to a full
31 hearing on the merits. Decision and Order on Motions, February 8, 2005.
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1 Petitioners OBCT and Panesko also filed motions to supplement the record. Petitioner
2 Motion to Supplement the Record (Panesko), January 17, 2005; OBCT's Motion to
3 Supplement the Record, January 18, 2005. There was no opposition to these motions,
4 although Cardinal requested that the entirety of the Memorandum of Understanding
5 between Cardinal and the County be included in proposed Exhibit 3001. Cardinal FG
6 Company's Response to Petitioner Panesko's Motion to Supplement the Record,
7 January 26, 2005. These motions were granted. Order on Motions to Supplement the
8 Record, February 9, 2005.

10
11 The Hearing on the Merits was held in Chehalis, Washington in the Historic Lewis County
12 Courthouse on April 12, 2005, following the Board's hearing on the County's Motion to
13 Rescind Invalidity as to the Cardinal MID in the related cases of *Butler v. Lewis County*,
14 WWGMHB Case No. 99-2-0027c and *Panesko v. Lewis County*, WWGMHB Case No.
15 00-2-0031c. OBCT notified the Board in advance that it would not participate in the Hearing
16 on the Merits. Eugene Butler spoke for the Battin Petitioners. Vince Panesko and Kathleen
17 Heikkila appeared *pro se*. The County was represented by Chief Civil Deputy Prosecuting
18 Attorney, Douglas Jensen, and Director of Community Development, Bob Johnson.
19 Cardinal was represented by attorneys John Hempelmann and Andrew Lane. All three
20 board members attended.
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23 24 III. ISSUES PRESENTED

25 The following are the issues set out for resolution in the Amended Prehearing Order,
26 December 21, 2004:

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1. Whether Lewis County failed to comply with RCW 36.70A.300 and .302 when it made Resolution No. 04-322 "effective immediately upon adoption" because Resolution No. 04-322 and the comprehensive plan designation on the subject site are subject to an invalidity order issued by this Board.
 2. Whether Lewis County failed to comply with RCW 36.70A.300 and .302 when it made Ordinance No. 1179H "take effect immediately upon adoption" because Ordinance

1 No. 1179H and the zoning regulations for the subject site are subject to an invalidity
2 order issued by this Board.

3
4 3. Whether Lewis County failed to comply with RCW 36.70A.300 and .302 when in
5 adopting Resolution No. 04-322 and Ordinance No. 1179H, it failed to provide that
6 the Master Plan application could not vest or be approved until and unless this Board
7 lifted invalidity on the comprehensive plan designation and zoning on the subject site.

8 4. Whether Lewis County failed to comply with the public participation requirements of
9 the GMA including RCW 36.70A.020(11), .035, .070, .106, .130, and .140 in the
10 adoption of Resolution No. 04-322 and Ordinance No. 1179H.

11 5. Whether Lewis County failed to comply with the requirements of RCW 36.70A.365
12 and local implementing policies and regulations when it adopted Resolution No.
13 04-322 and Ordinance No. 1179H.

14
15 6. Whether Resolution No. 04-322 is consistent with the comprehensive plan as
16 required by RCW 36.70A.130(1)(b) and .070(preamble).

17 7. Whether Resolution No. 04-322 and Ordinance No. 1179H fail to comply with the
18 GMA because of the failure of the County to use a process established in
19 consultation with the cities, consistent with RCW 36.70A.210, as required by RCW
20 36.70A.365 (preamble).

21
22 8. Whether Resolution No. 04-322 and Ordinance No. 1179H fail to comply with the
23 GMA because the County failed to conduct an adequate inventory of developable
24 lands so that it could validly give priority to sites that are all or partially inside or are in
25 close proximity to urban growth areas as required by RCW 36.70A.365(2)(h).

26 9. Whether Resolution No. 04-322, Ordinance No. 1179H and Resolution No. 04-323
27 fail to comply with RCW 36.70A.365(2)(a) and local implementing policies and
28 regulations in that there is no evidence of water rights and/or there is no binding
29 agreement for providing water supply or waste water disposal.

30 10. Whether Resolution No. 04-322 and Ordinance No. 1179H fail to comply with RCW
31 36.70A.020(12), .130(1)(b), .070, and .110 in that urban level of service standards
32 and concurrency requirements have not been established by Lewis County and such

1 standards are not implemented in the new non-municipal UGA and there is no
2 adequate plan for transformance of governance.

- 3
4 11. Whether Resolution No. 04-322 and Ordinance No. 1179H fail to comply with RCW
5 36.70A.365(2)(a) and CP Policies including LU 7.3 and 8.1 and local development
6 regulations by failing to provide for adequate new infrastructure for the project's
7 access road to the freeway.
- 8 12. Whether Resolution No. 04-322 and Ordinance No. 1179H fail to comply with RCW
9 36.70A.365(2)(e) in that development regulations have not been established to
10 ensure that urban growth will not occur in adjacent currently nonurban areas.
- 11 13. Whether Lewis County failed to comply with RCW 36.70A.130(1)(b) and RCW
12 36.70A.070(1) and .040(3) in that it failed to address maximum building intensities in
13 the float glass Major Industrial Development in Resolution No. 04-322 and Ordinance
14 No. 1179H.
- 15 14. Whether Resolution No. 04-322 and Ordinance No. 1179H are inconsistent as to the
16 land designated and zoned for the float glass Major Industrial Development in
17 violation of RCW 36.70A.130(1)(b) and .070(preamble).
- 18
19 15. Whether Lewis County failed to comply with the requirements of SEPA as they apply
20 to the adoption of Resolution No. 04-322 and Ordinance No. 1179H.
- 21
22 16. Whether Lewis County violated SEPA requirements in WAC 197-11-440(5)(b), RCW
23 43.21C, and local SEPA regulations in that it failed to include in the EIS adequate
24 analysis of reasonable alternatives.
- 25 17. Whether Lewis County violated SEPA requirements by not adequately analyzing the
26 project's impact to pedestrian safety on Avery Road, by not finding this impact
27 significant, and by not identifying mitigation measures such as widening Avery Road
28 to meet collector or arterial standards.
- 29
30 18. Whether amendments to the Lewis County Comprehensive Plan and the
31 Development Regulations which allow urban governmental services to be extended
32 outside of UGAs to a Major Industrial Development are inconsistent with the Lewis
County Comprehensive Plan Land Use Element, page 4-28 (f), which states, "The

1 County plan prohibits the extension of the urban services defined below, outside of
2 the urban growth area, except where already in existence, or where necessary and
3 available to resolve existing or imminent health hazards,” and, therefore,
4 noncompliant with RCW 36.70A.070, RCW 36.70A.120, and RCW 36.70A.130(1)(b).

