

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 EUGENE BUTLER, et al,

Petitioners,

3 v.

4 LEWIS COUNTY,

5 Respondent,

6 And

7 CITY OF CENTRALIA, et al,

8 Intervenors.

Case No. 99-2-0027c

**COMPLIANCE ORDER**

9 VINCE PANESKO, et al,

10 Petitioners,

11 v.

12 LEWIS COUNTY,

13 Respondent,

14 And

15 LEWIS COUNTY ECONOMIC  
16 DEVELOPMENT COUNCIL & INDUSTRIAL  
17 LANDS ADVISORY TASK FORCE,

Intervenors.

Case No. 00-2-0031c

**COMPLIANCE ORDER**

18 DENNIS HADALLER, et al.,

19 Petitioners,

20 v.

Case No. 08-2-0004c

**FINAL DECISION and ORDER**

1 LEWIS COUNTY,

2 Respondent.

3  
4 **I. SYNOPSIS**

5 For many years, the Board has coordinated hearings and decisions on two cases dealing  
6 with agricultural resource lands in Lewis County. The Butler matter, Case No. 99-2-0027c,  
7 is a consolidated case arising from several Petitions for Review (PFR) filed in 1999. The  
8 Panesko matter, also consolidated as Case No. 00-2-0031c, arose from several PFRs filed  
9 in 2000. Since that time, the Board has issued its Final Decision and Order<sup>1</sup> (FDO) and  
10 several orders pertaining to compliance for these matters, the last of which occurred in June  
11 2007. The challenges presented by this matter are in response to Lewis County's efforts to  
12 comply with the Growth Management Act (GMA), RCW 36.70A, as required by the previous  
13 decisions of this Board, by adopting two enactments in November 2007- Ordinance 1197  
14 and Resolution 07-306.

15 In addition to receiving objections by the Petitioners of the prior cases based on actions  
16 taken in response to the Board's Orders, several new PFRs were filed by these same  
17 Petitioners as well as a new party, Dennis Hadaller. These PFRs were consolidated by the  
18 Board and are referenced as Case No. 08-2-0004c.<sup>2</sup> Hadaller also sought and was granted  
19 the right to participate in the compliance proceedings as they related to his property.

20 The issues of the parties were founded primarily in the GMA's mandate to conserve  
21 agricultural lands of long-term commercial significance and to maintain and enhance the  
22 agricultural industry. Additional issues were raised pertaining to public participation and  
private property rights. Because of the common thread between all three of these matters,  
the Board coordinated the proceedings, hearings, and issues a single decision which

<sup>1</sup> Case No. 99-2-0027c, FDO issued March 5, 2001; Case No. 00-2-0031c, FDO issued June 30, 2000

<sup>2</sup> For Case No. 08-2-0004c, joint briefing was done by Petitioners Butler and Futurewise. Throughout this  
Order, reference to "Butler" shall be construed as meaning both of these petitioners.

1 represents its Final Decision and Order in regards to Case No. 08-2-0004c and its  
2 Compliance Order in regards to Case Nos. 99-2-0027c and 00-2-0031c.

3 The Board finds that Hadaller has not demonstrated that the County violated the GMA's  
4 property rights goal. The Board has no jurisdiction to determine if an unconstitutional taking  
5 of private property has occurred. Furthermore, Petitioner Hadaller has failed to demonstrate  
6 that the County's designation of his property as ARL was clearly erroneous.

7 With regard to the public participation challenges, the Board finds that Petitioners Panesko  
8 and Butler have failed to demonstrate that the County did not comply with the public  
9 participation requirements of the GMA or the Lewis County code.

10 This order finds that the County's designation process was flawed in several ways. The  
11 Board finds that the County's rationale for excluding from Agricultural Resource Lands  
12 (ARL) designation consideration that those lands that are drained or irrigated, because no  
13 data is available to identify which lands with prime soils are drained is not sufficient. If  
14 "prime if drained/irrigated lands" are in fact drained or irrigated then they are prime soils  
15 which under the County's methodology are qualified for further consideration for designation  
16 the County must make an effort to identify these lands.

17 The Board also finds that by excluding from consideration for ARL designation non-soil  
18 dependant uses such as poultry operations and Christmas tree farming, the County failed to  
19 maintain and enhance the agricultural industry. The County is not required to designate all  
20 non-soil dependant agricultural uses ARL, but it may not exclude them solely on the basis of  
21 non-prime soils. Additionally, the County's ARL designation process failed to consider for  
22 ARL designation lands currently designated as forest lands of long-term commercial  
significance.

The Board recognizes Lewis County's need for economic development. Nevertheless, the  
Board finds that Lewis County erred when it placed its potential needs for future economic  
development and the cities' undocumented needs for future expansion of its UGAs above all

1 other considerations when applying its use of proximity to the "I-5 Corridor" and relationship  
2 or proximity to urban growth areas when determining which lands should be designated as  
3 ARL fails to comply with the goals and requirements of the GMA.

4 The Board further finds that Petitioners Panesko and Butler have failed to demonstrate that  
5 the County's process for considering the areas under consideration for ARL designation  
6 was made at an inappropriate level of detail.

7 Additionally, Petitioners have failed to carry their burden of proof to demonstrate that the  
8 County failed to include the raising of grain, hay, straw and turf in the definition of  
9 agricultural uses in LCC 17.30.610, an alleged violation of RCW 36.70A.030(2), (10) and  
10 RCW 36.70A.060.

11 The Board considered challenges to several of the County's development regulations and  
12 LCC 17.30.590, .610, .620 and .650. With the exception of challenges to LCC 17.30.610  
13 and LCC 17.30.650 Petitioners Panekso and Butler have failed to carry their burden of proof  
14 in establishing that the County's action in adopting these regulations was clearly erroneous.  
15 With LCC 17.30.610, Lewis County has assigned family day cares and home businesses  
16 the status of "primary"; the GMA permits, under certain circumstances, such uses to be  
17 "accessory" uses and therefore, Lewis County fails to comply with RCW 36.70A.177 which  
18 permits nonagricultural accessory uses within agricultural lands.

19 The Board finds that LCC 17.30.650 undermines the GMA's agricultural conservation  
20 mandate by failing to adequately protect against negative impacts to agricultural resource  
21 lands and the industry that relies on them and this provision substantially interferes with  
22 RCW 36.70A.020(8).

Petitioners also challenged Natural Resources Policy NR 1.6 contending that it was  
inconsistent with RCW 36.70A.177. The Board disagrees, finding that NR 1.6 implements  
RCW 36.70A.177.

1 Petitioner Butler has demonstrated that a new finding of invalidity is warranted for LCC  
2 17.30.650 due to the number of permits pending for development in previous lands subject  
3 to a finding of invalidity. At the same time, due to noncompliance of its designation  
4 process, the County has not removed substantial interference with Goal 8, the GMA's  
5 agricultural conservation goal, it is premature to lift the Board's earlier invalidity order while  
6 the County still has not properly designated its agricultural resource lands.

## 6 II. PROCEDURAL HISTORY

7 The Procedural History for this matter is set forth in Appendix A.

## 8 III. ISSUES PRESENTED

9 The parties challenge Lewis County's adoption of two legislative enactments – Ordinance  
10 1197 and Resolution 07-306. The challenges arise from the actions taken by the County in  
11 response to Compliance Orders issued by the Board on February 13, 2004 and June 8,  
12 2007. The challenges are based on both the designation and de-designation of agricultural  
13 lands within the County; the amount of public participation afforded by the County during its  
14 amendment process; non-resource uses within agricultural resource lands, including  
15 accessory uses and airports; maximum residential densities and lot area requirements; the  
16 definition of commercial agriculture, including types of agricultural activities; and private  
17 property rights.

18 To prevent redundancy, the compliance issues and legal issues are set forth in their entirety  
19 in Appendix B. Each issue will be denoted in the Discussion section below (see Part VI).

## 18 IV. PRELIMINARY MATTERS

### 19 Hadaller's Objections to Petitioners' Response Briefs – Case No. 08-2-0004c

20 In reply to Hadaller's Prehearing Brief in Case No. 08-2-0004c, Petitioners Butler and  
21 Panesko filed briefs setting forth contrasting arguments.<sup>3</sup> Hadaller objects to the filing of

22 <sup>3</sup> See February 28, 2008 filings of Petitioners Butler and Panesko in Response to Hadaller HOM Brief – Case No. 08-2-0004c.

1 these response briefs, asserting that the Board's Prehearing Order makes no provision for a  
2 petitioner to file reply or response briefs to another petitioner's brief and, therefore, both  
3 should be stricken. In both their response briefs and at the Hearing on the Merits (HOM),  
4 Panesko and Butler assert that the responses are warranted because Hadaller is an  
5 Intervenor in the coordinated compliance cases and has "carried over the same arguments"  
6 as to agricultural designation that were raised in the briefing submitted for Case No. 08-2-  
7 0004c.

8 The Board notes the overlap of these cases, however what these petitioners are now  
9 attempting to do is file a responsive brief in regard to the arguments presented by Hadaller  
10 in Case No. 08-2-0004c; the only party that has such a right is the County. To allow  
11 submittal of these briefs would allow the other petitioners to have a second attempt at  
12 challenging Hadaller's objections set forth in the compliance portions of this matter.

**Therefore, Hadaller's Motion to Strike the Response Briefs of Petitioners Butler and  
Panesko filed in Case No. 08-2-0004c is GRANTED.**

*Petitioners' Response Briefs – Case Nos. 99-2-0027c/00-2-0031c*

13 Petitioners Butler and Panesko also filed response briefs to Hadaller's Objections to the  
14 County Compliance Report, Case Nos. 99-2-0027c and 00-2-0031c.<sup>4</sup> Hadaller responded  
15 to the assertions made in these briefs, but, unlike the responsive briefs received in Case No.  
16 08-2-0004c, he did not seek to strike these briefs.

17 The Board notes that Hadaller was granted intervention/participation status in the  
18 compliance portion of this matter as to those compliance issues which directly affect his  
19 property interests. Hadaller, in his Motion to Intervene, asserted that Lewis County erred  
20 when it rezoned his property to agricultural, essentially taking a stance similar to that of the  
21 parties in the compliance matter, i.e. the County's actions were not in compliance with the  
22 GMA. As with the response briefs filed by Petitioners in the related case, the Board

<sup>4</sup> See January 4, 2008 filings of Petitioners Butler and Panesko in Response to Intervenor Hadaller's  
Objections – Case No. 00-2-0031c and 99-2-0027c.  
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1 questions the propriety of parties, especially those with differing opinions on just how the  
2 County failed to comply with the GMA, filing briefings countering one another's arguments.  
3 The Board further notes that the briefing schedule set forth in the Board's Order of Non-  
4 Compliance provides that Petitioners may file a reply brief to the arguments set forth by the  
5 County in its response. The Order does not imply replies may be filed against any other  
6 party, regardless of their position. This is especially relevant in this situation since although  
7 Hadaller was an intervenor/participant in the compliance portion of this matter, he was in no  
8 way supporting the County's action and, thus, was in the same position as the petitioners.

9 Although Hadaller did not specifically move for the reply briefs to be struck, the Board *sua*  
10 *sponte*, finds that the submittal of these briefs is not supported by the Board's Order of Non-  
11 Compliance nor is it supported by the interests of justice and the orderly and prompt  
12 conduct of the Board's proceedings. **THEREFORE, Panesko's Response to Intervenor**  
13 **Hadaller's Objections to County Compliance Report and Butler's Response to**  
14 **Intervenor Hadaller will not be considered by the Board. Hadaller's Reply to these**  
15 **briefs will be permitted only in regard to the responses pertaining to Lewis County's**  
16 **assertions; any responses to arguments or facts raised by either Panesko or Butler**  
17 **will not be considered by the Board.**

18 *Hadaller's Motion for Reconsideration – Order on Motion to Supplement*

19 On March 7, 2008, Hadaller filed a Motion for Reconsideration of the Board's March 4, 2008  
20 Order on Motion to Supplement which denied, in part, inclusion of several exhibits sought  
21 for admission. The reason for this motion was that, based on conversations at the  
22 Prehearing Conference and in the Board's January 17, 2008 Prehearing Order, Hadaller  
expected oral arguments on the proposed exhibits would be heard prior to substantive  
arguments at the Hearing on the Merits. Hadaller contends that without this opportunity, the  
Board will be prevented from "fully realizing the evidence... [and] ... understanding site-

1 related facts as they pertain to Mr. Hadaller's specific circumstances as he is now affected  
2 by Ordinance 1197."<sup>5</sup>

3 At the HOM, the Board noted that it has previously waited until the HOM to rule on a Motion  
4 to Supplement. However, the Board concluded that it is more efficient for the parties to  
5 know what evidence they can rely on for both briefing and argument, therefore, the issuance  
6 of a ruling by the Board prior to the HOM was necessary. The Board further noted, as it did  
7 in its March 4 Order, supplemental evidence compiled after the decision of the local  
8 government has been made is of little relevance in determining whether the County acted in  
9 compliance with the GMA at the time it took the action under appeal. **Therefore, at the  
10 HOM the Board DENIED Hadaller's Motion for Reconsideration. The Board's  
11 decision stands and only Exhibits 504 and 507 are admitted to the Record for Case  
12 No. 08-2-0004c.**

13 Lewis County's Motion to Strike

14 Within its Response to Petitioner Panesko's Objections, the County moved to strike  
15 annotated maps presented by this Petitioner as Attachments 1 through 15 of Panesko's  
16 Objections to a Finding of Compliance (Panesko Objections).<sup>6</sup> The County contends that  
17 these maps are not illustrative of Record evidence but are instead an effort to introduce new  
18 evidence and were not before the County when it made its decision.<sup>7</sup>

19 At the HOM, the County noted that these annotated maps were addressed in the Board's  
20 March 5, 2008 Order on Illustrative Exhibits but that it was still unclear as to the extent of  
21 their use. Petitioner Panesko asserted these maps provide for clarity, showing areas  
22 previously held by the Board to be invalid and denote major landmarks for orientation  
purpose.

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<sup>5</sup> Motion for Reconsideration, at 2.

<sup>6</sup> County Compliance Response – Panesko, at 12.

<sup>7</sup> *Id.* at 11-12

1 At the HOM, the Board ruled that no annotated map produced by the parties would be  
2 admitted; only those maps produced by the County are to be contained within the Record.  
3 **Therefore, the admission of Petitioner's Attachments 1 through 15 for inclusion**  
4 **within the Record for this matter is DENIED, the County's Motion to Strike is**  
5 **GRANTED.**

6 Butler's Motion to Supplement

7 At the HOM, Futurewise/Butler<sup>8</sup> orally moved to supplement the record with an Amended  
8 Staff Report, dated February 22, 2008. Futurewise/Butler asserted that this is relevant to  
9 the issue of invalidity because it shows that a substantial number of development  
10 applications are pending on properties subject to the moratorium issued by the County after  
11 the Board's Order of Invalidity. The County objected to this document, noting that it was  
12 produced after the adoption of the challenged action and that the evidence it relies on is  
13 contained within the Record.

14 Although the Board generally prohibits the admission of documents developed after the  
15 adoption of the action under challenge, the County notes that the contents of the Staff  
16 Report are reflected in the Record and was prepared by the County itself. **Therefore,**  
17 **Futurewise/Butler's Motion to Supplement the Record with the February 22, 2008**  
18 **Amended Staff Report is GRANTED.**

19 Lewis County's Motion to Supplement

20 Within its Response Brief to Butler's Objections, the County moved for supplementation of  
21 the Record with the Declaration of Pat Anderson.<sup>9</sup> The basis for this submittal was to rebut  
22 Butler's public participation argument that the Planning Commission did not receive public  
comments for review. The Declaration, dated January 2, 2008, provides that in August  
2007, prior to public meetings and the adoption of the challenged action, the staff member

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<sup>8</sup>At the HOM and in some of the briefing, the interests of Petitioner Butler were represented by Keith Scully of Futurewise.

<sup>9</sup> County Compliance Response – Butler, at 30.  
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1 responsible for compiling the record provided all public comments received to the Planning  
2 Commission.

3 Butler does not appear to object to this submittal, as no reference is made to the declaration  
4 within this Petitioner's reply brief. **The Board finds, pursuant to WAC 242-02-540, the  
5 Declaration of Pat Anderson will assist the Board in resolving the issue related to  
6 public participation and this Declaration shall be admitted to the Record for  
7 compliance cases in this matter.**

7 Evidence

8 Butler contends that Index 187 should be stricken in its entirety from the Record. Index 187  
9 is a September 2007 summary of information gathered by the County on the nature of  
10 commercial agricultural within Lewis County. While Butler concedes evidence amounting to  
11 hearsay may be admissible in administrative proceedings, there is "no way to check the  
12 accuracy of perception of either the interviewer or interviewee" whose views are expressed  
13 in the memorandum.<sup>10</sup>

13 In response, the County asserts that although a petitioner may challenge a document's  
14 relevancy and materiality to the issues before the Board, "no Record evidence can be  
15 stricken from the Record and Petitioners provide no legal authority to do so."<sup>11</sup>

16 Although no reference is made in Index 187 as to the individuals providing the information,  
17 except that these individuals were representatives of various agricultural industries within  
18 the County, the Board concludes that this document was in the Record and available for  
19 review by the County when taking the challenged action. It is not for the Board to decide  
20 the relevancy of documents contained within the Record nor is it for the Board to decide

21 \_\_\_\_\_  
22 <sup>10</sup> Butler Compliance Objections, at 37.

<sup>11</sup> County Response – Butler Objections, at 24-25.

1 what the contents of the County's Record should be – that is for the County to decide.<sup>12</sup>

2 **Therefore, the Boards finds that Index 187 is part of the County's Record for this**  
3 **matter and the Petitioner Butler's request that it be stricken is DENIED.**

4 Abandoned or Withdrawn Issues

5 In the Board's January 17, 2008 Prehearing Order, the issues for Case No. 08-2-0004c  
6 were set forth. Hadaller's Legal Issue 2 questioned whether his property was Freeway  
7 Commercial under LCC 17.56. **Within briefing submitted for this matter, Hadaller fails**  
8 **to brief the issue and it is, therefore, deemed abandoned.**<sup>13</sup>

9 Petitioner Panesko specifically withdrew Legal Issue 8.<sup>14</sup>

10 **V. BURDEN OF PROOF**

11 For purposes of Board review of the comprehensive plans and development regulations  
12 adopted by local government, the GMA establishes three major precepts: a presumption of  
13 validity; a "clearly erroneous" standard of review; and a requirement of deference to the  
14 decisions of local government.

15 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
16 amendments to them are presumed valid upon adoption. The statute further provides that  
17 the standard of review shall be whether the challenged enactments are clearly erroneous:

18 <sup>12</sup> The Board notes that although the development of the Record is for the County, the Board does have  
19 authority to add to this Record any supplemental exhibits that it concludes were erroneously omitted or may be  
20 of substantial assistance to the Board.

21 <sup>13</sup> An issue not addressed in petitioner's brief is considered abandoned. *WEC v. Whatcom County*, WWGMHB  
22 Case No. 95-2-0071 (FDO, 12-20-95); *OEC v. Jefferson County*, WWGMHB Case No. 94-2-0017 (FDO, 2-16-  
95). The Board notes that Hadaller does reference the Freeway Commercial zone in his compliance briefs,  
but the December 20, 2007 Order on Intervention specifically stated that raising of issues not set forth in the  
June 8, 2007 Compliance Order would be considered outside the scope of the issues for which  
intervenor/participant status was granted. Therefore, the Board will not consider any argument pertaining to  
the Freeway Commercial zone.

<sup>14</sup> Panesko Prehearing Brief, at 6.  
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1 The board shall find compliance unless it determines that the action by the  
2 state agency, county, or city is clearly erroneous in view of the entire record  
before the board and in light of the goals and requirements of this chapter.

3 RCW 36.70A.320(3)

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

7 Within the framework of state goals and requirements, the boards must grant deference to  
8 local government in how they plan for growth:

9 In recognition of the broad range of discretion that may be exercised by  
10 counties and cities in how they plan for growth, consistent with the  
11 requirements and goals of this chapter, the legislature intends for the boards  
12 to grant deference to the counties and cities in how they plan for growth,  
13 consistent with the requirements and goals of this chapter. Local  
comprehensive plans and development regulations require counties and cities  
14 to balance priorities and options for action in full consideration of local  
15 circumstances. The legislature finds that while this chapter requires local  
16 planning to take place within a framework of state goals and requirements, the  
17 ultimate burden and responsibility for planning, harmonizing the planning goals  
18 of this chapter, and implementing a county's or city's future rests with that  
19 community.

20 RCW 36.70A.3201 (in part).

21 In sum, the burden is on Petitioners to overcome the presumption of validity and  
22 demonstrate that any action taken by Lewis County is clearly erroneous in light of the goals  
and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW  
36.70A.320(2).<sup>15</sup> Where not clearly erroneous and thus within the framework of state goals  
and requirements, the planning choices of local government must be granted deference.

A county or city subject to a determination of invalidity made under RCW  
36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or

<sup>15</sup> Because the County has formally moved for a lifting of the earlier determination of invalidity, the burden of  
proof remains on Petitioners.

1 resolution it has enacted in response to the determination of invalidity will no  
2 longer substantially interfere with the fulfillment of the goals of this chapter under  
3 the standard in RCW 36.70A.302(1).  
4 RCW 36.70A.320(4)

5 Because the Board has previously found Lewis County's actions in regards to the  
6 designation of agricultural lands invalid, the burden in demonstrating that the ordinance and  
7 resolution that Lewis County has enacted in response to the Board's Orders will no longer  
8 substantially interfere with the fulfillment of the goals of the GMA is on Lewis County.<sup>16</sup>

## 9 VI. DISCUSSION OF THE ISSUES

10 On November 5, 2007, the Lewis County Board of County Commissioners (BOCC) adopted  
11 Ordinance No. 1197 and Resolution No. 07-306. With Ordinance No. 1197, the BOCC  
12 adopted amendments to various provisions of the Lewis County Code (LCC), including  
13 zoning maps and development regulations, pertaining to agricultural and rural lands, and  
14 WAC application methodology and analysis.<sup>17</sup> With Resolution No. 07-306, the BOCC  
15 adopted various amendments to the County's Comprehensive Plan (CP), including land use  
16 designations and ARL related narrative and policies.<sup>18</sup> The amended maps designate  
17 approximately 43,485 acres as ARL land and revise corresponding revisions to rural  
18 designations. With these amendments, the County contends that its "Comprehensive Plan  
19 and development regulations meet the goals and requirements of the GMA which include to  
20 (1) maintain and enhance the agricultural industry, (2) designate agricultural lands that have  
21 long-term commercial significance, and (3) conserve designated agricultural lands."<sup>19</sup>

### 22 PROPERTY RIGHTS

***Legal Issue 4 (Hadaller PFR): Does the rezone of the Petitioner's property amount to an arbitrary and discriminatory unconstitutional taking of private property without just compensation in violation of LCC 17.30.030 and the GMA, RCW 36.70A.020(6)?***

<sup>16</sup> RCW 36.70A.320(4)

<sup>17</sup> Index No. 320.

<sup>18</sup> Index No. 321.

<sup>19</sup> County's Report on Compliance, at 3.

1 **Position of the Parties**

2 In addition to the arguments about the agricultural viability of the land itself, with this Legal  
3 Issue Hadaller argues the County violated the GMA's property rights goal (Goal 6) because:  
4 (1) the re-designation devalues the property so much that it amounts to a taking; (2) the  
5 "lingering value" of the property exceeds Lewis County's threshold value for agricultural  
6 land; and (3) ARL land should be used by commercial farmers not hobby farmers.<sup>20</sup> In  
7 support of these assertions, Hadaller cites to several cases addressing rezones and the  
8 devaluation of property values.<sup>21</sup>

9 The County contends Hadaller's assertion that Goal 6 of the GMA has been violated is  
10 based solely on property values. The County argues that nothing in the GMA or the WAC  
11 criteria pertaining to agricultural lands can be construed to mean that a single criterion is  
12 determinative.<sup>22</sup> The County further argues that the GMA does not prohibit changes in land  
13 use designations and Hadaller has failed to show the County's weighing and balancing of  
14 ARL criteria was clearly erroneous.<sup>23</sup>

15 **Board Discussion**

16 The Board first notes it has no jurisdiction in regards to constitutional issues, rather the  
17 "takings" element of Goal 6 requires a determination that property values were given  
18 adequate consideration.<sup>24</sup>

19 The Board has previously stated that in order for a petitioner to prevail in a challenge based  
20 on Goal 6, they must prove that the action taken by a local jurisdiction has impacted a  
21 legally recognized right and that the action is *both* arbitrary *and* discriminatory, showing only  
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20 <sup>20</sup> Hadaller HOM Brief, at 7-8.

21 <sup>21</sup> Hadaller Objections, at 5

22 <sup>22</sup> County Response – Hadaller, at 6.

<sup>23</sup> County Response – Hadaller, at 6

<sup>24</sup> *Achen v. Clark County*, WWGMHB Case No. 95-2-0067, FDO, at 7-8 (Sept 20, 1995)

1 one is insufficient to overcome the presumption of validity that is accorded to local  
2 jurisdictions by the GMA.<sup>25</sup>

3 As this Board held in *Achen v. Clark County*<sup>26</sup>, the “protection” prong of Goal 6 involves a  
4 requirement for protection of a *legally recognized right* of a landowner from being singled  
5 out for unreasoned and ill-conceived action. *Achen* further noted that “[S]uch  
6 unrecognized “rights” as the right to divide portions of land for inheritance or financing, or  
7 “rights” involving local government never having the ability to change zoning, or “rights” to  
8 subdivide and develop land for maximum personal financial gain regardless of the cost to  
9 the general populace, are not included in the definition in this prong of Goal 6. Rather, the  
10 “rights” intended by the Legislature could only have been those which are legally  
11 recognized, e.g., statutory, constitutional, and/or by court decision.

12 The right Hadaller asserts will be allegedly impacted by the County’s action is founded in  
13 economics with the statements such as: “[T]he land is too valuable when used for  
14 residential, commercial or industrial purposes to support an agricultural zoning designation”  
15 and the ARL designation “fails to maximize the utility and value of the property.”<sup>27</sup> The  
16 right to make the most profitable use of property possible is not the type of property right for  
17 which the Legislature has intended protection under Goal 6.<sup>28</sup>

18 Since Hadaller fails to assert a legally protected property right, the Board’s review of this  
19 issue needs to go no further.<sup>29</sup>

20 <sup>25</sup> *Pt. Roberts Registered Voters Assoc. v. Whatcom County*, WWGMHB Case No. 00-2-0052 at 4 (FDO, April 6, 2001)  
(citing *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (FDO, Sept. 20, 1995)).

21 <sup>26</sup> *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (FDO, Sept. 20, 1995).

22 <sup>27</sup> Hadaller HOM Brief, at 8.

<sup>28</sup> See *Achen*, WWGMHB Case No. 95-2-0067 (holding that the Legislature did not intend to protect unrecognized rights  
such as the right to subdivide or develop land for maximum personal financial gain but rather those which are legally  
recognized by statute, constitution, or court decision).

<sup>29</sup> Even if Hadaller had provided a recognized property right, he must still show that the County’s action was arbitrary *and*  
discriminatory, which he has failed to do. Hadaller offers no argument to demonstrate the arbitrary nature of the County’s  
action. The Board notes that the County chose to designate Hadaller’s property as agricultural based on soil capability and  
the ten ARL designation criteria. With these considerations in mind, we do not conclude that the County’s action was  
baseless. Similarly, Hadaller provides no direct argument on whether the action was discriminatory. W<sup>29</sup> *Pt. Roberts  
Registered Voters Assoc. v. Whatcom County*, WWGMHB Case No. 00-2-0052 at 4 (FDO, April 6, 2001) (citing *Achen v.  
Clark County*, WWGMHB Case No. 95-2-0067 (FDO, Sept. 20, 1995)).

1 **Conclusion:** Hadaller has not demonstrated that the County has violated the GMA's  
2 property rights goal. The Board has no jurisdiction to determine if an unconstitutional taking  
3 of private property has occurred.

### 4 **PUBLIC PARTICIPATION**

#### 5 **Butler Issue 4:**

6 4. *Did the County fail to comply with the public participation requirements of the*  
7 *GMA and the County's Code by changing issues presented for a public hearing after*  
8 *providing a notice of hearing, failing to obtain planning commission approval for a*  
9 *public hearing, failing to provide relevant documents to the public before a hearing,*  
10 *failing to circulate written comments from the public to the planning commission and*  
11 *other members of the public prior to hearing, and failing to allow open discussion*  
12 *during the hearing process, in violation of LCC 17.12.050(2)(a), RCW*  
13 *36.70A.020(11), RCW 36.70A.035, 36.70A.130, and 36.70A.140?*

#### 14 **Butler Objections to Compliance Topic E: Public Participation**

- 15 1. *The County failed to provide proper public participation and failed to comply with*  
16 *RCW 36.70A.035, .140, LCC 17.12.050, and goal 11 of RCW 36.70A.020.*
- 17 2. *The County's amendments to the Planning Commission's recommendations*  
18 *failed to comply with RCW 36.70A.035(2)(a) by omitting parcels of land belonging*  
19 *to the County Auditor without any hearing or public comment.*

#### 20 **Panekso Objections to Compliance Topic 3: Lack of Public Participation**

21 *Panesko asserts: "The public was not given the opportunity for early and continuous*  
22 *participation during the development of new ARL criteria and maps in 2007 ... [T]he*

23 <sup>29</sup> *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (FDO, Sept. 20, 1995).

24 <sup>29</sup> Hadaller HOM Brief, at 8.

25 <sup>29</sup> See *Achen*, WWGMHB Case No. 95-2-0067 (holding that the Legislature did not intend to protect unrecognized rights  
26 such as the right to subdivide or develop land for maximum personal financial gain but rather those which are legally  
27 recognized by statute, constitution, or court decision).

28 <sup>29</sup> Even if Hadaller had provided a recognized property right, he must still show that the County's action was arbitrary *and*  
29 discriminatory, which he has failed to do. Hadaller offers no argument to demonstrate the arbitrary nature of the County's  
30 action. The Board notes that the County chose to designate Hadaller's property as agricultural based on soil capability and  
31 the ten ARL designation criteria. With these considerations in mind, we do not conclude that the County's action was  
32 baseless. Similarly, Hadaller provides no direct argument on whether the action was hen determining if an action is  
33 discriminatory, the Board looks at the application of the regulation and whether it unduly burdens or unfairly impacts a  
34 single group without rationale. All land use regulations discriminate in a literal sense because they apply only within  
35 certain zoning districts or to certain uses. But the "right" to have a particular zoning classification not treated differently from  
36 other classifications is not the type of "right" this Board or the courts has ever recognized as being protected by Goal 6 nor  
37 is it discriminatory in the sense that it "it unduly burdens or unfairly impacts a single group without rationale." In this case, it  
38 cannot be said that the ARL designation was adopted without rationale. As noted, the County based its determination on  
39 soil capability and the ARL criteria. Such a determination cannot be said to be "without a rational basis".

1           *approach used by Lewis County excluded the public, petitioners, stakeholders, and*  
2           *other interested parties.*<sup>30</sup>

3           The Board notes that, in their objections to the County's Compliance Report, Panesko and  
4           Butler both contend the County's process in adopting the challenged amendments failed to  
5           comply with the GMA's public participation requirements.<sup>31</sup> Although the Board does not  
6           generally allow new issues to be raised in a compliance proceeding,<sup>32</sup> an issue regarding  
7           adherence to public participation requirements during the County's attempt to achieve  
8           compliance is sufficiently related to the compliance proceeding itself and may be raised by a  
9           petitioner in the objections.

### 8           **Position of the Parties**

9           Panesko asserts that the public was not given the opportunity for early and continuous  
10          participation during the development of new ARL criteria and maps in 2007, primarily  
11          because the County out-sourced the development of these components.<sup>33</sup> According to  
12          Panesko this created an "exclusionary approach" that did not allow the public, petitioners,  
13          stakeholders, and other interested parties to provide necessary information these parties  
14          had due to their familiarity with the land and its uses within Lewis County.<sup>34</sup>

15          In contrast to Panesko, Butler asserts the County failed to comply with its own public  
16          participation program, LCC 17.12, in addition to the GMA's provisions. Butler contends  
17          LCC 17.12.050(2) requires the Planning Commission to circulate a draft proposal at least 15  
18          days prior to a public hearing, to authorize a public hearing, and to submit complete  
19          materials— all of which were not done and thus, precluded the public from a pre-hearing  
20          opportunity to review materials and be aware of the criteria utilized to support the decision.<sup>35</sup>

21          Butler also contends the County failed to circulate public comments to either the public or to

22           

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23           <sup>30</sup> Panesko Compliance Objections at 23.

24           <sup>31</sup> Panesko Compliance Objections, at 23; Butler Compliance Objections, at 38.

25           <sup>32</sup> See *1000 Friends (Futurewise) v. Thurston County*, WWGMHB Case No. 05-2-0002, Compliance Order, at  
26           22 (Nov. 30, 2007).

27           <sup>33</sup> Panesko Compliance Objections, at 23.

28           <sup>34</sup> Panesko Compliance Objections, at 23.

29           <sup>35</sup> Butler's Objections, at 38-41.

1 the planning commission and the Record does not demonstrate just how these comments  
2 were considered.<sup>36</sup> Butler further argues the failure to provide proper notice, a proper  
3 hearing, and to provide information violates the GMA. Lastly, Butler argues that the public  
4 was not given an opportunity to review and comment on changes made to the Planning  
5 Commission's recommendations and the County failed to follow the prescribed process set  
6 forth in RCW 36.70, Planning Enabling Act, or RCW 36.70A.035(2)(a).

7 The County asserts that Panesko has not demonstrated a violation of the GMA's public  
8 participation requirements but rather is asking the Board to establish a requirement that the  
9 County "hold special meetings between the County and Petitioners to determine ARL  
10 designations."<sup>37</sup> As for Butler, the County points to its public participation program, LCC  
11 Chapter 17.12 and its Compliance Report in support of its assertion that sufficient public  
12 participation was provided.<sup>38</sup> The County notes various workshops and public hearings,  
13 contends it complied with adopted notice provisions, and asserts that engaging consultants  
14 to assist County staff or seeking advice from state agencies does not amount to a failure to  
15 include the public in the adoption process.<sup>39</sup> The County argues that Butler's arguments in  
16 regard to the modification of a proposal after public review is unsupported by the Record  
17 and Butler provides no legal authority which would require the County to circulate comments  
18 received by the County to members of the public.<sup>40</sup>

19 In reply, Panesko contends the Record pertaining to the public hearings relied on by the  
20 County does not demonstrate that: (1) the public was involved in decisions to delete ARL  
21 acreage; (2) the public was aware of the use, or lack of the use, of criteria established by  
22 WAC 365-190-050 (WAC criteria); and (3) information was provided to the public in a timely  
manner.<sup>41</sup> Butler states the failure to comply with an ordinance that the County adopted to

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<sup>36</sup> *Id.* at 42

<sup>37</sup> County's Response – Panesko, at 1.

<sup>38</sup> County Response – Panesko, at 2-3. In conjunction with this statement, the County requests the Board to take official notice of LCC Chapter 17.12. Pursuant to WAC 242-02-660(4), the Board GRANTS this request.

<sup>39</sup> County Response - Panesko at 3-5; County Response – Butler, at 26

<sup>40</sup> *Id (Butler)* at 27-31.

<sup>41</sup> Panesko Compliance Reply, at 2-6.

1 comply with the GMA is, in itself, a violation of the GMA and reiterates his claim the County  
2 simply circumvented its procedures - resulting in a non-compliant, non-transparent  
3 process.<sup>42</sup>

### 4 **Board Discussion**

#### 5 Adherence to County's Public Participation Process

6 Butler has failed to carry his burden of establishing that the County violated the public  
7 participation requirements of the GMA. Lewis County's public participation program is found  
8 at LCC 17.12. This program requires the County to provide public notice of proposed  
9 actions and to hold workshops and public hearings before the County Planning Commission  
10 and Board of County Commissioners. The County's report on compliance details that, in  
11 addition to Planning Commission workshops on ARLs over the past few years, the Planning  
12 Commission held nine workshops and two public hearings since the May 10, 2007 remand  
13 hearing.<sup>43</sup> County staff explained the ARL topics that would be considered at each  
14 workshop and the public was given an opportunity to offer oral comments during the "good  
15 of the order" section before the end of each workshop.<sup>44</sup> In accordance with LCC  
16 17.12.050(1)(b), the public could submit written comments on any topic on the agenda. In  
17 addition to the nine Planning Commission workshops, there were two days of public  
18 hearings before the Planning Commission.<sup>45</sup> Following the Planning Commission hearings,  
19 there were opportunities to be heard before the Board of County Commissioners in public  
20 hearings on October 29 and 30, 2007.

21 Rather than demonstrate that the County failed to employ "early and continuous public  
22 participation in the development and amendment of comprehensive land use plans and  
development regulations implementing such plans" as required by RCW 36.7A.140,  
Paneko instead urges the Board to consider imposing a mediation process "where county

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<sup>42</sup> Butler Compliance Reply, at 14-15.

<sup>43</sup> Lewis County's Report on Compliance at 7-8.

<sup>44</sup> County's Response to Petitioner Paneko's Objections at 3.

<sup>45</sup> Id.

1 staff and petitioners would examine one map at a time to determine if any of the invalid  
2 parcels are clearly not ARL and which are ARL with specific issues.”<sup>46</sup> While such a  
3 process might be fruitful, it is not one required by the GMA, and thus not within the Board’s  
4 power to impose.

#### 4 Outsourcing to Consultants (Panesko)

5 Panesko’s objections to the County’s use of retained consultants to assist in the ARL  
6 designation process are likewise not well-founded. It is not uncommon for local jurisdictions  
7 to retain consultants with specialized expertise to assist in their planning efforts, and  
8 Petitioner cites no authority that would prohibit such a process. While Petitioner might have  
9 a stronger argument if the public were excluded from the process in favor of retained  
10 consultants, this has not been demonstrated to be the case. The workshops and hearings  
11 were open to the public and the County demonstrated in its response several instances  
12 where public input had a demonstrable impact on the final outcome. <sup>47</sup>

#### 11 Circulation of Comments to the Public (Butler)

12 Butler’s objections to the County’s process focuses first on the County’s process in  
13 advertising a public hearing prior to the time the Planning Commission could meet and  
14 approve a draft proposal.<sup>48</sup> Petitioners then object to the Planning Commission moving the  
15 proposal from that September 11 hearing forward, even though not all changes requested  
16 had been drafted. Petitioners fail to demonstrate how any of this deprived the public of a  
17 fair opportunity for public participation. In light of the fact that the Planning Commission was  
18 forwarding a recommendation, as opposed to making a final decision, there was no harm to  
19 the public. Without outright suggesting as much, Petitioners appear to advocate for  
20 additional meetings of the Planning Commission where the sole purpose would be to  
21 confirm that staff had made the requested changes. Such a process is not required by the  
22 GMA or the County’s code.

21 <sup>46</sup> Panesko’s Objections to Compliance, at 24.

22 <sup>47</sup> Lewis County Response to Petitioner Panesko’s Objections at 5.

<sup>48</sup> Petitioner Butler’s Objections at 38.

1 Although Petitioners claim that staff proposals for amendments to the Comprehensive Plan  
2 were presented for the first time on September 11, 2007, the County's Report on  
3 Compliance indicates that the proposed amendments were posted at libraries and  
4 community centers on August 31, 2007 in accordance with LCC 17.12.050. The proposal  
5 showed the proposed ARLs as well as other areas that warranted further study by the  
6 Planning Commission.<sup>49</sup> The proposal posted on August 31 was available for the public to  
7 comment on at the September 11 workshop and the subsequent public hearings on  
8 September 18 and 19. The public had the opportunity to submit written comments until the  
9 Planning Commission made its recommendation on October 2, 2007.<sup>50</sup>

#### 8 Use of the WAC Criteria

9 The most serious of Petitioners' public participation challenges is that, instead of using the  
10 WAC criteria as a tool for determining whether certain lands devoted to commercial  
11 agriculture should be designated, the County fashioned post-hoc criteria to explain the  
12 proposed action.<sup>51</sup> Petitioners base this allegation on the fact that the subarea summaries  
13 were prepared after public testimony had been closed on September 20. However, the fact  
14 that the summaries were prepared after September 20 is not evidence that the WAC criteria  
15 were not considered during the Planning Commission's deliberations. As the County  
16 argues, the subarea summaries were prepared to capture the Planning Commission's  
17 analysis.<sup>52</sup> The Board inquired into this process at the Hearing on the Merits, and the  
18 County indicated that its consultant, who was present throughout the Planning  
19 Commission's deliberations, prepared the summaries including the use of the WAC criteria,  
20 based on the Planning Commission discussions on the use of those criteria. Additionally,  
21 the County points out that while the summaries were not part of the proposed  
22 Comprehensive Plan and development regulation amendments, the public had an  
23 opportunity to comment on them at a September 25 Planning Commission workshop and to

<sup>49</sup> County Compliance Report at 8.

<sup>50</sup> Id. at 8-9.

<sup>51</sup> Petitioner Butler's Objections at 40.

<sup>52</sup> Lewis County's Response to Butler Objections at 28.

1 submit comments to the Planning Commission until September 26. Furthermore, as it is the  
2 Board of County Commissioners, not the Planning Commission, that takes final action, it is  
3 important to note that the public had additional opportunities to comment at the October 29  
4 and 30, 2007 Board of County Commissioner hearings.

4 Finally, as to Petitioner's argument that the Community Development Department failed to  
5 circulate public input to the public,<sup>53</sup> Petitioners cite to no GMA or County code requirement  
6 to circulate such materials. As no such requirement exists, the Board finds no GMA  
7 violation in this regard. As to the allegation that public input was not circulated to the  
8 Planning Commission, the County disputes this allegation and states that each Planning  
9 Commissioner had a notebook of public comments.<sup>54</sup> Because the burden of proof is upon  
10 the Petitioner, the Board finds that this allegation has not been proven.

10 With regard to Petitioner's allegation of a violation of RCW 36.70<sup>55</sup> and RCW  
11 42.30.060(1)<sup>56</sup>, this is a matter outside the Board's jurisdiction.

12 **Conclusion:** Petitioners have failed to demonstrate that the County failed to comply with  
13 the public participation requirements of the GMA or LCC 17.12.

## 14 DESIGNATION OF AGRICULTURAL LANDS

### 15 **A. Overview**

15 There is no doubt that the GMA sees agricultural lands and the industry that relies on them  
16 as something special given the duty set forth to *designate* agricultural land<sup>57</sup> and  
17 *conserve*<sup>58</sup> such land in order to *maintain* and *enhance*<sup>59</sup> the agricultural industry. The  
18 purpose of this legislative mandate was articulated by the Supreme Court a decade ago  
19 when it held:

20 <sup>53</sup> Petitioner Butler's Objections at 42.

21 <sup>54</sup> County's Response to Butler Objections at 30.

22 <sup>55</sup> Petitioner Butler's Objections at 43-44.

<sup>56</sup> Petitioner Butler's Objections at 40

<sup>57</sup> See, RCW 36.70A.170.

<sup>58</sup> See, RCW 36.70A.060.

<sup>59</sup> See, RCW 36.70A.020(8).

1 The GMA sought to control and regulate growth, and specifically emphasized  
2 the protection of natural resource lands, including agricultural land. The  
3 Legislature hoped to preserve agricultural land near our urban centers so that  
4 freshly grown food would be readily available to urban residents and the next  
generation could see food production and be disabused of the notion that food  
grows on supermarket shelves.<sup>60</sup>

5 The pressure to convert these lands, especially in areas impacted by population growth and  
6 development, is even more prevalent today. The Board recognizes that the counties and  
7 cities of Washington face a multitude of difficult and demanding challenges when  
8 determining how their communities will grow. But these challenges must be addressed  
9 within the mandates of the GMA so as to serve the “public’s interest in the conservation and  
10 the wise use of our lands.”<sup>61</sup> Washington’s limited, irreplaceable agricultural lands are at  
11 the forefront of this mandate.

12 The GMA, through RCW 36.70A.020(8), .060, and .170, directs counties and cities to  
13 protect agricultural lands by:

- 14 1. *Designating* agricultural lands of long-term commercial significance;
- 15 2. Assuring the *conservation* of agricultural land;
- 16 3. Assuring that the use of adjacent lands *does not interfere* with their continued use for  
17 agricultural purposes;
- 18 4. Conserving agricultural land in order to *maintain and enhance* the agricultural  
industry; and
- 19 5. *Discouraging* incompatible uses.<sup>62</sup>

20 The question of the meaning of agricultural lands, under the GMA, was recently clarified by  
21 the Supreme Court in the *Lewis County* matter.<sup>63</sup> In that case, the proper definition of  
22 agricultural land was set forth with the Court holding:

We hold that agricultural land is land:

- a. not already characterized by urban growth

<sup>60</sup> *Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn. 2d 38, 57-58 (1998).

<sup>61</sup> RCW 36.70A.010

<sup>62</sup> *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 588 (2000).

<sup>63</sup> *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488 (2006).

- 1           b. that is primarily devoted to the commercial production of agricultural products  
2           enumerated in RCW 36.70A.030(2), including land in areas used or capable of  
3           being used for production based on land characteristics, *and*  
4           c. that has long-term commercial significance for agricultural production, as  
5           indicated by soil, growing capacity, productivity, and whether it is near  
6           population areas or vulnerable to more intense uses.<sup>64</sup>

7 This definition emphasizes the three required elements of agricultural lands – that it is *not*  
8 *already characterized by urban growth* and that it is *primarily devoted to* and has *long-term*  
9 *commercial significance* for agricultural production.

10 The meaning of *primarily devoted to* the commercial production of agricultural products has  
11 been addressed by the Supreme Court, with the phrase denoting that the land “*is in an area*  
12 *where the land is actually used or capable of being used for agricultural production*”.<sup>65</sup> The  
13 focus is on the general characteristics of the property itself and whether it can be used for  
14 any of the types of agriculture enumerated in RCW 36.70A.030(2). The Board notes that  
15 soils play a significant role in determining whether land is capable for agricultural use,  
16 however it is not the exclusive method since some types of agriculture are not soil  
17 dependent. The Board further notes that “capable” does not equate to the economics of the  
18 property<sup>66</sup> – that is for the next element which addresses the viability of the site for long-  
19 term commercial value.