- 5 19. Whether the provisions in the amendments to the Lewis County Comprehensive
6 Plan and the amendments to Lewis County Code, specifically LCC 17.21.030 and
7 LCC 17.21.070, fail to comply with RCW 36.70A.110(4) for failure to contain urban
8 governmental services within the boundaries of existing urban growth areas (UGAs),
9 and for allowing extension of water and wastewater facilities to cross nonurban
10 areas.
- 11 20. Whether the amendments to the Lewis County Comprehensive Plan and the
12 Development Regulations are noncompliant with RCW 36.70A.110(4) by providing
13 for urban governmental services to a Major Industrial Development UGA.
- 14 21. Whether the revision to the Land Use Map is non-compliant with RCW
15 36.70A.110(4).
- 16
- 17 22. Whether amendments to the Lewis County Comprehensive Plan and Lewis County
18 Code (LCC 17.21.030) are noncompliant with RCW 36.70A.365 for allowing urban
19 governmental services from outside service providers, including municipalities, and
20 special purpose districts, which were authorized by the Legislature for Master
21 Planned Resorts in RCW 36.70A.360 but which were not authorized by the
22 Legislature for Major Industrial Developments in RCW 36.70A.365.
- 23 23. Whether amendments to the Lewis County Comprehensive Plan and Lewis County
24 Code (LCC 17.21.070) that allow extension of water and wastewater facilities to
25 cross nonurban areas are inconsistent with Lewis County Code 17.150.030(3)(k)
26 and, are therefore, noncompliant with RCW 36.70A.070, RCW 36.70A.120, and RCW
27 36.70A.130(1)(b).
- 28 24. Without an order of the WWGMHB removing the determination of invalidity as to rural
29 lands within and adjacent to the approved major industrial development that have
30 been or should have been designated Agricultural Resource Lands, do the
31 amendments to the Lewis County Comprehensive Plan and the Development
32 Regulations fail to comply with RCW 36.70A.302(7).

1 25. Whether an inventory of developable land was not conducted in time for citizen
2 comment prior to enactment of the amendments to the Lewis County Comprehensive
3 Plan and Development Regulations establishing a major industrial development, and
4 thereby fails to comply with RCW 36.70A.140.

5 26. Whether the change in zoning from RDD 1-10 to an industrial UGA implemented by
6 the Lewis County CP and DR amendments on September 23, 2004, violate the
7 February 13, 2004, WWGMHB Order in Case Nos. 00-2-0031c and 99-2-0027c
8 which imposed invalidity on RDD lands (especially land such as Cardinal's which
9 was removed from an ARL designation to accommodate industrial development), and
10 is noncompliant with RCW 36.70A.060, RCW 36.70A.170, and RCW 36.70A.302(1).

11 27. Whether the rezone of the Cardinal property implemented by the September 23,
12 2004, Lewis County CP and DR amendments was in violation of the March 5, 2001,
13 FDO in Case No. 00-2-0031c which required that RDD lands including land now
14 owned by Cardinal to be reconsidered for ARL designations.

15 28. Whether the comp plan amendment which allows water, natural gas pipelines,
16 electric power lines, and railroad tracks to cross nonurban areas including farmlands
17 with prime soils to serve this major industrial development is noncompliant with RCW
18 36.70A.170 and RCW 36.70A.060 for failing to conserve agricultural land, and
19 noncompliant with RCW 36.70A.300 and .320 for failing to comply with the
20 February 13, 2004, Order which ruled LCC 17.30.640(2)(a), (c), (e)---incidental uses-
21 and LCC 17.30.650---pipelines on ag lands---invalid.

22 29. Whether Resolution No. 04-322, Ordinance No. 1179H or Resolution No. 04-323 and
23 any provisions reinstated by a savings clause, should be found invalid or in
24 continuing invalidity for substantial interference with the fulfillment of the goals of the
25 GMA including RCW 36.70A.020(1), (2), (3), (5), (6), (7), (8), (10), (11), and (12).

26 **IV. BURDEN OF PROOF**

27 In determining the issues presented in this case, the Petitioners bear the burden of proof.
28 Comprehensive plan amendments and development regulations, and amendments to them
29 are presumed valid upon adoption. RCW 36.70A.320(1). To meet their burden, the
30 Petitioners must show that the challenged amendments are clearly erroneous:
31
32

1 The board shall find compliance unless it determines that the action by the state
2 agency, county, or city is clearly erroneous in view of the entire record before the
3 board and in light of the goals and requirements of this chapter.
4 RCW 36.70A.320(3).

5
6 In order to find the County's action clearly erroneous, the board must be "left with the firm
7 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
8 121 Wn.2d 179, 201, 849 P.2d 646 (1993). We review the challenges under the clearly
9 erroneous standard.

10 11 V. DECISION

12 A. Abandoned Issues – Issues Nos. 10, 13, 15, 16, and 17

13 An issue is deemed abandoned by this Board when it is not addressed by any petitioner in
14 the opening briefing. We have held that an issue that is not briefed by a petitioner is
15 deemed abandoned. *WEC v. Whatcom County*, WWGMHB Case No. 95-2-0071 (Final
16 Decision and Order, December 20, 1995); *OEC v. Jefferson County*, WWGMHB Case No.
17 94-2-0017, Final Decision and Order, February 16, 1995. Fairness requires that an issue
18 must be addressed in the petitioner's opening briefing or the respondent will not have an
19 opportunity to respond to it.
20
21

22
23 In the opening briefing submitted in this case, the Petitioners carefully laid out the issues
24 that were addressed in each brief. The Board appreciates this clarity. Issues Nos. 10, 13,
25 14, 15, 16, and 17 were not addressed.

26
27 *Conclusion:* The Petitioners elected not to address the following issues so they are deemed
28 to be abandoned:

29
30 Issues 10, 13, 14, 15, 16 and 17
31
32

1 B. Issues Related to Provision of Urban Governmental Services – Issues Nos. 6, 18, 19,
2 20, 21 and 23.

3 Petitioners argue that both RCW 36.70A.110(4) and the County comprehensive plan
4 prohibit the extension of urban levels of services to the Cardinal MID UGA. The argument
5 that RCW 36.70A.110(4) prohibits the provision of urban services across rural and resource
6 lands to the new MID UGA is made as to Issues Nos. 19, 20, and 21. Some of the
7 petitioners made essentially the same argument in the related case of *Heikkila v. Winlock*,
8 WWGMHB Case No. 04-2-0020c. The arguments that the extension of urban services to
9 the Cardinal MID UGA is inconsistent with the County comprehensive plan and
10 development regulations are made in Issues 6, 18, and 23.
11

12
13 **Urban governmental services to the MID UGA.** The County¹ and Cardinal point out that
14 the Board has already ruled on the issue of the provision of urban services to the new
15 Cardinal MID UGA. This is correct. In *Heikkila v. Winlock*, this Board ruled on motions that
16 RCW 36.70A.110(4) does not prohibit the extension of urban levels of service from one
17 UGA to another, nor does it prohibit the crossing of rural or resource lands to extend those
18 services. We incorporate the same reasoning here:
19

20 The prohibition in RCW 36.70A.110(4) does not apply to urban services in urban
21 growth areas. Urban growth areas by definition are allowed to have urban levels of
22 growth and should have the urban services to support that growth. See RCW
23 36.70A.030(17), (18), and (19). Nor can the statute be read to mean that water
24 service lines cannot pass through rural lands. The reason for the prohibition in RCW
25 36.70A.110(4) against providing urban services to rural areas is that urban services
26 in the rural areas would create pressure to urbanize the rural areas and create
27 sprawl. *Thurston County v. Cooper Point Association*, 148 Wn. 2d 1, 57 P. 3d 1156
28 (2002). If the Winlock water lines just traverse the rural areas and do not serve them,
it will not violate RCW 36.70A.110(4).

29 The Petitioner does not point to any statutory prohibition against providing water
30 services from one UGA to another. The burden is on the Petitioner(s) to demonstrate
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32 _____
¹ The County joined in the arguments of Cardinal. Lewis County's Joinder of Cardinal FG Company Response Brief, March 22, 2005.