20 After finding that land is not already characterized by urban growth and is primarily devoted  
21 to the commercial production of agricultural products, the final inquiry before land is

22 <sup>64</sup> *Lewis County*, 157 Wn.2d at 502.

<sup>65</sup> *Redmond*, 136 Wn.2d at 52 (emphasis added) holding:

[I]f current use were a criterion, GMA comprehensive plans would not be plans at all, but mere inventories of current land use. The GMA goal of maintaining and enhancing natural resource lands would have no force; it would be subordinate to each individual landowner’s current use of the land ... [I]f landowner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably, in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture ... [I]f the designation of such land as agricultural depends on the intent of the landowner as to how he or she wishes to use it, the GMA is powerless to prevent the loss or natural resource land.

<sup>66</sup> *See also Lewis County*, 157 Wn.2d at 500.

<sup>66</sup> *See Redmond*, 136 Wn.2d at 52 (Neither current use nor a landowner’s intent is conclusive in regard to primarily devoted)

1 designated as agricultural land is whether the land has long-term commercial significance  
2 for agricultural production. The meaning of *long-term commercial significance* seeks to  
3 address the economic viability of the property. This requires an assessment of five different  
4 factors, three generally related to the quality or capability of its soils and two based on  
5 development-related impacts from the surrounding area.<sup>67</sup> These five factors are: growing  
6 capacity, productivity, soil composition, proximity to population areas, and the possibility of  
7 more intense uses of the land.

8 When considering growing capacity, productivity, and soil composition, the focus is on the  
9 quality of the land itself and jurisdictions must use the United States Department of  
10 Agriculture (USDA) soil classification system which incorporates these three  
11 considerations.<sup>68</sup> If the property contains a soil type the USDA has determined suitable  
12 for agricultural production, then it qualifies for *potential* treatment as land with long-term  
13 commercial significance, *subject to* the considerations of development-related impacts.  
14 The Board notes that although the presence of agricultural soils weighs heavily on the  
15 designation of agricultural land, soils alone do not mandate designation; the GMA requires  
16 an analysis of more than just soils to identify and designate agricultural lands – the GMA  
17 requires consideration of development-related impacts.

18 When evaluating the proximity of the property to population areas as well as its vulnerability  
19 to more intensive uses counties and cities may consider the development-related factors  
20 enumerated in WAC 365-190-050(1).<sup>69</sup> These factors consider not only the availability of  
21 public facilities and services but the intensity of neighboring land uses, some of which may  
22 be incompatible with agricultural uses. The GMA does not assign or dictate the weight of  
each factor and, therefore, a jurisdiction has discretion in determining how to weigh them.<sup>70</sup>  
Discretion is also afforded to a jurisdiction in defining the factors, consistent with the goals  
and requirements of the GMA; however, due to the very general description the factors by

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<sup>67</sup> RCW 36.70A.030(10)

<sup>68</sup> WAC 365-190-050(1)

<sup>69</sup> *Lewis County*, 157 Wn.2d at 502; see also *Redmond*, 136 Wn.2d at 55.

<sup>70</sup> *Id.* at 502-503.

1 the WAC, they must be consistently applied by the local government on a jurisdiction-wide  
2 basis to prevent arbitrary decision making. In contrast to the analysis of capacity,  
3 productivity, and soils, the focus of these factors is on the development prospects of the  
4 site.

5 With GMA's mandate to conserve, maintain, and enhance those farmlands with long-term  
6 commercial significance and the industry relying on them guiding the evaluation, the Board  
7 reviews the County's actions in regard to the definition, designation, and protection of  
8 agricultural lands of long-term commercial significance in Lewis County.

9 In regard to the coordinated compliance matters, Case Nos. 99-2-0027c and 00-2-0031c,  
10 and the new matter, Case No. 08-2-0004c, Petitioners Panesko and Butler allege the  
11 County has failed to properly designate agricultural lands of long-term commercial  
12 significance, referred to by the County as Agricultural Resource Lands (ARL) These  
13 Petitioners further contend the County has failed to conserve ARL lands because it permits  
14 non-agricultural development on these lands. Although his argument is based on a  
15 different premise, Hadaller also asserts the County's actions in regard to the designation of  
16 ARL land were erroneous. The Board will address the designation of ARL land first and  
17 then address the need to conserve designated lands and the industry that relies on them.

### 18 **B. Designation of Agricultural Land**

#### 19 **Summary of Panesko/Butler Arguments - Designation and Conservation of 20 Agricultural Land<sup>71</sup>**

21 Both Panesko and Butler contend the County has failed, based on the 2002 USDA Census,  
22 to designate over 87,000 acres of commercial farmland which is now proposed to be

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<sup>71</sup> Arguments presented in this section represent briefing submitted by Petitioners Butler and Panesko in all cases before the Board. Panesko Compliance Objections and Panesko Compliance Reply - Case Nos. 99-2-0027c/00-2-0031c; Butler Compliance Objections and Butler Compliance Reply - Case Nos. 99-2-0027c/00-2-0031c; Panesko HOM Brief Case No. 08-2-0004c; Butler HOM Brief Case No. 08-2-0004c; Lewis County Compliance Response – Panesko and Lewis County Compliance Response – Butler – Case Nos. 99-2-0027c/00-2-0031c; Lewis County Response – Panesko and Lewis County Response – Butler – Case No. 08-2-0004c. Petitioners did not file reply briefing in Case No. 08-2-0004c.

1 rezoned for residential or commercial development. These Petitioners allege, through both  
2 their compliance objections and within the new PFRs, the County (1) fails to include within  
3 its comprehensive plan and development regulation (DR) criteria that defines land that is  
4 “capable of being farmed”; (2) fails to designate land with prime soil that is currently being  
5 used for, or is capable of being used for, agricultural purposes; (3) analyzes land patterns  
6 on too large of a scale; (4) fails to maintain DR provisions that protect agricultural land,  
7 including prohibiting non-agricultural uses on ARL lands and incompatible uses on or  
8 immediately adjacent to ARL lands and allowing accessory uses as primary uses on ARL  
9 land; (5) omits types of agricultural uses specifically enumerated in the GMA; (6) fails to  
10 prohibit parcelization of ARL lands; and (7) has adopted legislative actions that warrant  
11 invalidity.<sup>72</sup>

### 12 **Compliance Issues**

13 In the prior compliance proceedings, the Board set forth various facts and  
14 conclusions, including these key Conclusions of Law from the February 2004/June  
15 2007 Compliance Orders:

16 **Conclusion C (February 2004):** *The County is not in compliance with the*  
17 *GMA goals and requirements for the designation and conservation of*  
18 *agricultural resource lands. Ordinance 1179E, Resolution 03-368, including*  
19 *the maps adopted therein.*

20 **Conclusion D (June 2007):** *The County’s criteria and mapping of agricultural*  
21 *lands of long-term commercial significance as modified by Ordinance 1179R*  
22 *and Resolution 07-104 fail to comply with RCW 36.70A.060(1),*  
*36.70A.170(1)(a), and 36.70A.040.*

23 In addition to the issues remaining from the compliance proceedings, Petitioners raise new  
24 issues within the PFRs:

### 25 **Butler Legal Issues**

26 \_\_\_\_\_  
27 <sup>72</sup> See Panesko’s Prehearing Brief 08-2-0004c; Futurewise/Butler Prehearing Brief 08-2-0004c; Panesko  
28 Compliance Objections; Butler Compliance Objections.  
29 COMPLIANCE ORDER and FINAL DECISION AND ORDER  
30 Case No. 00-2-0031c/99-2-0027c/08-2-0004c  
31 July 7, 2008  
32 Page 27 of 90

1           1.     Do Lewis County's criteria for designating and de-designating agricultural  
2           lands of long-term commercial significance fail to properly define commercial  
3           production of agricultural products and fail to include all prime and unique soils and  
              thereby violate RCW 36.70A.020 (8, 10), 36.70A.040, 36.70A.050, 36.70A.060,  
              36.70A.070, 36.70A.110, and 36.70A.170?

4           2.     Does Lewis County's designation of only 43,856 acres as agricultural lands of  
5           long-term commercial significance by applying standards and criteria inconsistent  
6           with the GMA and violate RCW 36.70A.020 (8, 10), 36.70A.040, 36.70A.050,  
              36.70A.060, 36.70A.070, 36.70A.110, and 36.70A.170?

6           **Panesko Legal Issues**

7           1.     Whether the Lewis County Comprehensive Plan, Natural Resource Lands  
8           Sub-element, and Lewis County development regulations are non-compliant with  
9           RCW 36.70A.170 and RCW 36.70A.030 for failing to include criteria that defines land  
              that is "capable of being farmed" in the policy for designating agricultural lands?

10          2.     Whether the designation of ARL in the Comprehensive Plan maps, i.e.  
11          Resource Lands, Future Land Use rural Lands, and Agricultural Resource Lands, is  
12          non-compliant with RCW 36.70A.020(8) and RCW 36.70A.170 for failing to designate  
13          land with prime soil that is currently being used for agricultural purposes, or is  
14          capable of being farmed?

15          3.     Whether the failure to designate farmland as ARL based on (1) global  
16          proximity to UGAs or freeways (up to 4-5 miles away) or (2) global land use  
17          settlement patterns (based on 64 square mile analyses) or (3) intensity of nearby  
18          land uses (defined as land use across a 64 square mile area) are non-compliant with  
19          RCW 36.70A.020(8) and RCW 36.70A.170 for failing to address actual conditions on  
20          neighboring parcels?

21          4.     Whether the primary uses set forth in Ordinance 1197, LCC 17.30.610, are  
22          non-compliant with RCW 36.70A.030(2), (10) and RCW 36.70A.060 for failure to  
              include the uses of raising grain, hay, straw and turf?

At the heart of these cases is the County's determination as to what lands should be  
designated Agricultural Lands of Long Term Commercial Significance (LTCS) or, as the  
County refers to them, ARL. According to the County, in order to make the determination it  
applied the following methodology:<sup>73</sup>

- 1 1. Identified prime soils using NRCS soils data
- 2 2. Exclusion of lands within UGAs, federally-owned, forest lands of LTCS, and LAMIRDs
- 3 3. Mapped remaining areas with prime soils on an area-by-area basis
- 4 4. Considered lands with prime soils that were devoted to agricultural – currently being used or capable of being used
- 5 5. Considered combined effects of proximity to population areas and possibility of more intense uses as indicated by application of the 10 WAC criteria.

6 Therefore, the County first excluded lands that were not, pursuant to NRCS soils data,  
7 prime soils and then further excluded lands which by their land use designation and/or  
8 ownership, would not qualify for designation, narrowing the universe of lands to be  
9 considered. The County then developed subareas to recognize the “geographic boundaries  
10 for the Planning Commission and BOCC to consider when applying the WAC criteria within  
11 a specific subarea” and permitted a “zoom in to view parcel-level development and to zoom  
12 out to view regional conditions.”<sup>74</sup> Because of Lewis County’s geographical and  
13 economical diversity, the Planning Commission determined that weighing the designation  
14 criteria identically throughout the County did not provide for a rational evaluation of the long-  
15 term significance of all lands in Lewis County for commercial production of agriculture nor  
16 did it give consideration and flexibility for specific areas.<sup>75</sup>

17 The Board will evaluate Petitioners arguments in regard to the County’s designation  
18 process. At the outset, it must be stated the mandatory considerations in designating  
19 agricultural lands of long term commercial significance are contained in RCW 36.70A.030(2)  
20 and (10).

21 1. Lands that should be evaluated for designation

22 First, by commencing their review based solely on the presence of prime soils, the County  
failed to consider a key element of the GMA’s definition for agricultural land – that the land

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20 <sup>73</sup> Lewis County Compliance Report, at 10-11; Index 321, Attachment B. The Board notes that the County had  
21 established a quantitative model that established criteria, assigned numeric values, and scored lands for  
agricultural suitability ( See Index 39), however, this methodology was largely rejected by the Planning  
Commission and BOCC. *County Response to Butler Objections*, at 15.

22 <sup>74</sup> County’s Response 08-2-0004c, at 3;

1 is primarily devoted to commercial agriculture, which our Supreme Court has concluded  
2 means that land is actually used or capable of being used for agricultural production.<sup>76</sup> As  
3 noted supra, the first focus for a jurisdiction in making its designation determinations is to  
4 look at the general characteristics of the property itself and whether it can be used for any of  
5 the types of agriculture enumerated in .030(2). Although, soils play a significant role in  
6 determining whether land is capable for agricultural uses, it is not the exclusive method  
7 since some types of agriculture are not soil dependent. Therefore, by failing to initially base  
8 its methodology on an evaluation of parcels within Lewis County that are actually being  
9 used or are capable of being used for agriculture, the County inappropriately narrowed the  
10 universe of land beyond that anticipated by the Legislature when it defined agricultural land.

#### 9 **a. Census of Agriculture**

10 Panesko notes that the 2002 USDA Census of Agriculture found 130,950 acres of  
11 commercially significant farmland in Lewis County, and from the fact that the County has  
12 designated only 43,483 acres of ARL concludes that the County improperly failed to  
13 designate 87,465 acres of farmland.<sup>77</sup>

14 As the County correctly notes, the 2002 Census of Agriculture does not establish ARLs. If  
15 that were the case, the designation process would be a far simpler, and less litigious  
16 process. Instead, the Census identifies agricultural activities and acreages for those  
17 persons reporting gross farm income greater than \$1,000.

18 **Conclusion:** Although the Census of Agriculture is a tool that can be helpful in identifying  
19 farms that are currently being farmed and the amount of farmland eligible for designation,  
20 counties are not mandated to use it in the designation process.

#### 19 **b. Defining Agricultural Land in Regard to Types of Agricultural 20 Activities**

#### 21 **Positions of the Parties**

22 <sup>76</sup> *Redmond*, 136 Wn.2d at 53; *See also Lewis County*, 157 Wn.2d at 500.

<sup>77</sup> Butler's Objections to Compliance at 6-7.

1 Petitioners' Positions

2 Butler contends that the County's Planning Commission misapplied the definition of  
3 "commercial production" as contained in RCW 36.70A.030(2) by appearing to find that land  
4 utilized for cattle, horses, poultry, hay and Christmas tree growing did not constitute  
5 commercial production.<sup>78</sup> Butler points to the designation criteria in Policy NR 1.3(1) to  
6 support this, arguing this policy does not reflect the language contained in RCW  
7 36.70A.030(2) nor does it reference areas "used or capable of being used for agriculture"  
8 which is part of the definition of "primarily devoted to."<sup>79</sup> Panesko puts forth similar  
9 arguments to support his claim the County erred when it made the decision that land used  
10 for grain, hay, straw, and turf was not suitable for ARL designation.<sup>80</sup>

11 Butler contends, with Policy NR 1.5, the County fails to maintain and enhance non-soil  
12 dependent agricultural activities, such as poultry production.<sup>81</sup> According to Butler, the  
13 County seeks to maintain non-soil activities through application of its development  
14 regulation, specifically a special use permit, as opposed to designating the land it is sited on  
15 as agricultural.<sup>82</sup> Butler asserts this is contrary to the GMA and Supreme Court holdings in  
16 regard to the incompatible nature of agriculture activities with residential development and  
17 that, even with the application of Right to Farm ordinances, there is no mechanism for  
18 conservation of such agricultural uses within rural areas.<sup>83</sup> In a related argument, Butler  
19 contends LCC 17.30.610 references commercial greenhouse but links such structures to the  
20 soil, thereby demonstrating clear intent to exclude any hydroponic operations.<sup>84</sup>

21 County's Position

22 <sup>78</sup> Butler Compliance Objections, at 4-6.

<sup>79</sup> Butler Compliance Objections. at 7 (citing to *Lewis County v. WWGMHB* (2006))

<sup>80</sup> Panesko HOM Brief, at 4

<sup>81</sup> Butler Compliance Objections, at 17.

<sup>82</sup> Butler Compliance Objections, at 18-19

<sup>83</sup> Id. at 20-21.

<sup>84</sup> Id. at 33-34; Butler Compliance Reply, at 12

1 The County contends its definition of agriculture includes both the GMA’s definition and the  
2 court’s interpretation.<sup>85</sup> Lewis County further notes its planning commission has “intimate  
3 knowledge of commercial agriculture” via life experience and observations, with many being  
4 “life-long farmers in Lewis County.”<sup>86</sup> According to the County, this clear understanding and  
5 knowledge is supported by the Record for this proceeding.

6 Lewis County further contends land being used for such non-soil dependent operations as  
7 poultry or Christmas tree farms are not required to be designated as ARL land just because  
8 of the presence of these operations.<sup>87</sup> The County argues its focus is primarily on the nature  
9 of the land and not the use occurring on it, many of which could occur generally within rural  
10 areas with protection via Right-to-Farm Ordinances.<sup>88</sup> As for hydroponic greenhouse  
11 operations, Lewis County contends these are permitted as a primary use, being considered  
12 as a type of “horticulture” or as “other agricultural activities” under the County’s definitional  
13 provisions of LCC 17.30.610.<sup>89</sup>

#### 14 Petitioner’s Reply

15 In reply, Butler reiterates the claim that the “definition of agriculture” was unknown to the  
16 County. Butler further notes agriculture is more than just the growing of food crops, but  
17 also includes non-soil dependent uses such as poultry operations.<sup>90</sup> Butler acknowledges  
18 that “Right to Farm” ordinances assist in protection of farms, the GMA creates a duty for the  
19 conservation of agricultural land and the maintenance and enhancement of the agricultural  
20 industry, something that is not accomplished under Right to Farm ordinances which have no  
21 notification provisions for rural areas.<sup>91</sup>

#### 22 **Board Discussion**

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<sup>85</sup> County Compliance Response – Butler, at 2; County HOM Response, at 2 and 4-5.

<sup>86</sup> County Compliance Response – Butler, at 2.

<sup>87</sup> Id. at 7.

<sup>88</sup> Id. at 8-9.

<sup>89</sup> Id. at 21.

<sup>90</sup> Butler Compliance Reply, at 5

<sup>91</sup> Id.

1 **Failure to include the phrase “capable of being farmed” in the criteria**

2 While both Petitioners assert that the County did not properly define agriculture by failing to  
3 include the phrase “capable of being farmed” within the County’s definition of “Agricultural  
4 land-Agricultural resource land” in its comprehensive plan, the County’s definition in both its  
5 CP and its DRs mirrors the definition contained in RCW 36.70A.030(2) except for the  
6 reference to aquaculture as opposed to upland finfish hatcheries.

7 The Natural Resources Sub-Element of the County’s Land Use Element and LCC 17.30.080  
8 provide:

9 Agricultural/Agricultural Resource Lands are those lands primarily devoted to  
10 the commercial production of aquaculture, horticultural, viticultural, floricultural,  
11 dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw,  
12 turf, seed, Christmas trees not subject to the excise tax imposed by RCW  
13 84.33.100 through 84.33.140, or livestock, and that has long-term  
14 commercial significance for agricultural production.

15 RCW 36.70A.030(2) provides:

16 “Agricultural land” means land primarily devoted to the commercial production  
17 of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal  
18 products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject  
19 to the excise tax imposed by finfish in upland hatcheries, or livestock, and that  
20 has long-term commercial significance for agricultural production.

21 What Petitioners seek is to have the County provide the definition language our Supreme  
22 Court has applied to the phrase “primarily devoted to”.<sup>92</sup> The Board believes this to be  
unnecessary as where the Supreme Court has interpreted a statutory definition, the  
County’s use of that definition necessarily includes the Court’s interpretation. It is not  
necessary to amend a definition to include the Court’s language. Petitioner has not cited to  
any legal authority that would require the County to include the judicial interpretation of a  
statute within its plan. Accordingly, we conclude that Petitioner has not demonstrated that

22 <sup>92</sup> See *Redmond*, 136 Wn. 2d 38.  
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1 the County violated RCW 36.70A.170 and RCW 36.70A.030 for failing to include criteria that  
2 defines land that is “capable of being farmed” in the policy for designating agricultural lands.

### 3 ***Poultry and Christmas Trees***

4 With regard to Petitioner’s argument that Policy NR 1.5 fails to maintain and enhance non-  
5 soil dependant agricultural activities such as poultry farming, and Christmas tree growing,  
6 the Board notes that the Supreme Court has questioned why Lewis County excluded  
7 productive tree farms from designated agricultural lands simply because they did not need  
8 the type of prime soils that other farm sectors needed.<sup>93</sup> The Court remanded for a  
9 determination of whether the County’s determination was clearly erroneous in light of RCW  
10 36.70A.030 or WAC 356-190-050. The County responds that these lands devoted to  
11 poultry and Christmas tree operations were not automatically excluded from consideration  
12 but were evaluated for ARL designation, and if they were not designated it was a result of  
13 the application of the WAC criteria. However, the County also notes that “all lands with  
14 prime soils (outside of UGAs, LAMIRDS, and FRLs) were evaluated for ARL designation . . .  
15 so that any poultry and Christmas tree operations on prime soils were considered for  
16 ARL.”<sup>94</sup> The County explains this approach in its Compliance Report as being based on  
17 the distinction GMA makes between land and uses. The County reasons that Goal 8 of the  
18 GMA encourages the conservation of productive agricultural lands. Yet, as the County  
19 acknowledges, Goal 8 also supports the maintenance and enhancement of natural resource  
20 based industries. While preservation of agricultural lands is of great importance in attaining  
21 this goal, the focus must be on the natural resource industries. Thus, poultry farming, to cite  
22 one example of a natural resource industry that does not depend on prime soils, is to be  
maintained and enhanced despite the lack of prime soils on the land where it is being  
conducted.

The County also argues that RCW 36.70A.030(2) focuses on the nature of the land.  
Perhaps, but this is not the same as focusing on the nature of the soil. That is, RCW

<sup>93</sup> Lewis County, 157 Wn.2d at 504.

<sup>94</sup> Lewis County’s Response to Butler Objections at 7.

1 36.70A.030(2) defines agricultural land as land “primarily devoted to the commercial  
2 production of . . . [a listing of various products, including Christmas trees] . . . and that has  
3 long-term commercial significance for agricultural production.” “Long term commercial  
4 significance” is itself defined in terms, of which only one parameter is soil composition.  
5 “Productivity” of the land is another parameter. Therefore, the County is in error when it  
6 asserts that “The occurrence of a non-soil dependant agricultural use on any property does  
7 not alter or reflect on the growing capacity, productivity, or soil composition of that land in  
8 any way.”<sup>95</sup> The occurrence of non-soil dependant uses such as Christmas tree farming or  
9 poultry operations certainly reflects upon the productivity of the land. The GMA seeks to  
10 enhance and maintain natural resource industries, not merely the prime soils upon which  
11 many but not all such industries depend. By excluding from consideration for ARL  
12 designation non-soil dependant uses the County failed to maintain and enhance those  
13 natural resource uses. The County is not required to designate all non-soil dependant  
14 agricultural uses ARL, but it may not exclude them solely on the basis that non-prime soils  
15 underlie the use.

16 In this context the need to focus on the maintenance and enhancement of natural resources  
17 industries, rather than merely preserving prime soils, poultry farming serves well to illustrate  
18 the point. As Petitioner Butler points out, poultry operations typically consist of tens of  
19 thousands of birds confined to barns. These operations generate offensive odors for  
20 substantial distances.<sup>96</sup> Designating areas devoted to poultry farming as ARL, when  
21 appropriate, serves to “discourage incompatible uses, as required by RCW 36.70A.020(8)  
22 and as recognized by the Supreme Court when it held that “The County is to conserve  
agricultural land in order to maintain and enhance the agricultural industry and to  
discourage incompatible uses.”<sup>97</sup> Failing to consider the needs of non-prime soil dependant  
natural resource industries does not serve this purpose.

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<sup>95</sup> Lewis County’s Report on Compliance at 12.

<sup>96</sup> Butler’s Objections to Compliance Report at 18; Hayden letter, Index 259.

<sup>97</sup> King County v. CPSGMHB, 142 Wn.2d 543, 556-57 (2000).

1 With regard to the alleged failure to include raising of grain, hay, straw and turf in definition  
2 of agricultural lands, Petitioner Panesko is incorrect that the County “has made the decision  
3 that land used to raise hay or straw is not ARL”<sup>98</sup>

4 The County’s definition of “agricultural land” or “agricultural resource land” at LCC 17.30.080  
5 clearly includes “land primarily devoted to the commercial production of . . . grain, hay,  
6 straw, turf . . .”. Therefore a fair reading of the listing of all “other agricultural activities” in  
7 LCC 17.30.610, which describes the primary uses of agricultural land, includes the  
8 commercial production of grain, hay, straw and turf.

- **LCC 17.30.610 - hydroponic greenhouses**

9 We concur with the County that hydroponic greenhouses fall within the definition of  
10 “horticulture” and “other agricultural activities and therefore are allowed as primary uses in  
11 ARL. The County’s interpretation of its ordinance is entitled to due deference.”<sup>99</sup>

12 **Conclusion:** Petitioner has not demonstrated that the County violated RCW 36.70A.170  
13 and RCW 36.70A.030 for failing to include criteria that defines land that is “capable of being  
14 farmed” in the policy for designating agricultural lands.

15 By excluding from consideration for ARL designation non-soil dependant agricultural uses  
16 the County failed to maintain and enhance those uses. The County is not required to  
17 designate all non-soil dependant agricultural uses ARL, but it may not exclude them solely  
18 on the basis of their location on non-prime soils and does not comply with RCW 36.70A.170  
19 and RCW 36.70A.020 (8).

20 Petitioners have failed to carry their burden of establishing that LCC 17.30.610 is clearly  
21 erroneous. Petitioner has failed to carry his burden of proof that the County failed to include  
22 the raising of grain, hay, straw and turf in the definition of agricultural uses in LCC  
17.30.610, an alleged violation of RCW 36.70A.030(2), (10) and RCW 36.70A.060.

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<sup>98</sup> Petitioner Panesko’s Prehearing Brief at 4.

<sup>99</sup> King County v. CPSGMHB, 91 Wn.App. 1, 23-13, 951 P.2d 1151 (1998).

1 **c. Agricultural Land with Forest Resource Lands**

2 Butler contends that in 2004, this Board found the County's failure to consider lands  
3 designated as Forest Resource Land (FRL) but on which agriculture was occurring, as ARL  
4 land did not comply with the GMA.<sup>100</sup> Butler asserts that several areas within the Butts  
5 Road region satisfy the criteria for ARL and the County's failure to address these area  
6 results in continuing non-compliance.<sup>101</sup>

7 Lewis County reads Butler's argument as presuming lands can be designated both ARL and  
8 FRL, and then contends there is no GMA reason to do so.<sup>102</sup> The County contends Butler  
9 has misread the Board's prior Orders, none of which can be read to require ARL  
10 designation within designated FRL lands.<sup>103</sup> The County goes on to note that although  
11 WAC 365-190-040(1) recognizes the potential for overlap of critical areas, it is silent about  
12 overlapping land use designations in regard to resource lands.<sup>104</sup>

13 In reply, Butler clarifies that they are not arguing land can simultaneously be ARL and FRL.  
14 Butler argues maps and aerial photographs demonstrate land designated FRL is actually  
15 devoted to agricultural uses and should not be designated for long-term commercial timber  
16 productions.<sup>105</sup> Butler further notes that although agriculture is permitted on FRL lands, the  
17 application of RCW 36.70A.177's Innovative Technique is not available.<sup>106</sup>

18 **Board Discussion**

19 While the County characterizes Petitioners' argument as presuming that land can be  
20 designated both ARL and FRL, the Board does not believe that Petitioners were making this  
21 argument. Instead, Petitioners argue that there is land currently devoted to agriculture with  
22

100 Butler Compliance Objections, at 24

101 Id. at 24-25.

102 County Compliance Response – Butler, at 11-12.

103 Id. at 12.

104 Id.

105 Butler Compliance Reply, at 7-8.

106 Id. at 8.

1 prime agricultural soils that should be designated ARL. We note that in this Board's Order  
2 on Reconsideration of Extent of Invalidity we stated:

3 We do not make a determination of invalidity as to lands meeting these two criteria  
4 that are currently designated as forest lands of long-term commercial significance.  
5 Forest lands of long-term commercial significance are, by definition, part of minimum  
6 blocks of 5,000 contiguous acres of forest lands. LCC 17.30.430(1). Because of the  
7 need for agricultural lands to be in proximity with one another and other uses  
8 compatible with them, it is unlikely that isolated farmlands in the middle of significant  
9 stretches of forest resource lands will ultimately be designated as agricultural  
10 resource lands. See WAC 365-190-050(1)(f). Therefore, invalidity will not be imposed  
11 with respect to the blue cross hatched areas shown on the new maps (Ex. XII-50)  
12 (Recommended as not Agricultural Resource Lands) that are located in lands zoned  
13 as forest lands of long-term commercial significance under LCC 17.30.430(1).<sup>107</sup>

8 The Board then found:

9 9. However, lands meeting those criteria that are located in areas zoned for forest  
10 lands of long-term commercial significance under the county code are unlikely to  
11 be ultimately designated as agricultural resource lands because such forest land  
12 zoning requires blocks of 5,000 acres of contiguous forest land (LCC 17.30.430(1)  
13 and many agricultural lands located in those zones already lack proximity to one  
14 another and other uses compatible with them,

15 10. Isolated farmlands in the middle of significant stretches of forest resource lands  
16 are currently subject to the protections applicable to forest resource lands under  
17 the county code.<sup>108</sup>

18 Thus, while the Board declined to impose invalidity on these lands, and found that it was  
19 *unlikely* that they would ultimately be designated as ARL, the County was still obligated to  
20 consider them for designation under compliant criteria. The Board previously held that  
21 "lands meeting these criteria should be considered in the designation process, although  
22 they may not all be designated under the final process. In the future designation process,  
other designation concerns may dictate that some of those lands would not ultimately be  
designated."<sup>109</sup>

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21 <sup>107</sup> Order on Reconsideration of Extent of Invalidity, May 21, 2004 at 7.

22 <sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 6.

1 Petitioners submitted evidence in support of designation, to the effect that the lands had  
2 prime agricultural soils and supported a commercial nursery. The County, on the other  
3 hand, has not responded in a manner to demonstrate that it did in fact consider these lands  
4 for ARL designation in accordance with the Board's Orders. While the County may  
5 ultimately determine that these lands do not meet its designation criteria, it must first  
6 consider them for designation.

6 **Conclusion:** The County's ARL designation process failed to consider for ARL designation  
7 lands currently designated as forest lands of long-term commercial significance

## 8 2. Prime Farmland Soils

### 8 **Positions of the Parties**

9 Butler argues that the challenged amendments fail to protect prime and unique farmland  
10 soils as agricultural land of long-term commercial significance.<sup>110</sup> Butler contends the  
11 County previously considered lands having "prime soils under all conditions" as prime soil  
12 but, with Policy NR 1.3(2), omitted from consideration soils listed by the NRCS as "Prime if  
13 drained" or "Prime if irrigated" resulting in a large quantity of acreage being eliminated from  
14 consideration despite previous agricultural designations.<sup>111</sup> Butler notes he submitted  
15 documents to support the claim that such soils are productive and current environmental  
16 regulations would permit the needed infrastructure (i.e. drains) for agriculture activities but  
17 may not allow other types of development, such as residential development and on-site  
18 sewage systems, leaving little value for alternative uses.<sup>112</sup>

17 Butler asserts the County erroneously looked only to NRCS prime soils and then  
18 immediately proceeded to the commercial significance of the site without considering  
19 whether it was, or was not, devoted to agriculture.<sup>113</sup> According to Butler, this exclusion is  
20 inconsistent with the Board's holding in *Diehl v. Mason County* and the WAC provisions

21 <sup>110</sup> Butler Compliance Objections, at 8

<sup>111</sup> Butler Compliance Objections at 8-9; *Id.* Soils Table at 13-15

<sup>112</sup> Butler Compliance Objections at 9-11

<sup>113</sup> Butler Compliance Objections at 11-12; Butler Compliance Reply, at 4.

1 which provide that jurisdictions shall use the USDA/SCS Land Capability Classification and  
2 SCS classification of prime and unique farmland soils.<sup>114</sup> Butler concludes that the  
3 County's decision to use prime soils to designate agricultural lands and then exclude soils  
4 based on drainage or irrigation was clearly erroneous.<sup>115</sup>

5 Panesko asserts the County's interpretation in regard to prime soils is incorrect and relies  
6 on testimony before the Planning Commission of WSU Soil Scientist Dr. Craig Cogger to  
7 counter the County's position.<sup>116</sup>

8 Lewis County argues all soils classified as "prime" were considered for ARL designation.<sup>117</sup>  
9 The County contends, under the *new* NRCS system,<sup>118</sup> "prime soils" are not the same as  
10 "prime if drained" or "prime if irrigated," with the later two becoming prime *only* with human  
11 intervention – draining or irrigation.<sup>119</sup> The County asserts its decision is supported by the  
12 Record and prior Board cases, with Butler providing no support or evidence for the claims  
13 he raises and Panesko simply offering numerous assertions with no legal authority or facts  
14 from the Record.<sup>120</sup>

15 The County cites *Friends of Skagit County v. Skagit County*, WWGMHB Case No. 95-2-  
16 0075 (Order Regarding a Finding of Partial Compliance, April 9, 1997). The County argues  
17 that this order found Skagit County's decision not to designate agricultural lands supports  
18 its decision not to include prime if drained ARL.

19 <sup>114</sup> Butler Compliance Objections at 16 (citing to WAC 365-190-050; citing *Diehl v. Mason County*, WWGMHB  
20 Case No. 95-2-0073 (1996) (Indicating prime farmland soils together with commercial viability mean that the  
21 land needed to be designated as agricultural land of long-term commercial significance).

<sup>115</sup> Butler Compliance Objections at 15-17

<sup>116</sup> Panesko Compliance Objections, at 7-8 (Noting Dr. Cogger's conclusions that NRCS Class I, II, and III soils  
22 are excellent agricultural soils).

<sup>117</sup> County Compliance Response – Butler, at 4

<sup>118</sup> The County utilized the NRCS November 2006 publication, rather than the USCA Handbook 210  
21 referenced in the WAC 365-190-050. CTED approved the usage of this updating publication. See  
22 *Compliance Report, Index 17*.

<sup>119</sup> County Compliance Response – Butler, at 4.

<sup>120</sup> *Id.* at 4-5; County Compliance Response – Panesko, at 8.

1 In reply, Butler clarifies that not all “prime if drained” land should be designated as ARL but  
2 that land within this category for which there is evidence of current or recent agricultural use  
3 should be designated if they qualify under proper application of the WAC criteria.<sup>121</sup> Butler  
4 further comments there is no evidence in the Record pertaining to wetlands on those lands  
5 devoted to agriculture in the “prime if drained” category and, even if there was evidence, this  
6 would demonstrate the lands are not suitable for alternative uses.<sup>122</sup> Panesko did not reply  
7 on the issue of agricultural soils.

## 8 **Board Discussion**

### 9 ***Prime if drained/irrigated***

10 First, Butler objects to the County’s use of new soils classification system from NRCS.<sup>123</sup>  
11 However, the Record contains advice from the Washington Department of Community,  
12 Trade, and Economic Development (CTED) that (USDA) Soil Conservation’s Service (SCS)  
13 Handbook 210 has been updated by the NRCS November 2006 publication. While WAC  
14 365-190-050 references USDA Handbook 210, CTED states that until it amends this WAC,  
15 its interpretation is that a county using the updated USDA publication for the purpose of  
16 classifying ARLS fulfills the intent of the WAC provision.<sup>124</sup> Based on CTED’s advice, the  
17 Board finds it was not clearly erroneous for the County to use the 2006 National Resource  
18 Conservation Service (NRCS) publication. This updated publication contains the soil  
19 classifications “prime”, prime if drained” and prime, if irrigated.”

20 Therefore, a central issue in considering what soils “ should be considered “prime” is  
21 whether the County clearly erred by failing to include within its designation of ARL lands  
22 those areas which would be considered prime soils if drained (“prime if drained”) or irrigated  
23 (“prime if irrigated”). Butler would have the County consider these lands for ARL  
24 designation. However, under the NRCS’s definition which Butler cites<sup>125</sup>, prime farmland

20 <sup>121</sup> Butler Compliance Reply, at 2-3.

21 <sup>122</sup> Butler Compliance Reply, at 3.

21 <sup>123</sup> Butler’s objections at 6.

21 <sup>124</sup> Index 17.

22 <sup>125</sup> 7 CFR Sec. 657.5(a)(1).

1 “has the soil quantity, growing season, and moisture supply needed to economically  
2 produced high yields of crops . . . In general prime farmlands have an adequate and  
3 dependable water supply from precipitation or irrigation . . . [and] are not excessively  
4 erodible or saturated by water for a long period of time”. Thus, under this definition, prime  
5 soils are prime if properly drained or irrigated, but they are *not prime* in the absence of the  
6 means necessary to have an appropriate level of moisture. The County points out, soils  
7 under the NRCS classification are “prime”, “prime if drained” or “prime if irrigated”, therefore  
8 the different classifications must be presumed to have a meaning, with the latter two  
9 categories being prime only with some intervention by the landowner. They are not prime in  
10 the absence of that intervention. Therefore, the Board concludes that the County was not  
11 clearly erroneous in not considering such lands as prime soils.

12 However, it also appears that the County did not consider “prime if drained” or “prime if  
13 irrigated” lands for ARL designation even where such lands are in fact drained or irrigated.  
14 The County itself notes that “The soils that are prime only when drained or only when  
15 irrigated are only considered prime by NRCS if they are drained or irrigated.” <sup>126</sup>(emphasis  
16 in the original) The County’s rationale for this exclusion, as explained at the Hearing on the  
17 Merits, was that concerns over access to the land would prevent staff from determining if  
18 such lands were drained or irrigated. This does not seem sufficient. If such lands are  
19 prime if drained or irrigated and *in fact* they are presently drained or irrigated then they are,  
20 by categorical definition, prime soils which under the County’s methodology would then  
21 qualify them for consideration for designation and the County must make an effort to identify  
22 them on its own.

23 Further, the situation described in Lewis County is not the same as the one described in  
24 *Friends of Skagit County*. . The Board upheld Skagit County’s decision to exclude certain  
25 ARLs because the County had expert advice from the Soil Conservation Service that those  
26 lands would need a certain type of drainage, and there was no evidence in the County of  
27 this existence of this type of drainage in Skagit County.

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28 <sup>126</sup> County’s Response to Butler Objections at 4.  
29 COMPLIANCE ORDER and FINAL DECISION AND ORDER  
30 Case No. 00-2-0031c/99-2-0027c/08-2-0004c  
31 July 7, 2008  
32 Page 42 of 90

1 **Conclusion:** On the record before us, the Board is not satisfied the County is unable to  
2 make a determination as to these lands. Therefore, on remand, the County needs to either  
3 consider for ARL designation its “prime if drained/irrigated” lands that are in fact  
4 drained/irrigated or demonstrate to the Board that its efforts to do so were thwarted by  
5 actual (rather than anticipated) denials of access or other major impediments to identifying  
6 these lands.

### 6 **Other Soil Considerations**

7 As noted *supra*, from the Record presented to the Board it appears the County, when  
8 considering whether a parcel was capable of being used for agricultural production,  
9 discounted for the slope of the area and flooding.<sup>127</sup> However, when placing soils into  
10 capability classes the NRCS already accounted for the slope of the area as well as other  
11 limitations such as erosion, drainage, and flooding.<sup>128</sup> In other words, when the NRCS  
12 assigned a classification of Class IIe, which the County has adopted as “prime” soil, to an  
13 area this classification was based on considerations of various limitations and, therefore, for  
14 the County to remove these areas based on committee members or commissioners’ opinion  
15 that are area was too steep or experienced flooding, effectively discounted for limitations  
16 which had already been taken into consideration when assigning the soil classification.

17 3. Application of Agricultural Land Designation Criteria including the “WAC Factors”  
18 Butler contends that the County failed to adopt objectives, policies, or standards to  
19 implement or govern the weight of the factors contained in WAC 365-190-050. Butler  
20 asserts this violates RCW 36.70A.070 which requires such directives in order to govern how  
21 the criteria should be evaluated and applied.<sup>129</sup> Butler argues, from the Record, it appears  
22 the Planning Commission was “without knowledge of how the County proposed to apply the  
ten WAC criteria” and it was not clear until *after* the public hearing was closed how the

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21 <sup>127</sup> Planning Commissioners’ comments; Index 105, Index 136.

22 <sup>128</sup> Index 90, Testimony of Dr. Cogger

<sup>129</sup> Butler Compliance Objections, at 25-27; Butler Compliance Reply, at 9.

1 criteria would be applied.<sup>130</sup> Butler sets forth argument on (1) relationship/proximity to the  
2 UGA, (2) parcel size, (3) public facilities and services, (4) land use settlement patterns, and  
3 (5) land values; generally providing a comparison between a June 2006 report (Index 53)  
4 and the County's actions in September 2007 when reviewing and adopting the challenged  
5 action.

6 Panesko sets forth an examination of 15 map areas to demonstrate the "errors made by the  
7 County in either ignoring farmland or in reaching unsupported conclusions about  
8 farmland."<sup>131</sup> With each mapping area, Panesko provides varying argument to support a  
9 finding of designation as ARL land including the presence of prime soils, the current or  
10 historic use of a parcel for agriculture, proximity to urban areas and transportation corridors,  
11 compatibility, future residential and commercial development, and parcel sizing.<sup>132</sup>

12 Panesko asserts the County made conclusions pertaining to the application of the WAC  
13 factors on too large a scale which resulted in an analysis not based on farmland alone but,  
14 in some situations, land within a neighboring UGA.<sup>133</sup>

15 In response, Lewis County contends its process for designation was proper, with the County  
16 considering whether lands were capable of or devoted to agriculture (using aerial photos,  
17 tax status, topography, soils, location, and staff knowledge), and whether it had long-term  
18 commercial significance, the sequence of which makes no difference for the designation  
19 process.<sup>134</sup> The County argues the "objectives, policies, or standards" Butler asserts are  
20 missing were adopted by Resolution 07-306 and set forth via policies contained in the  
21 Natural Resource Element of the Comprehensive Plan.<sup>135</sup> According to the County, the  
22 methodology chosen was not the "one-size-fits-all approach" apparently preferred by  
23 Petitioners but rather a subarea approach that provides flexibility across the County so as to

<sup>130</sup> Butler Compliance Reply, at 9

<sup>131</sup> Panesko Compliance Objections, at 8-19

<sup>132</sup> Id.

<sup>133</sup> Panesko HOM Brief, at 3

<sup>134</sup> County Compliance Response – Butler, at 6.

<sup>135</sup> Id. at 12-14 (citing to NR goals, objectives, and policies)

1 reflect variable geography and geology as well as differing economic pressures.<sup>136</sup> The  
2 County asserts this methodology was logical given the County's diversity and within the  
3 discretion granted to it by the GMA.<sup>137</sup> The County then goes on to counter Butler's  
4 arguments in regards to (1) relationship/proximity to UGAs; (2) predominant parcel size; (3)  
5 land use settlement patterns; (4) availability of public facilities and services; and (5) land use  
6 values.<sup>138</sup>

7 As for Panesko's arguments, Lewis County contends Panesko's review is "devoid of any  
8 discussion of how the County applied the WAC criteria or even how an alternative  
9 application of the criteria would achieve the results" advocated by this Petitioner.<sup>139</sup> The  
10 County argues the subarea maps do not represent the scale used in the application of the  
11 criteria rather, they demonstrate geographic boundaries to consider when applying the WAC  
12 criteria within a specific subarea.<sup>140</sup> The County then goes on to rebut the subarea by  
13 subarea assertions made by Panesko in regard to the WAC factors.<sup>141</sup>

14 In reply, Butler argues the "Planning Commission was without knowledge of how the County  
15 proposed to apply the ten WAC criteria before it approved designation proposals" therefore,  
16 there were no "objectives, principles, and standards" to direct the application of the  
17 criteria.<sup>142</sup> Butler goes on to point to various problems with the County's application of the  
18 WAC factors based on this lack of standards, counter the arguments presented by the  
19 County, including (1) relationship/proximity to UGAs, (2) parcel size, (3) land use settlement  
20 patterns, (4) availability of public facilities and services, and (5) land use values.<sup>143</sup>

21 In reply, Panesko contends that the WAC Factors were created to be used on a parcel-by-  
22 parcel basis as opposed to the area-wide analysis conducted by Lewis County, especially

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19 <sup>136</sup> Id. at 15.

20 <sup>137</sup> Id.

21 <sup>138</sup> Id. at 15-20.

22 <sup>139</sup> County Compliance Response – Panesko, at 12.

<sup>140</sup> County HOM Response – Panesko, at 3

<sup>141</sup> County Compliance Response – Panesko, at 12-24.

<sup>142</sup> Butler Compliance Reply, at 9.

<sup>143</sup> Butler Compliance Reply, at 9-12.

1 given the fact that ARL lands are intermixed amongst rural lands.<sup>144</sup> Panesko provides  
2 countering arguments to the County's in regards to the application of WAC criteria, pointing  
3 specifically to the Toledo Airport area to demonstrate that County's misinterpretation of the  
4 WAC criteria.<sup>145</sup>

#### 4 **Board Discussion**

5 As we noted *supra*, the mandatory considerations in designating agricultural lands of long  
6 term commercial significance are contained in RCW 36.70A.030(2) and (10).