1 why the challenged amendments violate the GMA. The legislature has directed the
2 boards to grant deference to counties and cities in how they plan for growth,
3 consistent with the goals and requirements of the GMA. RCW 36.70A.320.
4 Comprehensive plan amendments are presumed valid upon adoption. RCW
5 36.70A.320. Here, as the Central Board stated in *Gain v. Pierce County*, CPSGMHB
6 Case No. 99-3-0019, Final Decision and Order, April 18, 2000, "Petitioners offer no
7 statutory provisions to support their assertion that sewer [or water] lines must be
8 confined within the boundaries of UGAs and cannot pass through rural areas." RCW
9 36.70A.110(4) does not preclude municipalities from providing water service from
10 one UGA to another.

11 *Heikkila v. Winlock*, WWGMHB Case No. 04-2-0020c, Order on Motions, December 14,
12 2004.

13 **Inconsistency.** Petitioners also challenge the County's comprehensive plan amendments
14 and the new development regulations at issue here as being inconsistent with other
15 provisions of the County's comprehensive plan, development regulations, and the
16 Countywide Planning Policies. Petitioner's (Heikkila) Opening Brief.

17 Internal consistency among the provisions of the comprehensive plan is required by RCW
18 36.70A.070: "The plan shall be an internally consistent document and all elements shall be
19 consistent with the future land use map." Consistency between the plan and the
20 development regulations that implement it is required by RCW 36.70A.040 and
21 36.70A.130(1)(b). This Board has held that consistency means that no feature of the plan
22 or regulation is incompatible with any other feature of the plan or regulation. *CMV v. Mount*
23 *Vernon*, WWGMHB Case No. 98-2-0006, Final Decision and Order, July 23, 1998. See
24 also, WAC 365-195-210. In addition, it means no feature of one plan may preclude
25 achievement of any other feature of that plan or any other plan. *Carlson v. San Juan*
26 *County*, WWGMHB Case No. 00-2-0016, Final Decision and Order, September 15, 2000.

27
28
29
30 Petitioners allege inconsistency in three places: in the County comprehensive plan at 4-28;
31 in Countywide Planning Policy 2.5; and in the County's development regulation, LCC
32 17.150.070(3)(k). We will consider each of these.

1
2 First, Petitioners cite to 4-28(f) of the Lewis County Comprehensive plan. For
3 completeness, we include the language from 4-27 that introduces the subsection:

4 "Rural character" refers to the patterns of land use and development established by a
5 county in the rural element of its comprehensive plan. Lewis County adopts the
6 following narrative guidelines to identify and protect the rural character of the County.

7 ...

8 (f) *That generally do not require the extension of urban governmental services.*
9 RCW 36.70A.030(14)(f). The County plan prohibits the extension of the urban
10 services, defined below, outside of the urban growth area, except where
11 already in existence, or where necessary and available to resolve existing or
12 imminent health hazards. The rural area development contemplated in this
13 plan is to be accomplished by rural governmental services as defined below,
14 which permits the County to take advantage of a significant base of existing
15 facilities and services already available in the rural areas.

16 Lewis County Comprehensive Plan, Land Use Element 4-27-8, Approved Plan:
17 June 1, 1999, amended April 4, 2002.

18 Petitioners argue that the new provisions that allow the extension of sanitary sewer and
19 water to the Cardinal MID UGA are inconsistent with this provision of the comprehensive
20 plan. We do not agree. This section of the plan deals with development in the County's
21 rural areas, not in its special purpose industrial UGA. In fact, the comprehensive plan itself
22 defines urban governmental services as including the municipal public water and sanitary
23 sewer systems of "planned industrial areas" as well as of the nine cities and towns and
24 master planned communities. Comprehensive Plan, Land Use Element 4-5. These plan
25 provisions distinguish between growth in urban areas such as in this MID UGA and growth
26 in rural areas. Since the Cardinal MID UGA is not a rural area, there is no inconsistency.

27
28 Second, Petitioners cite to Countywide Planning Policy 2.5:

29 Urban water system extension should not be permitted in rural areas and resource
30 lands except to solve immediate health or safety problems threatening existing
31 residents. If urban water systems are extended, the number of hookups shall be
32 limited to that which is consistent with the adopted rural element of the adopted
Comprehensive Plan.

1 Again, this provision applies to extension of urban water systems to rural and resource
2 lands. It does not prohibit extension of urban services from one UGA to another, nor does it
3 prohibit crossing rural and resource lands to provide those services as long as such
4 services are not extended to residents of rural and resource lands.
5

6
7 Finally, Petitioners argue that LCC 17.150.070(3)(k) clarifies that prohibited urban growth
8 includes the extension of publicly owned sewer or water facilities. Petitioner's (Heikkila)
9 Opening Brief at 6. Again this regulation applies to urban growth in the rural area, not to
10 urban services to a UGA. We find no inconsistency.
11

12 *Conclusion:* The challenged plan amendments and development regulations comply with
13 RCW 36.70A.110(4) and are consistent with the rest of the County comprehensive plan and
14 development regulations.
15

16
17 C. Issues Alleging Failure to Meet Requirements of RCW 36.70A.365 – Issues Nos. 8, 9,
18 11, 12 and 22

19 These issues challenge the compliance of Ordinance 1179H and Resolution 04-322 with
20 RCW 36.70A.365, the provision of the GMA that applies to major industrial developments.
21 There are a variety of challenges to compliance with RCW 36.70A.365: challenges to the
22 adequacy of the inventory of developable land required by RCW 36.70A.365(2)(h) (Issue
23 No. 8); challenges to the infrastructure requirements (Issues Nos. 9 and 11); and challenges
24 related to urban growth and services (Issues Nos. 12 and 22).
25

26
27 There are eight specific criteria that must be met to approve an MID UGA pursuant to RCW
28 36.70A.365(2):
29

30 A major industrial development may be approved outside an urban growth area in a
31 county planning under this chapter if criteria including, but not limited to the following,
32 are met:

- (a) New infrastructure is provided for and/or applicable impact fees are paid;

- 1 (b) Transit-oriented site planning and traffic demand management programs are
2 implemented;
3 (c) Buffers are provided between the major industrial development and adjacent
4 *nonurban* areas;
5 (d) Environmental protection including air and water quality has been addressed and
6 provided for;
7 (e) Development regulations are established to ensure that urban growth will not
8 occur in adjacent nonurban areas;
9 (f) Provision is made to mitigate adverse impacts on designated agricultural lands,
10 forest lands, and mineral resource lands;
11 (g) The plan for the major industrial development is consistent with the county's
12 development regulations established for protection of critical areas; and
13 (h) An inventory of developable land has been conducted and the county has
14 determined and entered findings that land suitable to site the major industrial
15 development is unavailable within the urban growth area. Priority shall be given to
16 applications for sites that are adjacent to or in close proximity to the urban growth
17 area.

18 RCW 36.70A.365(2)

19
20 Petitioners argue that the adoption of Resolution 04-322 and Ordinance 1179H fails to
21 comply with (2)(a) (infrastructure); (2)(e) (protections against urban growth in adjacent
22 areas); and (2)(h) (the inventory of developable land) of RCW 36.70A.365.

23 **Infrastructure.** Petitioners challenge the sufficiency of the provision of water and roads to
24 the MID UGA.² Petitioners' greatest concern appears to be with respect to water. Ex. 23,
25 August 23, 2004, Letter from Petitioner Gabriel Morris to the Board of County
26 Commissioners, the Hearing Examiner, and the Lewis County Planning Commission.
27 Petitioners argue that the plan for obtaining water has not yet been approved and so does
28 not meet the statutory criterion. Petitioners Battin, et al., Hearing Brief at 16. Petitioner
29 Panesko asserts that it was erroneous to determine that there had been adequate provision

30 _____
31 ² Issue No. 17 also addresses the issue of roads but does so in the context of the DEIS and FEIS: "Whether
32 Lewis County violated SEPA requirements by not adequately analyzing the project's impact to pedestrian
safety on Avery Road, by not finding this impact significant, and by not identifying mitigation measures such as
widening Avery Road to meet collector or arterial standards."

1 for water at the site when “Cardinal did not actually have industrial water rights and might
2 never get them.” Petitioner Opening Brief at 5.

3
4 Cardinal and the County respond that it would be unreasonable and “absurd” to require that
5 the applicant for an MID UGA actually produce the new infrastructure before the application
6 could be approved. Cardinal FG Company’s Response Brief at 21. Such new infrastructure
7 could potentially cost millions of dollars with “absolutely no guarantee that the County would
8 approve the proposed use.” *Ibid.*

9
10
11 We do not understand the Petitioners to be arguing that the applicant must actually install
12 new infrastructure before an application can be approved. Rather, Petitioners argue that
13 the promise by Cardinal to provide infrastructure here is not sufficient. They are particularly
14 concerned that Cardinal does not have a commitment from either the Department of
15 Ecology to approve a groundwater source or from the City of Winlock to provide pipeline
16 water. See Findings of Fact and Conclusions of Law on Appeals of Final Environmental
17 Impact Statement (FEIS), Hearing No. 04-2-001, 04-2-002 and 04-2-003, Lewis County
18 Hearing Examiner, Finding No. 42.

19
20
21 Cardinal admits that “any groundwater source must first be approved by Ecology” but points
22 out that Winlock has offered pipeline water as an alternative. Cardinal FG Company’s
23 Response Brief at 22. Exhibit 23 to the Cardinal response brief includes three documents
24 from the City of Winlock concerning the City’s provision of water service to the Cardinal MID
25 UGA, including the statement of Mayor Pro Tem Cy Meyers that “The City is ready, willing
26 and able to meet the water service needs of Cardinal.” Ex. 37; Ex. 55 and 57. See also the
27 Hearing Examiner’s conclusion that the City of Winlock represents that it has sufficient water
28 and is willing to enter into an agreement with Cardinal. Decision on Appeals of Final
29 Environmental Impact Statement, In Re: Cardinal FG Company Float Glass Manufacturing
30 Plan and OBCT (Hearing No. 04-2-001), and Vinatieri and Butler (Hearing No. 04-2-002),
31
32

1 and Battin (Hearing No. 04-2-003), at 3-4. Engineers retained by Winlock determined that a
2 production well “could be developed on the property that will supply the required amount of
3
4 water.” Ex. 3003. This, in turn, would offset the drain on the City’s own water supplies in
5 providing service to the Cardinal facility. *Ibid*; Ex. 55, Ex. 57.
6
7

8 As Petitioners point out, the issue of water rights is complex and it may take some time for
9 Cardinal to acquire water rights, if it is ever able to do so. Without the support of the City of
10 Winlock, it is questionable whether we could find that the needed water service
11 infrastructure had been “provided for” as required by RCW 36.70A.365(2)(a). However, the
12 support of the City of Winlock is not insignificant. The City’s commitment to provide water
13 service is conditional but based on a serious effort to upgrade its water services to supply
14 non-municipal users. Ex. 55 and 57. Cardinal has committed to paying for whatever water
15 service it requires. See Ex. 84 at 73. We also note that at the permit level, the conditions
16 upon construction and occupancy of the Cardinal facility will require that water service
17 actually be provided to the site.
18
19

20 We do not denigrate in any way the Petitioners’ concerns about the adequacy of the water
21 supply. However, we must grant deference to the County Commissioners’ determination
22 that the alternatives available to Cardinal ensure that there is provision for water services at
23 the site. Ex. 84, Final Environmental Impact Statement, Cardinal FG Company at 67-73;
24 Ex. 86, Staff Report, August 11, 2004, at 10. We find that the County was not clearly
25 erroneous in determining that there is adequate provision of water service for the Cardinal
26 MID UGA at the planning level.
27
28

29 As to the road requirements, Petitioners argue that the access road to the MID UGA is not
30 an arterial as required by Lewis County planning policy LU 7.3. Petitioner Brief – Heikkila
31 at 4. Land Use Policy LU 7.3 provides:
32

1 New industrial sites should be located and designed to facilitate safe access and
2 circulation and reduce traffic impediments.

3
4 Petitioners also argue that Land Use Policy 8.1 is even more specific:

5 Designate and preserve sites for industrial use at locations that will be accessible from
6 roadways of arterial classification or higher, potentially served with utilities, and free of
7 major environmental constraints such as unsuitable soils, floodplains and wetlands.

8 Petitioners Battin, et al., Hearing Brief at 16.

9 Cardinal and the County respond that although Avery Road is not an arterial, this
10 classification is not a function of the construction or location of the roadway but of the
11 volume of traffic that travels that section of the road. LCC 12.60.240(3)(a)(i); Cardinal FG
12 Company's Response Brief at 23. Cardinal argues that Avery Road is a designated truck
13 route and that there is no evidence that there will be any significant increase in accidents as
14 a result of the Cardinal MID. *Ibid.*

15
16
17 However, the classification of "arterial" is not merely an indication of volume of traffic.
18 Arterials must conform to the design standards for that classification as well, in this case
19 "Rural Area Design Standards 3-2." Ch. 17.60 LCC. Those standards include a minimum
20 road width of 30 feet. The Hearing Examiner recommended that Avery Road be improved
21 to a surface width of 30 feet "to meet present standards." Hearing Examiner Master Plan
22 Findings, Conclusions and Recommendations at 5. He states that improving only the
23 project's frontage on both sides of Avery Road "will offer no real benefit and could prove to
24 be misleading to pedestrians and cyclists." *Ibid.* Since the Board of County Commissioners
25 elected not to adopt this recommendation of the Hearing Examiner, there is a clear
26 inconsistency between LUP 8.1 and 7.3 and the adopted MID UGA infrastructure
27 development regulations. Because RCW 36.70A.365(2)(a) requires that new infrastructure
28 be "provided for," this gap between the County's road requirements for new industrial
29 development and the regulations imposed on the Cardinal MID UGA is also not compliant
30 with RCW 36.70A.365(2)(a).
31
32

1 **Protections against urban growth in adjacent areas.** RCW 36.70A.365(2)(e) requires
2 that development regulations be adopted to protect against the spread of urban growth to
3 areas adjacent to the MID UGA. Issue No. 12 claims that the County has failed to adopt
4 such development regulations; Issue No. 22 claims that allowing outside service providers,
5 including municipalities, and special purpose districts to provide service to the new MID
6 UGA violates RCW 36.70A.365.
7

8
9 Petitioners first argue that the County has taken no action to ensure that urban growth will
10 not occur in adjacent currently nonurban areas. Petitioners Battin, et al., Hearing Brief at
11 15. Petitioners particularly point to a pending application for a major industrial land bank on
12 adjoining acreage as a substantial risk for expanding urban development around the MID
13 UGA. *Ibid*; Ex. 29, Attachment 3. They argue that no development regulations have been
14 adopted to ensure that urban growth will not occur in adjacent *nonurban* areas as required
15 by RCW 36.70A.365(2)(e).
16