7 When evaluating the proximity of the property to population areas as well as its vulnerability  
8 to more intensive uses – counties and cities *may consider* the development-related factors  
9 enumerated in WAC 365-190-050(1).<sup>146</sup> These factors consider not only the availability of  
10 public facilities and services but the intensity of neighboring land uses, some of which may  
11 be incompatible with agricultural uses. The GMA does not assign or dictate the weight of  
12 each factor and, therefore, a jurisdiction has some discretion regarding how to apply  
13 them.<sup>147</sup> The Board notes that while a jurisdiction has discretion, these ten factors must be  
14 evaluated in light of the conservation imperative set forth by the GMA. In contrast to the  
15 analysis of capacity, productivity, and soils, the focus of these factors is on the development  
16 prospects of the site and, as the Supreme Court found in *Lewis County*, may potentially  
17 pertain to factors not specifically enumerated in RCW 36.70A.030(10), including the  
18 economic needs of the agricultural industry for the county as a whole, so long as these  
19 considerations are within the mandates of the GMA and pertain to the characteristics of the  
20 agricultural land to be evaluated.<sup>148</sup>

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19 <sup>144</sup> Panesko Compliance Reply, at 7.

20 <sup>145</sup> *Id.* at 7-11.

21 <sup>146</sup> *Lewis County*, 157 Wn.2d at 502; *see also Redmond*, 136 Wn.2d at 55.

22 <sup>147</sup> *Id.* at 502-503.

<sup>148</sup> *Lewis County*, 157 Wn.2d at 502-503 (Finding that it was not clearly erroneous for the County to weigh the farm industry's anticipated land needs above all else, noting that if the industry cannot use the land then the possibility of more intense uses of the land is heightened); *Id.* at 505 (Holding that the farmer's non-farm economic needs are not a logical or permissible consideration because it does not relate to a characteristic of farmland to be evaluated in determining long-term commercial significance).

1 Panesko focuses on the application of the factors to 15 separate areas (numbered 1-18, but  
2 excluding 12, 13 and 16). As noted above, at the HOM, the Board ruled that no annotated  
3 map produced by the parties would be admitted; only those maps produced by the County  
4 are to be contained within the Record. The admission of Petitioner's Attachments 1 through  
5 15 for inclusion within the Record for this matter has been denied. In the absence of these  
6 maps, the remainder of Panesko's argument is unsupported by the record. In addition,  
7 much of what remains of Panesko's argument addresses the historic or present use of these  
8 lands as farmland. As the Board's prior discussion in this Order addressed, the process of  
9 ARL designation involves more than identifying lands that have in the past or presently  
10 support farming operations, it necessarily includes the future viability – the long-term  
11 significance – of the land.<sup>149</sup>

12 On the other hand, Butler focuses on the WAC factors and asserts the County failed to  
13 adopt objectives, policies, or standards to implement or govern the weight of the factors  
14 contained in WAC 365-190-050(1) and that this failure violates RCW 36.70A.070 which  
15 requires such directives in order to govern how the criteria should be evaluated ..<sup>150</sup>

16 In addressing the WAC factors, Butler takes exception to five of the ten factors. As to four  
17 of these – proximity to UGAs, predominant parcel size, availability of public facilities and  
18 services, and land values under alternative uses, Butler's challenge is based largely on the  
19 County's lack of a standard under which these criteria were to be applied

20 Initially the County's process included a citizen's task force, the Technical Advisory  
21 Committee (TAC) that consisted of local experts in the farming industry whose task it was to  
22 craft of method to identify and designate ARLs. The County describes the TAC's work as a  
"thoughtful, analytical approach" which resulted in a sound, quantitative model that  
established criteria, assigned numeric values, and scored lands for agricultural suitability".<sup>151</sup>

<sup>149</sup> Lewis County, 157 Wn.2d at 500-02.

<sup>150</sup> Butler Compliance Objections, at 25-27; Butler Compliance Reply, at 9.

<sup>151</sup> Index 39 at 1 and 2.

1 The TAC used a process that assigned numeric values to each of the WAC factors.<sup>152</sup>  
2 However, the Record shows that the Planning Commission, and eventually adopted by the  
3 Board of County Commissioners, modified the TAC's approach for a more subjective one  
4 because the TAC's approach did not account for the County's policies for economic  
5 development and cities' desire for expanded urban growth areas, as well as including lands  
6 as ARLs that did not include prime soils.<sup>153</sup> The Planning Commission concluded that  
7 compared to the rest of the County that the subareas along I-5 in the did not have long-term  
8 predictability for agricultural uses based generally on current conditions, the cities' desire for  
9 expanded UGAs, and the County's examination of potential for siting a fully contained  
10 community and future proposals for business and industrial parks locating in that area. The  
11 Planning Commission's approach was eventually adopted by the Board of County  
12 Commissioners.<sup>154</sup>

13 For one of the factors, where the County has adopted a standard – land values under  
14 alternative uses – Butler asserts that the chosen value of \$2500 per acre is arbitrary. The  
15 County's response that this value was a product of the Technical Advisory Committee and  
16 the Planning Commission's deliberations based on a consideration of when land may be too  
17 expensive to acquire to make commercial farming practical has not been demonstrated to  
18 be clearly erroneous. However, the Supreme Court has held that while landowner intent can  
19 be considered, it is not a determinative factor in the designation of agricultural lands. The  
20 Court stated:

21 Presumably, in the case of agricultural land, it will always be financially more  
22 lucrative to develop such land for uses more intense than agriculture.  
Although some owner of agricultural land may wish to preserve it as such  
for personal reasons, most . . . will seek to develop their land to maximize  
its return. If the designation of such land as agricultural depends on the  
intent of the landowner as to how he or she wishes to use it, the GMA  
is powerless to maintain and enhance agricultural land. . . . We decline  
to interpret the GMA definition in a way that vitiates the stated intent of

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21 <sup>152</sup> *Ibid.*

22 <sup>153</sup> *Ibid* at 3, 4, 5, 10.

<sup>154</sup> *Ibid* at 11 and 12, Index 84.

1 the statute.<sup>155</sup>

2 Thus, we held in *Karpinski et al. v. Clark County*, that “[B]ecause agricultural lands will  
3 almost always be more lucrative to develop as other uses, allowing the value of land under  
4 other uses to be the controlling factor would also prevent the accomplishment of the stated  
5 intent of the statute. Just as with proximity to urban areas, the value of land under  
6 alternative uses can be *considered*, according to WAC 365-195-050(1)(c), but it cannot be  
7 the controlling factor.”<sup>156</sup>

8 As to the WAC factors, in Lewis County, the Supreme Court stated:

9 ... [W]e do not decide whether Lewis County, in focusing on the needs of the  
10 local agricultural industry, went beyond the considerations permitted by WAC  
11 365-190-050 and RCW 36.70A.030 in designating agricultural lands.

12 Unfortunately, Lewis County’s briefs do not explain the extent to which the county  
13 applied the specific factors. And while Lewis County Ordinance 1179C does  
14 spell out in detail how the county considered WAC 365-190-050 factors in  
15 mapping agricultural lands, the record does not indicate whether the county used  
16 permissible criteria in other decisions not explicitly tied to the WAC factors.<sup>157</sup>

17 Although the County’s review was based on an area by area analysis<sup>158</sup> so as to take into  
18 account “geographical and economical considerations,” it is the inconsistent application of  
19 the criteria which concerns the Board the most, not review based on subarea.<sup>159</sup> While the  
20 Board recognizes that the County has discretion on how much weight to give each criteria,  
21 applying criteria in an inconsistent manner leads to arbitrary decision-making. It is evident  
22 from the Record that the County did not consistently apply the criteria when analyzing  
varying subareas, with criteria being given differing weight based, in part, on their proximity  
to the “I-5 Corridor” or certain regions of the County (e.g. UGAs with growth potential or

155 *Redmond .v CPSGMHB*, 136 Wn.3d 38, 959 P.2d 1091 (1998).

156 *Karpinski et al. v. Clark County*, *supra*, at 39-40.

157 *Lewis County*, 157 Wn.2d at 503-504

158 Petitioner Panesko objected to the County’s use of subareas for analysis. See *Panesko HOM Brief 08-2-0004c*, at 3. From the Record, it appears that County utilized these subareas when analyzing information but considered a regional aspect as well.

159 Index 84, WAC Criteria Matrix; Index 321, Attachment B Planning Commission Transmittal

1 western side of the County) – primarily in the name of economic development.<sup>160</sup>

2 Particularly troubling are the County’s lack of definition in regards to the proximity to urban  
3 growth areas and defining almost all the lands adjacent to I-5 corridor as having more value  
4 under alternative uses. In addition, the County inappropriately considered the presence of  
5 industrial activity and tight line sewer lines in its analysis.<sup>161</sup>

6 As this Board has previously stated, the GMA creates a mandate to designate agricultural  
7 lands by including goals with directive language as well as specific requirements and that  
8 the GMA’s economic development goal does not supersede this agricultural mandate set  
9 forth by the Supreme Court.<sup>162</sup> The Record before this Board demonstrates that in the “I-5  
10 Corridor” lands the County’s goal for potential economic development which may have met  
11 the criteria for ARL were excluded largely – proximity to the “I-5 Corridor” – with that factor  
12 being weighed more heavily than any other.<sup>163</sup> It is unclear from the record the exact  
13 scope of the “I-5 Corridor” but, from the sub-area maps designating agricultural lands no  
14 ARL was designated along the corridor which runs from the northern border to the southern  
15 border of the County. From this perspective, it would appear that the County intends to  
16 encourage development along the continuum of the I-5 Corridor, creating what could only

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17 <sup>160</sup> Index 84, WAC Criteria Matrix; Index 321, Attachment B Planning Commission Transmittal

18 <sup>161</sup> When the Board found the de-designation of the land in order to develop the Cardinal Glass MID  
19 compliant, one of the reasons the Board did so was because the County had provided for measures to protect  
20 adjacent agricultural lands from encroachment. See *Eugene Butler v. Lewis County*, WWGHB Case No.99-2-  
21 0027c (Order Rescinding Invalidity as for the Cardinal Glass MID site, May 12, 2005) at 3, 4, 16, and 17  
22 (holding “The County unequivocally represented that the designation of the MID will have no impact on  
potential designation of agricultural lands.”) To use the presence of this MID as factor in de-designating  
agricultural land is not consistent with that decision. Likewise, to note the presence of sewer line as a factor  
in de-designation in Area 6, ignores our decision in that allowed a sewer line to extended from the City of  
Winlock to the MID through rural lands was that it be sized to serve only that development. See *OBCT v.*  
*Lewis County, Cardinal Glass, Intervenor*, WWGMHB Case No. 04-2-0041c(FDO, June 5, 2005) at 11.

<sup>162</sup> *Karpinski v. Clark County*, WWGMHB Case No. 07-2-0007, at 3 Amended FDO (June 3, 2008)(citing  
*Redmond v. CPSGMHB*, 136 Wn.2d 38 (2005) and *Lewis County*, 157 Wn.2d at 501).

<sup>163</sup> See Index 95 and 116: I-5 corridor will provide needed economic growth opportunities for urban areas  
along this major transportation route; Index 111: We recognize the need for designating long-term  
commercially significant agricultural land, however, in view of the focused current development pattern and  
proposed future development attention being given the I-5 corridor and the county’s need for a stable  
economic base, we do not think that designation of agricultural land within this area is either appropriate or  
complementary to the long-range economic plans of the county.

1 be described as a industrial/commercial strip development bisecting the County from north  
2 to south along miles of a limited access highway.

3 Further, the Board notes that the GMA recognizes that agricultural lands can be de-  
4 designated if these lands are no longer commercially significant and provides mechanisms  
5 for economic development opportunities in designated rural and agricultural lands t through  
6 the use of Master Planned Developments (MID)<sup>164</sup> and Master Planned Locations for Major  
7 Industrial Activity (MPLMIA), RCW 36.70A.365- .368 Master Planned Resorts (MPR), RCW  
8 36.70A.360-.362, and Fully Contained Communities(FCC) , RCW 36.70A.350, all available  
9 to Lewis County. In allowing for these uses in rural and agricultural lands, the Legislature  
10 set up a well defined process to ensure that these developments would not detract from the  
11 goal of directing urban growth to urban areas and creating sprawl. The GMA is focused on  
12 concentrating all types of growth – residential, commercial, and industrial – in urban areas  
13 because it is these areas that have the supporting public facilities and services critical to  
14 economic development. However, by providing for MIDs, MPLMIA, MPRs, and FCCs to be  
15 located outside of urban areas, the GMA allows for the conversion of non-urban lands in  
16 order to facilitate economic development but, in all regards, development potential is  
17 focused in well-defined nodes or centers and not broadly distributed along an interstate that  
18 transverse the County from north to south.<sup>165</sup>

15 The Board also notes that the County, in part, is basing its determination in regards to  
16 agricultural lands on the anticipated need for urban land based on its plans for economic  
17 development along the I-5 Corridor and the cities' desires for expanded UGAs. The County  
18 contends that such development will require both residential and commercial development  
19 to support an increase in employment that will result from this future economic growth.<sup>166</sup>

19 The County errs in this approach. From its inception, the GMA has sought to ensure that  
20 urban growth areas are sized to accommodate the County's anticipated growth, but not to

21 <sup>164</sup> The Board previously has found Lewis County's use of this mechanism compliant.

22 <sup>165</sup> Summaries attached to Exhibits 07-306.

<sup>166</sup> County Response – Butler Objections, at 16; See also, Index 321, Attachment B

1 big so as to encourage sprawl. The County's UGAs are to be sized to accommodate  
2 population growth for 20 years. RCW 36.70A.110(2). Even if the County's UGAs were not  
3 properly sized to accommodate residential, commercial, and industrial needs, if a UGA  
4 needs to be expanded to accommodate population growth the County is to first look to land  
5 already characterized by urban growth, to rural lands, and then, if no other suitable land is  
6 available, Lewis County could evaluate if natural resource lands should be de-designated to  
7 accommodate growth. RCW 36.70A.110(1). No documented need exists in the record that  
8 shows that the County needs this land to accommodate the 20-year population growth or  
9 commercial and industrial needs or, that the County looked to other lands to accommodate  
10 these needs. In other words, the continuation of lands suitable for agricultural production  
11 should be retained until such time as the County has no other option but to consider  
12 whether these lands are no longer capable of serving in a commercially viable way and that  
13 these lands are in fact needed to accommodate growth. What Lewis County is doing is  
14 removing agricultural lands based on speculative, future economic development and  
15 seeking to utilize these lands to provide for potential expansion areas.

12 **Conclusion:** The GMA does not assign or dictate the weight of the "WAC factors" and,  
13 therefore, a jurisdiction has discretion regarding how to apply them. However, while the  
14 Board recognizes Lewis County's need for economic development, the County's desire to  
15 further economic development can not outweigh its duty to designate and conserve  
16 agricultural lands so as to assure the maintenance and enhancement of the agricultural  
17 industry. Thus, for the reasons set forth above, the Board finds and concludes that Lewis  
18 County erred when in its use of proximity to the "I-5 Corridor" and relationship or proximity to  
19 urban growth areas when determining which lands should be designated as ARL and failed  
20 to comply with the goals and requirements of the GMA, RCW 36.70A.020(8), .030(2), .050,  
21 and .170.

## 22 **Hadaller – Designation as Agricultural Resource Land**

1 In both Case No. 08-2-0004c and the Compliance Case, the issues raised by this petitioner  
2 pertain to acreage owned by Dennis Hadaller (“Hadaller”), which was rezoned to ARL with  
3 the adoption of Ordinance 1197.<sup>167</sup> Hadaller primarily limits his objections to whether the  
4 County properly applied ARL zoning to his property, both in regards to the statutory  
5 definition and the WAC criteria set forth in WAC 365-190-050(1).

### 6 **Positions of the Parties**<sup>168</sup>

7 Hadaller contends that the re-designation of his 313 acres to ARL violates clear criteria for  
8 the designation of lands as “rural” as set forth in RCW 36.70A.070(5) and the Legislature’s  
9 goals as articulated in RCW 36.70A.011.<sup>169</sup> Hadaller argues that the classification system  
10 used by the County, specifically using typological soil classifications as a single  
11 determinative criterion, fails to recognize that a soil can be prime agricultural soil in one  
12 location but marginal or dysfunctional in another context.<sup>170</sup> According to Hadaller, Lewis  
13 County’s hydro-geological context makes for poor agricultural soils and this is demonstrated  
14 by the economic history of his property which has “never produced any profitable  
15 agricultural crop,” with the site being used only to raise hay.<sup>171</sup> Hadaller contends that the  
16 ARL designation limits the use of his property because it “not only fails to maximize the  
17 utility and value of the property, but [limits it] to a use that is not practical or profitable on the  
18 property.”<sup>172</sup> Hadaller further notes that, based on the GMA’s definition of long-term  
19 commercial significance and a previous Supreme Court holding, “land is properly  
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<sup>167</sup> Because of this relationship, the Board will discuss Petitioner Hadaller’s Legal Issues 1 and 3 and the objection raised by his participation in the compliance together.

<sup>168</sup> This section is comprised of arguments from Hadaller HOM Brief Case No. 08-2-0004c; Hadaller Compliance Objections and Hadaller Compliance Reply Case Nos. 99-2-0027c/00-2-0031c; Lewis County Compliance Response – Hadaller Case Nos. 99-2-0027c/00-2-0031c; Lewis County Response Case No. 08-2-0004c. Hadaller did not file a reply brief specific to Case No. 08-2-0004c. Petitioners Futurewise/Butler and Panesko filed response briefs to Hadaller’s HOM Brief in Case No. 08-2-0004c. As noted *supra* (Preliminary Matters, Section IV), these briefs were not considered by the Board.

<sup>169</sup> Hadaller HOM Brief, at 2-3.

<sup>170</sup> *Id.* at 3.

<sup>171</sup> *Id.* at 3-4.

<sup>172</sup> *Id.* at 4.

1 designated only if a competent commercial farmer would not go broke trying to farm the  
2 land.”<sup>173</sup>

3 Hadaller also argues his property is surrounded by more intensive uses and is more suitable  
4 for residential, commercial, or industrial uses; therefore, his property should be zoned to  
5 harmonize it with surrounding uses and increase the tax base.<sup>174</sup> Hadaller further notes  
6 that the location of his property – abutting Highway 12 – and its characteristics (poor  
7 agricultural soil, rocky soils, and not “wet”) make it well-suited for more intensive  
8 development.<sup>175</sup> Hadaller contends that the County did not properly analyze the ten criteria  
9 (as provided by WAC and Lewis County Code (LCC)) when it conducted its assessment of  
10 the area.<sup>176</sup> Hadaller contends that public facilities, such as utilities, would not be “hard or  
11 expensive to install”; the County gave “undue weight” to the current tax status of the  
12 property and public services; parcels of greater than 20 acres are also suitable for  
13 commercial/industrial needs; property owners should not be penalized for previously  
14 resisting development; and the property’s value and alternative uses were not properly  
15 considered nor was its location abutting a state highway.<sup>177</sup>

16 Hadaller goes on to contend the re-designation fails to comply with Lewis County Code  
17 (LCC) in regards to criteria for ARL designation. Hadaller points to LCC 17.30.570 and  
18 contends the reliance on only two factors – soil type and water – is an incorrect approach  
19 because it assumes that “if a piece of land has water and certain soil types, it will be  
20 productive and commercially viable farmland.”<sup>178</sup> Hadaller further notes his property has  
21 no irrigation water rights; has historically been used commercially; and although not next to  
22 a UGA, the settlement pattern and intensity of uses within the surrounding area all “believe the

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20 <sup>173</sup> Id. (citing to RCW 36.70A.030(10) and *Redmond v. Central Puget Sound GMHB*, 136 Wn.2d 38 (1998)).

<sup>174</sup> Id. (citing to *Woods v. Kittitas County*, 130 Wn. App. 573 (2005)).

<sup>175</sup> Id. at 5.

<sup>176</sup> Hadaller Compliance Objections, at 1 (citing to Index 320 – Ord. 1197, Attachment A).

<sup>177</sup> Id. at 3-5.

<sup>178</sup> Id. at 6

1 land's designation as agricultural land" and therefore, the re-designation reveals a  
2 "concealed non-compliance" between the LCC and the GMA.<sup>179</sup>

3 In response, the County asserts the GMA provides no "clear criteria" for the designation of  
4 *rural* lands as Hadaller contends; rather, the GMA addresses specific designation criteria for  
5 resource lands, such as agricultural land.<sup>180</sup> The County argues it utilized soil type as a  
6 threshold consideration, noting that the soils mapping performed by NRCS demonstrates  
7 the soils are predominantly prime soils.<sup>181</sup> The County states it then considered whether  
8 the land was being used or is capable of being used for agriculture and weighed and  
9 balanced the WAC Criteria when determining which lands should be have the ARL  
10 designation.<sup>182</sup> The County relied on aerial photography which showed cultivated and  
11 open fields along with timberland and Hadaller's own statements that his property is used  
12 for hay production, which is an agricultural crop under the GMA.<sup>183</sup> The County addresses  
13 each criteria - tax status, parcel size, intensity of nearby uses, land values, history of  
14 development, availability of public services and facilities, and proximity to market - and  
15 contends the ARL designation was not clearly erroneous.<sup>184</sup> The County further asserts the  
16 Supreme Court did not define "long term commercial significance" based on a determination  
17 of whether or not a competent commercial farmer would go broke trying to farm the land.<sup>185</sup>  
18 Nor, do the Legislative findings of RCW 36.70A.011 override the GMA obligation to  
19 designate and conserve agricultural lands of long-term commercial significance.<sup>186</sup>

20 As for the application of the LCC, the County states that the provisions Hadaller based his  
21 argument on were repealed; specifically the two criteria of soil type and water, and are no  
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18 <sup>179</sup> Id. at 6-7.

19 <sup>180</sup> County Response – Hadaller, at 2.

20 <sup>181</sup> Id. at 3; County Compliance Response - Hadaller, at 3 (noting NRCS classified the property as "prime  
21 farmland").

22 <sup>182</sup> County Response – Hadaller, at 2-3; County Compliance Response – Hadaller, at 3.

<sup>183</sup> County Compliance Response – Hadaller, at 3-4

<sup>184</sup> Id. at 4-8

<sup>185</sup> County Response – Hadaller at 4-5 (citing *Redmond*, 136 Wn.2d 38 (1998); *Lewis County v. WWGMHB*,  
157 Wn.2d 488 (2006)).

<sup>186</sup> Id. at 5.

1 longer a pre-requisite for ARL designation. In addition, the County notes the ARL criteria  
2 are consistent with the WAC criteria and Hadaller failed to demonstrate how the County's  
3 weighing and balance of these factors was clearly erroneous.<sup>187</sup>

4 Hadaller did not file a Reply Brief specific to Case No. 08-2-0004c but did file a reply in  
5 regard to Case Nos. 99-2-0027c and 00-2-0031c, which has a similar foundation. Hadaller  
6 contends that although much of his property is timberland, qualifying for agricultural tax  
7 classification, it does not make prime soils or profitable land and the County's designation is  
8 simply speculative.<sup>188</sup> Hadaller asserts public facilities and services are available to serve  
9 the property - because of the location of Highway 12, residential developments, proximity of  
10 two UGAs – and such services could support an expansion.<sup>189</sup>

### 9 **Board Discussion**

10 While conceding that his property contains soils the County classifies as prime agricultural  
11 soil<sup>190</sup> Hadaller relies on Proposed Exhibit 506 to support his argument that this soil can be  
12 marginal in certain contexts, and in this particular hydro-geological context, it is a poor  
13 agricultural soil. However, the Board has previously denied the supplementation of the  
14 record with this exhibit, finding that a study, consisting of information not presented to the  
15 County before it took its challenged action would not be "necessary or of substantial  
16 assistance to the board in reaching its decision."<sup>191</sup> Therefore, the Board takes no notice of  
17 this exhibit and must discount any argument based upon material outside the record.  
18 Further, Hadaller is incorrect in asserting that the County used soil type as a "single,  
19 determinative criterion for designation of land as ARL land".<sup>192</sup> The County's Compliance  
20 Report details a far more involved process employed for the ARL designations.<sup>193</sup>

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20 <sup>187</sup> Id. at 6.