17
18 Cardinal and the County respond that the development regulations applicable to adjacent
19 lands do ensure that urban growth will not occur. Cardinal FG Company's Response Brief
20 at 24. They point out that those lands are designated Rural Development District – 10, a
21 designation that allows single family homes at a density of 1 dwelling unit per 10 acres, and
22 other agricultural and resource uses. *Ibid*. The County also adopted LCC 17.21.070 when
23 it approved the Cardinal MID UGA. This regulation, Cardinal argues, prohibits water and
24 sewer extensions from the MID UGA to uses outside its boundaries. *Ibid* at 25. In addition,
25 the County's project approval requires that, prior to issuance of building permits, Cardinal
26 enter into a covenant "stating that urban governmental services cannot be extended to
27 adjacent nonurban areas unless such extensions are consistent with state law and the
28 Lewis County Comprehensive Plan, and the uses have first been approved and authorized
29 by Lewis County." Ex. 25, Index 211, Resolution 04-323, Attachment B thereto, Approval
30 and Conditions 18.
31
32

1 Petitioners reiterate their concern about the pending application for an industrial land bank
2 adjacent to the Cardinal MID UGA. Petitioners Battin, et al., Reply Brief at 12-13. While we
3 agree that the requirement to contain the MID UGA may affect the industrial land bank
4 application, we do not read RCW 36.70A.365(2)(e) as requiring the County to adopt
5 regulations addressing specific applications for a land use designation change as part of the
6 MID UGA approval. Also, as Petitioners point out, the rural designation of the adjacent
7 lands is subject to a finding of invalidity and that invalidity finding must be lifted before a new
8 designation can take effect. RCW 36.70A.302(7). The County is working on a
9 comprehensive approach to the designation and protection of agricultural resource lands
10 and these adjacent lands must be considered in the course of that review. Under these
11 circumstances, we believe that the development regulations currently in place provide
12 sufficient assurance that urban growth will not occur on adjacent lands. We note, too, that
13 any designation change will require a comprehensive plan amendment which is subject to
14 challenge under Ch. 36.70A. RCW; and that the regulations for processing an industrial land
15 bank application are themselves presently under a finding of invalidity. See *Vinatieri v.*
16 *Lewis County*, WWGMHB Case No. 03-2-0020, Compliance Order – 2005, January 7, 2005.
17
18
19

20 Under the circumstances here, the Petitioners have not met their burden of proof that the
21 development regulations adopted by the County to assure that urban growth will not occur
22 on adjacent lands are non-compliant with the GMA.
23

24
25 **Inventory of Developable Land.** RCW 36.70A.365(2)(h) requires that “[A]n inventory of
26 developable land has been conducted and the county has determined and entered findings
27 that land suitable to site the major industrial development is unavailable within the urban
28 growth area. Priority shall be given to applications for sites that are adjacent to or in close
29 proximity to the urban growth area .”
30

31
32 ///

1 Petitioners claim that the County failed to conduct an adequate inventory of developable
2 lands so that it could validly give priority to sites that are all or partially inside or are in close
3 proximity to urban growth areas as required by RCW 36.70A.365(2)(h). Issue No. 8. They
4 point out that “[n]o document entitled inventory was presented until after all testimony had
5 been closed.” Petitioners Battin, et al., Hearing Brief at 13. They further urge that the
6 inventory was defective in that it did not purport to list the developable lands of the County.
7 *Ibid.* OBCT argues that the County did not perform any actual inventory of developable
8 land outside the UGA. OBCT’s Opening Brief at 3. OBCT prepared a list of potential sites
9 for the Cardinal facility that are of suitable parcel size and close to rail and the natural gas
10 pipeline. Exhibit 2001. OBCT urges that the County should have reviewed those sites
11 because they are closer to a UGA than the proposed Cardinal site. OBCT also asks this
12 Board to find that major industrial development UGAs should be adjacent or as close as
13 possible to a municipal UGA. OBCT’s Opening Brief at 4.
14
15

16
17 Cardinal responds that it provided an inventory of suitable sites in its October 31, 2003,
18 application. Cardinal FG Company’s Response Brief at 15. This inventory was made
19 available to the public immediately and public notice was provided on November 21, 2003.
20 *Ibid.* However, Cardinal takes issue with the argument that the County must conduct an
21 inventory of developable land generally when there are unique siting requirements such as
22 those necessary for the Cardinal float glass facility. *Ibid* at 14. Cardinal asks the Board to
23 find that once an industrial development is proposed, the inventory of developable land
24 should be based on the unique siting requirements of the proposed MID. *Ibid* at 15.
25
26

27 The inventory of developable land required by RCW 36.70A.365 is clearly designed to
28 ensure that potential sites for the major industrial development within the existing urban
29 growth areas are considered before any additional UGAs are created. The “developable
30 land” to be inventoried is therefore land that meets the requirements for the industrial
31 purpose. The County has an obligation to assure itself that those criteria are *bona fide*
32

1 operational requirements. However, provided they are *bona fide* operational requirements,
2 the inventory of developable land may be limited to lands that meet those siting
3 requirements.

4
5 In this case, no one challenges that the Cardinal requirements are not *bona fide* operational
6 requirements. These include: an eighty-acre parcel size; a water table at least 35 feet
7 below ground; location outside a flood plain; uninterruptible natural gas supply; dependable
8 electricity supply; on-site rail access for materials; access to raw materials at a reasonable
9 cost; interstate highway access; and an adequate water supply. October 31, 2003, Cardinal
10 Application, Ex.3. Mr. Nelson, the plant manager of Cardinal's Tumwater plant, testified at
11 length about the reasons for its siting requirements. Ex. 33. The need for a deep basement
12 is driven by the need to house the facility's glass furnace regenerators. Adequate
13 separation of groundwater is necessary to protect the furnace. *Ibid* at 46.

14
15
16
17 While OBCT listed a number of other potential sites, those sites only meet a few of the
18 Cardinal requirements: parcel size; access to rail; and availability of the natural gas pipeline.
19 Ex. 2001. As Cardinal points out, despite all the public meetings and opportunities for
20 comment, no one has brought forward another site that would meet Cardinal's unique siting
21 requirements. Cardinal FG Company's Response Brief at 18-19.

22
23
24 Cardinal itself produced a list of eleven possible sites. Ex. 3. The FEIS considered 16
25 possible sites. Ex. 32. These included sites within the County's municipal UGAs, as well as
26 sites outside the UGAs. *Ibid*. Even so, only the Avery Road site met all the *bona fide*
27 operational requirements that Cardinal has for a float glass manufacturing facility. *Ibid*.

28
29
30 *Conclusion:* In sum, the Board finds that the requirements of RCW 36.70A.365 have been
31 met in this application, with the exception of the failure of the County to meet its road design
32 standards for arterial service to the new industrial development. The County was not clearly

1 erroneous in determining that there is adequate provision of water service for the Cardinal
2 MID UGA at the planning level.

3
4 Under the facts presented, the Petitioners have not met their burden of proof that the
5 development regulations adopted by the County to assure that urban growth will not occur
6 on adjacent lands are non-compliant with the GMA. Further, in light of all the circumstances,
7 the inventory of developable land was compliant with the requirements of RCW
8 36.70A.365(2)(h).
9

10
11 However, the failure to adopt arterial road design requirements for Avery Road fails to
12 comply with both the consistency requirements of RCW 36.70A.040, 36.70A.070, and
13 36.70A.130(1)(b) and the infrastructure requirements of RCW 36.70A.365(2)(a).
14

15
16 D. Procedural Challenges – Issues Nos. 5 and 7

17 Petitioners argue that the County failed to follow LCC 17.20.030 in processing the Cardinal
18 application:

19 The proponent of any specific proposal shall submit an application with the
20 information required below. The application must be signed by the owners of at least
21 50% of the property subject to the plan.