<sup>188</sup> Hadaller Compliance Reply, at 2.

<sup>189</sup> Id. at 3-4.

<sup>190</sup> Petitioner Hadaller's Prehearing Brief at 3.

<sup>191</sup> See, Order Re: Petitioner Hadaller's Motion to Supplement at 4.

<sup>192</sup> Hadaller Prehearing Brief, at 3.

<sup>193</sup> See, County's Report on Compliance, at 9, et seq.  
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1 Hadaller's argument that his property has never produced a profitable crop does not  
2 demonstrate that the County was clearly erroneous in designating it ARL. Although the  
3 *Lewis County* Court did note that the GMA was not intended to trap anyone in economic  
4 failure,<sup>194</sup> when it comes to agricultural lands, it is the economic concerns of the agricultural  
5 industry not an individual farmer's economic needs that are to be considered.<sup>195</sup> Whether a  
6 competent commercial farmer would go broke trying to farm the land is not the test the  
7 Legislature or the Courts require the County to apply when designation agricultural lands of  
8 long term commercial significance.

9 Hadaller's contention that the County's approach to designation contained in LCC 17.30.580  
10 improperly relies on only two factors – soil type and water - is in error because, as the  
11 County points, out that the language Hadaller relies on in support of his argument has been  
12 repealed.<sup>196</sup>

13 Hadaller also contends that the County improperly relied upon a consideration of  
14 predominant parcel size. While acknowledging that the area selected by the County for  
15 ARL designation is characterized by parcels in excess of twenty acres, and that the Hadaller  
16 property is not next to an urban growth boundary, Hadaller contends that the specific area  
17 around his property is one where actual or approved five acre parcels predominate.  
18 Hadaller cites nothing in the record to support this argument. The Board will not consider  
19 arguments not supported by the record.

20 **Conclusion:** Petitioner Hadaller has failed to demonstrate that the County's designation of  
21 his property as ARL was clearly erroneous.

## 22 **AGRICULTURAL LANDS: Conservation of Land & Maintenance of Industry**

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<sup>194</sup> Id.

<sup>195</sup> *Lewis County* 157 Wn.2d 488 (holding that although the County could consider the economic needs of the agricultural industry, serving the farmer's "non-farm" economic needs is not a logical or permissible consideration in designating agricultural lands under the GMA).

<sup>196</sup> *Lewis County's* Response to Petitioner Hadaller's Prehearing Brief at 5; also see, County Compliance Report, Ord. 1197, Ex. C.

1 **Compliance Orders**

2 **Conclusion D (February 2004):** *The following development regulations adopted in*  
3 *Ordinance 1179C fail to comply with the GMA goals and requirements to assure the*  
4 *conservation of designated agricultural and forest resource lands:*

- 5 a. LCC 17.30.470(2)(c) and (d)
- 6 b. LCC 17.30.480
- 7 c. LCC 17.30.490 (3)(b) and (g)
- 8 d. LCC 17.30.510
- 9 e. LCC 17.30.620(3) and (4)
- 10 f. LCC 17.30.640(2)(b), (c) and (e)
- 11 g. LCC 17.30.650
- 12 h. LCC 17.30.660 (1)(b) and (g)

13 **Panesko Legal Issues:**

14 *1. Whether the deletion in Ordinance 1197 of LCC 17.30.570 (Classification),*  
15 *LCC 17.30.580 (Identification), and LCC 17.30.500 (Designation) results in*  
16 *development regulations which are non-compliant with RCW 36.70A.060 for*  
17 *failing to maintain ARL development regulations which implement the Lewis*  
18 *County Comprehensive Plan policy to protect ARL?*

19 *6. Whether the use exceptions in LCC 17.30.590 are non-compliant with RCW*  
20 *36.70A.020 (2), (8) and RCW 36.70A.060 for failing to protect ARL by allowing*  
21 *incompatible uses intermixed with agricultural uses on land where small strips of*  
22 *non-prime soils may exist between prime soils on land designated as ARL?*

*7. Whether Comprehensive Plan Policy NR 1.6 is non-compliant with RCW*  
*36.70A.020 (2), (8), RCW 36.70A.060, and RCW 36.70A.070 for failing to protect*  
*ARL by allowing incompatible uses immediately adjacent to and on the same*  
*parcels as ARL, when in practice Lewis County is implementing a policy to have*  
*all parcels designated with just one designation?*

*9. Whether LCC 17.30.650(c) (Maximum density and minimum lot area), (for*  
*ARL) is non-compliant with RCW 36.70A.020 (2), (8), RCW 36.70A.060, and*  
*RCW 36.70A.070 for failing to protect ARL by allowing portions of farmland*  
*designated ARL which consist of residents, shops, yards, parking, and roads to*  
*be subdivided into separate parcels (even after the Supreme Court agreed with*  
*the Western Board that such action in the above captioned case was invalid)?*

**-Development Regulations to Conserve Agricultural Lands**

1 Panesko asserts that the deletion of LCC 17.30.570, 17.30.580, and 17.30.500 – provisions  
2 which pertain to the designation, classification, and identification of ARL lands – results in  
3 the County no longer having implementing development regulations to protect these  
4 lands.<sup>197</sup>

4 Lewis County responds the GMA only requires the “conservation” of agricultural land, not  
5 the “protection,” as Panesko contends.<sup>198</sup> And, according to the County, RCW 36.70A.060  
6 does not require it to include policies for designating resource lands in its development  
7 regulations; rather, this provision requires adoption of regulations that assure the  
8 conservation of previously designated ARL lands which the County implements via its  
9 zoning regulations.<sup>199</sup>

## 9 **Board Discussion**

### 10 ***Failure to Maintain Development Regulations to Protect Agricultural Lands***

11 Petitioner’s assertion that the County’s deletion of LCC 17.30.570, Classification, LCC  
12 17.30.580, Identification, and LCC 17.30.500, Designation result in development regulations  
13 non-compliant with RCW 36.70A.060 is not borne out by a reading of that statute or WAC  
14 365-195-050. RCW 36.70A.060 provides in pertinent part that the County shall “adopt  
15 development regulations . . . to assure the conservation or agricultural, forest, and mineral  
16 resource lands designated under RCW 36.70A.170.” LCC 17.30.570, .580 and .500 were  
17 not the County’s means of conserving ARL lands but for designating them in the first  
18 instance. RCW 36.70A.060 does not mandate the adoption of regulations to define the  
19 designation process.

18 WAC 365-190-040(1), guidance prepared by CTED for the designation of ARLs states in  
19 pertinent part):

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21 <sup>197</sup> Panesko HOM Brief, at 4; Panesko Compliance Reply, at 7.

22 <sup>198</sup> County Response – Panesko, at 4.

<sup>199</sup> Id.

1) Classification is the first step in implementing RCW 36.70A.050. It means defining categories to which natural resource lands and critical areas will be assigned.

Pursuant to RCW 36.70A.170, natural resource lands and critical areas will be designated based on the defined classifications. Designation establishes, for *planning* purposes: The classification scheme; the general distribution, location, and extent of the uses of land, where appropriate, for agriculture, forestry, and mineral extraction; and the general distribution, location, and extent of critical areas. Inventories and maps can indicate designations of natural resource lands... Designation means, at least, formal adoption of a policy statement, and may include further legislative action. Designating inventoried lands for *comprehensive planning and policy definition* may be less precise than subsequent regulation of specific parcels for conservation and protection. (emphasis added).

While it is good planning practice to include designation criteria in development regulations, the use of the words in WAC 365-190-040(1) of “for planning purposes”; “policy statement”; and “for comprehensive planning and policy definition”, all speak to comprehensive planning and policies, the role of the comprehensive plan. This section of the WAC advises that the appropriate place for the classification scheme and designation policies is in the comprehensive plan.

There is no clear error in including the designation criteria in the Comprehensive Plan rather than within the County Code. The County points out that the ARL designation is implemented by zoning and the restrictions on land use contained in the development regulations conserve that land.<sup>200</sup>. Considering that zoning ordinances are within GMA’s definition of development regulations, RCW 36.70A.030 (7), and the WAC advice that the appropriate place for designation criteria is in the comprehensive plan, Panesko has failed to demonstrate why placing the designation criteria in the County zoning regulations does not provide for the required designation of agricultural land.

**Conclusion:** Panesko has failed to carry his burden of proof that the County has violated RCW 36.70A.060 in the manner in which it designates ARL lands.

***-Protection of Agricultural Land from Non-Agricultural/Accessory Uses***

<sup>200</sup> County’s Response to Petitioner Panesko’s Prehearing Brief, at 4  
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1 **LCC 17.30.590, 17.30.610, and 17.30.620**

2 Panesko and Butler both contend that with LCC 17.30.590, which addresses land where  
3 prime soil does not underlie the entire parcel, the County permits non-agricultural uses to be  
4 located on ARL land through the Special Use Permit process contained in LCC 17.115.<sup>201</sup>  
5 According to Panesko, with a Special Use Permit residential, recreational, and other non-  
6 resource uses are allowed with no language limiting the location of these uses to the non-  
7 ARL portion of the parcel.<sup>202</sup> Butler further notes there are no restrictions contained within  
8 the ordinance itself, so without such restrictions, a hearing examiner will be required to  
9 simply issue a Special Use Permit.<sup>203</sup> Panesko and Butler both point out this issue was  
10 addressed by the Supreme Court which held that permitting inconsistent uses on or  
11 adjacent to ARL lands did not comply with the GMA.<sup>204</sup>

12 Similarly, Panesko notes with Policy NR 1.6 Lewis County appears to be attempting to apply  
13 a single zoning designation to a single parcel.<sup>205</sup> According to Panesko, this will encourage  
14 the practice of establishing both agricultural use and non-agricultural use on the same  
15 parcel, thereby creating incompatible uses both on and adjacent to ARL land.<sup>206</sup> Butler also  
16 points to NR 1.6, NR 1.7, and LCC 17.30.600 which permits re-designation of parcels based  
17 on mapping errors, which Butler argues would result in isolated pockets of land zoned in a  
18 manner incompatible with agriculture.<sup>207</sup> Butler further notes that (1) soils are not constant  
19 throughout a parcel and that the GMA contemplates this by allowing innovative techniques  
20 on agricultural lands, which other LCC provisions provide for, and (2) the provisions do not  
21 require peer review to ensure accuracy.<sup>208</sup>

22 <sup>201</sup> Panesko Compliance Objections, at 25; Butler Compliance Objections, at 22-23

<sup>202</sup> Panesko Compliance Objections, at 25

<sup>203</sup> Butler Compliance Reply, at 6

<sup>204</sup> Panesko Compliance Objections, at 25; Butler Compliance Objections, at 22 (citing to *Lewis County*, 157  
Wn.2d 488, at 506).

<sup>205</sup> Panesko HOM Brief, at 5

<sup>206</sup> Id.

<sup>207</sup> Butler Compliance Objections, at 22; Butler Compliance Reply, at 6-7.

<sup>208</sup> Butler Compliance Objections, at 23-24.

1 Panesko contends that LCC 17.30.620(9) permits non-agricultural accessory uses and  
2 activities on up to one acre of ARL of every farm without regard to soil, productivity, or other  
3 specified factors.<sup>209</sup> Similarly, Butler also argues that LCC 17.30.620(4) continues to allow  
4 private airports and heliports.<sup>210</sup> Panesko and Butler point out that both the Supreme Court  
5 and the Board have found non-farm development on designated agricultural lands violates  
6 the GMA if such development undermines the GMA's mandate to conserve agricultural  
7 lands.<sup>211</sup>

8 Butler also asserts that LCC 17.30.610 permits family day cares and home business on ARL  
9 lands as primary uses as opposed to accessory uses, with no definition provided for these  
10 terms in the LCC.<sup>212</sup> Butler sees these uses as non-agricultural primary uses which violate  
11 the GMA.<sup>213</sup>

12 Lewis County argues LCC 17.30.590 implements the GMA's innovative zoning technique  
13 provisions, RCW 36.70A.177, by recognizing that not all of the soils within a parcel may be  
14 prime. According to the County, rather than splitting the parcel by having a mixed  
15 designation or zoning, the entire parcel may be designated agricultural and uses permitted  
16 which will not adversely impact the productivity of the agricultural activity on the prime  
17 soils.<sup>214</sup> Similarly, Lewis County argues LCC 17.30.620(9) specifically implements  
18 .177(3)(b)(ii) which provides for parallel language.<sup>215</sup>

19 Lewis County asserts LCC 17.30.620(4) was not amended and has previously been  
20 approved by the Board in 2004 so long as the landing fields are directly connected with and  
21 in aid of an agricultural activity.<sup>216</sup> As for LCC 17.30.610, the County contends non-farm

22 <sup>209</sup> Panesko Compliance Objections, at 25.

<sup>210</sup> Butler Compliance Objections, at 36-37.

<sup>211</sup> Butler Compliance Objections, at 34-35; Panesko Compliance Objections, at 25 (citing to *Lewis County*,  
157 Wn.2d at 507-508 (2006)).

<sup>212</sup> Butler Compliance Objections, at 33-34; Butler Compliance Reply, at 13

<sup>213</sup> Butler Compliance Reply, at 13.

<sup>214</sup> County Compliance Response – Panesko, at 25-26.

<sup>215</sup> County Compliance Response – Panesko, at 26.

<sup>216</sup> County Compliance Response – Butler, at 23-24.

1 activities which do no negatively impact the ability to use land for agricultural activities, such  
2 as family day cares and home businesses, which must be within the provider's home, are  
3 not prohibited under the GMA.<sup>217</sup>

### 4 **Board Discussion**

#### 5 ***Failure to protect ARL by allowing non-agricultural uses***

6 The foundation for Petitioners' arguments in regard to the cited CP policies and the LCC  
7 provisions is that the County is failing to adequately protect agricultural land by creating  
8 situations where incompatible, non-agricultural uses will be permitted. The County asserts  
9 LCC 17.30.590 (Use Exceptions), 17.30.610 (Primary Uses), 17.30.620 (Accessory Uses),  
10 and 17.30.650 (Subdivision Development) are all consistent with RCW 36.70A.177 and, in  
11 the same regard, NR 1.6 and 1.7 recognize the legislative intent behind this RCW provision  
12 which permits development within the ARL so long as the land is conserved and the  
13 agricultural economy is encouraged with a focus on using land with poor soil or otherwise  
14 not suitable for agriculture.

#### 15 ***-Uses – Exceptions, Primary, and Accessory (LCC 17.30.590, .610, and .620, NR 1.6 16 and 1.7)***

17 RCW 36.70A.177 allows for innovative zoning techniques and accessory uses on  
18 agricultural land. Pursuant to this provision, "a county or city should encourage  
19 nonagricultural uses to be limited to lands with poor soils or otherwise not suitable for  
20 agricultural purposes." Petitioners are correct that the State Supreme Court has earlier held  
21 that permitting inconsistent uses on or adjacent to resource lands does not comply with  
22 RCW 36.70A.060.<sup>218</sup> However in the *Lewis County* case, the Court noted the Board's  
conclusion that the non-farm uses allowed within farmlands, including mining, residential  
subdivisions, telecommunications towers and public facilities, "are not limited in ways that  
would ensure that they do not impact resource lands and activities negatively" and, thus,

<sup>217</sup> County Compliance Response – Butler, at 21-22.

<sup>218</sup> *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 506, 139 P.3d 1096 (2006).

1 substantially interfere with achieving the GMA goal of maintaining and enhancing the  
2 agricultural industry. In other words, it was the impacts that any non-farm uses generated  
3 that needed to be considered. In the present case, LCC 17.30.590 requires that a property  
4 owner applying for a use exception must use the special use process of LCC 17.115. The  
5 applicable provision, LCC 17.115.030(7) requires a showing that “Such uses shall  
6 demonstrate that the use does not adversely affect the overall productivity of the total  
7 resource parcel for the intended resource use by reason on the nonresource activity  
8 proposed.” We conclude that LCC 17.30.590, in conjunction with LCC 17.115.030(7),  
9 appropriately conserves agricultural lands and is allowed under RCW 36.70A.177.

8 As for LCC 17.30.610, the Board concurs with the County’s interpretation of its ordinance in  
9 that hydroponic greenhouses fall within the definition of “horticulture” and “other agricultural  
10 activities and therefore are allowed as primary uses in ARL.<sup>219</sup>

10 With regard to family day care and home businesses,<sup>220</sup> according to the County’s  
11 Resource Lands regulations, primary uses are those allowed outright and accessory uses  
12 are allowed only if they are directly connected with and aid an agricultural activity.<sup>221</sup> Lewis  
13 County also allows for incidental uses – those uses which may provide supplementary  
14 income without detracting from the overall productivity of the farming activity. The Board  
15 notes that RCW 36.70A.177 permits the use of innovative zoning techniques but specifically  
16 prohibits non-farm uses of agricultural land and relegates other non-agricultural uses to the  
17 status of *accessory* and to those areas with poor soils or otherwise unsuitable for  
18 agricultural purposes. The Board reads this provision, in conjunction with the GMA’s  
19 mandate for agricultural conservation, to mean that the only primary use of ARL lands is one  
20 that is agricultural, all other uses are subordinate to this.

19 The Board further notes that the County’s development regulations do not specifically define  
20 “family day care” or “home business” therefore, the Board shall give these terms their

21 <sup>219</sup> Deference should be given to the County’s interpretation of its own ordinances. *King County v. CPSGMHB*,  
91. Wn. App. 1, 23, 951 P.2d 1151 (1998).

22 <sup>220</sup> In the Board’s opinion, a family day care is, in fact, a type of home business.

<sup>221</sup> LCC 17.30.610 and 17.30.620

1 ordinary and customary meaning which, for both, relate to a use that is conducted by the  
2 owner/occupant of a residence and is secondary to the use of the structure as a dwelling  
3 unit.<sup>222</sup> Therefore, under the GMA and the County's own regulations, family day cares and  
4 home business must be considered either "accessory" or "incidental" as such uses are  
intended to provide supplementary, not primary, income to the farm.<sup>223</sup>

5 With LCC 17.30.610, Lewis County has assigned family day cares and home businesses  
6 the status of "primary"; the GMA permits, under certain circumstances, such uses to be  
7 "accessory" uses and therefore, Lewis County fails to comply with RCW 36.70A.177 which  
permits nonagricultural uses accessory uses within agricultural lands.

8 As for LCC 17.30.620, while Petitioner objects to the provision of LCC 17.30.620 which  
9 allows nonagricultural accessory uses on up to one acre of agricultural land, this provision is  
10 taken essentially verbatim from RCW 36.70A.177(3)(b)(ii). Clearly, the Legislature  
11 determined that a limited conversion of agricultural land for nonagricultural activities was  
12 appropriate. The County is merely implementing the will of the Legislature, and there is no  
error.

13 **Conclusion:** Petitioner has failed to demonstrate that LCC 17.30.590 is clearly erroneous.  
14 Petitioner has failed to demonstrate that County Policy NR 1.6 is clearly erroneous.  
15 With LCC 17.30.610, Lewis County has assigned family day cares and home businesses  
16 the status of "primary"; the GMA permits, under certain circumstances, such uses to be  
17 "accessory" uses and therefore, Lewis County fails to comply with RCW 36.70A.177 which  
permits nonagricultural uses accessory uses within agricultural lands.

18 LCC 17.30.620 implements RCW 36.70A.177(3)(b)(ii). Petitioner has failed to demonstrate  
19 that LCC 17.30.620 is clearly erroneous.

20 <sup>222</sup> Further guidance can be gleaned from LCC 17.30.170 which define "Home-Based Industries" and requires  
21 this use to be "accessory, incidental, and secondary to the use of the building for dwelling purposes." In  
22 addition, LCC 17.30.760, which applies to mineral resource lands, limit home occupations to accessory uses.  
Lastly, the Board notes that LCC 17.115.030(8) subjects a "home business" to review by the hearing examiner  
as a special use; such review would not be required by uses permitted out right

<sup>223</sup> LCC 17.30.630

1                   **-Parcelization/Subdivision of ARL: LCC 17.30.650**

2 Both Panesko and Butler contend LCC 17.30.650 permits the subdivision of parcels in  
3 areas of prime soils if the site has previously been converted to non-crop related agricultural  
4 uses, including residential and farm or shop buildings.<sup>224</sup> Butler contends LCC 17.30.650  
5 permits, under certain circumstance, clustered or small lot zoning on lands with prime soils  
6 and provides for non-agricultural development that is unrelated to the principal use and at  
7 densities inconsistent with agriculture.<sup>225</sup> Butler further argues LCC 17.30.650 permits the  
8 subdivision of lands having prime soils when existing buildings are located on such land and  
9 does not prevent the erection of new buildings after the subdivision has taken place.<sup>226</sup>  
10 Lastly, Butler contends there is no limiting language in this provision assuring that the  
11 agricultural activity would not be negatively impacted.<sup>227</sup> Both Petitioners argue the  
12 doctrine of *res judicata* is applicable in this situation because both this Board and the *Lewis*  
13 *County* court have held such a subdivision invalid.<sup>228</sup>

14 The County contends LCC 17.30.650 is “consistent with and implements the innovative  
15 zoning techniques authorized by RCW 36.70A.177.”<sup>229</sup> According to the County, this  
16 provision has safeguards which limit total density to 1 du/20 acres, even on already  
17 developed land, thereby requiring the protection of prime soils while recognizing that  
18 existing buildings and roads may have “already consumed prime soils.”<sup>230</sup>

19 **Board Discussion**

20 <sup>224</sup> Panesko Compliance Objections, at 26; Panesko HOM Brief, at 6; Butler Compliance Objections, at 34-36.

21 <sup>225</sup> Butler Compliance Objections, at 34-36.

22 <sup>226</sup> Butler Compliance Reply, at 13-14.

<sup>227</sup> Butler Compliance Reply, at 14.

<sup>228</sup> Panesko Compliance Objections, at 26; Butler Compliance Objections, at 34

<sup>229</sup> County Compliance Response – Panesko, at 27; County Compliance Response – Butler, at 22.

<sup>230</sup> County Compliance Response – Panesko, at 27; County Compliance Response – Butler, at 22-23.

1 A similar question has been before this Board in prior proceedings<sup>231</sup> and, as noted by  
2 Butler, was addressed by the Supreme Court in the 2005 *Lewis County* decision. In *Lewis  
County*, the Court stated:

3  
4 In concluding that Lewis County's permitting of nonfarm uses could "impact  
5 resource lands and activities negatively" and therefore *substantially interferes*  
6 *with maintaining and enhancing the farm industry*, the Board essentially  
7 interpreted the GMA to *prohibit negative impacts on agricultural lands and  
activities*. That is consistent with the directive to conserve designated  
8 agricultural lands, the goal of maintaining and enhancing the agricultural  
9 industry, and the holding that *innovative zoning may not undermine  
10 conservation*.<sup>232</sup>

11 Therefore, with the guidance given by our Supreme Court, the Board must determine  
12 whether Lewis County, with the amendments to LCC 17.30.650, has adopted innovative  
13 zoning techniques which do not undermine the GMA's agricultural conservation mandate by  
14 prohibiting uses and activities which may negatively impact such resource lands and the  
15 industry that relies on them.

16 LCC 17.30.630(2)(a) permits residential subdivisions as an incidental activity, which  
17 according to the County's own language, is a use which provides supplementary income  
18 without detracting from the overall productivity of the farming activity. With LCC 17.30.650,  
19 the County is permitting the subdivision of parcels 20 acres and greater but does provide  
20 that lots under five acres in size may be subdivided so long as the total density on the entire  
contiguous ownership (the "parent" farm), including existing dwellings, does not exceed 1  
dwelling unit per 20 acres (1 du/20acres). The Board notes that with the application of  
clustering a residential development may appear urban, but the GMA permits clustering  
and, with a required density of 1 du/20 acres, the overall density of the site will be consistent  
with the County's overall ARL zoning density. The Board finds no error in this approach.

21 <sup>231</sup> See FDO 99-2-0027c and FDO/Compliance Order 00-2-0031c/99-2-0027c. Both of these decisions were  
22 rendered prior to the Legislature's amendments to RCW 36.70A.177 in 2004 and 2006.

<sup>232</sup> *Lewis County*, 157 Wn 2d at 509 (emphasis added)(internal citations omitted)

1 In addition, the County is requiring, with the exception of lands where the prime soils have  
2 previously been converted to non-crop related agricultural uses, that the subdivision does  
3 not affect the prime soils on the contiguous (parent farm) holding. What this provision fails  
4 to recognize is that under the GMA agricultural is not limited to crop production but includes  
5 such non-crop related activities as dairies, poultry farms, and fish hatcheries - all of these  
6 activities require structures which may overlay prime soils. To allow for conversion of  
7 previously converted prime soils based on "non-crop" related uses effectively negates the  
8 GMA's mandate to maintain that portion of the agricultural industry which does not produce  
9 crops and, in essence, permits a poultry barn on prime soils to become a residential  
10 subdivision merely because it does not involve crop production despite the fact that the use  
11 is agricultural and has prime soils. If conversion should be permitted to occur, it should  
12 occur to favor the retention of those areas with prime soil, not for the long-term removal of  
13 lands from agricultural use.<sup>233</sup>

11 In addition, LCC 17.30.650 states that the plat shall be subject to the covenants and  
12 protections set forth in LCC 17.30.680, but the County has repealed that section (as it  
13 relates to covenants) and .680 now address non-regulatory incentives such as conservation  
14 easements and open space tax credits. In other words, the notice provisions as to the  
15 inevitability of agricultural activities and the potential that such activities are incompatible  
16 with residential development no longer exists. The Board notes that Lewis County has a  
17 Right to Farm Ordinance, LCC 17.40, and that the notice provisions are set forth in these  
18 code provisions. However, even LCC 17.40 contains error with a reference to a plat  
19 approved pursuant to LCC 17.30.660, a provision now relating to setback for structures.

18 **Conclusion:** For the reasons set forth above, the Board finds and concludes that LCC  
19 17.30.650 undermines the GMA's agricultural conservation mandate by failing to adequately  
20 prevent against negative impacts to agricultural resource lands and conserve the industry  
21 that relies on them.

22 <sup>233</sup> *Redmond v. CPSGMHB*, 142 Wn.2d at 562 (innovative zoning was non-compliant because it would result  
in a long-term removal of agricultural land, possibly never returning to agricultural use).

## INVALIDITY

### Positions of the Parties

No party to this consolidated and coordinated proceeding set forth a specific issue in regard to invalidity.<sup>234</sup> Reference was made in the compliance briefing as to “substantial interference”<sup>235</sup> and to a need for invalidity to be maintained.<sup>236</sup> However, only Butler argues that invalidity is warranted in Case No. 08-2-0004c and submits a brief in that regard.<sup>237</sup> Butler seeks invalidity because “there is every reason to believe development permits will be sought in at least some of the areas left improperly undesignated by the County as agricultural land, and for the impermissible uses allowed by Lewis County code.”<sup>238</sup> At the HOM, Futurewise/Butler<sup>239</sup> orally moved to supplement the record with an Amended Staff Report, dated February 22, 2008. Futurewise/Butler asserted that this is relevant to the issue of invalidity because it shows that a substantial number of development applications are pending on properties subject to the moratorium issued by the County after the Board’s Order of Invalidity. The Board admitted the Exhibit to the Record.

The County asserts that Butler fails to provide any evidence or reasoning in support of the argument that “there will be a rush of applications,” rather Petitioner’s contention is mere speculation and generalization which does not satisfy the GMA’s requirements for invalidity.<sup>240</sup> The County argues that residential development does not *per se* harm farming, and densities permitted on ARL lands by the County do not substantially interfere with the goals of the GMA.<sup>241</sup>

### Board Discussion

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<sup>234</sup> See January 18, 2008 Prehearing Hearing Order – Issues Presented (Section II).

<sup>235</sup> See Butler Compliance Objections, at 43; Butler Compliance Reply, at 16

<sup>236</sup> See Panesko Compliance Objections, at 26; Panesko Compliance Reply, at 11.

<sup>237</sup> Futurewise/Butler HOM Brief, at 4.

<sup>238</sup> Futurewise/Butler HOM Brief, at 4.

<sup>239</sup> At the HOM and in some of the briefing, the interests of Petitioner Butler were represented by Keith Scully of Futurewise.

<sup>240</sup> County Response – Futurewise/Butler, at 2.

<sup>241</sup> County Response – Futurewise/Butler, at 2-3.

1 As noted above, Butler seeks an additional finding invalidity because “there is every reason  
2 to believe development permits will be sought in at least some of the areas left improperly  
3 undesignated by the County as agricultural land, and for the impermissible uses allowed by  
4 Lewis County code.”<sup>242</sup> Amended Staff Report, dated February 22, 2008 provides evidence  
5 to support that allegation. Therefore, a new finding of invalidity will be imposed in LCC  
6 17.30.650 due to the possibility that new subdivisions on lands with agricultural uses on  
7 non-prime soils could vest and fail to conserve the natural resource industry.

8 Additionally, based on the foregoing order, it is clear that the County has much additional  
9 work to do in properly designating agricultural resource lands. The Board previously has  
10 found that the County’s designation and mapping of agricultural resource lands substantially  
11 interferes with Goal 8 of the GMA. For the reasons stated in this order, the adoption of  
12 Resolution 07-306, which amends the Lewis County Comprehensive Plan, including ARL  
13 maps and Ordinance 1197, which amends the Lewis County Code, and designates ARL  
14 zones on the Official Zoning Map has not sufficiently addressed the concerns that warranted  
15 the imposition of invalidity by prior Board order, and the Board will not lift invalidity at this  
16 time.

17 **Conclusion:** Petitioner Butler has adequately demonstrated that a new finding of invalidity  
18 is warranted for LCC 17.30.650. Additionally, based on this set of facts and the findings  
19 conclusions in this order, it is premature to lift the Board’s earlier invalidity order while the  
20 County still has not properly designated its agricultural resource lands.

## 21 VII. FINDINGS OF FACT

- 22 1. Lewis County is a county located west of the crest of the Cascade Mountains that is  
required to plan pursuant to RCW 36.76A.040.
2. On February 13, 2004 this Board entered an Order Finding Noncompliance and  
Imposing Invalidity regarding the Lewis County’s designation of agricultural resource  
lands of long-term commercial significance.

<sup>242</sup> Futurewise/Butler HOM Brief, at 4.  
COMPLIANCE ORDER and FINAL DECISION AND ORDER  
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- 1 3. On May 21, 2005 the Board entered an Order Granting Reconsideration of Extent of  
2 Invalidity and on June 8, 2007 an Order Finding Noncompliance, Imposing a  
3 Determination of Invalidity and Setting a New Schedule for Compliance.
- 4 4. On November 5, 2007 Lewis County adopted Resolution 07-306, which amends the  
5 Lewis County Comprehensive Plan, including ARL maps and Ordinance 1197, which  
6 amends the Lewis County Code, and designates ARL zones on the Official Zoning  
7 Map.
- 8 5. With Ordinance No. 1197, the BOCC adopted amendments to various provisions of  
9 the Lewis County Code (LCC), including zoning maps and development regulations,  
10 pertaining to agricultural and rural lands, and WAC application methodology and  
11 analysis.
- 12 6. With Resolution No. 07-306, the BOCC adopted various amendments to the County's  
13 Comprehensive Plan (CP), including land use designations and ARL related narrative  
14 and policies.
- 15 7. The amended maps designate approximately 43,485 acres as ARL land and revise  
16 corresponding revisions to rural designations.
- 17 8. On November 9, 2007, Lewis County filed its Compliance Report.
- 18 9. On January 4, 2008 Dennis Hadaller filed a Petition for Review, assigned case No.  
19 08-2-0002.
- 20 10. Also on January 4, 2008 Eugene Butler and Futurewise filed a Petition for Review,  
21 assigned case No. 08-20003
- 22 11. On January 9, 2008 Vince Panesko filed a Petition for Review and on January 14,  
2008 this Board entered an Order of Consolidation under case No. 08-2-0004c.
12. The County chose to designate Hadaller's property as agricultural based on soil  
capability and the ten ARL designation criteria.
13. Hadaller offered no argument to demonstrate the arbitrary nature of the County's  
action.
14. Lewis County's public participation program is found at LCC 17.12.

- 1 15. This program requires the County to provide public notice of proposed actions, and  
2 workshops and public hearings before the County Planning Commission and Board of  
3 County Commissioners.
- 4 16. The County's report on compliance details that, in addition to Planning Commission  
5 workshops on ARLs over the past few years, the Planning Commission has held nine  
6 workshops and two public hearings since the May 10, 2007 remand hearing.
- 7 17. County staff explained the ARL topics that would be considered at each workshop  
8 and the public was given an opportunity to offer oral comments during the "good of the  
9 order" section before the end of each workshop.
- 10 18. In accordance with LCC 17.12.050(1)(b), the public could submit written comments  
11 on any topic on the agenda.
- 12 19. In addition to the nine Planning Commission workshops, there were two days of public  
13 hearings before the Planning Commission.
- 14 20. Following the Planning Commission hearings, there were opportunities to be heard  
15 before the Board of County Commissioners in public hearings on October 29 and 30,  
16 2007.
- 17 21. The County's Report on Compliance indicates that the proposed amendments were  
18 posted at libraries and community centers on August 31, 2007 in accordance with  
19 LCC 17.12.050.
- 20 22. The proposal showed the proposed ARLs as well as other areas that warranted  
21 further study by the Planning Commission.
- 22 23. The proposal posted on August 31, 2007 was available for the public to comment on  
at the September 11, 2007 workshop and the subsequent public hearings on  
September 18 and 19, 2007.
24. The public had the opportunity to submit written comments on the summaries until the  
Planning Commission made its recommendation on October 2, 2007.
25. Subarea summaries for lands considered for ARL designation were prepared to  
capture the Planning Commission's analysis.

- 1 26. The County's consultant, who was present throughout the Planning Commission's  
2 deliberations, prepared the summaries, including the use of the WAC criteria, based  
3 on the Planning Commission discussions on the use of those criteria.
- 4 27. While the summaries were not part of the proposal, the public had an opportunity to  
5 comment on them at a September 25, 2007 Planning Commission workshop and to  
6 submit comments to the Planning Commission until September 26, 2007.
- 7 28. The public had additional opportunities to comment at the October 29 and 30, 2007  
8 Board of County Commissioner hearings.
- 9 29. Under the NRCS's definition of "prime farmland", prime farmland "has the soil  
10 quantity, growing season, and moisture supply needed to economically produce high  
11 yields of crops . . . In general prime farmlands have an adequate and dependable  
12 water supply from precipitation or irrigation . . . [and] are not excessively erodible or  
13 saturated by water for a long period of time"
- 14 30. Under the NRCS classification soils are "prime", "prime if drained" or "prime if  
15 irrigated". The latter two categories are prime only with some intervention by the  
16 landowner. They are not prime in the absence of that intervention.
- 17 31. The County did not consider "prime if drained" or "prime if irrigated" lands for ARL  
18 designation even where such lands are in fact drained or irrigated.
- 19 32. The Planning Commission and BOCC used the subarea maps during its review of  
20 land under consideration for ARL designation to consider geographic boundaries.  
21 Within each subarea, the County was able to focus, as necessary, and to view  
22 specific uses, soils, valuation, aerial photographs, and other information.
33. The 2002 Census of Agriculture does not establish ARLs. Instead, the Census merely  
identifies agricultural activities and acreages for those persons reporting gross farm  
income greater than \$1,000. Reliance upon the Census is not the mechanism  
established by the Legislature for the identification of ARL lands.
34. The County's definition of "Agricultural land-Agricultural resource land" in its  
comprehensive plan closely follows the definition contained in RCW 36.70A.030(2).

- 1 35. In designating agricultural lands of long term commercial significance, the County first  
2 excluded lands that were not, pursuant to NRCS soils data, prime soils and then  
3 further excluded lands which by their land use designation and/or ownership, would  
4 not qualify for designation, narrowing the universe of lands to be considered. The  
5 County then developed subareas to recognize the “geographic boundaries for the  
6 Planning Commission and BOCC to consider when applying the WAC criteria within a  
7 specific subarea” and permitted a “zoom in to view parcel-level development and to  
8 zoom out to view regional conditions.” Because of Lewis County’s geographical and  
9 economical diversity, the Planning Commission determined that weighing the  
10 designation criteria identically throughout the County did not provide for a rational  
11 evaluation of the long-term significance of all lands in Lewis County for commercial  
12 production of agriculture nor did it give consideration and flexibility for specific areas.
- 13 36. When considering whether a parcel was capable of being used for agricultural  
14 production, the County discounted for the slope of the area and flooding. However,  
15 when placing soils into capability classes the NRCS already accounted for the slope  
16 of the area as well as other limitations such as erosion, drainage, and flooding.
- 17 37. The County did not consistently apply the criteria when analyzing varying subareas,  
18 with criteria being given differing weight in different subareas, based, particularly, on  
19 their proximity to the “I-5 Corridor” or certain regions of the County (e.g. UGAs with  
20 growth potential or western side of the County), and the cities’ desire but  
21 undocumented need for expanded UGAs – primarily in the name of potential for  
22 future economic development.
38. It is unclear from the record the exact scope of the “I-5 Corridor” but, from the sub-  
area maps designating agricultural lands no ARL was designated along the corridor  
which runs from the northern border to the southern border of the County. From this  
perspective, it would appear that the County intends to encourage development along  
the continuum of the I-5 Corridor, creating what could only be described as a  
industrial/commercial strip development bisecting the County from north to south  
along miles of a limited access highway.

- 1 39. The County inappropriately considered the presence of industrial activity and tight  
2 line sewer lines in its analysis.
- 3 40. No documented need exists in the record that shows that the County needs this land  
4 to accommodate the 20-year population growth or commercial and industrial needs or,  
5 that the County looked to other lands to accommodate these needs.
- 6 41. The “I-5 Corridor” lands which may have met the criteria for ARL were excluded on  
7 the basis of a single determination – proximity to the “I-5 Corridor” – with that factor  
8 being weighed more heavily than any other.
- 9 42. The occurrence of non-soil dependant uses such as Christmas tree farming or poultry  
10 operations certainly reflects upon the productivity of the land. The GMA seeks to  
11 enhance and maintain natural resource industries, not merely the prime soils upon  
12 which many but not all such industries depend.
- 13 43. The County’s definition of “agricultural land” or “agricultural resource land” at LCC  
14 17.30.080 clearly includes “land primarily devoted to the commercial production of . . .  
15 grain, hay, straw, turf . . .”.
- 16 44. Hydroponic greenhouses fall within the definition of “horticulture” and “other  
17 agricultural activities and therefore are allowed as primary uses in ARL.
- 18 45. The County’s ARL designation process did not consider for ARL designation lands  
19 currently designated as forest lands of long-term commercial significance.
- 20 46. Hadaller relied on Proposed Exhibit 506 to support his argument that this soil can be  
21 marginal in certain contexts, and in this particular hydro-geological context, it is a poor  
22 agricultural soil. However, the Board had previously denied the supplementation of  
the record with this exhibit, finding that a study, consisting of information not  
presented to the County before it took its challenged action would not “be necessary  
or of substantial assistance to the board in reaching its decision”.
47. The County’s Compliance Report details a far more involved process employed for  
the ARL designations than using soil type as a single, determinative criterion for  
designation of land as ARL land.

1 48. LCC 17.30.590 requires that a property owner applying for a use exception must use  
2 the special use process of LCC 17.115. The applicable provision, LCC 17.115.030(7)  
3 requires a showing that "Such uses shall demonstrate that the use does not adversely  
4 affect the overall productivity of the total resource parcel for the intended resource use  
by reason on the nonresource activity proposed."

5 49. LCC 17.30.620 which allows nonagricultural accessory uses on up to one acre of  
6 agricultural land, this provision is taken, word for word, from RCW  
36.70A.177(3)(b)(ii).

7 **Findings Related to Invalidity**

8 50. LCC 17.30.650 states that the plat shall be subject to the covenants and protections  
9 set forth in LCC 17.30.680. However, the County has repealed that section (as it  
10 relates to covenants) and LCC 17.30.680 now address non-regulatory incentives such  
11 as conservation easements and open space tax credits. The notice provisions as to  
the inevitability of agricultural activities and the potential that such activities are  
incompatible with residential development no longer exists.

12 51. LCC 17.30.650 permits the subdivision of parcels in areas of prime soils if the site has  
13 previously been converted to non-crop related agricultural uses, including residential  
and farm or shop buildings.

14 52. LCC 17.30.650 permits, under certain circumstance, clustered or small lot zoning on  
15 lands with prime soils and provides for non-agricultural development that is unrelated  
16 to the principal use and at densities inconsistent with agriculture.

17 53. LCC 17.30.650 permits the subdivision of lands having prime soils when existing  
18 buildings are located on such land and does not prevent the erection of new buildings  
after the subdivision has taken place.

19 54. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.

20 **VIII. CONCLUSIONS OF LAW**

21 A. The Board has jurisdiction over the parties to this action.

22 B. The Board has jurisdiction over the subject matter of this action.

- 1 C. Petitioner Panesko has standing to raise the issues in this case.
- 2 D. Petitioner Butler has standing to raise the issues in this case.
- 3 E. Petitioner Hadaller has standing to raise the issues in this case.
- 4 F. Petitioner Futurewise has standing to raise the issues in this case.
- 5 G. Hadaller has not demonstrated that the County has violated the GMA's property  
rights goal. The Board has no jurisdiction to determine if an unconstitutional taking of  
6 private property has occurred.
- 7 H. Panesko has failed to carry his burden of establishing that the County violated the  
public participation requirements of the GMA.
- 8 I. A mediation process to consider lands for ARL designation is not within the Board's  
power to impose.
- 9 J. The County's use of retained experts to assist in the ARL designation process was  
10 not a violation of GMA's public participation requirements.
- 11 K. Petitioners proposal of additional meetings of the Planning Commission where the  
sole purpose would be to confirm that staff had made requested changes is not  
12 required by the GMA or the Lewis County code and does not violate RCW  
36.70A.140 or RCW 36.70A.035.
- 13 L. Petitioner's allegation of a violation of RCW 42.30.060(1), is a matter outside the  
14 Board's jurisdiction.
- 15 M. There is no GMA obligation to circulate public comment materials to other members  
of the public for consideration.
- 16 N. It is not a clearly erroneous violation of RCW 36.70A.170 for the County to not  
17 consider "prime if drained" and "prime if irrigated" lands as prime soils.
- 18 O. It was clear error for the County not to consider ARL designation for those prime if  
19 drained" and "prime if irrigated" lands that are in fact drained or irrigated and this  
does not comply with RCW 36.70A.170.
- 20 P. It was not error for the County to use the NRCS 2006 publication in classifying soils.  
21 The GMA does not require use of Handbook 210 and the use of this publication does  
22 not violate RCW 36.70A.170.

- 1 Q. Petitioner Panesko has failed to demonstrate that the County's process for viewing  
2 the areas under consideration for ARL designation was made at an inappropriate  
3 level of detail.
- 4 R. The County did not fail to properly define agriculture by not including the phrase  
5 "capable of being farmed" within it. The County's definition of "Agricultural land-  
6 Agricultural resource land" in its comprehensive plan closely follows the definition  
7 contained in RCW 36.70A.030(2).
- 8 S. By excluding from consideration for ARL designation non-soil dependant uses the  
9 County failed to maintain and enhance those uses and this exclusion violates RCW  
10 36.70A.170 and RCW 36.70A.020(8). The County is not required to designate all  
11 non-soil dependant agricultural uses ARL, but it may not exclude them solely on the  
12 basis on non-prime soils.
- 13 T. Petitioner has failed to carry his burden of proof that the County failed to include the  
14 raising of grain, hay, straw and turf in the definition of agricultural uses in LCC  
15 17.30.610, an alleged violation of RCW 36.70A.030(2), (10) and RCW 36.70A.060.
- 16 U. By commencing their review based solely on the presence of prime soils, the County  
17 failed to consider a key element of the GMA's definition for agricultural land – that the  
18 land is primarily devoted to commercial agriculture, which the state Supreme Court  
19 has concluded means that land is actually used or capable of being used for  
20 agricultural production. This failure does not comply with RCW 36.70A.170.
- 21 V. By failing to initially base its methodology on an evaluation of parcels within Lewis  
22 County that are actually being used or are capable of being used for agricultural, the  
County inappropriately narrowed the universe of land beyond that anticipated by the  
Legislature when it defined agricultural land. This does not comply with RCW  
36.70A.170 and RCW 36.70A.020(8).
- W. The County's desire to further economic development can not outweigh its duty to  
designate and conserve agricultural lands so as to assure the maintenance and  
enhancement of the agricultural industry. By weighing its desire for economic  
development and undocumented needs of the cities' UGAs above the agricultural

1 conservation goal (Goal 8), the County does not comply with RCW 36.70A.170 and  
2 RCW 36.70A.020(8).

3 X. Lewis County erred in its use of proximity to the “I-5 Corridor” and relationship or  
4 proximity to urban growth areas when determining which lands should be designated  
5 as ARL and failed to comply with the goals and requirements of the GMA, RCW  
6 36.70A.020(8), .030(2), .050, and .170. This does not comply with RCW  
7 36.70A.020(8).

8 Y. The County’s ARL designation process failed to consider for ARL designation lands  
9 currently designated as forest lands of long-term commercial significance and this  
10 does not comply with RCW 36.70A.170 and RCW 36.70A.020(8).

11 Z. Petitioner Hadaller has failed to demonstrate that the County’s designation of his  
12 property as ARL was clearly erroneous.

13 AA. Panesko has failed to carry his burden of proof that the County has violated  
14 RCW 36.70A.060 in not including designation criteria in the LCC.