22 Petitioners Battin, et al., Hearing Brief at 10.

23
24 Cardinal and the County point out that the sufficiency of the application under LCC
25 17.20.030 is a project issue subject to the Land Use Petition Act rather than the GMA.
26 Cardinal FG Company's Response Brief at 12.
27

28 We agree. Petitioners' arguments regarding the local implementing policies and regulations
29 fail to meet the burden of proof.

30
31 ///

1 Petitioners also argue that Resolution 04-322 and Ordinance 1179H fail to comply with the
2 GMA because the County did not use a process established in consultation with the cities
3 as required by RCW 36.70A.365. Petitioners point to the Board's decision in *Roth, et al., v.*
4 *Lewis County*, WWGMHB Case No. 04-2-0041c, Final Decision and Order, December 10,
5 2004, in which we found that the County's process was not established in consultation with
6 the cities as required by RCW 36.70A.365. Petitioners Battin, et al., Hearing Brief at 12.

8
9 Cardinal and the County respond that the Board's decision in *Roth* related to the process
10 established by the County rather than to the particular application for a comprehensive plan
11 amendment here. Petitioners Battin, et al., Hearing Brief at 10. Cardinal states that there is
12 un rebutted testimony in the record that the County and cities did discuss the MID process
13 and approval of the Cardinal MID. *Ibid*; Ex. 23 (Index 176). Cardinal also points to various
14 letters from the cities. Index 37, 55, 57, 87, and 122. *Ibid*.

16
17 The Board did determine that the process the County established to consider applications
18 for major industrial developments failed to comply with RCW 36.70A.365 because the
19 County failed to consult with the cities in establishing that process. *Roth, et al., v. Lewis*
20 *County*, WWGMHB Case No. 04-2-0041c, Final Decision and Order, December 10, 2004.
21 However, because the Cardinal application had already been processed under that
22 (noncompliant) process, the Board left open the question whether that *particular* application
23 met the requirements of RCW 36.70A.365, whether or not the process required it. *Ibid*.

25
26 Here we find that because the cities were consulted and involved in the approval of the
27 Cardinal MID UGA, this particular application met the requirements for consultation with the
28 cities. We hasten to add that this finding does not affect the County's obligation to establish
29 its process under RCW 36.70A.365 in consultation with the cities. That obligation continues
30 through the non-compliance findings in the *Roth* case. We also wish to make it clear that
31 this specific case should not be viewed as precedent to avoid the requirements of creating a
32

1 compliant process before processing an application pursuant to RCW 36.70A.365. We
2 simply find that in this case, under its unique facts and where the application was processed
3 before a finding of noncompliance was entered, the involvement of the cities in processing
4 the application meets the consultation requirements of RCW 36.70A.365.

5
6
7 *Conclusion:* Compliance with LCC 17.20.030 is a project-level requirement, not subject to
8 Board review. Petitioners have not met their burden of proving Lewis County failed to
9 comply with the requirements of RCW 36.70A.365 and local implementing policies and
10 regulations when it adopted Resolution No. 04-322 and Ordinance No. 1179H. In addition,
11 because the cities were consulted and involved in the approval of the Cardinal MID UGA,
12 this particular application met the requirements for consultation with the cities.

13
14 E. Issues Related to the Board's Prior Findings of Invalidity – Issues Nos. 1, 2, 3, 24, 26,
15 27, and 28

16
17 On prehearing motion, Petitioner OBCT moved for judgment on Issues 1 and 2. OBCT's
18 Motion on Issues 1 and 2. The Board declined to decide those issues on motion:

19 We also find that these issues are not ripe because they rest, at least in part, on the
20 County's failure to request that the Board lift its invalidity finding as to the designation
21 of the lands which have been re-designated as the Cardinal MID UGA in the
22 comprehensive plan amendment challenged here.

23 Decision and Order on Motions, February 8, 2005.

24 Subsequently, on February 28, 2005, the County moved to rescind the invalidity finding
25 imposed on the designation of the lands now designated as the Cardinal MID UGA. *Butler*
26 *v. Lewis County*, WWGMHB Case No. 99-2-0027c and *Panesko v. Lewis County*,
27 WWGMHB Case No. 00-2-0031c, Motion of Lewis County To Rescind Invalidity on Cardinal
28 MID. We determined to rescind the finding of invalidity as to the Cardinal MID UGA site in
29 our Order Rescinding Invalidity as to Cardinal MID UGA Site, May 12, 2005. Because we
30 have rescinded our finding of invalidity as to the designation of the Cardinal MID UGA site,
31
32 Issues Nos. 1, 2, 3, 24, 26, and 27 are now moot. However, we point out that a process

1 that makes a designation change to the comprehensive plan and approves a master site
2 plan for a major industrial development contemporaneously would not be compliant if it
3 provides that the designation change takes effect immediately. The reason for this is that
4 such a process would effectively remove the ability of the public to obtain review of the
5 compliance of the designation change (and accompanying development regulations). As
6 the County moves forward to achieve compliance in the *Roth v. Lewis County*, WWGMHB
7 Case No. 04-2-0041c case (the case in which the County is establishing the County's
8 process for reviewing applications for major industrial development), this consideration
9 should be addressed.
10

11
12 The remaining issue, Issue No. 28, argues that "the comp plan amendment which allows
13 water, natural gas pipelines, electric power lines, and railroad tracks to cross nonurban
14 areas including farmlands with prime soils to serve this major industrial development is
15 noncompliant with RCW 36.70A.170 and RCW 36.70A.060 for failing to conserve
16 agricultural land, and noncompliant with RCW 36.70A.300 and .320 for failing to comply with
17 the February 13, 2004, Order which ruled "LCC 17.30.640(2)(a), (c), (e)---incidental uses---
18 and LCC 17.30.650---pipelines on ag lands---invalid." This challenge is directed to
19 conservation of adjacent agricultural resource lands.
20
21

22
23 Petitioner Panesko points to the following language of the comprehensive amendment
24 adopted as part of approval of the Cardinal MID UGA:

25 Water and natural gas pipelines and electric power lines and facilities, and railroad
26 tracks may cross non-urban areas to serve this specific Major Industrial
27 Development.

28 Resolution 04-322, Land Use Element 4-1.

29 He also points to the new development regulation (adopted by Ordinance 1179H) which
30 provides:

31 Urban governmental services may be provided to this Major Industrial Development
32 so long as such services are not connected to uses in non-urban areas unless such
connections are consistent with state law and the Lewis County Comprehensive Plan

1 and have been approved by Lewis County. Consistent with existing local, state and
2 federal laws, water and natural gas pipelines and electric power lines and facilities,
3 and railroad tracks may cross non-urban areas to serve this specific Major Industrial
4 Development.

5 LCC 17.21.030 (in pertinent part).

6 Petitioner Panesko argues that the Board has found such utilities across agricultural lands
7 are "unrelated to agriculture and do not need to be placed on agricultural lands when there
8 is so much rural lands [sic] in Lewis County where there is no prohibition for such facilities."
9 Petitioner Opening Brief (Panesko) at 27.³

10
11
12 Cardinal and the County respond that the Petitioner has misstated the Board's earlier
13 finding; the Board did not prohibit such utility lines on agricultural lands but required that
14 they be located such that they do not interfere with resource uses. Cardinal FG Company's
15 Response Brief at 27. In this case, Cardinal argues, the utility routes have been determined
16 and are shown on the FEIS. Ex. 41 (Index 84.01, FEIS Figures 6, 25). According to
17 Cardinal, all the routes follow road rights-of-way and will be buried. There is, Cardinal and
18 the County argue, no evidence that there will be any interference with agricultural activity.