15 BB. Petitioner has failed to demonstrate that LCC 17.30.590 is clearly erroneous.

16 CC. Petitioner has failed to demonstrate that County Policy NR 1.6 is clearly  
17 erroneous.

18 DD. With LCC 17.30.610, Lewis County has assigned family day cares and home  
19 businesses the status of “primary”; the GMA permits, under certain circumstances,  
20 such uses to be “accessory” uses and therefore, Lewis County fails to comply with  
21 RCW 36.70A.177 which permits nonagricultural uses accessory uses within  
22 agricultural lands.

EE. LCC 17.30.620 implements RCW 36.70A.177(3)(b)(ii). Petitioner has failed to  
demonstrate that LCC 17.30.620 is clearly erroneous.

FF. LCC 17.30.650 undermines the GMA’s agricultural conservation mandate by  
failing to adequately protect against negative impacts to agricultural resource lands  
and the industry that relies on them and does not comply RCW 36.70A.060 and  
substantially interferes with RCW 36.70A.020(8).

1 GG. It is premature to lift the Board's earlier invalidity order while the County still  
2 has not properly designated its agricultural resource lands. The County's designation  
3 process in does not comply with RCW 36.70A.170 and continues to substantially  
interfere with RCW 36.70A.020(8).

4 HH. Any Conclusion of Law later determined to be a Finding of Fact is adopted  
5 as such.

**IX. ORDER**

6 The County is ordered to achieve compliance in accordance with this decision no later than  
7 February 6, 2009. The following schedule shall apply unless altered by written order of the  
8 Board:

Item	Date Due
<b>Compliance Due</b>	<b>February 6, 2009</b>
Compliance Report and Index to Compliance Record	February 13, 2009
Objections to a Finding of Compliance	February 27, 2009
Response to Objections	March 20, 2009
<b>Compliance Hearing</b>	<b>April 10, 2009</b>

12 DATED this 7th day of July, 2008.

13 \_\_\_\_\_  
14 James McNamara, Board Member

15 \_\_\_\_\_  
16 Holly Gadbaw, Board Member

17 Pursuant to RCW 36.70A.300 this is a final order of the Board.

18 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the  
19 mailing of this Order to file a petition for reconsideration. Petitions for  
20 reconsideration shall follow the format set out in WAC 242-02-832. The original and  
21 three copies of the petition for reconsideration, together with any argument in  
support thereof, should be filed by mailing, faxing or delivering the document directly  
to the Board, with a copy to all other parties of record and their representatives.  
22 **Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),**

1 **WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for**  
2 **filing a petition for judicial review.**

3 **Judicial Review. Any party aggrieved by a final decision of the Board may appeal the**  
4 **decision to superior court as provided by RCW 36.70A.300(5). Proceedings for**  
5 **judicial review may be instituted by filing a petition in superior court according to the**  
6 **procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil**  
7 **Enforcement. The petition for judicial review of this Order shall be filed with the**  
8 **appropriate court and served on the Board, the Office of the Attorney General, and all**  
9 **parties within thirty days after service of the final order, as provided in RCW**  
10 **34.05.542. Service on the Board may be accomplished in person, by fax or by mail,**  
11 **but service on the Board means actual receipt of the document at the Board office**  
12 **within thirty days after service of the final order.**

13 **Service. This Order was served on you the day it was deposited in the United States**  
14 **mail. RCW 34.05.010(19)**

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## APPENDIX A PROCEDURAL HISTORY

On March 12, 2008, the Board held a consolidated Hearing on the Merits for Case Nos. 99-2-0027c, 00-2-0031c, and 08-2-0004c. The hearing was conducted at the Board's offices in Olympia, Washington. Board members Holly Gadbow and James McNamara were present, Board member McNamara presiding. Lewis County was represented by Andy Lane of Cairncross & Hemplemann; Petitioners Futurewise and Eugene Butler were represented by Keith Scully of Futurewise; Petitioner Dennis Hadaller was represented by Ben Cushman of the Cushman Law Offices; and Petitioner Vince Panesko appeared *pro se*.

Following are the filings received from the parties and orders issued by the Board for each of the matters:

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**Butler, et al v. Lewis County, Case No. 99-2-0027c**  
**Panesko, et al v. Lewis County, Case No. 00-2-0031c**<sup>243</sup>

On June 30, 2000, the Board issued its Final Decision and Order in *Butler, et al v. Lewis County*, Case No. 99-2-0027c.

On March 5, 2007, the Board issued its Final Decision and Order (FDO) in *Panesko, et al v. Lewis County*, Case No. 00-2-0031c. This FDO was coordinated with the *Butler* matter and therefore, also served as a Compliance Order for the *Butler* case.

On February 13, 2004, the Board issued its Order Finding Non-Compliance and Imposing Invalidity.

On May 21, 2004, the board issued Order Considering the Extent of Invalidity.

On December 23, 2004, the Lewis County Superior Court upheld the Board's 2004 Orders.

The Washington Supreme Court reversed in part (the Board's application of the definition of agricultural land), and upheld the Board's decision on uses in agricultural lands and remanded the case to the Board for further proceedings.<sup>244</sup>

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<sup>243</sup> The Butler matter (99-2-0027c) arose from several Petitions for Review filed in 1999 challenging Lewis County's actions in regards to GMA planning. Since that time, the Board has issued its Final Decision and Order (March 5, 2001) and several orders pertaining to compliance. The Panesko matter (00-2-0031c) arose from several Petitions for Review filed in 2000 challenging Lewis County's actions in regards to GMA planning. Since that time, the Board has issued its Final Decision and Order (June 30, 2000) and several orders pertaining to compliance. The procedural history contained in this appendix pertains to matters relevant to the instant proceedings and commences with County's November 9, 2007 Report on Compliance.

1 On June 8, 2007, the Board issued its Order Finding Non-Compliance, Imposing a  
2 Determination of Invalidity, and Setting a New Schedule for Compliance.

3 On November 9, 2007, Lewis County timely filed its Report on Compliance, with 55  
4 attachments.

5 On November 21, 2007, Petitioner Butler filed a Motion for Continuance to File Objections to  
6 Compliance Report.

7 On November 26, 2007, the County filed its Opposition to Petitioners' Motion for  
8 Continuance.

9 On November 28, 2007, Petitioner Butler filed a Reply to County's Response to Motion for  
10 Continuance.

11 On November 28, 2007, Petitioner Panesko filed his Objections to a Finding of Compliance,  
12 with 20 attachments.

13 On November 30, 2007, the Board issued its Order Adjusting Briefing and Hearing  
14 Schedule on Compliance. The basis for the adjusted schedule was due to the parties  
15 reaching an amicable resolution as to the filing of Petitioner Butler's objections. This Order  
16 was subsequently amended on December 3, 2007.

17 On December 5, 2007, the County filed its First Amended Index to the Record.

18 On December 6, 2007, the Board received a Motion to Intervene from Dennis Hadaller, with  
19 11 attachments.

20 On December 7, 2007, the County filed its Response to Hadaller's Motion to Intervene.

21 On December 10, 2007, Petitioner Butler, et al. filed their Objections to the County's  
22 Compliance Report, with 42 attachments, several CD-Rs and maps.

On December 11, 2007, Petitioner Panesko filed an Objection to Hadaller's Motion to  
Intervene.

On December 13, 2007, Hadaller filed a Reply to Petitioner Panesko's Objections to the  
Motion to Intervene.

1 On December 14, 2007, Hadaller filed Objections to the County's Compliance Report, with  
eight attachments.

2 On December 20, 2007, the Board issued its Order Granting Intervention to Hadaller.

3 On January 4, 2008, Petitioner Butler, et al. filed their Response to Intervenor Hadaller, with  
4 four attachments.

5 On January 4, 2008, Lewis County filed its Response to Petitioner Panesko's Objections,  
with 19 attachments; its Response to Intervenor Hadaller's Objections, with four  
6 attachments; and its response to Petitioner Butler's Objections.

7 On January 4, 2008, Petitioner Panesko filed a Response to Intervenor Hadaller's  
Objections.

8 On January 7, 2008, Futurewise filed a Notice of Intent to Participate and a Joinder in  
9 Petitioners' [Butlers] Objections to a Finding of Compliance.

10 On January 14, 2008, Intervenor Hadaller filed a Reply to Lewis County and Petitioners  
Butler and Panesko's Responses to Hadaller's Objections.

11 On January 14, 2008, Petitioners Butler, et al. filed a Reply to Lewis County's Response to  
12 Objections, with one attachment.

13 On January 14, 2008, Petitioner Panesko filed a Reply to Lewis County's Response to  
Objections, with 11 attachments.

14 On January 18, 2008, the Board issued its Order Setting Compliance Hearing to Coordinate  
with Hearing on the Merits on New Petition for Review [Case No. 08-2-0004c] and Agenda.

15 On February 11, 2008, Petitioner Panesko filed a Motion to Add Illustrative Exhibits to the  
16 Index, with 25 attachments.

17 On February 25, 2008, the Board issued a letter notifying the parties that, as of March 3,  
18 2008, the matter has been assigned to a new Presiding Officer – James McNamara.

19 On February 28, 2008, Lewis County filed its response to Petitioner Panesko's Motion to  
Add Illustrative Exhibits to the Index.

20 On March 5, 2008, the Board issued its Order on Petitioner Panesko's Motion to Add  
21 Illustrative Exhibits. The Board denied the Petitioner's Motion.

22 On March 12, 2008, a Hearing on the Merits was held on this matter.

1 On March 17, 2008, Lewis County filed, via e-mail, material requested by the Board at the  
2 March 12, 2008 hearing.

3 **Hadaller, et al v. Lewis County, Case No. 08-2-0004c**

4 On January 4, 2008, Dennis Hadaller filed a Petition for Review and was assigned Case No.  
5 08-2-0002. Also on January 4, 2008, Eugene Butler and Futurewise filed a Petition for  
6 Review and was assigned Case No. 08-2-0003. Both of these petitions challenge the  
7 adoption of Ordinance No. 1197 amending the Lewis County Comprehensive Plan and  
8 Lewis County Codes relating to Agricultural Resource Lands.

9 On January 7, 2008, the Board issued its Order of Consolidation and Notice of Hearing and  
10 Preliminary Schedule. This Order consolidated Case Nos. 08-2-0002 and 08-2-0003 into a  
11 single, consolidated matter referenced as Case No. 08-2-0003c.

12 On January 9, 2008, Vince Panesko filed a Petition for Review and was assigned Case No.  
13 08-2-0004. Like the Hadaller and Butler/Futurewise petitions, this challenge sought review  
14 of Ordinance No. 1197.

15 On January 14, 2008, the Board issues its Order of Consolidation and Notice of Hearing  
16 and Preliminary Schedule. This Order consolidated Case Nos. 08-2-003c and 08-2-0004  
17 into a single, consolidated matter referenced as Case No. 08-2-0004c. Board member  
18 Margery Hite is Presiding Officer in these consolidated matters.

19 On January 17, 2008, the Board held a telephonic prehearing conference and, based on the  
20 discussions at the prehearing conference, the parties agreed to coordinate Case No. 08-2-  
21 0004c with the compliance hearing in WWGMHB Case Nos. 99-2-0027c and 00-2-0031c,  
22 including a single hearing and an expedited briefing schedule.

On January 18, 2008, the Board issued its Notice and Agenda for Hearing on the Merits.

On January 28, 2008, the County filed the Index to Record.

On February 7, 2008, Petitioner Hadaller filed a Prehearing Brief, with ten attachments. In  
conjunction with this filing, Petitioner Hadaller filed a Motion to Supplement the Record, with  
eight attachments.

On February 7, 2008, Petitioners Futurewise and Butler filed a Prehearing Brief. This brief  
adopted by reference the arguments set forth by Panesko as they related to the matters of  
Case 08-2-0004c.

On February 11, 2008, Petitioner Panesko filed a Prehearing Brief.

1 On February 14, 2008, the Board issued a letter notifying the parties that, as of March 3,  
2 2008, the matter has been assigned to a new Presiding Officer – James McNamara.

3 On February 25, 2008, Petitioner Panesko filed a Response to Petitioner Hadaller's  
4 Prehearing Brief. In conjunction with this filing, Petitioner Panesko filed a Motion to  
Supplement the Record, with five attachments.

5 On February 28, 2008, Petitioners Futurewise and Butler filed a Response to Petitioner  
Hadaller's Prehearing Brief.

6 On February 28, 2008, Lewis County filed its Response to Petitioners Futurewise and  
7 Butler's Prehearing Brief; Response to Petitioner Panesko's Prehearing Brief and Motion to  
8 Supplement the Record; and Response to Petitioner Hadaller's Prehearing Brief and Motion  
to Supplement the Record.

9 On March 4, 2008, the Board issued its Order on Petitioner Hadaller's Motion to Supplement  
the Record. The Board granted supplementation for two of the eight exhibits.

10 On March 5, 2008, the Board issued its Order on Petitioner Panesko's Motion to  
11 Supplement the Record. The Board denied supplementation, finding that the Motion was  
untimely.

12 On March 5, 2008, Petitioner Hadaller filed an Objection to Petitioners Futurewise, Butler,  
13 and Panesko's Response Briefs to Hadaller's Prehearing Brief.

14 On March 7, 2008, Petitioner Hadaller filed a Motion for Reconsideration of the Board's  
March 4, 2008 Order which denied, in part, Hadaller's Motion to Supplement the Record.

15 On March 12, 2008, a Hearing on the Merits was held on this matter.

16 On March 17, 2008, Lewis County filed, via e-mail, material requested by the Board at the  
17 March 12, 2008 hearing.

1 **APPENDIX B**  
2 **Issues on Appeal**

3 **Butler, et al v. Lewis County, Case No. 99-2-0027c**

4 **Panesko, et al v. Lewis County, Case No. 00-2-0031c**

5 On February 13, 2004, the Board issued its Order Finding Non-Compliance and Imposing  
6 Invalidation. This Order, at 45-46 – Part VII Conclusions of Law, concluding the following  
7 (emphasis added):

- 8 C. The County is not in compliance with the GMA goals and requirements for the  
9 designation and conservation of agricultural resource lands. Ordinance 1179E,  
10 Resolution 03-368, including the maps adopted therein.
- 11 D. *The following development regulations adopted in Ordinance 1179C fail to*  
12 *comply with the GMA goals and requirements to assure the conservation of*  
13 *designated agricultural and forest resource lands:*
- 14 a. LCC 17.30.470(2)(c) and (d)
  - 15 b. LCC 17.30.480
  - 16 c. LCC 17.30.490 (3)(b) and (g)
  - 17 d. LCC 17.30.510
  - 18 e. LCC 17.30.620(3) and (4)
  - 19 f. LCC 17.30.640(2)(b), (c) and (e)
  - 20 g. LCC 17.30.650
  - 21 h. LCC 17.30.660 (1)(b) and (g)

22 *Invalidity – Substantial Interference With The Goals Of The Growth  
Management Act*

In addition to being non-compliant as set forth above, the continued validity of the  
following provisions would substantially interfere with the fulfillment of Goal 8 of the  
Growth Management Act (RCW 36.70A.020(8)):

*Invalid Provisions Regarding Designation Of Agricultural Resource Lands*

LCC 17.10.126(a), defining “long-term agricultural resource lands”, adopted in  
Ord.1179E;  
LCC 17.10.126(b), excluding “farm homes” and “farm centers” from long-term  
agricultural resource lands, adopted in Ordinance 1179E;  
The amendment to the Comprehensive Plan enacted through Resolution 03-  
368;  
LCC 17.30.590(1)(c) – requiring “sufficient irrigation capability” for designation  
of Class A Farmlands, adopted in Ordinance 1179C;

1 All maps designating agricultural resource lands (adopted in Ordinance 1179E  
and Resolution 03-368).

2 *Invalid Provisions Regarding Allowable Uses In Resource Lands*

3 Revisions to Ch.17.30 of Lewis County Code adopted in Ordinance 1179C:

4 LCC 17.30.480

LCC 17.30.490 (3)(b) and (g)

5 LCC 17.30.510

LCC 17.30.620(3)(b) and (4)

6 LCC 17.30.650

LCC 17.30.660 (1) (b) and (g)

7  
8 On June 8, 2007, the Board issued its Order Finding Non-Compliance, Imposing a  
9 Determination of Invalidity, and Setting a New Schedule for Compliance. This Order, at 14-  
15 - Part VII Conclusions of Law, concluded the following (emphasis added):

- 10 C. With the adoption of Ordinance 1179R and Resolution 07-104, the  
11 County has modified its designation criteria and mapping of agricultural  
12 lands of long-term commercial significance from that which was subject  
13 to the remand from the Washington State Supreme Court.
- 14 D. *The County's criteria and mapping of agricultural lands of long-term  
15 commercial significance* as modified by Ordinance 1179R and  
16 Resolution 07-104 *fail to comply* with RCW 36.70A.060(1),  
17 36.70A.170(1)(a), and 36.70A.040.
- 18 E. The adoption of Ordinance 1179R, Resolution 07-104, and Ordinance  
19 1193A *does not remove the substantial interference* with Goal 8 of the  
20 Growth Management Act (RCW 36.70A.020(8)) found by this Board in  
21 prior orders.
- 22 F. *The continued validity of the County's designation criteria and mapping  
of lands shown on the maps to which the moratorium in Ordinance  
1193A applies substantially interferes* with the fulfillment of Goal 8 of  
the GMA.

18 **Hadaller, et al v. Lewis County, Case No. 08-2-0004c**

19 On January 17, 2008, the Board its Prehearing Order which set forward the Legal Issues for  
20 this consolidated matter. The Legal Issues are as follows:

21 **HADALLER PETITION, WWGMHB CASE NO. 08-2-0002:**

- 1 1. Is re-zoning 198 acres of Petitioner's property to agricultural resource land (ARL) inconsistent with the existing land use contrary to RCW 36.70A.070 (5), and the associated legislative findings set forth in RCW 36.70A.011?
- 2 2. Is Petitioner's property a potential Freeway Commercial area under Lewis County Code 17.65, a type of limited area of more intensive rural development, that is essential to serve the commercial needs of the traveling public, as well as to serve local commercial, retail and industrial needs, as provided under RCW 36.70A.070(5)(C)?
- 3 3. Does Petitioner's property fail to meet Lewis County's own criteria for the ARL designation because it does not contain prime soils, is not irrigated and has never produced any profitable crop?
- 4 4. Does the re-zone of Petitioner's property amount to an arbitrary and discriminatory unconstitutional taking of private property without just compensation in violation of Lewis County Code 17.30.030 and the Growth Management Act, RCW 36.70.020 (6)?

8 **FUTUREWISE/BUTLER PETITION, 08-2-0003:**

- 9 3. Do Lewis County's criteria for designating and de-designating agricultural lands of long-term commercial significance fail to properly define commercial production of agricultural products and fail to include all prime and unique soils and thereby violate RCW 36.70A.020 (8, 10), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, and 36.70A.170?
- 10 4. Does Lewis County's designation of only 43,856 acres as agricultural lands of long-term commercial significance by applying standards and criteria inconsistent with the GMA and violate RCW 36.70A.020 (8, 10), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, and 36.70A.170?
- 11 5. Do Lewis County Code (LCC) provisions § 17.30.630, Accessory uses, LCC § 17.30.640, Incidental uses, and LCC § 17.30.650, Maximum Density & Minimum Lot Area, allow uses and densities on agricultural lands of long-term commercial significance in violation of RCW 36.70A.020 (8, 10), 36.70A.060, 36.70A.110, and 36.70A.177?
- 12 6. Did the County fail to comply with the public participation requirements of the GMA and the County's Code by changing issues presented for a public hearing after providing a notice of hearing, failing to obtain planning commission approval for a public hearing, failing to provide relevant documents to the public before a hearing, failing to circulate written comments from the public to the planning commission and other members of the public prior to hearing, and failing to allow open discussion during the hearing process, in violation of LCC 17.12.050(2)(a), RCW 36.70A.020(11), RCW 36.70A.035, 36.70A.130, and 36.70A.140?

20 **PANESKO PETITION, 08-2-0004:**

- 21 2. Whether the Lewis County Comprehensive Plan, Natural Resource Lands Sub-element, and Lewis County development regulations are non-compliant with RCW

1 36.70A.170 and RCW 36.70A.030 for failing to include criteria that defines land that  
is “capable of being farmed” in the policy for designating agricultural lands?

- 2 3. Whether the designation of ARL in the Comprehensive Plan maps, i.e. Resource  
3 Lands, Future Land Use rural Lands, and Agricultural Resource Lands, is non-  
4 compliant with RCW 36.70A.020(8) and RCW 36.70A.170 for failing to designate  
5 land with prime soil that is currently being used for agricultural purposes, or is  
6 capable of being farmed?
- 7 4. Whether the failure to designate farmland as ARL based on (1) global proximity to  
8 UGAs or freeways (up to 4-5 miles away) or (2) global land use settlement patterns  
9 (based on 64 square mile analyses) or (3) intensity of nearby land uses (defined as  
10 land use across a 64 square mile area) are non-compliant with RCW 36.70A.020(8)  
11 and RCW 36.70A.170 for failing to address actual conditions on neighboring parcels?
- 12 5. Whether the deletion in Ordinance 1197 of LCC 17.30.570 (Classification), LCC  
13 17.30.580 (Identification), and LCC 17.30.500 (Designation) results in development  
14 regulations which are non-compliant with RCW 36.70A.060 for failing to maintain  
15 ARL development regulations which implement the Lewis County Comprehensive  
16 Plan policy to protect ARL?
- 17 6. Whether the primary uses set forth in Ordinance 1197, LCC 17.30.610, are non-  
18 compliant with RCW 36.70A.030(2), (10) and RCW 36.70A.060 for failure to include  
19 the uses of raising grain, hay, straw and turf?
- 20 7. Whether the use exceptions in LCC 17.30.590 are non-compliant with RCW  
21 36.70A.020 (2), (8) and RCW 36.70A.060 for failing to protect ARL by allowing  
22 incompatible uses intermixed with agricultural uses on land where small strips of non-  
prime soils may exist between prime soils on land designated as ARL?
8. Whether Comprehensive Plan Policy NR 1.6 is non-compliant with RCW 36.70A.020  
(2), (8), RCW 36.70A.060, and RCW 36.70A.070 for failing to protect ARL by  
allowing incompatible uses immediately adjacent to and on the same parcels as ARL,  
when in practice Lewis County is implementing a policy to have all parcels  
designated with just one designation?
9. Issue withdrawn by Panesko at Prehearing Conference.
10. Whether LCC 17.30.650(c) (Maximum density and minimum lot area), (for ARL) is  
non-compliant with RCW 36.70A.020 (2), (8), RCW 36.70A.060, and RCW  
36.70A.070 for failing to protect ARL by allowing portions of farmland designated  
ARL which consist of residents, shops, yards, parking, and roads to be subdivided  
into separate parcels (even after the Supreme Court agreed with the Western Board  
that such action in the above captioned case was invalid)?

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Western Washington  
Growth Management Hearings Board  
515 15<sup>th</sup> Avenue SE  
Olympia, WA 98502  
P.O. Box 40953  
Olympia, Washington 98504-0953  
Phone: 360-725-3870  
Fax: 360-664-8975