19
20 *Ibid.*

21
22 The Board's ruling with respect to uses on agricultural resource lands found LCC 17.30.650
23 invalid and noncompliant with the GMA. The Board found noncompliant and invalid that
24 provision of the County code which allowed essential public facilities, including utility
25 facilities, to be located in resource lands without restriction on any potential interference with
26 resource uses. *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c and *Panesko v.*
27 *Lewis County*, WWGMHB Case No. 00-2-0031c, Order Finding NonCompliance and
28 Imposing Invalidity, February 13, 2004. Cardinal and the County are correct, however, that
29
30

31
32 ³ Petitioner references the Board's February 13, 2004, decision in *Butler v. Lewis County*, WWGMHB Case
No. 99-2-0027c and *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c, Order Finding
NonCompliance and Imposing Invalidity.

1 the Board indicated that public facilities such as utility lines and pipelines would likely need
2 to cross resource lands of necessity in some areas, and that the Board's concern was the
3 lack of a provision indicating that such utility lines would be located so as not to interfere
4 with resource activity. *Ibid.* The Board did not find them an incompatible use *per se* in
5 resource lands.
6

7
8 In the instant case, there is no evidence that the approved utility lines to the Cardinal MID
9 UGA will interfere with agricultural activity. Ex. 41 to the Cardinal Response Brief shows
10 the path of the natural gas and water pipeline routes. Those routes follow existing roads,
11 Antrim Road and Hawkins Road, and then appear to cross one parcel of land to the
12 Cardinal site. No one disputes Cardinal's claim that these lines will be buried and will not
13 interfere with agricultural activity.
14

15
16 While it is true that the comprehensive plan amendment does not prohibit interference by
17 the utility lines with resource activity, the implementing development regulation requires that
18 they be "[C]onsistent with existing local, state and federal laws." LCC 17.21.030. In its
19 compliance efforts with respect to development regulations governing uses in resource
20 lands in the *Butler* and *Panesko* cases, the County will need to address that question in
21 general and thus create a "local law." Until that time, the specific project limitations are part
22 and parcel of the County's regulations of the MID UGA and do ensure that the utility lines
23 crossing resource lands will not interfere with agricultural activity.
24

25
26 *Conclusion:* Because we have rescinded our finding of invalidity as to the designation of
27 the Cardinal MID UGA site, Issues Nos. 1, 2, 3, 24, 26, and 27 are now moot. As to Issue
28 No. 28, the Petitioners have failed to show that the development regulations fail to conserve
29 resource lands or mitigate any adverse impacts on resource lands.
30
31
32

1 F. Public Participation Issues – Issues Nos. 4 and 25

2 Petitioners argue that the enactment of Resolution 04-322, Ordinance 1179H and
3 Resolution 04-323 “constituted a study in the art of thwarting true public participation.”
4 Petitioners Battin, et al., Hearing Brief at 7. The County did not follow its public participation
5 procedures for comprehensive plan amendments in Ch. 17.12 LCC, Petitioners point out,
6 and did not hold the background workshops that are required by that part of the county
7 code. *Ibid* at 10. Petitioners particularly focus on the inventory of developable land and
8 claim that it was not provided to the public until the public was effectively precluded from
9 rebutting the County’s evidence. *Ibid*.

10
11
12 Cardinal and the County respond that the test is whether the adoption of the Cardinal MID
13 satisfied the requirements of RCW 36.70A.140. Cardinal FG Company’s Response Brief at
14 5. Cardinal notes that the Board’s decision in *Roth v. Lewis County*, WWGMHB Case No.
15 04-2-0021c, Final Decision and Order, December 10, 2004, found noncompliant the
16 County’s development regulations establishing a *process* for reviewing of major industrial
17 development applications. The Board reserved the question whether the actual public
18 participation procedures followed relative to the Cardinal MID application complies with the
19 GMA. *Ibid*. Cardinal and the County argue that the requirements of RCW 36.70A.140 for
20 early and continuous public participation were more than met in this case. Lewis County’s
21 Joinder of Cardinal FG Company Response Brief.
22
23

24
25 In *Roth*, we found that “[T]he County could, in practice, follow proper public participation
26 procedures in the approval of an application for a major industrial development even if its
27 written ordinance did not require them.” Therefore, we agreed that the test in this case
28 would be whether proper public participation procedures were followed under RCW
29 36.70A.140.
30

31 ///

32 ///

1 In pertinent part, RCW 36.70A.140 provides:

2 The procedures shall provide for broad dissemination of proposals and
3 alternatives, opportunity for written comments, public meetings after effective
4 notice, provision for open discussion, communication programs, information
5 services, and consideration of and response to public comments.

6
7 Cardinal provides a chart listing the actions taken to involve the public in the Cardinal
8 application on pp. 6-7 of its response brief. After the application was filed on October 31,
9 2003, notice of the application was published. Ex. 70.02. The SEPA DS scoping notice
10 was mailed on November 25, 2003. Ex. 70.06. The County published and periodically
11 updated a fact sheet on its website, giving information about the Cardinal proposal and
12 opportunities for comment. Ex. 16 (Index 213.02). A list of interested parties who wished to
13 receive mailed notice concerning the application was developed. Ex. 71.01. After the DEIS
14 was issued, written comments were received by April 7, 2004. Exhibit 81. Written
15 comments were received from many members of the public. Ex. 7 to the Cardinal response
16 brief. The comments were incorporated and addressed in the FEIS issued in July 2004.
17 Ex. 18 (Index 84.01). The Planning Commission hearing on the application was held on
18 August 23 and 24, 2004, with written comments accepted through August 27, 2004. Ex. 21
19 (Index 176). A Planning Commission workshop was held on August 31, 2004, and on
20 September 2, 2004. The Planning Commission adopted its recommendations. These
21 recommendations were forwarded to the Board of County Commissioners who held a public
22 hearing on September 22 and 23, 2004.

23
24
25
26 Petitioners urge that the public was not given sufficient opportunity to respond to the
27 inventory of developable land because it was not issued until the Staff Report was prepared
28 on August 11, 2004. Ex. 86. At the Hearing on the Merits, Cardinal and the County
29 responded that the other potential sites were published first in the Cardinal application, then
30 in the environmental impact statements. The Staff Report responded to the many
31 comments submitted in response to the list of potential sites and formalized the inventory of
32

1 developable lands. The public then had the opportunity to respond to this final list of sites at
2 the Planning Commission hearing and before the Board of County Commissioners.

3
4 Petitioners describe an ideal situation for public participation. The question for the Board is
5 whether the procedure for public participation followed by the County in this case was
6 clearly erroneous. We find that the public was notified and included in the consideration of
7 this application. The many written comments received and addressed in the process, dating
8 from January 2004, are evidence of this fact. We find that the process by which the
9 inventory of developable lands was created was inclusive and properly responded to
10 suggestions from the public.
11

12
13 *Conclusion:* Petitioners have not met their burden of proof in showing that the public
14 participation procedure followed in this case did not comply with RCW 36.70A.140.
15

16
17 **VI. FINDINGS OF FACT**

- 18 1. Lewis County is a county located west of the crest of the Cascade Mountains that is
19 required to plan pursuant to RCW 36.70A.040.
20
21 2. The Petitioners have participated in person or in writing in the legislative adoption
22 proceedings of Resolution 04-322, 04-323 and Ordinance 1179H.
23
24 3. This case is a consolidation of four petitions for review: WWGMHB Case No. 04-2-
25 0027 filed on November 22, 2004, and WWGMHB Case Nos. 04-2-0039, 04-2-0040
26 and 04-2-0041, filed on November 24, 2004.
27
28 4. Resolution 04-322 amends the Lewis County comprehensive plan to create a major
29 industrial development ("MID") urban growth area ("UGA") for the Cardinal FG
30 Company float glass facility.
31
32 5. Resolution 04-323 approves the Cardinal FG Major Industrial Development Master
Plan.
6. Ordinance 1179H adopts development regulations to implement MID UGA.

- 1 7. All three of these enactments were adopted on September 23, 2004, and published
2 September 29, 2004.
- 3 8. Cardinal FG Company has an interest in the adoption of the MID UGA and
4 implementing development regulations and was granted leave to participate in these
5 proceedings as an Intervenor.
- 6 9. The Petitioners elected not to address Issues 10, 13, 14, 15, 16, and 17 of the issues
7 in the prehearing order in their briefing.
- 8 10. Resolution 04-322 and Ordinance 1179H allow urban governmental services to be
9 provided to the Cardinal MID UGA but does not allow those services to be extended
10 to rural or resource lands.
- 11 11. Urban growth areas by definition are allowed to have urban levels of growth and
12 should have the urban services to support that growth.
- 13 12. The County's comprehensive plan prohibits the extension of urban services into the
14 County's rural areas, not into a special purpose industrial UGA.
- 15 13. Countywide Planning Policy 2.5 does not prohibit extension of urban services from
16 one UGA to another, nor does it prohibit crossing rural and resource lands to provide
17 those services as long as such services are not extended to residents of rural and
18 resource lands.
- 19 20 14. LCC 17.150.070(3)(k) applies to urban growth in the rural area, not to urban services
21 to a UGA.
- 22 15. Any groundwater source for the Cardinal MID UGA must first be approved by
23 Ecology.
- 24 16. The City of Winlock has offered pipeline water as an alternative source of water
25 needed by the Cardinal MID UGA.
- 26 17. The City's commitment to provide water service is conditional but based on a serious
27 effort to upgrade its water services to supply non-municipal users.
- 28 18. Cardinal has committed to paying for whatever water service it requires.
- 29 19. At the permit level, the conditions upon construction and occupancy of the Cardinal
30
31
32

1 facility will require that water service actually be provided to the site before Cardinal
2 can occupy its facility.

3 20. The access road to the MID UGA does not meet the design standards for an arterial.

4 21. Land Use Policy 8.1 of the County's comprehensive plan requires that sites for
5 industrial use must be accessible from roadways of arterial classification or higher.

6 22. Arterials must conform to the design standards for that classification as well, in this
7 case "Rural Area Design Standards 3-2." Ch. 17.60 LCC. Those standards include a
8 minimum road width of 30 feet.

9 23. Arterials must conform to the design standards for that classification as well, in this
10 case "Rural Area Design Standards 3-2." Ch. 17.60 LCC. Those standards include a
11 minimum road width of 30 feet.

12 24. The Hearing Examiner recommended that Avery Road be improved to a surface
13 width of 30 feet "to meet present standards."

14 25. The Board of County Commissioners elected not to adopt this recommendation of the
15 Hearing Examiner.

16 26. LCC 17.21.070 prohibits water and sewer extensions from the MID UGA to uses
17 outside its boundaries.

18 27. The rural designation of the lands adjacent to the Cardinal MID UGA is subject to a
19 finding of invalidity and that invalidity finding must be lifted before a new designation
20 can take effect.

21 28. Cardinal's *bona fide* operational requirements include: an eighty acre parcel size; a
22 water table at least 35 feet below ground; location outside a flood plain;
23 uninterrupted natural gas supply; dependable electricity supply; on-site rail access
24 for materials; access to raw materials at a reasonable cost; interstate highway
25 access; and an adequate water supply.

26 29. The need for a deep basement is driven by the need to house the facility's glass
27 furnace regenerators. Adequate separation of groundwater is necessary to protect
28 the furnace.
29
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- 1 30. Cardinal produced a list of eleven possible sites. Ex. 3. The FEIS considered 16
2 possible sites. Ex. 32. These included sites within the County's municipal UGAs, as
3 well as sites outside the UGAs. Only the Avery Road site met all the *bona fide*
4 operational requirements that Cardinal has for a float glass manufacturing facility.
5
6 31. The cities of Lewis County were consulted and involved in the approval of the
7 Cardinal MID UGA.
8
9 32. The Board rescinded the finding of invalidity as to the designation of the Cardinal MID
10 UGA site. Order Rescinding Invalidity as To Cardinal MID UGA Site, May 12, 2005.
11
12 33. The path of the natural gas and water pipeline routes follow existing roads and then
13 cross one parcel of land to the Cardinal site.
14
15 34. These utility lines will be buried and will not interfere with agricultural activity.
16
17 35. The public was involved in the consideration of the Cardinal application in the
18 following ways. Notice of the application was published in November 2003. A list of
19 interested parties who wished to receive mailed notice concerning the application
20 was developed. Ex. 71.01. After the DEIS was issued, written comments were
21 received by April 7, 2004. Exhibit 81. Written comments were received from many
22 members of the public. Ex. 7 to the Cardinal response brief. The comments were
23 incorporated and addressed in the FEIS issued in July 2004. Ex. 18 (Index 84.01).
24 The Planning Commission hearing on the application was held on August 23 and 24,
25 2004, with written comments accepted through August 27, 2004. Ex. 21 (Index 176).
26 A Planning Commission workshop was held on August 31, 2004, and on
27 September 2, 2004. The Planning Commission adopted its recommendations. These
28 recommendations were forwarded to the Board of County Commissioners who held a
29 public hearing on September 22 and 23, 2004.
30
31 36. Other potential sites were published first in the Cardinal application (11 sites), then in
32 the environmental impact statements (16 sites).

1 37. The Staff Report of August 11, 2004, responded to the many comments submitted in
2 response to the list of potential sites and formalized the inventory of developable
3 lands.
4

5
6 **VII. CONCLUSIONS OF LAW**

- 7 A. This Board has jurisdiction over the parties and subject matter of the issues related
8 to the enactment of Resolution 04-322 and Ordinance 1179H.
9 B. The Board lacks subject-matter jurisdiction over Resolution 04-323, which is a
10 project action.
11 C. The Petitioners have standing to bring their claims and raised them in a timely
12 manner.
13 D. The failure to adequately provide improvements to Avery Road to arterial road
14 design standards fails to comply with RCW 36.70A.365(2)(a) and RCW 36.70A.040
15 and 36.70A.130(1)(b).
16 E. Other than the failure to include improvements to Avery Road, Resolution 04-322
17 and Ordinance 1179H comply with Ch. 36.70A RCW.
18
19

20
21 **VIII. ORDER**

22 The County is ordered to achieve compliance in accordance with this decision no later than
23 150 days from the date of this final decision and order. The following schedule shall apply:

24 Compliance Due	October 11, 2005
25 Report of Compliance Actions Due	October 18, 2005
26 Objections to a Finding of Compliance Due	November 2, 2005.
27 County Response Due	November 14, 2005
28 Compliance Hearing	November 22, 2005

30
31 The location of the compliance hearing will be set at a subsequent time. The period of
32 remand shall extend until the Board issues its next order on compliance.

1 This is a final order for purposes of appeal pursuant to RCW 36.70A.300(5) and for a motion
2 for reconsideration pursuant to WAC 242-02-832. A motion for reconsideration must be
3 filed within 10 days of service of this final decision.
4

5 Entered this 13th day of May 2005.
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11 _____
Margery Hite, Board Member

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14 _____
Holly Gadbow, Board Member

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Gayle Rothrock, Board Member
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